How should the relevant law be applied to the gifted amounts?

The AAT considered the eligibility criteria for job search allowance under s.513 of the Act. The rate at which the allowance is paid must be determined by reference to the assets test and the income test provisions of the act.

Acting on their decision that the amended s.1125A could not be retrospectively applied, the AAT turned to the original s.1126 and related provisions. Section 1126 provides that the value of an asset disposed of by a person during a pension year is taken into account in assessing the rate of allowance payable to the person and partner for 5 years from the date of disposal. The gifts of $25,000 to each of De Ryk's three daughters fell within the definition of disposal of an asset in s.1123.

But the loan of $11,000 could not be considered a disposal of income because s.11(11) of the Act specifically stated 'that lending of money after 27 October, 1986 is not a disposition of an asset for the purposes of s.1123': Reasons, para. 13.

Definition of pension year

Section 1126 referred to assets disposed of in the pension year. The AAT looked at two possible interpretations of pension year. First, the pension year may be the year commencing on the date when pension was first payable. Applying s.11(10)(8), this would mean that because De Ryk disposed of assets in August 1991 the disposal did not occur within the pension year commencing 31 August 1992, when allowance was first payable.

The second possible interpretation was that pension year refers to the calendar year in which a person received the pension or allowance. This would make the actual date of disposal irrelevant as long as it occurred in the same year as commencement of claim.

The AAT preferred the first interpretation, that the pension year commenced upon receipt of pension. This interpretation also accorded with the subsequent inclusion of s.1125A in the Act. Although the AAT stressed that s.1125A did not apply in this case, the Tribunal acknowledged that it 'is relevant in understanding what section 1126 means': Reasons, para. 21.

The AAT concluded that s.1126 is only to be applied in those cases where disposal of assets occurred while the person was in receipt of benefit or allowance.

Application of s.1126 to De Ryk's circumstances

The AAT found that because 'De Ryk disposed of $75,000 of assets before he claimed job search allowance, he had not disposed of any assets during a pension year within the meaning of s.1126': Reasons, para. 24. Thus the AAT found that the $75,000 should not be taken into account when assessing how much allowance was payable to De Ryk. In view of its decision on this point it was necessary to consider under s.1127, whether at the time De Ryk made the gifts he could reasonably have expected that he or his wife would become qualified for a payment under the Act.

Formal decision

The decision was set aside and the matter was sent back to the DSS for recalculation of job search allowance on the basis that the gifts were not relevant to assessment of rate payable.

[B.M]

Child disability allowance: care and attention

KRZNARIC-GRAHAM and SECRETARY TO DSS
(No. 9526)
Decided: 6 June 1994 by S.A. Forgie.

Krznaric applied for a child disability allowance (CDA) for her two daughters Aamie and Teagan. The application was refused by the DSS and this decision was affirmed by the SSAT. Krznaric appealed to the AAT.

The legislation

Section 954 of the Social Security Act 1991 provides that a person may receive CDA if the young person in respect of whom the allowance is paid is a 'CDA child of the person'.

The child must be a disabled child as provided by s.952 of the Act:

> 'Subject to section 953, a person is a disabled child if:
> (a) the young person has a physical, intellectual or psychiatric disability; and
> (b) because of that disability, the young person:
> (i) needs care and attention from another person on a daily basis; and
> (ii) the care and attention needed by the young person is substantially more than that needed by a young person of the same age who does not have a physical, intellectual or psychiatric disability; and
> (c) the young person is likely to need that care and attention permanently for for an extended period.'

The facts

Krznaric had two children aged 4 and 2. Both children had asthma and Krznaric applied CDA in respect of both children. The elder child, Aamie, was diagnosed by Dr Grigoleit as having moderately severe asthma. Her attacks were monthly, lasting 7 to 10 days. Krznaric had to supervise Aamie's activities and diet constantly. She had to administer medication daily and place her daughter on a ventalair machine 3 times a day for 30 minutes each session. Aamie had been admitted to hospital for her asthma on 3 or 4 occasions.

The younger child, Teagan had been diagnosed by Dr Grigoleit with mild-moderate asthma. He described the attacks as 'three-four monthly' and stated that they last for two weeks.

Medical evidence

Dr Ian Skelton, General Surgeon, had treated Aamie for her asthma condition since February 1993, when she was referred to him by Dr Grigoleit. His reports indicated that Aamie was prone to vomiting and had a poor appetite. When he examined her on 22 March 1993, she had a respiratory tract infection.

A Commonwealth Medical Officer, who saw Aamie on 23 February 1993 reported that she did not require substantially more care and attention on a daily basis than is usually required at that age.

Dr Grigoleit had treated Teagan since 24 September 1992 and reported that she had mild to moderate asthma and suffered attacks 'three-four monthly'. The AAT interpreted this statement to mean that Teagan had an attack each 3 to 4 months as he stated that the duration of each attack was 2 weeks. Dr Grigoliet did not indicate whether Teagan required substantially more care and attention than a child of her age without a disability.

Dr Skelton, who had also seen Teagan reported on 9 March 1993, that a chest X-ray showed extensive changes which were consistent with infection. He saw her again on 22 March 1993 and reported that despite antibiotics, X-rays showed persistent changes which had been present since July 1992. Due to her lack of response to treatment, he referred her to the thoracic unit at the Royal Children's Hospital. The AAT did not have access to the results of that referral.

A Commonwealth Medical Officer examined Teagan and reported that she did not require substantially more care and attention on a daily basis than a child of the same age without a disability.

Disability

The AAT was satisfied that both children had a disability, namely asthma, which required care and attention on a daily basis.

Substantially more daily care and attention

The AAT referred to the AAT decision, *Monaghan and Secretary, Department of Social Security* (1990) 20 ALD 572 where it was stated that the phrase 'substantially more than' meant 'considerably or significantly more than'. In that case, the AAT held that the test for need was an objective test: Reasons, para.25.

The AAT noted that both Aamie and Teagan were very young children who were too young to administer their own medication or treatment. The AAT found that Aamie did require substantially more care and attention than a child of the same age without a disability as she required constant supervision of her activities and diet and had to be placed on a ventalair machine 3 times a day. Teagan, the AAT concluded did require care and attention because of her asthma but did not require substantially more care and attention than a child of her age without a disability.

Formal decision

The AAT set aside the decision of the SSAT and substituted its decision that Krznaric was entitled to CDA in respect of Aamie but was not entitled to CDA in respect of Teagan.

[H.B.]

Disability support pension: continuing inability to work

D'AMBROSIO and SECRETARY TO DSS
(No. 9553)
Decided: 17 June 1994 by D.J. Grimes, D.B. Travers and N.J. Attwood.

D'Ambrosio applied for a disability support pension (DSP) and his application was rejected by the DSS. This decision was affirmed by the SSAT and D'Ambrosio appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act 1991* provides that to qualify for a DSP, a person must have:

- a physical, intellectual or psychiatric impairment of 20% or more under the Impairment Tables (in sch.1B to the Act): s.94(1)(a) and (b); and
- a continuing inability to work: s.94(1)(c).

Section 94(2) provides that a continuing inability to work means that the impairment prevents a person from doing their usual work or work for which they are currently skilled: s.94(2)(a); and also prevents them undertaking educational or vocational training during the next 2 years which would be likely to equip the person within the next 2 years to do work for which they are currently unskilled: s.94(2)(b).

The facts

D'Ambrosio was born on 16 December 1976. From the age a 6 and a half, he was placed in a special education unit because of learning difficulties. He attended special education classes until 1993 when he completed Year 10. In 1994, he attended Copeland College and was currently undertaking Year 11. He was enrolled in mathematics, English, metalwork, woodwork and sport studies.

D'Ambrosio had had epilepsy since 1982. Since 1987, his seizures had been controlled with anti convulsants taken twice daily. He currently has fits on average once every 6 months during which he becomes unconscious and on the following day, he has headaches and feels weak and dizzy.

The applicant applied for DSP on 23 October 1992.

Medical evidence

Dr Boyopati examined D'Ambrosio at the request of the DSS on 24 November 1992. He took into account the report of Mr Petroni, clinical psychologist and concluded that D'Ambrosio was medically fit to enter the workforce on a full-time basis.

Dr Boyopati referred D'Ambrosio to Mr Petroni for a psychological assessment. He concluded D'Ambrosio had an IQ of 86 and noted that his responses revealed 'better potential ability than the standard scores'. Mr Petroni concluded that there was no reason why he could not work full time after completing his Year 10 studies. He believed that D'Ambrosio was fit for unskilled work.

Mrs Peters, a senior counsellor working in the ACT school system gave evidence that his full scale IQ was assessed at 63. She regarded Mr Petroni's findings as to D'Ambrosio's IQ to be inflated and concluded that his overall ability fell into the 'borderline-intellectually deficient' range.

Mrs Peters assessed D'Ambrosio's reading ability as at mid primary level of development and found that he had inadequate vocabulary, spelling and style as well as difficulty expressing his thoughts in writing. She recommended a training program based on pre-work and vocational skill development. Mrs Peters believed that he was not capable of working 30 hours a week under normal award conditions as he would require constant supervision in the workplace because of attention problems.

In a 'request for medical details' submitted with the claim for DSP, Dr Walters described D'Ambrosio's conditions as epilepsy, mild intellectual delay and behavioural problems. Dr Walker stated that D'Ambrosio's ability to work was affected by his limited understanding. He believed that whilst he was fit for his usual work, that is school, for at least 30 hours a week, he was not fit for other work for 30 hours a week.

Impairment

The AAT 4accepted that that D'Ambrosio had an impairment in that he had epilepsy and an intellectual impairment. The AAT found that, as the frequency and duration of attacks were not extended, the epilepsy condition was assessed under Table 26.4 as having an impairment rating of 0%.

The AAT assessed D'Ambrosio's intellectual impairment and behavioural problems, under Table 12. It found that his level of intelligence fell into 'the lower reaches of the 'borderline' classes', warranting a score of 3. In relation to his behavioural problems, the AAT concluded that he had a problem which attracted a score of 3 under Table 12. As he required minor help in his capacity for independent living, a score of 3 under Table 12 was found to be appropriate. D'Ambrosio was therefore assessed by the AAT as having a total score of 9 under Table 12 which gave him an impairment rating of 40%. Accordingly, the AAT concluded that he had an impairment well in excess of 20% as required by s.94(1)(b) of the *Social Security Act.*