

Splitting of family payment

BERTELLI and SECRETARY TO DSS
(No. 10869)

Decided: 16 April 1996 by B.G. Gibbs.

Background

The applicant, Mrs Bertelli, appealed to the AAT for review of the SSAT's decision to grant Mr Bertelli a 15% share of the family payment (FP) in respect of 3 of their 4 children. Mr Bertelli was joined as a party to the AAT proceedings.

At the time of the SSAT decision in March 1995 there were no Family Court orders in respect of the children. Family Court orders were made in September and December 1995. They provided:

- that Mr and Mrs Bertelli have joint guardianship of the 4 children;
- that Mrs Bertelli have sole custody;
- that Mr Bertelli have access to the 3 younger children each alternate weekend during the school term and half of each school holiday period.

Legislation

One of the qualifications for FP is that the person has at least one FP child and s.831(1) of the *Social Security Act 1991* provides that each dependent child of the person is an FP child. The definition of 'dependent child' is contained in s.5(2) of the Act which states that a young person is a dependent child of an adult if:

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

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) provides for the division of FP between parents:

'If the Secretary is satisfied that 2 people who are not members of the same couple are each qualified for family payment for the same child, the Secretary is to make a declaration:

- (a) stating that the Secretary is satisfied that the 2 people are each qualified for family payment for the child; and

- (b) specifying the share of the family payment for the child that each of the 2 people is to receive.'

The issue

The issue was whether Mr Bertelli had a dependent child and the critical question

was whether he had the right to have the daily care and control of any of the children.

Case law

The AAT referred to *Elliot v Secretary to DSS* (1996) 2(1) SSR 10 and to

Secretary to DSS v Field (1989) 52 SSR 694. In those cases the Federal Court 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.

Care and control

The AAT decided that the access periods exercised by Mr Bertelli during the school term, and during school holidays immediately following the first, second and third school terms were not sufficient to allow his rights to be properly characterised as the right to have the daily care and control of the 3 children. However during the 3-week period when Mr Bertelli had access during holidays following the fourth school term, he would have the right to make decisions about the daily care and control of the children.

The AAT concluded that Mr Bertelli should be granted a 5% share of the FP in respect of the 3 children to whom he had access. His entitlement should commence from the date of the first Family Court order.

Formal decision

The Tribunal varied the decision under review by determining that the share of family payment granted to Paul Bertelli in respect of the children Fabio, Laila and Tara, be amended to 5% with effect from 6 September 1995.

[A.A.]

Newstart allowance: jurisdiction, within a person's control

FERGUSON and SECRETARY TO DEPARTMENT OF EDUCATION, EMPLOYMENT, TRAINING AND YOUTH AFFAIRS (DEETYA)
(No. 10981)

Decided: 3 June 1996 by J.R. Dwyer.

Ferguson requested review by the AAT of the SSAT decision to cancel his newstart allowance (NSA). Ferguson had failed to attend an appointment with his case manager on 19 May 1995, and as a result DEETYA had cancelled his allowance.

The facts

Ferguson lived in Ballarat in Victoria. In May 1995 a friend had returned to Ballarat from Western Australia. He advised Ferguson that there may be work available in the mines, and Ferguson decided to travel to Western Australia seeking work. He forgot about a forthcoming interview with his case manager on 19 May 1995.

Ferguson told the AAT that he probably left for Western Australia shortly after receiving a letter from his case manager on 8 May. He estimates that he was in Western Australia for approximately two weeks, returning via Adelaide. Ferguson said that he had returned to Ballarat by Sunday 21 May. He collected his continuation of payment form, and lodged it with the DSS on 22 May. Between that date and 5 June, Ferguson travelled between South Australia and Melbourne, working for some days on an uncle's farm.

The AAT noted that this account was not totally consistent with the history set out in the documents. It had been recorded on 4 July that Ferguson had stated that he was in South Australia on 19 May, and that he did receive the letter advising him of the interview, but that he had forgotten about it. Ferguson had also stated that he went to Coober Pedy looking for work, and that he spent approximately 6 nights in South Australia.

According to the AAT, the continuation of payment form lodged on 22 May did not contain any reference to Ferguson having been in Western Australia. Ferguson admitted in evidence that the form was inaccurate.