Hoy using it in any other way.

This did not, however, prevent the money being received 'for her own use or benefit' and thereby being classified as income. The house was owned by the applicant and her husband as joint tenants. This meant that each had an interest in the whole. Thus the payment by the husband of 'his part' of the mortgage repayment at the same time benefited the applicant.

> ... differences between the contributions of the respective joint tenants to the cost of the property are not reflected in their respective beneficial interests in it.

(Reasons, para. 18)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that special benefit paid between 25 February 1980 and 31 March 1980 should have been paid without deduction for income [the DSS conceded that voluntary payments between these dates had not been made by the applicant's husband] but that maintenance payments received by the applicant from 1 April were income for the purposes of Part VII of the *Social Security Act*.

SMITH and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/221)

Decided: 25 July 1983 by W.T. Prentice.

Ella Smith had purchased a small business in October 1978. For the year ending June 1979 it ran at a loss of $4562, for the year ending June 1980 it ran at a loss of $465 and for the year ending June 1981 it showed a profit of $2819. However, for the purposes of income tax she was allowed to set off her losses against her income for 1981 so reducing her income.

The applicant had been in receipt of age pension at the maximum rate since 17 July 1980. The DSS on learning of her profit of $2819 in 1981 decided that the sum should be taken into account in assessing her 'income' for the purposes of s.28(2) of the *Social Security Act*. Section 28(2) then read:

> The annual rate at which an age or invalid pension is determined shall . . . be reduced by one-half of the amount (if any) per annum by which the annual rate of the income of the claimant or pensioner exceeds–
> (a) in the case of an unmarried person – $1040 per annum . . .

Accordingly, the DSS decided on 1 October 1981 that as from 4 November 1981 the applicant should be paid the maximum rate of pension reduced by $899. The power to reduce the rate of the pension is contained in s.46(1) of the Act. That section reads:

> If –
> (a) having regard to the income of the pensioner,
> (b) by reason of the failure of a pensioner to comply with section 44 or 45; or
> (c) for any other reason,
> the Director-General considers that the pension which is being paid to a pensioner should be cancelled or suspended, or that the rate of the pension which is being paid to a pensioner is greater or less than it should be, the Director-General may cancel or suspend the pension, or reduce or increase the rate of the pension, accordingly.

'Income': insufficiency of information

To reduce the rate of pension it is clear from s.46(1) that the DSS must have regard to the 'income' of the applicant. However, the DSS only had regard to the 1981 tax return of Smith, there was nothing before the DSS as to when that had been earned and whether it would continue into the 1982 period. There was no knowledge at all (apparently) of the income of Smith between 30 June 1981 and the date of the decision on 1 October 1981. Thus the decision of the DSS was not properly based.

Overpayment: discretion to reocover

There was a possibility that the DSS may seek to recover an overpayment of pension having regard to the income of the applicant in the 1981 tax year. The first question was whether there was such income to take into account.

It was argued for the applicant that that income should be treated under the *Social Security Act* in the same way as it is under the *Tax Act*, that is, that the accumulated losses should reduce her income. It was also put to the AAT that the profits from the business were not put to her own use and benefit but went to such things as the purchase of stock.

The AAT adopted the reasonsing of *Szuts* (1983) 13 *SSR* 128. 'Income' is 'that which comes in'. There is no express provision in the *Social Security Act* as there is in the *Tax Act* which allows business losses to be carried forward from one year to another. Also, the fact that the applicant chose to dispose of the 'profits' by putting them back into the business rather than to her own personal use does not prevent them from being regarded as income for the purposes of the Act.

While the income derived from the business in 1981 may have led to an overpayment the AAT considered that the discretion in s.140(2) should be exercised against recovery.

> ... the fact that a concession has been made as to wrong calculation in the re-assessment process in any event, to the unfortunate state in which the applicant finds herself with her unprofitable business, to the fact that no 'profit' even approaching that of the tax year 1981 had been made since, to the fact that the maximum rate of pension has been paid since February 1983, and to the amount of the alleged overpayment that would be involved; I would consider the preferable course for the Director would be to exercise his discretion against proceeding under s.140(2) in respect of any overpayment of pension calculated in the light of the 1981 tax year's income.

(Reasons, para. 10)

Formal decision

The AAT set aside the DSS decision to reduce the rate of the applicant's pension and remitted the matter to the Director-General with the direction that the applicant's pension be reinstated at the full rate from the date of reduction in 1981 and recommended no action be taken for recovery of any overpayment.

Handicapped child's allowance

GILBY AND GILBY and DIRECTOR-GENERAL OF SOCIAL SECURITY (No.Q82/214)

Decided: 14 June 1983 by J.B.K. Williams.

The applicants were the parents of a child with respect to whom a handicapped child's allowance was granted on 13 February 1979. Following a review the DSS cancelled the allowance on 25 May 1981. The applicants then appealed to an SSAT which formed the view that their son was 'handicapped' within the meaning of the *Social Security Act*, but concluded that the applicants were not subjected to severe financial hardship by reason of the care and attention provided for their son as required by s.105JA to qualify for the allowance. The Gilbys appealed to the AAT.

The legislation

Section 105JA is in the following terms:

> The Director-General may grant a handicapped child's allowance in respect of a handicapped child to a person having the custody, care and control of the child if the Director-General is satisfied that the person–
> (a) provides, in a private home that is the residence of that person and of that child, care and attention in respect of that child only marginally less than the care and attention that the child would need if he were a severely handicapped child; and
> (b) is, by reason of the provision of that care and attention, subjected to severe financial hardship.

Section 105H defines a 'severely handicapped child as a child who by reason of physical or mental disability needs constant care and attention.

Attendance at school: care not constant

The Gilby's son attended a normal primary school from 8.30 to 3.00 each day. This raised the question whether the care and attention being provided to him was only marginally less than constant as required by the combined operation of s.105H and s.105JA.

The AAT referred to its earlier decisions in *Yousef* (1981) 5 *SSR* 55, *Schramm* (1982) 10 *SSR* 98 and *Meloury* (1983) 13 *SSR* 126, which adopted the reasoning in *Schramm*. In *Schramm* the Tribunal had said

> . . . it is true that the meaning of the word 'constant', as explained in *Re Yousef*, admits that the care and attention in question may be less than full nursing care and attention. It admits also that constant watchfulness is a necessary part of the constant

care and attention, but it does not seem to me to admit that the care and attention is constant, on the part of the person having custody etc. of the child, when the custody, and the required care and attention, are handed over to others, whether at school, or, as first occurred, at pre-school.

Moreover, the attendance at school also failed to satisfy the further requirement in s.105JA that the care and attention be provided in a private home.

The reasoning in *Schramm* had clear application in the present case according to the AAT and so disqualified the applicants from receiving the allowance.

The AAT found it unnecessary to pursue the issue of the financial hardship suffered by the Gilbys.

Formal decision

The AAT affirmed the decision under review.

GARDNER and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/55)

Decided: 4 August 1983 by C.D. Clarkson

Sheila Gardner asked the AAT to review a DSS refusal of handicapped child's allowance for her two children.

The legislation

Section 105J of the *Social Security Act* provides that:

> . . . where a person who has the custody, care and control of a severely handicapped child provides, in a private home that is the residence of that person and of that child, constant care and attention in respect of that child, that person is qualified to recieve a handicapped child's allowance in respect of that child.

Section 105JA reads:

> The Director-General may grant a handicapped child's allowance in respect of a handicapped child to a person having the custody, care and control of the child if the Director-General is satisfied that the person –
>
> (a) provides, in a private home that is the residence of that person and of that child, care and attention in respect of that child only marginally less than the care and attention that the child would need if he were a severely handicapped child; and
>
> (b) is by reason of the provisions of that care and attention, subjected to severe financial hardship.

Handicapped child: care in the home

Both of the applicant's children suffered from asthma and allergic conditions. They were classed as 'handicapped'. Thus the eligibility of the applicant for handicapped child's allowance fell for determination under s.105JA.

That section required the applicant to provide care and attention very close to the constant care and attention referred to in s.105J, and that care was to be provided in the residence of the applicant and the children.

The applicant's children attended normal school thus being absent from home from 8 a.m. to 3.45 p.m. during school terms. They also went swimming and at least once a week socialised away from home.

The AAT thus formed the view that quite apart from the issue of whether the care provided was close to the constancy as required by the Act, the claim failed under s.105JA(a) as the care was not provided in the home.

Formal decision

The AAT affirmed the decision under review.

Overpayment

BRAKENRIDGE and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. S83/13)

Decided: 17 August 1982 by I.R. Thompson

The applicant was the father of seven children. His two youngest daughters were adopted by his sister and a third daughter went to live with that sister from June or July 1980 onwards. [The applicant was deserted by his wife but had remarried and this daughter apparently did not get on with her stepmother.]

Brakenridge had been in receipt of family allowance in respect of this daughter since January 1978 until 14 April 1981. His sister applied for family allowance in respect of this daughter on 18 February 1981. This was granted from 15 February 1981 to 14 April 1981 (when the daughter turned 16). However, Brakenridge continued to receive family allowance for this daughter. Thus from 15 February 1981 to 14 April 1981 the DSS claimed he had been overpaid $52. They decided to recover overpayment by deductions from his invalid pension under s.140(2) of the Act. He applied to the AAT for review of that decision.

The legislation

Section 95 of the *Social Security Act* provides:

> (1) . . . a person who has the custody, care and control of a child (not being a child who is an inmate of an institution of which children are inmates) is qualified to receive a family allowance in respect of each such child in accordance with this section.

Necessity for custody, care and control

A person who has only care, or only care and control of a child is not eligible to receive family allowance (see *Dowling* (1982) 8 *SSR* 80). Custody is also necessary.

Brakenridge had a legal right to custody of his daughter, however when she moved to her aunt's house he no longer had care or control. The fact that she visited him frequently and was bought food and clothes on these occassions did not alter that conclusion. He accordingly was not qualified to recieve family allowance at the relevant time.

Discretion to recover

Was the decision to recover the overpayment by deduction from the applicant's invalid pension the correct or preferable decision?

The factors to be taken into account in the exercise of the discretion to recover in s.140(2) were the administrative error in paying the allowance both to the applicant and his sister, any acts or omissions of the applicant contributing to the overpayment, (and whether they were deliberate), and any hardship caused to the applicant if recovery was made.

The applicant had failed to notify the DSS that his daughter had left home in respect of the period of family allowance payment from 15 February to 14 March 1981. However, a DSS officer had interviewed the applicant and had been told that his daughter no longer lived with him prior to the payment of family allowance up to 14 April 1981.

The amount of overpayment was very small – $52. Having regard to the total income of the applicant's household – one daughter received a supporting parent's benefit, another received unemployment benefit and his wife was entitled to a wife's pension – a deduction of $5 per week should not cause undue hardship, concluded the Tribunal.

Thus the discretion in s.140(2) as to recovery (see *Hales* (1983) 13 *SSR* 136) should be exercised to recover the overpayment.

Formal decision

The AAT affirmed the decision under review.

MORTON and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/28)

Decided: 22 July 1983 by G.D. Clarkson.

The AAT *affirmed* a DSS decision to recover an overpayment of wife's pension in the sum of $1857.70 by deductions with the (consented) amendment that those deductions be $10 per fortnight (and not $15 as originally decided by the Department).

The overpayment resulted from the abandonment by the DSS of its annual review of pensions between 1974 and 1979 and the failure of the applicant to notify increases in income.

The Tribunal could *not* find a reason for reducing the total amount claimed such as a failure on the part of the DSS to act on information it obtained regarding the applicant's wages between May 1979 and September 1981. In fact, no overpayment was made in that period and so the total amount claimed by the DSS was recoverable.

A P and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/7)

Decided: 22 July 1983 by G.D. Clarkson.