propriate amount of the value of the mortgage to be so included.

The legislation

Section 151(1) of the *Social Security Act* provides that the rate of rehabilitation allowance is the invalid pension rate and is thus subject to the assets and income tests under s.33.

In applying the assets test, s.4(1)(a)(vii) provides that

'there shall be disregarded –

...

(vii) the value of any property (not being a contingent, remainder or reversionary interest) to which the person is entitled from the estate of a deceased person but which has not been and is not able to be received'.

The other relevant provision is s.4(11), which provides:

'Where a person lends an amount after the commencement of this subsection, the value of the property of the person for the purposes of the Act shall include so much of that amount as remains unpaid but shall not include any amount payable by way of interest under the loan.'

This provision came into force on 27 October 1986.

[*Note:* This case was determined before the enactment of s.4C of the *Social Security and Veterans' Affairs Legislation Amendment Act (No. 2)* 1990.]

Decision

The AAT held that Robinson's loan to his brother was made in 1982 at the time the trustees first made the loan to his brother. Robinson had an equitable interest in the mortgage at this point. The Tribunal appears to have taken the view that the 1987 transaction, in which Robinson and his sister took a legal interest in the mortgage, was not a new source of legal rights against the brother; rather, the respondent merely 'took over the existing loan' originally made by the trustees.

Having made this finding, the AAT noted that, as the original loan predated the enactment of s.4(11), that provision had no application in this case.

Robinson argued that, because the mortgage redemption had been deferred until 1992, the value of the loan was not able to be received until that date; and, accordingly, s.4(1)(a)(vii) applied to exclude the value of the loan from the respondent's assets.

The AAT did not explicitly deal with this argument but did implicitly reject it in finding that part of the value of the loan should be included in Robinson's assets.

The Tribunal held that, in the case of transactions predating the enactment of s.4(11), the appropriate valuation technique to adopt in relation to a debt owed to a person was an actuarial approach rather than merely taking the present face value of the loan as provided for in s.4(11). In applying the actuarial calculation the Tribunal indicated that the value of the debt should be discounted by, *inter alia*, the gift made by Robinson to his brother by way of partial forgiveness of the debt and by a factor reflecting the depressed market situation in New Zealand.

Formal decision

The AAT set aside the decision of the SSAT and substituted a new decision along the lines indicated above.

[*Note:* The AAT's finding, that the part of the debt forgiven by the respondent should be deducted from the value of Robinson's property, should be viewed with caution. Section 6 provides that any asset or income producing property disposed of, beyond certain threshold amounts, after 1 June 1984 is property in a person's hands. The forgiveness of a debt may be a disposition of property (*Rogers* (1987) 41 *SSR* 517) and possibly a disposition of income producing property (*Gibbons* (1986) 36 *SSR* 457). The Tribunal did not address this issue in its decision.]

[A.A.]

Assets test: reversionary interest in land

SMART and SECRETARY TO DSS (No. W90/185)

Decided: 6 December 1990 by T.E. Barnett.

This case concerned an application by an age pensioner for review of a decision by the SSAT not to disregard his wife's interest as a tenant in common in certain property, for the purposes of the assets test, when calculating his age pension.

The facts

Henry Smart was eligible for an age pension. Among other assets owned by him and his wife, his wife owned a 50% share as tenant in common in land at Rockhampton. She had obtained this interest in the land through her parents and had subsequently executed a life tenancy in respect of the property in favour of her mother. The evidence was that Smart's wife had voluntarily created the life tenancy in favour of her mother without reserving any right to herself to collect rent from her mother.

The issues

There were two issues:

(1) whether the AAT should disregard the reversionary interest of Smart's wife in the property as it produced no income; or

(2) whether s.4(1)(a)(vi) of the *Social Security Act* applied to exempt the inclusion of the reversionary interests in the assets test.

The hardship provisions did not apply.

Legislation

Section 3(5) of the *Social Security Act* provides that, for the purposes of the assets test, a married person's property is taken to be half the total property of the pensioner and spouse. Thus half of the value of Smart's wife's reversionary interest in the property would be included in his assets.

Section 4(1)(a)(vi) provides:

'in calculating the value of property of a person for the purposes of this Act . . .

(a) there shall be disregarded –

...

(vi) the value of any contingent, remainder or reversionary interest of the person (not being an interest created by the person, by the person's spouse or by both of them) . . .'

Decision

The AAT implicitly decided the first issue in favour of the DSS without giving express reasons. Nevertheless the decision is obvious on its face: the lack of rent received by the wife of the applicant is relevant only to the income test and not to the assets test.

[*Note*: The DSS apparently did not take the issue of whether Smart's wife had disposed of income or income producing property within the meaning of s.6 of the Act.]

In relation to the second issue, the AAT noted the provisions of s.4(1)(a)(vi) to the effect that, if the reversionary interest is created by the applicant or his spouse, then it is not exempt from the assets test. In this case the evidence was that Smart's wife had voluntarily created the life tenancy for her mother and accordingly Smart was not entitled to the protection of s.4(1)(a)(vi).

Formal decision

The decision of the SSAT to include the reversionary interest in the assets test was affirmed.

[*Note*: The Tribunal recommended

that the property concerned be valued again taking full account of the existence of the mother's life tenancy as a factor reducing the value of the property in the wife's hands. However, this view may be inconsistent with ss.4(1)(b) and 4(10) of the Act, depending upon the width of the meaning given to the words 'charge or encumbrance' in s.4(1)(b). If a life tenancy is a 'charge or encumbrance', then the property must be valued without deduction for the life tenancy if the life tenancy was given for the benefit of a person other than the applicant or a spouse, which is the case in the present instance.]

[A.A.]

Assets test: disposal

SECRETARY TO DSS and DOYLE (No. 6346)
Decided: 6 November 1990 by K.L. Beddoe.

Margaret Doyle, who was born in 1915, claimed an age pension in 1989. The DSS decided that Doyle had disposed of assets valued at $82 624 for inadequate consideration, by transferring her share in a farming property to her son. The DSS concluded that the value of her assets, including the assets disposed of, exceeded the limit fixed by the assets test.

On review, the SSAT decided that Doyle had received adequate consideration for her transfer of property. The DSS asked the AAT to review that decision.

The legislation

Section 6(2) of the *Social Security Act* provides that property disposed of by a person is to be included in the person's property for the purpose of the assets test.

According to s.6(10), a person disposes of property for the purposes of s.6 where the person disposes of that property for no consideration or inadequate consideration.

The evidence

In 1975, Doyle and her husband were tenants in common of a farming property, which was farmed under a partnership agreement with their son, each of the partners holding a 1/3rd share.

In 1979, Doyle's husband died, leaving his 1/2 share in the property and his 1/3rd share in the partnership to his son. From that time, the business of the partnership was conducted by Doyle's son, who lived on the farming property.

By 30 June 1988, the partnership had become insolvent, with a deficiency in the accounts of $114 946. By a contract executed on 25 August 1988, Doyle agreed to sell to her son her 1/2 interest in the property and her 1/3rd interest in the partnership at a consideration of $165 124. The consideration was to be paid as follows:

- $10 000 on completion;
- $40 000 in instalments, free of interest;
- $82 624 to be forgiven by Doyle in consideration of the many years of unpaid labour carried out by her son on her behalf.

The SSAT took the view that the contribution made by Doyle's son to the partnership and the farming business justified the notional payment of $82 624 by Doyle.

Inadequate consideration for transfer

The AAT decided that Doyle's son would have had no claim on her for the labour which he put into the partnership and the farm business. He had been given a 1/3rd interest in the partnership in return for his labour. It could not be said that his labour amounted to consideration for the transfer of Doyle's interests.

The AAT also said that it would not be realistic to read the 1979 partnership agreement made between Doyle and her son when she was 64 years of age as contemplating that Doyle should participate actively in the partnership.

It followed that there was no basis on which the Doyle's son could have had a monetary claim against her, on the principle in *Airey v Borham* (1861) 29 Beav. 620, because of her failure to participate actively in the partnership.

Finally, the AAT said, the element of the price to be paid by Doyle's son which consisted of the $40 000 interest free loan, should be discounted to $23 336, leaving a further deficiency of $29 754.

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary with a direction that there had been an inadequacy of consideration for the purposes of s.6 of the *Social Security Act*.

[P.H.]

Family allowance: income test

SECRETARY TO DSS and CROSS (No. V90/2)
Decided: 30 August 1990 by H.E. Hallowes.

Josephine Cross lodged a claim for family allowance for her 5 children on 1 September 1988, shortly after the birth of her 5th child. Her claim was rejected because of the combined taxable income of Cross and her husband.

On 31 January 1989, Cross lodged a further claim for family allowance, and this claim was accepted. She was paid a reduced allowance of $8 a fortnight.

On 14 July 1989, Cross applied for an increase in the rate of her allowance, on the basis of a reduction in combined taxable income. The DSS rejected this application.

On review, the SSAT decided that Cross was eligible for family allowance from 1 September 1988, the day on which she had lodged her first claim. The DSS asked the AAT to review that decision.

The first period

The AAT first considered Cross's eligibility for family allowance at the time of her claim on 1 September 1988.

At that time s.85(1) of the *Social Security Act* fixed the income threshold, based on combined taxable income in the 'last year of income', namely the year of income ending on 30 June in the preceding calendar year. The income threshold applicable to Cross was then $60 000.

Under s.85(3), no family allowance would be payable where the relevant taxable income was $68 586.

Section 85(8) provided that, for the period 15 October 1987 to 14 January 1989, the 'last year of income' was the 1986/87 tax year.

Section 85(7) allowed combined taxable income in the following year of income to be used for the income test, where that combined taxable income was, or was likely to be, at least 25% less than the person's taxable income in the last year of income.

In the 1986/87 tax year, the combined taxable income of Cross and her husband was $68 808; and in the 1987/88 tax year it was $71 420.

The AAT had no difficulty in deciding that Cross was not eligible for family allowance at the time of her first claim: her combined taxable income in 1986/