

In determining whether a person was incapable of managing his or her financial affairs, the Guide said, the DSS should seek 'reliable medical evidence' and should interview the proposed nominee to ensure that he or she understood the responsibilities being taken on.

Insufficient basis for payment to mother

The AAT decided that the DSS had acted properly in accepting and granting the claim for sickness benefits signed by Every's mother.

Turning to the DSS decision to pay benefits to Every's mother, the AAT said that there had been sufficient evidence before the DSS to establish that

Every was not capable of handling his own affairs at the time of the claim for sickness benefit.

However, the basis for the decision to make payments to Every's mother had been less clear. The DSS had not enquired whether there was a more appropriate person. Nor had the DSS attempted to interview Every's mother before deciding to make payments to her – although the Guide stated that such an interview was required.

As Every was married and had a child (although he and his wife had separated at the time of his injury), it was possible that there was a more appropriate person to whom the payments should have been made.

The AAT concluded that the decision to pay Every's sickness benefits to his mother should not have been made on the evidence then available to the DSS, which should now pay to Every the amount which it had paid to his mother in 1980.

Formal decision

The AAT set aside the decision under review and decided that the DSS should pay to Every \$610.50, representing the payments made to his mother between July and September 1980.

[P.H.]

[Editor's Note: The AAT did not indicate in its Reasons whether Every's mother had accounted to Every for the payments made to her.]

Federal Court Decisions

Dependent child: informal variation of custody order

SECRETARY TO DSS v WETTER
(Federal Court of Australia)

Decided: 4 February 1993 by Hill J.

This was an appeal from the AAT's decision in *Wetter* (1991) 64 SSR 905. The AAT had decided that, although Wetter's former husband had been given sole guardianship and custody of their child, Wetter could qualify for family allowance and sole parent pension for the child.

This was because, the AAT had said, Wetter and her former husband had agreed informally to vary the terms of Wetter's access to the child, so that the child spent every second week with each parent.

Family allowance

Hill J said that the child was not Wetter's 'dependent child' within s.3(1) of the *Social Security Act* 1947 because the informal agreement made between Wetter and her former husband did not operate to vary the custody order over the child, so that Wetter did not have a right of access to her child for a sufficient period to allow her to be regarded as having the right to have the daily care and control of the child within s. 3(2) of the 1947 Act.

Hill J said that the Full Court's decision in *Field* (1989) 52 SSR 694 had decided that the legal right to the daily care and control of a child was central to the question whether a person had a dependent child; and that the question of factual responsibility was not important.

Further, Hill J said, Wetter could not be regarded as having the right to have the daily care and control of the child as the delegate of her husband. It followed that Wetter's child was not her 'dependent child' within s.82 of the 1947 Act and the AAT had erred in law in holding that Wetter was entitled to family allowance in respect of her child.

Sole parent pension

Hill J noted that the child could be Wetter's 'dependent child' and 'qualifying child' for the purpose of sole parent pension if the child was 'substantially maintained' by Wetter: s.43(1) of the 1947 Act.

The child would fall within this description if the child was maintained in the main or as to the greater part by Wetter: in context, the word 'substantially' meant something less than 'wholly' but more than merely 'insubstantial' or 'insignificant'.

As the AAT had not made any finding on whether Wetter was substantially maintaining the child, this aspect of the matter was remitted to the AAT for further determination. Hill J observed that, in the course of making that determination, the AAT should bear in mind

that only one person could qualify for sole parent pension in respect of the one child.

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and confirmed the decision of the Secretary's delegate that Wetter was not eligible for family allowance. The court remitted to the AAT for re-determination the question whether Wetter was eligible for sole parent pension.

[P.H.]

Overpayment: is a criminal conviction conclusive?

SECRETARY TO DSS v RIDLEY
(Federal Court of Australia)

Decided: 23 December 1992 by Hill J.

This was an appeal from a decision of the AAT which had set aside a DSS decision that Ridley was living in a *de facto* marriage relationship and, therefore, had received payments of widow's pension to which she was not entitled.

The AAT had reached this decision despite the fact that Ridley had been