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

and the whole of each school vacation with Rollins and her husband.

Apart from the period between 1 July 1990 and 27 August 1990, Yalambee was an approved institution for family allowance purposes under the *Social Security Act 1947*.

Family allowance

The AAT said that, apart from the period 1 July 1990 to 27 August 1990 and the periods covered by school vacations, L was an inmate of an institution, Yalambee, within s.82(2) of the *Social Security Act 1947*. Adopting the approach laid down in *Piggott* (1986) 11 ALD 9; 35 *SSR* 443, the AAT said that L was a person admitted to, and residing in, the institution for protracted periods even though those periods might be interspersed with time spent away from the institution.

During the periods when L was an inmate of the institution, Rollins was not eligible for family allowance. She could not be paid family allowance for those fractions of a week which L spent with her while he was an inmate of Yalambee. The decision in *Matthews* (1988) 14 ALD 735, which had allowed a parent to receive part family allowance for the days (mostly weekends) which her child spent at home could no longer be followed because the section on which the AAT had relied in that case, s.103A, had since been repealed.

However, Rollins was qualified to receive family allowance on each pay day which fell during school vacations — her son was not an inmate of Yalambee during those periods. And she was also qualified to receive family allowance on each pay day which fell during the period 1 July 1990 to 27 August 1990. In that period, Yalambee had been awaiting re-approval as an institution, following a change in its management.

Child disability allowance

The AAT decided that Rollins' home was L's residence and the respondent provided L with care and attention on a daily basis in her home.

L was absent from Rollins' home for part of each week during school terms and these absences amounted to more than 28 days in any calendar year; but the absences were temporary within s.103(2)(c) of the 1947 Act. It was appropriate, the AAT said, to exercise the discretion conferred by s.103(2) of the 1947 Act so as to ensure that child disability allowance was paid to Rollins for each day of L's school vacations and each day of the period 1 July 1990 to 27 August 1990.

The 1991 Act

The AAT noted that the 1947 Act was repealed from 1 July 1991 and that the *Social Security Act 1991* contained a number of provisions dealing with the problem currently before the Tribunal. It appeared that these provisions might have produced some changes to the law. The AAT said it was sure that any such changes were inadvertent, because the 1991 Act was not intended to change the law but to rewrite the legislation in plain English.

The AAT said that the decision of the SSAT, as varied by the AAT, was an 'instrument' that was in force under the 1947 Act immediately before 1 July 1991. According to cl. 4(1) of Schedule 1A to the 1991 Act, that instrument now has effect from 1 July 1991 as if it were an instrument made under the 1991 Act.

The result was Rollins' eligibility for family allowance and child disability allowance after 1 July 1991 would be the same as before that date.

Formal decision

The AAT varied the decision under review by determining that, as from 13 June 1989, family allowance was payable to her for L for each family allowance pay day during school vacations and between 1 July and 27 August 1990; and child disability allowance was payable to Rollins for L on each family allowance pay day during school vacations or within 2 weeks after a vacation, and between 1 July and 27 August 1990.

[P.H.]

[**Editors' note:** Child disability allowance is paid to parents in 2-week portions; and, to receive a 2-weekly payment , a parent must be qualified on the pay day for that payment. In order to achieve the result which the AAT thought was desirable (that Rollins be paid for each day during L's school vacations), the AAT decided to treat Rollins as qualified, not only during the school vacations, but during the periods of 2 weeks after each vacation. The power to do this was conferred by s. 103(02) of the 1947 Act, if L's absences from Rollins' home were temporary. However, the AAT's decision to treat Rollins as qualified for an extra pay day after each school vacation could have the effect of paying her for more than the number of days in each school vacation.]

Child disability allowance

JONES and SECRETARY TO DSS (Nos 7693 and 7695)

Decided: 24 January 1992 by B. G. Gibbs.

Raffaela Jones had 4 children. Two of these, M and A, suffered from constant asthma.

Jones was granted handicapped child's allowance for of M, who was born in 1981, in 1983. This was converted to child disability allowance in 1987. Jones was granted child disability allowance for A, who was born in 1984, in 1988.

In June 1991, the DSS cancelled each allowance. On appeal, the SSAT affirmed the decision in respect of A but set aside the delegate's decision in respect of M.

Jones applied to the AAT for review of the first decision; and the DSS applied to the AAT for review of the second decision.

The legislation

At the time of the DSS decision, s.102 of the *Social Security Act* 1947 provided that a person who was qualified to receive family allowance for a disabled child was qualified to receive child disability allowance if the person or the person's spouse provided care and attention on a daily basis in their private home.

Section 101 of the Act defined a 'disabled child' as a child with a physical, intellectual or psychiatric disability who, because of that disability, needed (permanently or for an extended period) care and attention from another person on a daily basis that was substantially more than the care and attention needed by a child of the same age without such a disability.

(Similar provisions, ss.952 and 954, appear in the *Social Security Act* 1991, which came into operation on 1 July 1991.)

The evidence

M required the administration of sprays and the testing of airways flow each morning, under Jones' supervision. M used a Ventolin puffer 3 times a day and nebuliser therapy for 30 minutes each evening, the latter under Jones' supervision. Once or twice a week, the nebuliser therapy was repeated during the night. In addition, Jones had to provide more extended care on the occasions when M suffered a more severe