investments totalling more than $40 000 which produced income of about $6000 per annum and was granted a part pension.

Home interest not deductible

The AAT said:

> 'No question arises in this case like those which arose in [*Haldane-Stevenson* (1985) 26 *SSR* 323 and *Garvey* (1989) 53 *SSR* 711], there is no basis for arguing that the interest paid on the mortgage on [the applicant's home] should be deducted from the income received from any part of the applicant's investments. She cannot claim the proposed deduction is associated with the income merely because it was or would be possible to repay the loan with some of the moneys invested . . .
>
> The interest on the mortgage . . . is no more than a living expense incurred by the applicant, like rent . . . That interest is entirely unrelated to any investment which returns income. It is not a cost of achieving that income.'

(Reasons, p.4)

SSAT's reasons

The AAT noted in passing that the SSAT in its reasons -

> does not expressly distinguish its findings on material facts and evidence or material on which the findings were based from the reasons for its decisions as required by paragraph [204(1)(a) of the *Social Security Act*] . . . [but it] complies substantially with those requirements and is adequate to determine this application.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Investment income: spreading of capital gains

SPENCE and REPATRIATION COMMISSION
(No. V88/883)
Decided: 25 January 1990 by H.E. Hallowes.

Spence asked the AAT to review a decision of the Commission to maintain as income for 12 months capital profit earned on redeeming an investment.

The legislation

Under s.35A(4) of the *Veterans' Entitlements Act* 1986, where a person becomes entitled to receive an amount of income, not being income from remunerative work or a return from an accruing return investment, the person is taken to have received one 52nd of that amount as income during each week in the period of 12 months from the date when he becomes entitled to the income.

To be an 'accruing return investment' the value of the investment must be unlikely to decrease from time to time as a result of market changes; s.35A(1).

[These provisions were replaced and substantially replicated by ss.37B and 37J from 1 December 1988. These provisions are identical to *Social Security Act* 1947 s.3A(1) and (4) prior to 1 December 1988 and ss.12B and 12L since then.]

The facts

Spence invested $5000 with a BSL property trust in 1982 and withdrew $8283 on 5 February 1988 when the trust was terminated. The trust documents provided that neither repayment of the investment nor the performance of the trust were guaranteed. Indeed, in September 1986, the capital value of Spence's investment had dropped to $3906.

Not an 'accruing return investment'

The AAT decided that Spence's investment was not an 'accruing return investment' because its value was not guaranteed and affirmed the decision to apply s.35A(4) and maintain the $3283 profit component as income at the rate of $126.23 per fortnight until 5 February 1989 .

Definition of income

Spence argued that the decision was contrary to the definition of income in the dictionary and that applied by the Tax Commissioner; but the AAT stated that it must apply the *Veteran's Entitlements Act* definition rather than those other definitions.

Retrospectivity

In response to the argument that the decision operated retrospectively, the AAT said:

> 'The legislation affects a veteran's rate of income from the day the veteran becomes entitled to receive the income. To that extent, the Act does not operate retrospectively, although Mr Spence did not perceive that the legislation may be amended when he made his original investment.'

(Reasons, p.8)

'Double dipping' by the Commission & unconstitutional deprivation of property

The AAT rejected an argument that redefining an asset as income represented 'double dipping'. Spence also raised a rather ingenious argument that the Commission had acquired his property on unjust terms in contravention of s.51(31) of the Constitution by reducing his rate of service pension. This was also rejected by the Tribunal.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Supporting parent's benefit: which parent?

MINASSIAN and SECRETARY TO DSS
(No. N89/80)
Decided: 2 March 1990 by J.R. Gibson, J. Kalowski and M.T. Lewis.

Gerry Minassian had applied for supporting parent's benefit in respect of his son Luke on 3 June 1988. His claim was rejected on the basis that Luke was deemed to be in the custody, care and control of his mother, Donna Beales, who was receiving family allowance for him.

After appealing unsuccessfully to the Social Security Appeals Tribunal, Minassian applied to the AAT for review.

The facts

Luke was born on 31 October 1986. His parents separated on 26 April 1988. Ms Beales had sought orders of custody and guardianship in the Local Court and on 29 April 1988 the court had made an interim order giving the father access from 5 p.m. each Saturday to 1 p.m. Wednesday, and the mother access from 1 p.m. Wednesday to 6 p.m. Saturday.

Both parents had applied to the Family court for sole custody but, at the time of the AAT hearing, these applications were not finalised.

After Minassian's application for supporting parent's benefit was rejected, he applied for and was granted special benefit. In addition, family allowance payments were split between the two parents, as provided by s.86 of the *Social Security Act*.

The law

At the time Minassian applied for supporting parent's benefit, s.58(1) of the *Social Security Act* provided:

'where a child is a dependent child of 2 persons, that child shall, for the purposes of this Part, . . . be taken to be a dependent child of one of those persons only'.

If the Secretary is satisfied that a child is a dependent child of two people, the Secretary is to specify which of them is the relevant parent for the purpose of entitlement to supporting parent's benefit.

From March 1989, supporting parent's benefit was replaced by sole parent's pension. Under the new Part V, s.52 is in terms similar to the old s.58. The effect of this is that, even if a child is a qualifying child of both parents, only one of them can receive sole parent's pension in respect of that child. This is to be contrasted with the situation governing family allowance where, under s.86 of the Act, payment can be split between the parents (as it was in this case).

The AAT's findings

The AAT found that both parents could properly be characterised as joint custodians and that Luke was a 'dependent' child of both Minassian and Beales within the meaning of s.3(1) and (2) as it stood before 1 March 1989.

Further, the AAT was satisfied that Luke continued to be a dependent child and a qualifying child of both parties from 1 March 1989.

The AAT then had to consider which of them should be specified as the relevant parent for the purpose of s.52.

Operating on the basis that there is no presumption that the decision under review is correct, the AAT noted that s.52 does not provide any guidance to the decision-maker as to what factors are relevant in making such a determination.

The AAT also commented that, because of the pending custody proceedings, the parents refrained from putting before the AAT evidence matter which might have assisted the Tribunal.

Having found that there was not a great deal of difference between the capacity of the parents as carers or their financial needs for the maintenance of Luke, the tribunal concluded that the only evident difference was that Luke spent 14 hours more per week with Minassian, and continued:

'Reluctantly the Tribunal is now in a position of having to decide that, there being no other significant distinguishing factor, the quantum of care provided by each parent becomes the deciding factor.'

Formal decision

The AAT set aside the decision under review and determined that, throughout the period under review, Luke was the dependent child of both his parents; but, that for the purposes of Part V, 'Gerry Minassian is to be taken to be the person in relation to whom the said child is a dependent and a qualifying child'.

[J.M.]

Child disability allowance; family allowance; additional invalid pension:

A. PERECZ and SECRETARY TO DSS
(No. 5750)
Decided: 9 March 1990 by H.E. Hallowes.

This was an application to review a decision of an SSAT to reduce the applicant's rate of invalid pension and to cancel child disability allowance and family allowance paid to the applicant in respect of her son, Leslie, on the basis that he did not require constant care and supervision and that he was in receipt of an Austudy payment.

The facts

This case follows the case of *L. Perecz*, also reported in this issue of the *Reporter*. The facts relating to the condition of the applicant's son can be found in that report. The applicant had some expectation that her son would receive invalid pension on his 16th birthday and did not understand why it was decided that he was no longer regarded as disabled at that age. In 1988 her son began to receive a $50 per week Austudy payment and this caused the reduction in the applicant's rate of invalid pension.

Eligibility for child disability allowance

Section 102 of the *Social Security Act* provides that a child disability allowance is payable to a person in receipt of family allowance for a child who is a 'disabled child' where the person provides, in the private home of the person and the child, care and attention on a daily basis.

A 'disabled child' is defined in s.101 to mean a child who has a physical, intellectual or psychiatric disability, who needs substantially more care and attention on a daily basis than a child of the same age without that disability and who is likely to require that care and attention permanently or for an extended period.

The AAT accepted that the applicant's son had a physical disability. As to whether the child needed substantially more care and attention than a child of the same age with no disability the Tribunal commented that the test of need was an objective test. The subjective view of the applicant as to the needs of the child was not the test according to the AAT. In determining whether the child needs 'substantially' more care the AAT said:

'The care and attention a child needs must be more than a minimal amount of care and attention over and above the care and attention a child without a disability needs, but it need not be care and attention such that the child is supervised at all times and assisted with all tasks. The term is here used in a comparative sense.'

(Reasons, p.10)

The applicant's son had a constant fear that he would hit his head. This caused some restrictions being placed on family activities but the weight of the evidence, both in terms of his medical condition and in terms of his attendance at school, led the Tribunal to conclude that the care and attention applicant's son needed had diminished since the applicant was first granted child disability allowance. The AAT decided that the son was not a 'disabled child' and the applicant was thus not entitled to receive child disability allowance.

Eligibility for family allowance

Section 80(1) of the Act provides that a person is qualified to receive family allowance where that person has a 'dependent child'. However, according to s.81, where payments under Austudy are being made to that child, family allowance is not payable. These were the facts here and the Tribunal found that it had no discretion in the matter. The AAT did note that if the applicant's son stopped receiving Austudy payments then the applicant would qualify for family allowance.

The rate of invalid pension

Section 33(4) of the Act provides for additional pension to be paid where the person has a dependent child. Section 33(4)(b) provides for an increase of $260 per annum for a dependent child who is a prescribed student child (that is, receiving Austudy payments) and who was receiving such payments immediately before 1 January 1988.

The applicant's son was granted Austudy payments from 30 May 1988.