However, the AAT decided that the failure of the DCSH to advise Sharman of the cost of his rehabilitation was a 'special circumstance', even though this was a common practice of the Department. The AAT said that everyone was 'entitled to know the costs that they are incurring for provision of a service'. Avoiding disclosure of costs so as not to discourage some people taking a rehabilitation program 'would have to be regarded as unduly paternalistic', the AAT said: Reasons, para. 16.

The AAT also rejected an argument on behalf of the DCSH that its common practice could not be described as 'special'. The Tribunal rejected the view that repetition of 'some default of a department or instrumentality... among a sufficiently large group of persons ... changes the character of the circumstances to being normal'; and preferred 'to view the situation from the individual's point of view': Reasons, para. 13.

Some information should have been provided to persons undergoing rehabilitation and the failure to do so was a 'special circumstance', particularly where that failure had an adverse effect, as it had on Sharman. The AAT exercised the discretion in s.23(3) to release Sharman from $450, representing the approximate cost of the additional 6 days treatment provided above the original estimate.

Formal decision

The AAT set aside the decision under review and substituted a decision that the DCSH pay Sharman $450.

[P.H.]

Dependent child: shared custody

SECRETARY to DSS and WETTER

Decided: 8 October 1991 by T E Barnett

W91/36

The DSS asked the AAT to review a decision of the SSAT which had set aside the DSS cancellation of Wetter's sole parent pension and rejection of her claim for family allowance.

Wetter and her husband had separated and the husband had sole guardianship and custody of their only child under a Family Court order made in April 1990.

Wetter was awarded access by the court but she and her husband had come to an informal arrangement under which the child lived with each of them on a week on, week off basis. Wetter's sole parent pension was cancelled by the DSS from 23 July 1990 and a claim she lodged for family allowance was rejected on 10 August 1988.

The SSAT set aside the cancellation of sole parent pension and determined that Wetter and her husband were entitled to split the payment of family allowance.

The legislation

Payment of both family allowance and sole parent pension requires the recipient to have a dependent child, within the meaning of s.3(1) of the *Social Security Act* 1947; that is, a child under 16 who is in the custody, care and control of the person.

Section 3(2) provides that 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.

For sole parent pension, a person must have a qualifying child (s.44).

Under s.43, a dependent child includes a child who is being wholly or substantially maintained by the person.

Dependent child

The AAT noted that the only issue in relation to both sole parent pension and family allowance was whether Wetter's child, B, was her dependent child.

The DSS had argued that the guardianship and custody order determined the issue: since Wetter's husband had sole guardianship and custody, she was precluded from claiming that B was in her custody.

The evidence indicated that during the times B was in her care, Wetter met all the routine daily expenses for such things as food, medical expenses etc and that she and her husband shared the costs of his school fees, clothing and tennis lessons (though her husband paid the greater proportion).

The AAT, relying on the authority of the Federal Court decisions in *Ho* (1988) 40 *SSR* 510 and *Huynh* (1988) 44 *SSR* 569, decided that Wetter had effective custody, care and control of B every second week and during half of each school holidays.

While she was in daily control of B during the access periods ordered by the Family Court (as varied by consent), she did have, not only the right, but also the duty, to make decisions concerning the daily care and control of the child: Reasons for decision, p 7.

Applying this to the issue of family allowance, the AAT decided, relying on *Mrs B* (1984) 22 *SSR* 246, that, since the income of Mr Wetter was substantially more than that of his ex-wife, the family allowance should be shared on a two thirds, one third basis and that Mr Wetter receive the one third.

The AAT also decided that Wetter was entitled to receive the sole parent pension but only for the periods during which her son is actually under her daily care and control.

Formal decision

The AAT set aside the SSAT decision and substituted for it a decision that Wetter was entitled to a two thirds share of the family allowance and that she was entitled to sole parent pension for the periods when she exercises actual care and control over her son.

[Note: the AAT, while noting that s.86 permits the sharing of family allowance, did not refer to the fact that sole parent pension cannot be shared (see s.52), nor is there any provision authorising partial payment of pension, other than for means testing purposes.

Further, as sole parent pension is paid on the basis of full fortnightly periods (see now the distinction between payday-based and period-based payments in s.42 of the 1991 Act), there are real difficulties in payment for broken periods. This difficulty was discussed by the Federal Court in *Secretary to DSS v Field* (1989) 52 *SSR* 694].

[R.G..]

Discretion to grant special benefit: a humanist approach

SECRETARY TO DSS and SCHOFIELD

(No. 7378)

Decided: 11 October 1991 by P.W. Johnston.

The DSS sought review by the AAT of an SSAT decision that special benefit was payable to Lynelle Schofield from the date of her application for that benefit, 13 May 1991.