

Administrative Appeals Tribunal decisions

Family payment: whether in care and control if with grandparents

LEAHY and SECRETARY TO DSS (No. 12053)

Decided: 25 July 1997 by S.A. Forgie, A.M. Brennan and I.R.W. Brumfield.

Background

Leahy and Cooper are separated and have 5 children. In August 1995 an agreement relating to certain aspects of the children's welfare was registered in the Magistrates Court pursuant to the *Family Law Act 1975*. Leahy lodged a claim for family payment on 13 October 1995 which was rejected. Leahy's former wife and mother of the children, Cooper was joined as a respondent in the appeal.

The issue

The issue was whether Leahy had a right (either alone or jointly with another person) to have the daily care and control of all or any of his children, and to make decisions about their daily care and control at the time he lodged his claim in October or at any time within the next 3 months. Also, during that period were they in his care and control?

The legislation

Section 838(1) of the *Social Security Act 1991* sets out the qualifications for family payment. The person has to have at least one FP child. An 'FP child' is a dependent child in accordance with ss.831 to 836 of the Act. A dependent child is defined in s.5(2) to include a young person 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 a the young person;

and the young person is in the adult's care and control.'

Family payment may be determined at the time a claim is lodged or within a 3-month period after that date. Section 843(3) states that if a person is not qualified on the day a claim is lodged but becomes qualified on a day within 13 weeks starting immediately after the day

of lodgement, then the provisional commencement day is the date on which he or she becomes qualified.

'Care and control'

The Tribunal referred at some length to *Secretary, Department of Social Security v Field* (1989) 18 ALD 5 when considering what 'the right to have the daily care and control' meant. It found that although *Field* dealt with sole parent benefit the principles are directly applicable to whether Leahy has a dependent child.

The agreement pursuant to the *Family Law Act* stated that Cooper would have the children's 'care and possession' and their 'primary residence' would be with her. The agreement set out days and time that Leahy would have 'care and possession of the said children the secondary residence being with him'.

The Tribunal found that:

'under the terms of the order Mr Leahy has care and possession of the children for approximately 25% of the year and Ms Cooper for approximately 75%. Apart from the Christmas school holidays, the periods of care and possession are either for periods of hours, two days or a few days. They may not be characterised as continuous periods of care and possession.'

(Reasons, para. 19)

The Tribunal considered that although Leahy had the right to have the children in his care and possession and to make decisions concerning their care and control during those periods, this did not mean he had the right to make decisions concerning their daily care and control. The Tribunal, following *Field*, concluded this on the basis that the periods that Leahy had the children, although regular, were broken and generally for short periods. The Tribunal drew further support from the agreement which gave primary responsibility for schooling and health care to Cooper. As Leahy did not have the right to make decisions concerning the daily care and control of the children, they are not dependent children for the purposes of the *Social Security Act 1991*.

The Tribunal distinguished an extended period in January 1996. Leahy had the children from 13 January 1996 to 4 February 1996 and this period was of such a length that he could be said to have the right to make decisions concerning their daily care and control.

The issue during this period was whether the children were actually in his care and control during the period. The eldest daughter remained with him the

whole time but the other 4 children were in the physical care and control of Leahy's parents, the grandparents. The Tribunal found that it is sufficient for the children to be in Leahy's care and control 'in the sense that they were cared for and controlled in accordance with arrangements he had made' . . . otherwise . . . 'the legislation would be impossible to administer given the need for even custodial parents to arrange for others to care for their children from time to time'. Reasons, para. 24. This included a period of 3 days when Leahy asked Cooper to care for 2 of the children.

The Tribunal concluded that all 5 children were in Leahy's care and control during that period, and so were dependent children and FP children of Leahy during the period. They were not dependent children of Cooper during this period.

The Tribunal addressed the issue of whether family payment could be paid to Leahy for the period 13 January to 4 February 1996. To do so, Leahy needed to qualify on the day he lodged his claim or within 13 weeks of lodging the claim. Leahy was not qualified on 13 October 1995 when he lodged his claim. The last day of the 13-week period was 13 January 1996. The Tribunal found that Leahy was qualified on 13 January 1996 and it was not relevant that the remainder of the period for which he was qualified fell after that date.

Formal decision

The Tribunal varied the decision under review and:

- set aside that part of the decision which relates to the period between 13 January 1996 and 4 February 1996 in respect of 5 children;
- substituted a decision that
 - (a) the children were FP children of Leahy between 13 January 1996 and 4 February 1996; and
 - (b) Leahy was qualified for family payment in respect of the children between 13 January 1996 and 4 February 1996; and
- remitted the matter to the DSS to determine any amount of family payment payable to Leahy in respect of the children for the period 13 January 1996 and 4 February 1996; and
- otherwise affirmed the decision under review.

[N.A.N.]