# Assets test: 'severe financial hardship'

**FRENCH and SECRETARY TO DSS (No. W86/67)**
**Decided:** 10 October, 1986 by R.Balmford

Zoe French was a 66 year old age pensioner. She had a half share in a farm with her son valued at about $110,000. At the time the decision under review was made her total assets were $131,537. In March 1985 payment of her age pension was ceased due to the value of her assets. She applied to the AAT for review of that decision. At the time of the hearing her assets had been reduced to $126,097 of which sum $12,097 was available in bank accounts.

**The legislation**

Section 28(2) of the *Social Security Act* provides for the rate of a person's age pension to be reduced where the value of the person's property exceeds a certain amount.

Section 6AD(1) provides that the value of a person's property is to be disregarded if the property in question cannot be sold or realised or used as security for borrowing (or if it would be unreasonable to expect the property to be sold or realised or used as security for borrowing) and if the Secretary is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purpose of the assets test.

**Severe financial hardship?**

The question was whether the applicant would suffer severe financial hardship if her share of the value of the farm was taken into account.

The DSS referred to its guidelines which stated that a single person would not normally be regarded as suffering severe financial hardship if they have $6,000 in readily available funds. The applicant had just over $12,000.

The AAT referred to *Doyle* (1986) 33 *SSR* 414 where the need to apply the guidelines flexibly was recognised. Reference was also made to the acceptance of those guidelines as reasonable in *Lumsden* (1986) 34 *SSR* 430. Although, said the AAT, it was not bound to apply the Departmental guidelines.

The Tribunal agreed with the views expressed in *Lumsden* that the guidelines were reasonable as well as those views expressed in *Doyle.* Although the applicant was concerned at having to use her savings for daily living expenses, that is what Parliament intended and she would not suffer severe financial hardship if she was to support herself in this way.

**Formal decision**

The AAT affirmed the decision under review.

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**DOLLING and SECRETARY TO DSS (No. S85/146)**
**Decided:** 7 November 1986 by R.A.Layton, J.D.Horrigan and L.Rodopoulos

The applicant sought review of a DSS decision to cancel his age pension following the introduction of the assets test.

**The facts**

Mr Dolling had sold 573 acres of his 797 acre farm to his son for $177,700 in 1982. He gave the remainder of the property to his son as a gift. The applicant entered into a mortgage agreement with his son for the purchase price of the 573 acres. The mortgage was interest free and the applicant did not intend to seek repayment of the principal unless his son sold the property. At that time the applicant and his wife moved to a new home. The farm was only marginally viable and in 1985 it was put up for auction. No bids were received and in 1986 the farm was leased.

The applicant and his wife had other assets which totalled $46,538, including over $16,000 in bank accounts and life insurance policies worth over $19,000.

**Was the mortgage debt 'property'?**

The Tribunal stated that it was clear from the authorities that a mortgage debt is an asset and therefore constituted 'property of the person' under s.6AE and s.28(2)(b) of the *Social Security Act.*

**Severe financial hardship**

Would the applicant suffer severe financial hardship if the mortgage debt was taken into account?[see s.6AD, the terms of this section are set out in *French*, this issue.]

The readily available funds of the applicant (over $35,000) exceeded the $10,000 DSS guideline for married couples by a comfortable margin. Having regard to this fact and the conclusion therefrom that the applicant had sufficient funds to support himself, the AAT concluded that the applicant could not be described as being in circumstances of 'severe financial hardship'. The Tribunal observed:

> ...the applicant expressed dismay that he appears to have been penalised by the loss of his pension because of the frugal way in which he and his wife have lived and that if they had either squandered their assets or, alternatively, had sold the farm and purchased an expensive principal home, they would still be entitled to the pension. If the applicant had disposed of his assets prior to 1 June 1984, that may well be the case, however, the Act attempts to provide a basis for requiring persons who do have assets as at 1 June 1984, to use them where reasonably possible, to support themselves. The owning of income-producing assets is a privilege not shared by all recipients of pensions and benefits.

(Reasons, para.27)

The disadvantage of the applicant had to be looked at in the context of the aims of the legislation.

**Formal decision**

The AAT affirmed the decision under review.

# Assets test: 'property'

**MILLNER and SECRETARY TO DSS (No. N86/118)**
**Decided:** 2 October 1986 by C.J.Bannon, M.S.McLelland and J.H.McLintock

The DSS had taken into account, when assessing the applicant's assets with respect to an age pension, 'taxi plates' [the licence to operate a taxi] valued at between $70,000 and $80,000. The applicant claimed that the taxi plates should not be included in his assets and applied to the AAT for review of the decision.

**The facts**

The applicant had given his taxi to his son in June 1980. The applicant was then 74 years old. The registration of the taxi and the licence to operate a public vehicle remained in the father's name. A lease was executed by the father making the son a lessee of the taxi. The evidence given to the Tribunal suggested that the father

wished to give the taxi to his son for him to operate. The transfer fees payable to pass registration to his son were high and it seemed that this was an important reason why the father kept the registration in his name.

**Did ownership change?**

The Tribunal examined the issue as to whether ownership of the taxi plates had passed to the son. The AAT asked whether the applicant was estopped by acquiescence from asserting his title. The actions of the applicant and his son were not clear - they were consistent with the son being given the right to operate the taxi in his father's name. Thus the equitable doctrine would not apply.

**Can the DSS consider equitable doctrines when applying the assets test?**

There was nothing in the *Social Security Act* which gave the DSS power to decide equitable rights.

> It is the Tribunal's opinion that section 6AC confers no such power and that the Secretary and therefore this Tribunal are concerned with positive dispositive actions when making decisions under section 6AC. The proper course for persons asserting a right to equitable relief depending on equitable estoppel is to seek to have the right determined in a court exercising equitable jurisdiction but not to expect such right to be determined by a purely statutory Tribunal. It would take clear words, in the Tribunal's opinion, to confer such jurisdiction upon it or upon the Secretary.

(Reasons, p. 8)

Some positive disposition of the property was therefore required.

The Tribunal also considered whether there had been an assignment of the public vehicle licence or the applicant's interest in the taxi co-operative of which he was a member. The Tribunal concluded that the applicant had both legal and beneficial ownership of the public vehicle licence and the shares in the co-operative as he had done no acts indicating the relinquishment of ownership. The lease was evidence of his continuing ownership.

**Formal decision**

The Tribunal affirmed the decision under review.

# Dependent child

**SCHARRER and SECRETARY TO DSS**
**(No. V86/221)**

**Decided:** 3 December 1986 by H. E. Hallowes, G.F.Brewer and D. M. Sutherland

Denise Scharrer had been refused supporting parent's benefit by the DSS in December 1984. She had been caring for the son of a neighbour after the neighbour had entered hospital in August 1984 with a totally incapacitating disease. A supervision order was made by the Melbourne Children's Court in September 1984 in respect of the son. He was placed in the care of the applicant as a result of that supervision order.

**The legislation**

There were a number of amendments to the legislation during the relevant time. When the applicant first made her claim and prior to 5 September 1985, the relevant part of the *Social Security Act* read:

> s.83AAA(1)...'supporting parent' means an unmarried person who has the custody, care and control of a child...

On 5 September 1985, s.83AAA(1) was amended to read (so far as is relevant):

> 'supporting parent' means an unmarried person who has a dependent child...

Section 6(1) defined 'dependent child' to include 'a child under the age of 16 years who is in the custody, care and control of the person'.

On 1 July 1986 s. 83AAC(2) was amended to read:

> (2)...a child shall not be taken to be a dependent child of a person unless -
> (a) the person is a natural or adoptive parent of the child, or has the legal custody of the child;...

**Did the applicant have 'custody, care and control'?**

Concentrating on the period between the initial claim and 5 September 1985 when the Act was first amended, the AAT ascertained whether the applicant had custody, care and control of the child and so qualified for the benefit.

The Tribunal referred to earlier decisions which looked to the actual situation in terms of maintenance rather than legal rights.(*Hung Manh Ta* (1984) 22 *SSR* 247)

> To require '*legal* custody' and '*physical* care and control' of a child introduced a gloss on the words of the Act drawn from a different legislative context which could not be justified within the context of the *Social Security Act*...Mrs Scharrer is clearly responsible for the actual day to day maintenance, training and advancement of M. [His mother] will be unable to step back into that responsibility ... While maintenance alone will not justify the conclusion that an applicant has custody, care and control...it is a factor to be taken into account.

(Reasons, para.5)

Her commitment to the child and the lack of any limitation in time or scope on her care compelled the AAT to conclude that the applicant had custody, care and control at this time and so qualified for supporting parent's benefit at this time.

**The period between 5 September 1985 and 1 July 1986**

The practical change for this period was the inclusion of s.6(1A) which limited the definition of 'dependent child' by providing that:

> ...a person shall not be taken to have the custody of a child unless the person, whether alone or jointly with another person, has the right to have, and to make decisions concerning, the daily care and control of the child.