

Federal court decisions

'Custody, care and control': child fostered out

SECRETARY TO DSS v LEAHY
(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 *Leahy* (1988) 45 SSR 578.

The Tribunal had set aside a DSS decision not to pay Leahy, who was an invalid pensioner, additional pension for her child, L, who was living with foster parents.

The legislation

Section 33(3) and (4) of the *Social Security Act* provide for the payment of additional pension to an invalid pensioner who has a dependent child.

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

Section 3(2) declares that a person shall not be taken to have the custody of a child unless that person 'has the right to have, and to make decisions concerning, the daily care and control of the child'.

'Custody, care and control'

Leahy, who suffered from schizophrenia and epilepsy, lived in the Northern Territory and her child, L, had lived with a family in Perth since 1976. Despite the distance, Leahy had maintained close contact with her child, had made regular financial contributions towards the child's support and had paid for the child to visit her once a year in the Northern Territory. The arrangement between Leahy and the family in Perth had been described as a 'private fostering' arrangement.

The Federal Court said that Leahy met the test laid down in s.3(2) of the *Social Security Act*, because she had the right to control her daughter. This right was given to her by ss.34 and 35 of the *Family Court Act 1975* (WA), for as long as the child continued to live in Western Australia.

The Court said that there was no error of law in the AAT's decision that

Leahy had the 'custody, care and control' of the child. That term had been interpreted, in *Van Cong Huynh* (1988) 44 SSR 569, as requiring that the person in question have responsibility for the welfare of the child and undertake the child's care and control. In the present case, the AAT had examined the actual care and control exercised by Leahy over her child. There had been a 'matrix of [supporting] evidence' before the AAT on this issue; and it had been 'a matter for the Tribunal to allocate particular weight or emphasis to any part of that material'.

Lee J referred to some observations made by Burchett J in *Van Cong Huynh*, that the interpretation of the *Social Security Act* should take into account the 'complex problems created by mass migration, often of people with very limited resources'. Lee J expanded on those observations:

'In the same way that the Act may be seen to understand the position of migrants forced to surrender some part of the exercise of their parental rights to the daily care and control of their children, so the Act acknowledges the particular problems experienced by persons such as the respondent by reason of illness, deprivation and isolation. It will also comprehend that people such as the respondent may be forced to make decisions in respect of their children in an endeavour to offset, as far as possible, the disadvantages of life they experience. In such circumstances, a mother such as the respondent may feel compelled to delegate a substantial part of her custodial rights. . . It will be a question of fact in each case as to what elements of custody, care and control remain sufficient to satisfy the requirements of the Act.'

Formal decision

The Federal Court dismissed the appeal.

[P.H.]



Income test: can losses be deducted from income?

SECRETARY TO DSS v GARVEY
(Federal Court of Australia)

Decided: 7 December 1989 by Morling, Hartigan and Lee JJ.

This was an appeal to the full Federal Court from the decision of Spender J in *Garvey v Secretary to DSS* (1989) 49 SSR 644.

Spender J had held that losses sustained by an invalid pensioner on 4 rental properties should be set off against profits derived by the pensioner from employment and bank investments and only the net result be treated as the pensioner's income for the purposes of the invalid pension income test.

The financial background

Garvey and his wife (whose income was required to be taken into account in assessing the rate of his pension, because of s.3(5) of the *Social Security Act*) had income from several sources. These included his wife's salary from employment of \$23 779 a year, interest on bank credit union deposits, debentures and shares of \$9204 a year, and rental from 4 properties of \$16 396 a year.

The total income from these sources was \$47 657; but Garvey claimed that he was entitled to deduct from that amount the expenses directly related to the rental properties, amounting to \$43 365 a year — leaving an annual net income of \$4292.

Losses must be 'quarantined'

The Federal Court noted that the present case involved the definition of 'income' in s.6(1) [now numbered s.3(1)] of the *Social Security Act*, which defines 'income' as —

'personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for the person's own use or benefit by any means from any source whatsoever . . .'

That definition, Morley, Hartigan and Lee JJ said, was not 'concerned with losses, outgoings or deductions, except to the extent that the income from some income-producing activities