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

could only be identified after the outgoings related to those activities had been set off against receipts— a point that had been recognised in *Haldane-Stevenson* (1985) 26 *SSR* 323.

However, the decision in *Haldane-Stevenson* did not, the judges said, support the proposition that the losses incurred by Garvey in his business of letting properties should be deducted from the income which he and his wife derived from dividends, interest and employment.

The judges said that the *Social Security Act* was not concerned with supporting the losses incurred on a pensioner's unprofitable business activities:

> 'There would have been an expectation underlying the Act that any applicant for income assistance in the form of a pension would have corrected or relinquished any such activities which occasioned loss. The purpose of the relevant part of the Act was very clear, namely to maintain a basic level of income for those who were unable to receive sufficient income to provide for themselves. It was not the purpose of the Act to provide a further source of income for a person who had applied his or her income to maintain a business conducted at a loss or upon outgoings incurred in acquiring or maintaining assets.'

(Reasons, pp.9-10)

The judges concluded that the definition of 'income' in the *Social Security Act* did not permit the 'negative yield' of one source of income to be off-set against the positive yield from other sources of income.

Formal decision

The Federal Court allowed the appeal, set aside the orders made by Spender J and remitted the matter to the AAT for further enquiry and determination as appropriate.

[P.H.]

Recovery of sickness benefit: looking behind compensation award

SECRETARY TO DSS v LITTLEJOHN
(Federal Court of Australia)
Decided: 21 December 1989 by Ryan J.

This was an appeal, under s.44 of the *AAT Act*, from a decision of the Tribunal that Littlejohn was not obliged to refund to the DSS sickness benefit paid to him between July 1984 and February 1985, amounting to $5347: *Littlejohn* (1989) 49 *SSR* 637.

The DSS had attempted to recover this sickness benefit following Littlejohn's receipt of a worker's compensation award, which had been expressed as compensation for past medical expenses and future incapacity. The AAT had decided that, because the compensation award appeared to be one which could be made under the relevant compensation legislation (the *Workers' Compensation Act* (Vic.)) it should not look behind the compensation award. It followed that the compensation was not provided for the same incapacity as the sickness benefit payments, and, accordingly, there could be no recovery under the former s.115B(3) of the *Social Security Act* — under that provision, recovery of sickness benefit was only possible where the sickness benefit and compensation award had been made for the same incapacity.

Ryan J referred to the decision of the Full Federal Court in *Secretary to DSS v Siviero* (1986) 68 ALR 147, which held that, in order to recover sickness benefit following a compensation award under the former s.115B, the incapacity for which the sickness benefit and compensation award were paid must be the same: 'Incapacity in this context has both a causal and a temporal aspect'. (Reasons, p.8)

Ryan J pointed out that the incapacity for which Littlejohn had received sickness benefit was for a specific period, from July 1984 to February 1985. But the compensation award (made by consent) was expressed as in respect of incapacity for an indeterminate period beginning in December 1985:

> '*Prima facie*, therefore, the temporal aspect of the incapacity in respect of which the sickness benefit had been received was not the same as, or even partly co-extensive with, the temporal aspect of the incapacity for which the payment of compensation was to be made.'

(Reasons, p.9)

Ryan J then referred to the AAT decision in Cox (1989) 48 SSR 662. In that case, the Tribunal had said that the Secretary and the AAT could go behind the terms of a compensation award and conclude that some part of the award was compensation for the same incapacity as sickness benefit payments, particularly where there was evidence which indicated that the basis of the compensation expressed in the award was incorrect.

Ryan J noted that, in the present case, the AAT had considered whether there was any evidence which could indicate that the terms of the compensation award did not reflect the real situation and had concluded that there was no evidence to suggest that the compensation award related to past, rather than future, incapacity. Ryan J said that on the evidence available to the AAT, this finding was clearly open to the Tribunal. That evidence showed that, unlike the applicant in Cox, Littlejohn had clearly suffered a permanent incapacity:

> 'Therefore, the consent award which, on its face, compensated him for the effects of that incapacity arising only after the date of the award cannot be said to reflect "an incorrect view of the factual basis relating to that incapacity".
>
> ...
>
> For the reasons which I have already indicated, it was open to the AAT to find that there was no identity between the incapacity for which Mr Littlejohn received compensation and that for which he received sickness benefits. As the Full Bench of the AAT noted in Cox, an inability to point to such identity operates to defeat the Department's ability to recover.'

(Reasons, pp.14, 15)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]