

'Dependent child' is defined in s.5(2) of the Act as:

'a young person who has not turned 16 is a dependent child of another person (in this subsection called the "adult") if:

(a) the adult has the right (whether alone or jointly with another person):

(i) to have the daily care and control of the young person; and

(ii) to make decisions about the daily care and control of the young person;

and the young person is in the adult's care and control; or

(b) the young person:

(i) is not a dependent child of someone else under paragraph (a); and

(ii) is wholly or substantially in the adult's care and control.'

Section 869(1) of the Act allows the Secretary to pay family payments to 2 people if they are both qualified. The Secretary must specify the share each person is to receive. The SSAT applied this section when deciding to apportion family payments between Mr and Mrs Elliott.

The right to exercise daily care and control

Lehane J stated that s.869(1) can only apply if:

'Each parent has the right, whether alone or jointly with the other, both to have the daily care and control of each child and to make decisions about the daily care and control of each child.'

(Reasons, p.6)

An order was made by the Family Court pursuant to the *Family Law Act 1975* giving custody of the children to Mr Elliott, Mrs Elliott being given access. Section 63E of the *Family Law Act* gives the person who has custody of the child

the right to have daily care and control of the child, and the right to make decisions concerning that care. These rights can be varied by an access order. Lehane J quoted with approval the leading case in the area, *Secretary to DSS v Field* (1989) 25 FCR 425. That case dealt with supporting parents benefit, but had referred to similar issues. The Court in *Field* had drawn a distinction between factual custody and the relevant legal right. The Court did not consider that a right of access necessarily gave the person the right to daily care and control or the right to make decisions about that care etc. There are similarities between the rights of a parent granted custody, and those of a parent granted access. The Court concluded that a 'practicable and sensible rule' would be that a parent exercised the right to daily care and control when having access of not less than 14 consecutive days. There may be situations where a lesser period could be considered depending on the particular circumstances of the case.

Lehane J found that the crucial issue was 'when does a right concerning care and control become a right concerning daily care and control?': Reasons, p.12. *Field* had proposed that the distinction between custody and access was temporal rather than qualitative, and that daily care and control requires relatively long continuous period of living with the person.

'It is not particularly helpful to ask, for this purpose, what decisions a parent with access actually makes for the child concerned during the period of access or what the parent actually spends on looking after the child during periods of access . . . it is to be expected that the parent

with access will make decisions about "what the child eats, when he goes to bed".'

(Reasons, p.13)

If Mrs Elliott were to qualify for part family payment she must show that she had the relevant rights, whether alone or jointly with Mr Elliott. Clearly when Mr Elliott had the children Mrs Elliott had no jointly held right to exercise care and control etc. When Mrs Elliott had access to the children she had them for 3 weekends in 6, and then for 5 days. According to *Field* it is not appropriate to add short discontinuous periods together to see if rights exist. Therefore, Mrs Elliott could not be said to be exercising a right to care and control during the short access periods over the weekend. In relation to the 5-day periods, the Court considered the particular circumstances in Mrs Elliott's case. This did not mean looking at those decisions and actions a parent makes in the ordinary course of caring for a child. Lehane J concluded:

'I do not think it could be said that there is anything in the particular circumstances in this case which enables the decision-maker to conclude that a period of access significantly less than half the normal minimum suggested in *Field* may be regarded as conferring rights of the kind which are required.'

(Reasons, p.18)

Formal decision

The Federal Court allowed the appeal, set aside the AAT decision, and substituted its decision — the DSS decision that Mr Elliott alone is entitled to be paid family payment.

[C.H.]

SSAT decisions

Family payment: finance direction

KA and SECRETARY TO DSS

Decided: 2 November 1995.

KA was advised by letter dated 1 January 1994 that she did not qualify for family payment in the 1994 calendar year because her combined taxable income for 1992-93 exceeded the income limit for her family. She was also advised to contact the DSS if she expected her income in 1993-94 to be at least 25% lower than it was in 1992-93, and below the allowable limit. KA was also invited to contact the DSS if her income in 1994-95 was at least 25% lower than in 1992-93, and below the allowable limit. KA reapplied for family payment in September 1995

which was paid from that date. She then sought to have the payment paid from January 1995 because the letter of January 1994 was misleading. KA understood the letter to mean that she would only qualify for family payment if her combined income was at least 25% lower than her 1992-93 income.

The SSAT affirmed the decision not to pay family payments before September 1995, but suggested that a Finance Direction should be made equivalent to the amount of family payment which would have been paid if KA had lodged her claim in January 1995. The SSAT agreed that the letter was unclear because it implied that KA could only be paid family payment if her 1993-94 or 1994-95 income was 25% lower than her 1992-93 income. KA's income in 1993-94 was

below the income ceiling which meant that KA was qualified for family payment in 1995. The letter of January 1994 did not make it clear that KA was only ineligible for family payment in 1994 and not necessarily in 1995.

Age pension: rate of exchange of overseas income

LB and SECRETARY TO DSS

Decided: 23 October 1995.

LB appealed against the reduction of his rate of age pension because of overseas income. LB complained that the income being maintained by the DSS was not the same as the income he received.

The SSAT found that the DSS was using the rate used by the International Operations Branch. However there was no legislative authority for using this rate because no determination had been made under s.1100 of the *Social Security Act 1991*. (This section provides that the Secretary may determine the rate of conversion in relation to foreign currency.) Because no determination had been made in this case, the SSAT concluded that it could determine the appropriate rate. It decided that the preferable exchange rate should be the actual rate received by LB.

Family payment: date of effect of decision to cancel

MC and SECRETARY TO DSS

Decided: 11 October 1995.

MC's basic family payment was cancelled at the end of 1993 because her taxable income for 1992-93 exceeded the allowable limit. She reclaimed family payment on 1 August 1995 and this was granted with effect from that date based on her 1993-94 income. MC sought arrears of payments. The DSS advised that no copy of the cancellation notice was available.

The SSAT found that MC had received a letter from the DSS in about January 1994 advising of the cancellation of her family payment because her estimate of income was too high. It appeared that the DSS had purported to cancel MC's family payment under s.882 of the Act. The SSAT found that the com-

puter program cancelling the payments had never been approved by the Secretary as required by the Act, and therefore the cancellation was invalid. Section 874 provides that the determination that family payment is payable continues until it ceases to be payable under ss.875 or 876, or a further determination as to rate. According to the SSAT none of these provisions operated in this case, so payments continued until MC reclaimed in August 1995. This was despite the fact that MC's family payment had been properly cancelled and MC would not have been entitled to payments for 1994.

Wife pension: partner allowance

ND and SECRETARY TO DSS

Decided: 23 November 1995.

ND claimed wife pension in January 1995 which was rejected because of her income. ND and her husband went to the DSS in April 1995 asking about their entitlements, but they did not lodge a claim. ND resigned from her job in June 1995, and her husband retired in August 1995. They obtained claim forms from the DSS in June 1995 which they took to the DSS in July 1995. They were told that their claims would be rejected, and that they should reclaim after ND's husband retired. In August 1995 ND and her husband lodged their claims for wife pension and age pension. ND was advised that her claim for partner allowance had been rejected.

ND complained that despite all her contact with the DSS she had not been

advised that eligibility for wife pension ceased on 30 June 1995, and that claims lodged after that date would be treated as claims for partner allowance. ND was only entitled to partner allowance if she had no 'recent workforce experience' (s.771HA). Because ND resigned from work in June 1995 she did not satisfy this requirement.

Family payment: split payments

OE and SECRETARY TO DSS

Decided: 6 November 1995.

On 5 April 1995 OE claimed family payment for his son D. His claim was rejected. OE was separated and his former partner was invited to attend the SSAT hearing. She did not attend.

The SSAT found that OE and his partner did not have formal custody arrangements in relation to D. OE and his partner had not spoken to each other for 8 years. OE was solely responsible for D during specified periods when he was in his care. Because there were no formal custody arrangements, the SSAT found that OE and his partner had joint custody of D. Therefore OE had the right to have daily care and control of D, but only for those specified periods when D was with him. D was in the care and control of the parent with whom he was staying at the time. OE was qualified for family payments during the period he had D in his actual care and control. The SSAT concluded that OE and his former partner did not each qualify for family payment at the same time. OE was entitled to the full amount of family payment including additional family payment when a family payment payday fell during the period when D was with him. This meant that OE would have to lodge a claim for family payment each time D came to stay with him.

[C.H.]

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