pooling of resources. The AAT was satisfied that since September 1996, Coote had not shared joint responsibility for Nathan's care. It accepted their evidence as to their separate living arrangements, finding that this was consistent with House being Coote's carer. The AAT accepted that they rarely engaged in joint social activities. Despite the inconsistencies about the dates and periods of separation, the AAT found there were significant periods of separation both in Western Australia and New South Wales. There appeared to be little evidence of mutual companionship. The AAT said that, at the most, there was evidence of mutual emotional support and concern. It found that the relationship bore little resemblance to a marriage-like relationship.

Formal decision

The SSAT decisions were set aside. The AAT was not satisfied that House and Coote had a marriage-like relationship. They were entitled to pensions at the single rate.

[H.B.]

Order to stay implementation of SSAT decision: prejudice, hardship and prima facie merits of case

SECRETARY TO THE DFaCS and SRKK
(No. 19990846)

Decided: 11 November 1999 by B. Gibbs.

The issue

The DFaCS sought a stay of implementation of an SSAT decision concerning the rate of special benefit (SB) to be paid to SRKK. The DFaCS had determined in July 1999 that the appropriate rate of SB was the 'at home' rate, whilst in August 1999 the SSAT decided that the rate should be the maximum rate of youth allowance for an independent person living away from home, and should include a component for rent assistance if qualified. The effect of the SSAT decision was that, if implemented, SRKK would be paid SB at a considerably higher rate than that applicable to a child living at home. The DFaCS sought a stay of that decision from the AAT.

Background

SRKK was an 8-month-old infant wholly dependent on his mother, who as a non-resident was herself ineligible to receive social security payments. In April 1999 an Apprehended Violence Order was obtained by SRKK's mother against SRKK's father. In May 1999 SRKK and his mother moved to a women's refuge, where they lived on a rent-free basis, but in September 1999, then moved again to rental accommodation provided by St George Women's Housing Scheme. Under this housing scheme, rent was normally charged but at the time of the Tribunal hearing was being waived. The sole income to the family was the SB paid to SRKK, at the 'at home' rate of $146 per fortnight. It was asserted that this rate was insufficient for even SRKK's basic needs, and that even in the absence of rent payments considerable expenses had been incurred associated with the changes in the family's living circumstances.

The DFaCS accepted the obligation to pay income support to SRKK, but contended that the independent rate of SB was intended to apply only where higher expenses were incurred when young persons were living away from their families. The DFaCS further contended that rent assistance under the *Social Security Act 1991* (the Act) is not payable to young persons under 25 years who are living with their parents, and that to implement the SSAT decision would therefore be unfair as SRKK was living at home with his mother, and would continue to do so. To implement the SSAT decision would, the Department contended, be unfair and inequitable in that it would place SRKK in a better financial position than dependent children of Australian residents. The DFaCS also argued that, if a stay of implementation of the SSAT decision was refused, it would be unable to recover any moneys paid to SRKK if the Department was ultimately successful following full review by the Tribunal.

The law

The Act provides that debts may arise as a result of review of decisions by the AAT:

> **1223.AB.** If:
>
> (a) a person applies to the Administrative Appeals Tribunal under section 1283 for review of a decision; and
>
> (b) the Administrative Appeals Tribunal makes an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975; and
>
> (c) as a result of the order, the amount that has in fact been paid to the person by way of social security payment is greater than the amount that was payable to the person;
>
> the difference between the amount that was in fact paid to the person and the amount that was payable to the person is a debt due to the Commonwealth.

In *Secretary, Department of Social Security and Glanville* (1994) 81 *SSR* 1178 the AAT had decided that s.1223AB did not apply where the Department was (as in this case) the applicant.

The provisions of s.41(2) of the *Administrative Appeals Tribunal Act 1975* enable the AAT to make an order staying or otherwise affecting the implementation of a decision where this is considered '... appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

The decision

The AAT stated that in determining whether a stay should be granted, the principles of prejudice, hardship and the merits of the substantive application for review, should be considered. The AAT acknowledged that the Department may be unable to recover any moneys paid to SRKK if the SSAT decision were not stayed, but accepted that this consideration must be balanced against the assertion that considerable hardship to SRKK would result if the stay were granted. The AAT concluded that, whilst there was need to have regard to the merits of the Department's substantive application, this required only the establishment of whether there was a prima facie case by the Department. Against this, considerations of hardship must be weighed, which in this instance were accepted by the Tribunal as outweighing the prejudice concerns raised by the DFaCS.

Formal decision

The AAT refused to grant the application for a stay order.

[P.A.S.]