

## 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.

**The first statement**

The Federal Court noted that s.181(1) provided that benefits paid in consequence of a false statement or failure to comply with the Act were recoverable as a debt due to the Commonwealth; but —

'the sub-section stops short of providing a right to recover any overpayment that should not have been made (cf. s.181(2)). The sub-section does not provide a right to recover payments made under a mistake however caused.'

(Reasons, p.17)

The Court said that the 1983 form had not required Salvona to state absolute facts but only to state those facts which were true and correct to the best of his knowledge and belief. Referring to comments made by Dixon CJ in *Sternberg v Reg.* (1953) 88 CLR 646, at 653, the Court said that Salvona's statement could not be false if it had been made to the best of his knowledge and belief.

Similarly, the Court said, Salvona could not be said to have failed to comply with any provision of the *Social Security Act*. The former s.116 [now s.159] required Salvona to make his claim for benefit in writing in accordance with the form approved by the DSS. Salvona had done this and his failure to indicate that he was living in a *de facto* relationship, the Court said, 'was governed by the requirements placed on [Salvona] as expressed by the form'. Because the form had required Salvona to furnish information which was true and correct to the best of his knowledge and belief, he had not failed to comply with s.116 of the Act.

**The second statement**

However, the Federal Court said, the statements made on the second form, completed by Salvona in 1986, were entirely different. On that form, Salvona had declared that he was not

sharing accommodation with any person and that this information was 'true and correct in every particular'. There had been no qualification on that statement, yet the information provided was admittedly false, because Salvona was then sharing accommodation with J.

When looking at this second statement, the AAT had incorrectly concentrated on Salvona's belief that he was not living in a *de facto* relationship with J; but that belief was, the Court said, irrelevant: the form had asked whether Salvona was sharing accommodation, not whether he was living in a *de facto* relationship; and Salvona had denied that he was sharing accommodation. By providing that false information, Salvona had, in effect, discouraged the DSS from following up his living arrangements; and this would have contributed to the overpayment of unemployment benefit from 1986 on.

**Discretion to waive recovery**

In its decision, the AAT had said that, if a debt to the Commonwealth had arisen as a result of Salvona's statements, this was an appropriate case in which to exercise the discretion in the former s.186(1)(b) of the *Social Security Act* [now s.251(1)(b)] to waive recovery of that debt.

The AAT had said that it was proper to exercise the discretion where the person who had received the overpayment could not be convicted of an offence under the former s.174 [now s.239] for 'knowingly or recklessly [making] a false or misleading statement'.

The Federal Court said that s.181 (the recovery of overpayment provision) might be intended to operate in a wider field than s.174 (the prosecution provision) and continued:

'By treating s.174 of the Act as the governing factor, the Tribunal proceeded in error and thereby failed to properly exercise its discretion. In deciding whether to waive a right to recover a debt, due regard to principles of fairness and administrative justice may require consideration of the degree of fault on the part of the recipient, but it will be only one of a number of matters to be considered (see *Director-General of Social Services v Hales*).'

(Reasons, p.23)

**A jurisdictional point**

The Federal Court also discussed the jurisdictional question whether the Tribunal had the power to consider the exercise of the s.186(1) discretion, when it was reviewing a decision of the Secretary that there was a debt due to the Commonwealth under s.181(1). The two decisions, the Court said,

'are not interdependent and it does not follow that a decision to seek recovery of a debt necessarily involves an exercise of a discretion under s.186 of the Act not to waive the right of recovery of the debt.'

(Reasons, p.24)

The Court said that it was open to the DSS to decide to demand repayment of a debt, and to make a further decision to commence legal proceedings for recovery if the demand were ignored. The DSS might have thought it unnecessary to consider the s.186 discretion until it reviewed the progress of its steps to recover the debt or received a request from the debtor to waive recovery:

'In those circumstances, the assumption of a power to exercise a discretion under s.186 as part of the review of the decision under s.181 may have exceeded the Tribunal's powers.'

(Reasons, p.25)

**Formal decision**

The Federal Court allowed the appeal, set aside the decision of the AAT and remitted the matter to the AAT for reconsideration.

[P.H.]

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