take this factor into account. That was a matter for the Family Court, not for those administering the SPP scheme.

As an SPP child may be a maintained child as well as a dependent child, it was relevant to consider the extent to which each parent was maintaining Jullie. The AAT first considered what items of expense were to be taken into account. The Family Court in *Coon v Cox* (1994) FLC 92-464 discussed two scales measuring the costs of maintaining children, and preferred the Lee Scale which took account of additional expenses not included in the Lovering Scale, such as housing, transport and medical expenses.

The AAT found that both parents paid for the maintenance items when Jullie was in their care and control. As their periods of care were roughly equal, so too were their expenses. Vidler's $50 maintenance payments 'did not significantly alter the balance in his favour'. The AAT said that in this context it was not relevant to consider which of them had the greater earning power as 'a sole parent pension is not concerned with broader philosophical issues of who, if either, should be foregoing employment in order to care for Jullie': Reasons, para 77.

The AAT concluded that it should make a s.251(2) declaration in favour of Ashford since the Family Court order gave her greater periods of care of the child than it gave Vidler, and the terms had not been varied by order or by agreement between them.

Formal decision

The AAT affirmed the decision under review.

[P. O'C.]

Overpayment: departure certificate

SECRETARY TO DSS and APOSTOLOS AND HELEN THANASOUDAS

(No. 9713)

Decided: 2 September 1994 by G.L. McDonald.

The DSS decided to cancel payment of pharmaceutical allowance (PA) from 25 March 1993, to cancel payment of disability support pension (DSP) and age pension (AP) from 23 September 1993, and to recover an overpayment of PA, DSP and AP of $839.50 paid to the Thanasoudases from 25 March and 23 September to 21 October 1993. The SSAT set aside this decision deciding that there was no overpayment of DSP and AP because these pensions were to be cancelled when the Thanasoudases returned to Australia. The DSS requested review of the SSAT decision by the AAT.

The facts

The facts were not in dispute. Mrs Thanasoudas was paid AP, Mr Thanasoudas was paid DSP, and they both were paid PA. On the 13 January 1993 they were sent separate letters in similar terms advising them that they must tell the DSS within 14 days if they decide to leave Australia. Because the Thanasoudases do not speak English they did not understand the contents of the letters. On 13 March 1993 the Thanasoudases left Australia for Greece without notifying the DSS. They returned to Australia on 6 November 1993.

The law

With respect to the payment of AP, s.68 of the *Social Security Act 1991* authorises the DSS to give a notice requiring the person to notify the DSS if certain specified events occurred. According to s.71 a determination that a pension is payable continues in effect until it ceases to be payable because of certain sections of the *Social Security Act*. Section 73 provides that if the person does not notify the DSS of the specified event, and because of the event the person is no longer entitled to a pension, the pension ceases to be payable. Similar provisions apply to payment of DSP. Section 1064-C1 stipulates that a person must be in Australia to be paid the PA.

The section which authorised the DSS to cancel the Thanasoudases pensions is s.1218, which states that if a person leaves Australia without a departure certificate and remains absent for more than 6 months, the person ceases to be qualified for the pension at the end of the 6 months. Section 1219 sets out the procedure to be followed in order to obtain a departure certificate. The person must notify the DSS as required by the recipient notification notice of the proposed departure, and then a departure certificate may be issued. Finally, a debt is due to the Commonwealth if an amount has been paid to a person because that person failed or omitted to comply with a provision of the *Social Security Act* (s.1224).

Recipient notification notice

The AAT was satisfied that the letter of 13 January 1993 was a recipient notification notice as defined in s.68. It was noted that the letter did not specify that it was a 'recipient notification notice' as required. The AAT followed the decision of *Gellin* (1993) 76 *SSR* 1101 which decided that the inclusion of the section number authorising the issuing of the notice, was sufficient to validate the notice. The finding in *Moe* (1994) 80 *SSR* 1165 that the notice was not valid because it did not state the consequences of not notifying the DSS, was not followed by the AAT. The AAT decided that there was no a statutory requirement that the consequences of failing to notify be included in the notice. Section 62(2) provided that an event was not to be included in the notice unless it affected the payment of the pension, and therefore the letters to the Thanasoudases contained sufficient information. Similar reasoning applied to the notice issued in relation to payment of DSP to Mr Thanasoudas.

In passing, the AAT noted the amendment to s.68 which purported to validate all notices issued under the SSA from 1 July 1991.

> 'The application of such retrospectively acting provisions would indeed be extraordinary if the Tribunal had found that the notices . . . had been defective.'

(Reasons, para. 10)

The cancellation

The AAT followed previous AAT decisions of *Gellin* and *Moe*, and decided that s.1218 operated independently from the provisions of s.1219. Therefore the validity of the recipient notification notice did not affect the decision to cancel the pensions. The Thanasoudases' pensions were correctly cancelled after they had been absent from Australia for 6 months. As a basic requirement for payment of PA was that the person be in Australia, payment of PA was correctly cancelled from the date the Thanasoudases left Australia.

An amount of $873.30 was overpaid to the Thanasoudases because they omitted to notify the DSS when they left Australia. An administrative charge

was automatically imposed pursuant to s.1229 because the debt was not repaid within 3 months and was more than $50. The AAT noted that there was no suggestion that the Thanasoudases had acted improperly, and that a departure certificate would have been issued if the Thanasoudases had applied for one.

> 'The impossibility of applicants – whether they are non-English speaking or not – being able to comply with the retrospectively operating legislative provisions is a disquieting feature of this case.'

(Reasons, para. 15)

As with previous AAT decisions on this issue, the AAT referred this case to the Ombudsman.

Formal decision

The AAT set aside the decision of the SSAT and reinstated the original decision.

[C.H.]

[**Editor's note:** The AAT did not refer to the argument in the SSAT decision, that the date of effect of the DSS decision could only be either the date of the decision to cancel the pensions (5 November 1993) or a later date (see s.81). The automatic termination provisions did not apply because of the wording of the notice.]

Assets test: method of valuing forgiven loan

WRIGHT and SECRETARY, DSS

(No. 9736)

Decided: 16 September 1994 by M.D. Allen, G.D. Stanford and I.R. Way.

The Wrights had claimed age pensions on 8 July 1992. Their claims were rejected because their assets exceeded the permissible amount. The one issue which remained for determination by the AAT was how the net value of an asset deprivation, arising from the Wrights' forgiveness of a debt, was to be calculated.

Their situation at 8 July 1992, the date of their claims for age pension, was:

- they each held one of 6 shares in the family company, Collektra Holdings Pty Ltd ('Collektra');
- they had advanced to Collektra, by way of loans, the total sum of $447,968;
- of that sum, $154,940 had been advanced before 27 October 1986 and the balance, $293,027, had been advanced after that date;
- as, at 30 June 1992, it was plain that Collektra would never be in a position to repay the full sums advanced by way of loan, the Wrights, as directors of Collektra, forgave the debt by the company to them, thus disposing of the sum of $447,968;
- the 'consideration' for the disposal of the asset was the increase in the value of the Wrights' shares in Collektra to $50,950 each (the value of the shares reflecting Collektra's asset backing, as at 8 July 1992, of $305,701).

In order to calculate the value of the assets disposed of by the Wrights, the AAT had to ascertain the value of their shares in Collektra prior to 30 June 1992 when the debt was forgiven. Referring to the AAT decision *King and Repatriation Commission* 12 AAR 375, it stated that the value of the Wrights' advances to Collektra before 27 October 1986 were to be calculated having regard to the asset backing of the company and its capacity to repay. It found that prior to the forgiveness of the loan, the debts of Collektra amounted to $533,041 and the assets to satisfy the debts amounted to $390,774. On those figures, in the event of a winding up, and not allowing for preferences, each creditor would receive 73.3 cents in the dollar. Applying that figure, the true value of the Wrights' loan to the company was found to be $328,406.

Pursuant to s.1122 of the *Social Security Act 1991*, the amount advanced after 27 October 1986, $293,027, had to be valued at face value. The Tribunal therefore calculated the true value of the Wrights' loan to the company prior to 27 October 1986 to be $328,406 less $293,027, namely $35,379.

The total value of the Wrights' assets were then calculated by totalling their assets from all sources, including the value of their Collektra shares and the debt dispositions to Collektra (pre and post 27 October 1986), and subtracting the 'consideration' received for the dispositions (the value of the Collektra shares) and the gifting allowance of $10,000. As the resultant total still exceeded the permissible asset limit at the date of the Wrights' claims for age pensions, the AAT affirmed the decision to reject the Wrights' claims.

Decision

The AAT decided to affirm the decision that the Wrights were not entitled to age pensions as their assets exceeded the permissible amount.

[B.W.]

AAT procedure: application for reinstatement

OATES and SECRETARY, DSS

(No. 9698)

Decided: 25 August 1994 by S.A. Forgie

The SSAT had set aside a decision made by DSS to cancel Oates' family allowance payments, and had substituted a decision that they continued to be payable but, as Oates had applied to the SSAT more than 3 months after being notified of the DSS decision, that no arrears were payable.

Oates applied to the AAT however his application was dismissed under s.42A(2) of the AAT Act when he failed to appear at the hearing. Within 28 days of the dismissal, he applied under s.42A(8) for reinstatement of his application for review.

The principles applicable to reinstatement applications

The AAT canvassed case authorities which set out the principles applicable in similar procedures:

- applications for extensions of time; and
- applications to set aside judgements entered or dismissals of proceedings because of delay in prosecuting or failure to comply with procedural directions.

Having regard to the cases, it found that courts approached the two types of applications differently:

Applications for extension of time started with the premiss that applications which are out of time should not be entertained, so that consideration not only of the substantive merits of the application