The AAT noted that Ruediger had decided against returning the children in her care to DCW, because the children were particularly vulnerable and could be 'devastated' if she did this.

However, the AAT decided that Ruediger was not 'unable to earn a sufficient livelihood' within s.129(1) of the *Social Security Act*, because she had voluntarily chosen to adopt the role of a foster-parent. The Tribunal quoted from the decision in *Te Velde* (1981) 3 *SSR* 23:

> 'The degree of control which the person is able to exercise over the circumstances which give rise to his inability to earn a sufficient livelihood must... be a relevant consideration in deciding whether or not a grant of special benefits should be made.'

The AAT also referred to the earlier decision *Conroy* (1983) 14 *SSR* 143, where the AAT had said that it was not the purpose of special benefit 'to provide support from the public purse for people who make a voluntary decision to commit themselves to full-time work in social welfare, however desirable that work might be'.

On the basis of those decisions, the Tribunal decided that it was 'not possible for a discretion to be exercised in the applicant's favour': Reasons, para. 41.

However, the Tribunal noted that the DSS had given Ruediger wrongful advice, upon which she had acted. The Tribunal said that it was 'strongly of the view that the applicant should not be made to suffer for this': Reasons, para. 42.

The AAT said that -

> 'the respondent should have allowed payment to the applicant until at least the time that [the last of the children placed in her care in December 1985] ceased to be in her care. The Tribunal can only urge the respondent to reconsider and pay benefit to the applicant to July 1988...'

(Reasons, para. 43)

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Sole parent's pension: custody, care and control

EDGAR and SECRETARY TO DSS (No. 5859)
Decided: 2 May 1990 by T.E. Barnett.

Harlan Edgar was divorced from his wife in 1980. By order of the Family Court in 1983, Edgar's wife was given 'care and control' of their daughter, M, subject to reasonable access by Edgar.

In May 1989, Edgar was granted sole parent's pension following his separation from his second wife, because he had the custody of his son by the second marriage, B.

From the time of the grant of the sole parent's pension, Edgar substantially increased his contacts with his daughter, M, whom he had seen only every second week-end prior to that time. Under new arrangements, M spent each week-end and a substantial part of the school holidays with Edgar.

Edgar then applied to the DSS for additional sole parent's pension in respect of M. When the DSS rejected this application, Edgar appealed to the Social Security Appeals Tribunal. Following the SSAT's rejection of his appeal, Edgar sought review by the AAT.

The legislation

By s.48 of the *Social Security Act*, the rate of sole parent's pension payable to a person is increased on account of each dependent child of the person.

The term 'dependent child' is defined in s.3(1) to mean, *inter alia*, a child under 16 years 'in the custody, care and control of the person' or, where no other person has the custody care and control of the child, a child under 16 years who 'is wholly or substantially in the care and control of the person'.

Section 3(2) provides that, for the purposes of the definition of 'dependent child' -

> '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.'

The Tribunal's decision

Edgar maintained that he was now sharing the care and control of M with his former wife and calculated that, in each week, M spent 65 hours with him, 67 hours with his former wife, and 35 hours at school.

The AAT referred to the Family Court order, which gave 'care and control' of M to her mother. The effect of this, the AAT said, was that s.3(2) of the *Social Security Act* prevented Edgar from being 'taken to have the custody' of M. Therefore, M could not be treated as being in the 'custody, care and control' of Edgar.

Edgar also attempted to argue that M was 'wholly or substantially in [his] care and control' because she lived at least as many days and hours per year in his company, at his expense and under his control as she lived with her mother.

However, the AAT pointed out that the wording of the definition in s.3(1) defeated this line of argument. That alternative meaning of 'a dependent child' had, the AAT said, no application unless no other person had the custody, care and control of the child. In view of the Family Court order, it was clear that M's mother had joint custody of the child as well as the sole right to have 'care and control' of M.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Assets test: 'principal home'

BENNETT and SECRETARY TO DSS (No. 5743)
Decided: 1 March 1990 by G.L. McDonald.

The AAT *affirmed* a decision of the SSAT that a home unit owned by the applicant between 1975 and 1989 was not the applicant's 'principal home' within s.4(1)(a)(i) of the *Social Security Act*; and that, consequently, the value of that unit and the proceeds of its sale should be included in the applicant's assets for the purpose of the unemployment benefit assets test.

The applicant had lived in the unit for some 4 years after purchasing it, but had then rented it out for 10 years because his employment had required him to move to another part of the State.

The AAT referred to the decision in *Dickeson* (1989) 52 *SSR* 684, where the