

Including Student Assistance Decisions

Opinion

Split custody: whose dependent child?

The difficult question of whether a child is the dependent child of either or both parents has once again been addressed by the Federal Court. In *Elliott v Secretary to DSS* (1996) 2(1) SSR 10 the Court was concerned with the definition of 'dependent child' in respect of family payment. In *Vidler v Secretary to DSS* (p.26 this issue) the Court was concerned with the definition of 'dependent child' in respect of sole parent pension.

Both decisions emphasise that the crucial issues will be whether the parent has the legal right to exercise care and control of the child, whether the parent has the legal right to make decisions about the care and control of the child, and whether the parent actually has the care and control of the child. Both parents will ordinarily have this right and exercise it jointly. However, when the parents separate the right to exercise and make decisions about care and control of the child will often be governed by a Family Court Order. The Federal Court stressed the importance of these Orders in both decisions.

If one parent has the child in his/her care and control for a period which is longer than that set out in the Court Order, then it would be remiss of the DSS to base its decision on this fact. To do so would be to countenance a breach of the Court Order. If both parents have the right to exercise and to make decisions about the child's care and control, and share equally the care and control of the

child, then the proper approach will depend on whether the DSS is dealing with family payment or sole parent pension. If the issue is who is to receive family payment, then the payment may be divided between the parents (see s.869(1)). If the issue is who is to receive sole parent pension, then the DSS must determine which parent is to receive the pension (see s.251(2)). These decisions will depend on which parent has the right to exercise and to make decisions about the child's care and control, and which parent actually has care and control of the child. And this will depend on the legal rights of each parent which will usually be determined by the Family Court.

In *Elliott* the Federal Court followed *Field* (1989) 52 SSR 694 and decided that a right to access might also be a right to exercise and make decisions about care and control. However, this will only be so where the parent has access to the child for substantial periods of time. The Court in *Field* suggested this would be at least 14 days unless special circumstances applied. The Court in *Elliott* agreed.

Social Security Act 1991

The Government printer has published an official reprint of the *Social Security Act 1991*. The reprint includes all amendments to the Act to 1 July 1995, and is printed in three volumes. (The 1993 reprint was in two volumes). A fourth volume contains all the Acts which have amended the Act since 1 July 1995 — nine in all!

[C.H.]

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