Eventually, Chapman had sought psychiatric help in 1981 and had been persuaded by her daughter to leave H's house and return again to her parents' home. Although H had forced his way into the parents' house in 1982, it appeared that whatever relationship existed between Chapman and H came to an end at that time.

The DSS admitted that most of the factors used to demonstrate the existence of a *de facto* marriage relationship had not been established in this case. However, the DSS maintained, the behaviour of Chapman and H over 8 or 9 years was only consistent with an intense emotional relationship between Chapman and H.

The AAT said that this argument was 'intellectually appealing for there is considerable illogicity [*sic*] in the applicant's conduct.' However, the AAT concluded as follows:

> 'Nevertheless, I am not convinced that the applicant's explanation for her behaviour in persisting to reside in the various residences owned by H is substantially false. In reason, her behaviour appears strange but there is little limit to the range or relationships between human beings and many in the range can lead to reactions which one would not normally expect . . . I have therefore to accept as correct the applicant's statements about the nature of the relationship between H and herself.'

(Reasons, paras 25-6)

Formal decision
The AAT set aside the decision under review, directing that Chapman had been qualified to receive an invalid pension from 1973 to 1981.

Family allowance: sharing

McNAMARA and SECRETARY TO DSS (No. V84/368)

Decided: 8 March 1985 by R. Balmford.

Louis McNamara had married in 1976. In the same year, he and his wife, E, had a son, J. In 1981, McNamara and E were divorced and the Family Court gave E custody of J, subject to McNamara having regular access. In fact, McNamara cared for J 5 days a fortnight and shared with E joint responsibility for J's schooling and for all decisions about J's welfare.

Early in 1984, McNamara applied to the DSS for family allowance and family income supplement in respect of J. The DSS rejected these applications and McNamara asked the AAT to review the DSS decisions.

The legislation
Section 95(1) of the *Social Security Act* provides that family allowance is payable to a person who has the custody, care and control of a child. Section 99A gives the Secretary power to divided family allowance for a child between 2 or more persons.

Section 85(1) provides that an unmarried person who is qualified for family allowance in respect of a child may also qualify for family income supplement for that child.

'Custody, care and control'
The AAT adopted the view expressed in *Hung Manh Ta* (1984) 22 *SSR* 247, that a person had the custody, care and control of a child if that person was responsible for the actual day-to-day maintenance, training and advancement of the child. It was not necessary, the AAT said, for the person to have the legal custody of the child.

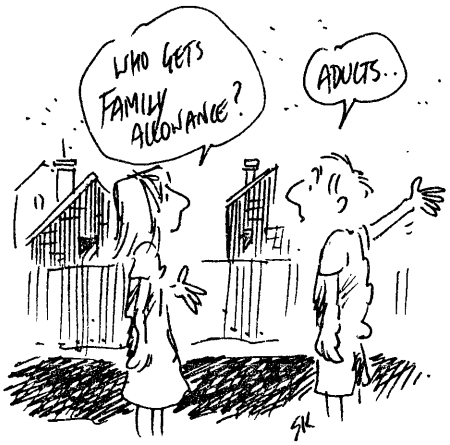
In the present case, the AAT said, McNamara had the custody care and control of J when the child was with him; and E had the custody, care and control of J when the child was with her.

Sharing family allowance
The AAT said that the power to apportion family allowance (in s.99A) should be exercised so as to promote the purpose of paying family allowance, that is, to enable the allowance to be spent on the maintenance of the child in question.

Because of the relatively small sums of money involved and because of the difficulty in precisely determining the shares of responsibility taken by 2 parents, the division of the family allowance should be done on a fairly broad basis. In the present case the AAT divided the allowance so that McNamara received one-third and E received two-thirds.

Family income supplement
Because McNamara was eligible for family allowance it followed that McNamara would be eligible for family income supplement.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with directions that McNamara was qualified to receive family allowance and family income supplement in respect of his child J, and that E was also qualified to receive family allowance in respect of J.



Family allowance: discrimination?

McDONALD and SECRETARY TO DSS (No. V84/362)

Decided: 8 March 1985 by R. Balmford, G. Brewer and H. C. Trinick.

The AAT *affirmed* a DSS refusal to pay family allowance to Bernard McDonald, in respect of his son, S.

When S had been born in 1981, his mother (McDonald's wife) had applied for and been granted a family allowance. The couple then decided that McDonald would stay at home to care for S and his wife would return to work—as the family's breadwinner. McDonald's wife then asked the DSS to pay the family allowance to McDonald.

The legislation
Section 95(1) of the *Social Security Act* provides that family allowance is payable to a person who has the custody, care and control of a child.

Section 94(2) provides that, where a husband and wife are not separated, their child 'shall be deemed, for the purposes of this Part, to be in the sole custody, care and control of the wife'.

An outmoded policy?
The AAT observed that the assumptions upon which family allowance had been based (when introduced as child endowment in 1941) 'no longer hold good for anything like all Australian families': Reasons, para. 11.

The AAT noted that the DSS was currently reviewing the basis for entitlement to family allowance. This review, the Tribunal said, would raise policy considerations 'which go beyond the purview of the DSS', because one of the policy justifications for paying the allowance to a wife had been 'to bring about some redistribution of income within families': Reasons, para. 16.

As the legislation stood at the moment, however, there was no discretion to pay the allowance to anyone other than McDonald's wife, even if she was not the primary care giver for their child.