

daughter] would remain with her mother and that her residence with her mother was more than simply an extension of similar periods of access as in the past.'

(Reasons, p.9)

Accordingly Ho was obliged to notify the DSS at that stage and he was not entitled to the 2 pension payments that he received in July 1991.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS to recalculate the overpayment in accordance with its directions. The AAT also decided that the overpayment was to be recovered by deduction from job search allowance at the rate of \$10 a week.

[D.M.]

Dependent child: additional benefit

FIELD and SECRETARY TO DSS
(No. 7961)

Decided: 18 May 1992 by R.C. Jennings.

After Field's son ceased to be in his custody pursuant to a Family Court order in 1987, the DSS cancelled payment of his supporting parent's benefit on the ground that he no longer had a 'dependent child'. Section 3(1) of the 1947 Act defined 'dependent child' as meaning a child who was in the person's 'custody, care and control'. Section 3(2) provided that a person could not have the custody of a child unless the person had the right to have, and to make decisions concerning, the daily care and control of the child.

The Federal Court's ruling

The Full Federal Court held, in *Secretary to DSS v Field* (1989) 52 SSR 694, that a person having access rights to a child, in the person's own home, for periods of not less than 14 consecutive days should ordinarily be regarded as meeting the requirements of s.3(1) and (2) and be regarded as having the custody, care and control of the child.

The present dispute

The present appeal arose out of a dispute between Field and the DSS concerning the interpretation of the Federal

Court's 1989 ruling. Field had access to his son for a continuous period from 19 January to 20 February 1991. He was paid additional benefits (included in the rate of his unemployment benefit) for his son from 19 to 31 January and sole parent pension from 1 to 15 February.

He was denied additional unemployment benefit for the period from 16 to 20 February because the DSS considered that the reasoning of the Federal Court meant that he could not be paid in respect of any period of access of less than a fortnight. The SSAT had affirmed the decision of the DSS.

The AAT said that Field was entitled to additional benefit for the 5-day period because it formed part of an extended period of over 1 month during which the applicant had daily care and control of his son. During that period his son was therefore his 'dependent child' within the meaning of s.3 as interpreted by the Federal Court.

The AAT expressed the view that the observations made by the Federal Court regarding the definition of 'dependent child' for the purposes of supporting parent's benefit were equally applicable to a claim for additional unemployment benefits.

Formal decision

The AAT set aside the decision under review and substituted a decision directing the DSS to pay the applicant additional benefit for the 5 days.

[P.O'C.]

Family allowance and child disability allowance: child in institution

SECRETARY TO DSS and
ROLLINS

(No. 7522)

Decided: 27 November 1991 by A.M. Blow.

In July 1989, the DSS decided that Denise Rollins was not eligible for family allowance and child disability allowance for her child, L, from 13 June 1989.

On review, the SSAT decided that Rollins was eligible for family allowance for L for those periods which L spent with Rollins and for child disability allowance for L.

The DSS applied to the AAT for review of the SSAT's decision.

The legislation

Family allowance: Section 82(1) of the *Social Security Act* 1947 provided that a person was qualified to receive family allowance for a dependent child if family allowance was not payable to an institution for the child and both the person and the child were Australian residents.

A dependent child of a person was defined in s.3(1) to include a child under 16 years of age in the custody, care and control of the person. This was subject to the requirement, expressed in s.3(2), that the person have the right to have, and to make decisions concerning, the daily care and control of the child.

According to s.82(2), an institution was qualified to receive family allowance for a child if the child was an inmate of the institution and was an Australian resident.

Section 79(1) defined 'institution' to mean an institution approved by the Secretary.

Section 87 provided that family allowance was payable to a person or an institution on each family allowance pay day on which the person or institution was qualified to receive family allowance for the child.

Child disability allowance: Section 102 of the 1947 Act provided that a person was qualified for child disability allowance, where family allowance was payable to the person for a child who was disabled and the person provided care and attention on a daily basis to the child in a private home that was the residence of the person and the child.

Section 103(2) gave the Secretary a discretion to decide that a person did not cease to be qualified for child disability allowance, for a period determined by the Secretary, where a child was temporarily absent from the child's home for more than 28 days during any calendar year.

The facts

L was mentally retarded and required constant care and attention. From April 1989, L lived in an institution, Yalambee, on 4 nights a week during school terms. L spent the other 3 nights