The issue

The Federal Court described the issue to be considered in this matter as:

> Whether the annual rate is to be the sum of maintenance payments received over a year or a variable figure which depends upon maintenance payments received from time to time.

(Reasons, para. 1)

The law

Section 838 of the *Social Security Act 1991* (the Act) sets out the qualifications for family allowance and includes an income test. Section 10 of the Act defines 'maintenance income' as including maintenance for a dependent child. The rate of family allowance is calculated according to the rate calculator in s.1069. To establish the appropriate rate the maintenance income test in Module J of s.1069 is to be applied. Module J states that maintenance income is to be worked out on an annual rate.

Annual rate of income

The Court noted that when the AAT had calculated the annual rate of maintenance income it had considered that King had been paid $1032 for the month of May. Therefore the annual rate of King's maintenance income was $1032 multiplied by 12. This contrasted to the SSAT's decision where it had simply added up the actual income received by King over the 12-month period. According to French J:

> The critical issue in my opinion reduced to whether the 'annual rate of ... maintenance income' referred to in Step 1 of Point 1069-J1 in Module J was the total of maintenance income received in a given year or a rate calculated each fortnight for which maintenance income was treated as received.

(Reasons, para. 16)

The Act does not provide any prescription for calculating the annual rate.

French J noted that King's argument, that the actual amount she had received over the 12 months should be taken into account, was a perfectly understandable common sense approach by her. However, this was not the process set out in the Act. Step 1 of Module J requires calculation of an annual rate of maintenance. In the High Court in *Harris v Director General of Social Security* (1985) 59 ALJR 194 the Court was concerned with the annual rate of income for the purposes of establishing the rate of age pension. The High Court was at pains to point out that it was not an annual amount of income but rather an annual rate. On this reasoning, according to French J, the AAT had correctly calculated the annual rate of maintenance income. That rate of maintenance income was the annualised rate of maintenance King received from time to time. Therefore, in May the annual income was $12,003.84.

Formal decision

The Federal Court affirmed the decision of the AAT and dismissed King's appeal.

[C.H.]

AUSTUDY: assets test; family home also used for business purposes

SECRETARY TO THE DEETYA v OVARI

(Federal Court of Australia)

Decided: 6 April 2000 by O'Connor, Heerey and Finkelstein JJ.

DEETYA appealed against a decision of the Federal Court at first instance (Gyles J) that Ovari was entitled to AUSTUDY in 1996.

The facts

The facts are outlined in the summary of Ovari in (1999) 3(12) *SSR* 193. Briefly, the Ovari family home was also used for business purposes, and for tax purposes 53.3% of outgoings were allowed as deductions. The AAT had decided that 46.67% of the value of the family home should be included as an asset for the purposes of the assets test. The family home is normally excluded from the assets test.

The law

Regulation 13 of the AUSTUDY Regulations states that a student cannot get AUSTUDY if the maximum value of their assets exceeds a certain limit. Regulation 14 sets out what is included in assets and regulation 15 what is excluded. According to regulation 15(1) the principal home is excluded.

Gyles J

Gyles J had found that once a property was found to be the principal home of the person then no right or interest which that person has in that home is to be included in the assets test. There is no reason why business activities were inconsistent with or detracted from the function of the house as a home. Deductions for the purposes of tax were worked out under a quite separate statutory regime.

The principal home

The Full Court stated:

> The term 'principal home' as such is not defined in the regulations. Regulation 15(1) only deals with some specific situations in which there might be some room for argument as to the physical extent of the 'principal home'. It could not be doubted that a suburban residence of the kind described was a home of the respondent's family. The adjective 'principal' is directed to excluding holiday homes and the like.

(Reasons, para. 12)

Once the principal home is identified then it is to be excluded. Nothing in the regulations allows for apportionment because part of the home is used for non-domestic uses. There was no evidence that the property had increased or decreased in value because it was used partly for business purposes. According to the Full Court this would be unlikely. There was also no finding by the AAT that some physical part of the property was exclusively used for business purposes. Therefore there was no basis for including any part of the principal home as part of the assets test.

Formal decision

The Federal Court dismissed the appeal by DEETYA.

[C.H.]

Sole parent pension: section 251; which parent entitled following repeal of SPP provisions

SECRETARY, DEPARTMENT OF FAMILY AND COMMUNITY SERVICES v HOLMES

(Federal Court of Australia)

Decided: 20 April 2000 by Gyles J.

DFACS appealed against a decision of the AAT that Holmes was entitled to be paid parenting payment.

The facts

Holmes claimed sole parent pension in December 1997, and this was rejected by letter dated 30 December 1997. At the time of this claim the qualifications for sole parent pension were set out in Part 2.6 of the *Social Security Act 1991* (the Act). In March 1998 Part 2.6 was re-

pealed and replaced by a new Part 2.10 which dealt with parenting payments. The two payments were similar but not the same.

Holmes and his ex-wife Passmore had four children, who were dependent on both adults. Holmes and Passmore had equal right to make decisions about the children's welfare, although Passmore had all four of the children in her care for more than 50% of the time. Centrelink paid 60% of the family allowance to Passmore and 40% to Holmes.

The law

According to s. 250 of the *Social Security Act 1991* (the Act), prior to March 1998, a young person could be the SPP (sole parent pension) child of an adult if the young person was a dependent child of the adult, or a maintained child of the adult. Section 251 provides that a young person can be the SPP child of only one person. Section 251(2) states:

> 251(2) If the Secretary is satisfied that, but for this section, a young person would be an SPP child of 2 or more persons, the Secretary is to:
>
> (a) make a written determination that the Secretary is satisfied that that is the case; and
>
> (b) specify in the determination the person whose SPP child the young person is to be; and
>
> (c) give each person a copy of the determination.

Section 500D and s.500E of Part 2.10 of the Act after March 1998 are to similar effect.

The SSAT decision

The SSAT made its decision after the SPP provisions had been repealed. Because the claim was made before those provisions had been repealed, the SSAT considered it was appropriate to decide Holmes' claim under the SPP provisions.

The AAT decision

The AAT decided the appeal under the parenting payment provisions which came into effect in March 1998.

Which law?

The Court noted that the Act required a proper claim to be made for SPP and it was that which must be determined. The SSAT's powers were set out in s.1253 of the Act, and for the purposes of reviewing a decision the Tribunal could exercise all the powers and discretions conferred on the Secretary. Similarly, pursuant to s.1293 of the Act the AAT had the same powers. Gyles J referred to:

> A series of decisions in which it had been held that tribunals exercising this kind of jurisdiction are not empowered, in reviewing a decision, to consider a different application and grant a different kind of benefit, particularly where there are statutory provisions as to the method of making a claim.

(Reasons, para 8)

The Court then considered the savings and transitional provisions noting that according to those provisions a sole parent pension would be payable up until 20 March 1998 and then would be payable as a parenting payment. The Court concluded:

> The Administrative Appeals Tribunal's first (and perhaps only) task was to examine the question as to whether the rejection of the claim for benefit in December 1997 was the correct decision on the merits of the case. Unfortunately, it directed attention to a quite different issue on quite different material. Whilst there is some ability to look at subsequent events, this is only to see what light they throw upon the actual question to be decided.

(Reasons, para. 11)

The correct law to apply was the law prior to 20 March 1998.

SPP child

The AAT had decided that even though Holmes had a minority share of the care of the four children, he could be granted SPP. It was argued before the Court that the AAT had erred in law in taking into account the financial positions of both parents. The AAT had referred to previous Federal Court decisions where the Court had expressly found no error in law in having regard to the respective financial situations of the competing parties. Gyles J noted:

> That there had been no legal error in applying that test to the decision under section 251(2). That is a very different thing to elevating what was said in Vidler to a direction of law as to the meaning of the statute.

(Reasons, para. 16)

The court said there was no legal error in deciding the question under s.251(2) solely on the basis of degree of care and control. Section 251(2) only applies where the Secretary is satisfied that the child is a SPP child of both persons. Where this occurs the Tribunal must choose which person has the SPP child, where the legislation does not provide any criteria for that selection. The discretion is only constrained by the purposes of the Act.

> The section does not oblige the decision maker to take any particular matter into account, and only prohibits taking into account those matters which are not relevant to the purposes of the Act.

(Reasons, para. 18)

If there is any relevant government policy, then regard should be had to that policy. The decision is for the AAT to make on the merits of the case.

Joined party

The Court noted that Passmore had not been made a party to the proceedings and noted that this would have been a serious irregularity except for the fac: that the matter was to be remitted back to the AAT to be redecided.

Formal decision

The Federal Court allowed the appeal and set aside the AAT decision. The matter was remitted to the AAT to be heard and determined according to law.

[C.H.]