The evidence

The AAT heard evidence by telephone from Leahy, who lived in the Northern Territory. She had met Mrs W, and Mrs W's daughter, Mrs Smith, when she was a cook at a Seventh Day Adventist Mission in Northern Australia. At the time of Loanne's birth in 1976, Leahy was having violent epileptic fits. Medical advice indicated she could not live alone with Loanne, so mother and child stayed with Mrs W in Perth until September 1976. During this time Leahy accepted full responsibility for caring for Loanne.

Leahy returned to her original home in Daly River after it became apparent it was 'unfair' for her to continue living with Mrs W. Mrs W agreed to care for Loanne until she was old enough to go to school. In the following year Loanne went to live with Mrs Smith where Mary visited her on at least two occasions. When Loanne was old enough she visited her mother in the Northern Territory on at least 6 occasions. Emotional ties between mother and child remained strong and there was 'a significant amount of contact having regard to the relative situations of mother and daughter'.

It was arranged that Leahy's then supporting parent's benefit be paid into a bank account in her name in Perth, but that Mrs W would withdraw amounts equivalent to the benefit payable for the child, send a regular amount to Mary, and leave the balance in the bank to be used as occasion demanded. This continued until the additional invalid pension for Loanne was refused.

No question of adopting or formal fostering of Loanne arose, although there were indications of a 'private fostering' arrangement. The Smiths were granted 'child endowment' and later 'family allowance', as they were regarded as having 'custody, care and control' of Loanne for the purposes of Part VI of the Act as it then was.

Pensions Manual

The DSS supported its refusal of additional pension by referring to s.28(1AA) of the *Social Security Act* [now s.33(3)], which at the time entitled an unmarried person to an increase in pension if the person had the custody, care and control of a child.

Chapter 13 of the Pensions Manual was also cited. The guidelines purported to add a requirement of 'significant control over the child's activities'. The AAT said of the guidelines:

> 'Although they may be useful for pointing to circumstances which may serve to qualify a pensioner for an increase they cannot operate to deny a pension to a person who fulfils the precise requirements of the Act.'

Legal considerations

The AAT considered it was the existence of the 'right to control which is the dominant consideration, not the extent to which it is in fact exercised'. Whether delegation of 'the right to control' to a person standing *in loco parentis* constitutes a complete abrogation of the responsibilities of parenthood will depend on other matters, the most important of which may be the question of 'care'. This includes physical, mental, moral and emotional matters. Health, schooling, love, comfort, discipline, hygiene are all essential to the total concept of care, as are a multitude of other considerations.

The AAT referred to other cases in which delegation of parental responsibilities had occurred. Insofar as these suggested that the terms of the delegation must be limited in time and scope the AAT disagreed, saying:

> '. . . there is an implied term that any such delegation is limited by the ultimate right of the parent making it to vary the terms unilaterally or terminate the arrangement altogether, . . . a delegation which fails to specify time or to define precisely the nature and extent of responsibility is not void like a legal contract would be void for uncertainty.'

The AAT concluded that, on the facts, Leahy had retained sufficient custody, care and control to warrant payment of additional pension for a child whose factual custody was delegated to a limited extent, not to the extent of abrogating either control or care. The fact that there was little evidence of actual control was sufficiently explained by the facts, and compensated for by the extent of care that was provided.

The degree of significant care as well as control must be considered. Even if 'significant control' is a *relevant* factor, the AAT said, the *determining* factor is the extent of care and control.

Formal decision

The AAT set aside the decision under review.

[B.W.]

Handicapped child's allowance: eligibility

PRYOR and SECRETARY TO DSS (No. W85/205)

Decided: 4 August 1988 by R.C. Jennings.

The AAT set aside a DSS decision and directed that Marie Pryor was eligible to receive an allowance in respect of her severely handicapped child, C, from 17 November 1986, the date on which the allowance had been cancelled.

The facts

C suffered from asthma and enuresis (bed-wetting) and it was not disputed that both conditions were likely to require care and attention for an extended period. The care was provided by her mother. Pryor also contended that her daughter had developmental delay for which her mother gives her regular care and attention. The DSS argued this did not constitute a mental disability.

A Commonwealth medical officer's report, dated 14 November 1986, noted:

> 'Child has mild asthma treated with a Ventolin Rotohaler 2 times per day. May have developmental delay and require assessment by a developmental pediatrician but does not require extensive care on that basis. Has enuresis but is 7 years old and improvement might be expected.'

He concluded that C was neither a severely handicapped nor a handicapped child.

In 1985 C's primary school teacher noted definite progress but that C was 'well below average . . . requiring individual attention in most lessons'. Another school report in June 1987 noted that C was 'slipping further behind in all language areas and needs constant supervision to complete activities'. The teacher expressed concern at the lack of progress and with C's subsequent frustration with her lack of comprehension.

The legislation

The relevant provisions at the time were s.105H(1), s.105J and s.105JA of the *Social Security Act* [now replaced by the provisions dealing with child disability allowance, ss.101-109].

Section 105H(1) defined a 'handicapped child' as one who was not severely handicapped but had a

physical or mental disability which required care and attention only marginally less than that required by a severely handicapped child, permanently or for an extended period.

A severely handicapped child was defined as one who had a physical or mental disability which required constant care and attention permanently or for an extended period.

The other two sections required the care to be given in a private home that was the residence of the child and the parent.

Developmental delay a mental disability

The AAT said the evidence from the school, which was supported by Pryor who spent many hours a week with C in an endeavour to overcome these problems, was sufficient to establish the existence of a mental disability that would call for further care and attention for some time to come. It is not necessary to describe it as a mental illness.

Although Pryor spent less time providing care and attention for the asthma than had been required a few years ago, she was 'constantly watchful of behaviour patterns which precipitate attacks'. By itself, the asthma would not have been sufficient to need the amount of care and attention required by statute. The enuresis, if it were a sole disability, would also have been insufficient. However the three disabilities taken together satisfied the requirements of the Act.

[B.W.]

Compensation payment: preclusion

KRZYWAK and SECRETARY TO DSS
(No. V88/47)
Decided: 9 September 1988 by J.R. Dwyer.

Barbara Krzywak claimed an invalid pension in May 1987. The DSS delayed considering the claim until September 1987. In the meanwhile, Krzywak received a lump sum compensation payment of $30 000. When the DSS dealt with the claim for invalid pension, it decided that Krzywak was precluded, because of s.153(1) of the *Social Security Act*, from receiving invalid pension from July 1987 until October 1988.

Krzywak asked the AAT to review that decision.

The legislation

At the time of the DSS decision, s.153(1) provided that a pension was not payable to a person 'during the lump sum payment period' (a period which was calculated under s.152(2)(e)) where that person, while 'receiving a pension' received a lump sum compensation payment.

From 16 December 1987, s.153(1) was amended so that it precluded payment of pension during the lump sum payment period where a person or the person's spouse while 'qualified to receive a pension' received a lump sum compensation payment. That amendment took effect from 16 December 1987.

The *Social Security Amendment Act* 1988 amended s.153(1), effective from 1 May 1987. The result of this retrospective amendment was that, between 1 May and 16 December 1987, s.153(1) precluded payment of pension where a 'person who is receiving a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'; and, from 16 December 1987, s.153(1) precluded payment of pension 'where a person or the spouse of a person who is qualified to receive a pension receives or has received (whether before or after becoming so qualified) . . . a lump sum payment by way of compensation'.

Preclusion before 16 December 1987

The AAT said that the retrospective amendment made by the *Social Security Amendment Act* 1988 to the form of s.153(1) in force before 16 December 1987 -

> 'did not apply a preclusion period to Mrs Krzywak, because even as retrospectively amended, s.153(1) only applied "where a person who is receiving a pension" receives lump sum payment of compensation. Mrs Krzywak was never "a person who is receiving a pension". She was never paid invalid pension because of the view of officers of the Department that her lump sum award of compensation precluded payment of pension to her, even though she had never been "a person who is receiving a pension".'

(Reasons, para. 17)

Preclusion from 16 December 1987

However, the AAT said, the form of s.153(1) in force from 16 December 1987, as retrospectively amended by the *Social Security Amendment Act* 1988, did have the effect of precluding payment of pension to Krzywak during the lump sum payment period. The new form of s.153(1) applied to all people qualified to receive pension who after 1 May 1987 received a lump sum compensation payment 'whether before or after becoming so qualified'; and Krzywak fell into this category.

According to s.152(3)(b), the lump sum payment period is to run from the day after the day that a person receives her last periodical payment of compensation. The AAT said that the effect of the new form (i.e. post-16 December 1987) of s.153(1) would prevent payment of pension to Krzywak during the whole of the lump sum payment period, even if that period began before 16 December 1987 (as it did in this case). The AAT explained:

> '19. There is therefore no advantage to Mrs Krzywak in the fact that s.153(1) as amended by the Retrospective Act did not apply to her until after 16 December 1987. Once s.153 "catches" Mrs Krzywak's payment of compensation, the preclusion period applicable is the same no matter when she first came within its ambit.'

Calculating the preclusion period

Section 152(2) provides that the 'lump sum payment period' (that is, the period during which payment of pension is precluded) is to be calculated by dividing 'the compensation part of the lump sum payment' by average weekly earnings.

Where a compensation claim was resolved before 9 February 1988 'the compensation part of the lump sum payment' is to be the portion of the lump sum payment which was, in the Secretary's opinion, 'in respect of the incapacity for work'.

Where a compensation claim is resolved on or after 9 February 1988, 'the compensation part of the lump sum payment' is a fixed statutory amount - 50% of the lump sum payment.

In the present case, the Victorian Accident Compensation Tribunal had awarded Krzywak $30 000, expressed to be in settlement of all forms of future compensation other than medical and similar expenses. That Tribunal's jurisdiction was to award payments of compensation for death, total or partial incapacity for work, various specified injuries, and medical expenses: *Accident Compensation Act* 1985 (Vic.).

Krzywak's solicitors had written to the DSS with two quite different interpretations of the award: first they had said that the whole of the award was