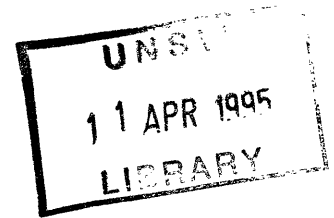


SOCIAL SECURITY

Reporter



Opinion

SPP and split custody arrangements

It is increasingly common for parents to retain joint legal custody after separation and for children to reside with each parent for alternating periods. Yet the sole parent pension (SPP) may not be paid to more than one parent for the one child.

To qualify for SPP, a parent must have at least one qualifying child ('SPP child') under 16 years. This may be either a 'maintained child' (wholly or substantially maintained by the SPP claimant) or a 'dependent child'. To have a 'dependent child' the claimant parent must have not only the daily care and control of the child in fact, but also a corresponding legal right. The legal right exists if the parent has sole or joint custody under statute or court order, or it may arise from a right of extended access under a court order (*Secretary, DSS v Field* (1989) 52 SSR 694).

The *Social Security Act 1991* assumes that a child may be a qualifying child (an SPP child) of more than one person at a time. Where this situation arises, the Secretary is required to make a written determination as to whose SPP child the child is to be: s.251(2). The Act gives no guidance as to how the Secretary's discretion is to be exercised.

The AAT has considered s.251(2) on very few occasions: see *Juren* (1993) 75 SSR 1987; *Minassian* (1990) 55 SSR 734. In *Edwards* (p.1134 this issue) the AAT passed up the opportunity to provide useful guidance on the factors to be taken into account in making a choice between parents who share legal and factual custody equally.

Edwards and his former partner had alternating legal custody, as well as daily care and control, week and week about. The AAT decided that s.251 did not apply because the child was not a 'dependent child' of both parents at one time.

It follows that even if the parents had joint legal custody continuously, the child would not be a dependent child of both of them at one time if factual care and control was exercised by them alternately. There would be no call for a s.251(2) determination, nor could family payments be apportioned between them.

The outcome in *Edwards* shows the unsatisfactory results of this reasoning. Although qualification for SPP may alternate between the parents, it does not mean that the SPP will be split between them. SPP is a payday-based payment. Nothing is paid to a person who was entitled for part of the fortnightly period not including the date of the pension payday. Since Edwards' alternating custody of his daughter always fell in a non-payday week, nothing was payable to him. The AAT left open the question whether Edwards' partner, who was qualified for SPP on each payday, could be paid continuously when her qualification was intermittent.

The 'capricious' result reached by the AAT could have been avoided by taking what Hill J in *Secretary, DSS v Wetter* (1993) 73 SSR 1065 called a 'common sense approach' to determining whether a child is a dependent child of two adults. Dependency should not be assessed on a particular day, but for the whole of a fortnightly pension period.

[P.O'C.]

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