

the school fees directly to the school. The decision to send Rivett to the school was made alone by the father. This was part of the Family Court Order in respect of child maintenance arrangements.

Issue

The issue was whether the payment of school fees by the father amounted to a payment of maintenance received 'on behalf of' a dependant and should be included as income of the mother in applying the parental income test under the AUSTUDY Regulations.

The legislation

Regulation 86(2) of the AUSTUDY Regulations deals with parental income for the purposes of calculating AUSTUDY benefits. Regulation 86(2)(c) states:

'an amount received:

- (i) by, or on behalf of, the parent for the maintenance of the parent or of a dependant of the parent;
- (ii) by a dependant of the parent for the maintenance of the dependant.

'On behalf of'

There was agreement between the parties that the payment of school fees by the non-custodial parent constituted the payment of maintenance for Rivett. The issue was whether the amount of school fees could be said to be received by either the mother or the child. Additionally it was submitted by Rivett that the money could not have been received 'on behalf' of the mother because the mother had no relationship with the school. The AAT considered that the essential point related to the meaning and scope of the words 'on behalf of'. The AAT referred to two relevant High Court decisions: *King v Portus: ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 and *R v Toohey: ex parte Attorney-General* (Northern Territory) (1980) 45 CLR 375. These cases found that the phrase 'on behalf of' has no strict legal meaning and the context and subject matter will be determinative. The AAT looked at the purpose of the AUSTUDY Regulations and the fact that the income of the custodial parent is taken into account and not that of the non-custodial parent. The AAT concluded that it was irrelevant that the decision to send Rivett to the private school was not made by the custodial parent:

'The fact is that the amount was paid for an essential element of [Rivett's] maintenance (i.e. her education) and it should be characterised as a payment being made "on behalf of" the custodial parent.'

(Reasons, para. 13)

The AAT also considered that the word 'received' should not be given a

narrow application so as to preclude moneys not paid directly into the hand of the [custodial] parent or dependant.

Formal decision

1. The decision under review was set aside.
2. The decision of the DSS to raise and recover a debt of \$1180.70 in respect of AUSTUDY paid to the respondent in the 1994 year, and the decision to pay AUSTUDY at a reduced rate in the 1995 year, were re-instated.

[M.A.N.]

Assets: land owned overseas; whether actual means test applicable

SECRETARY TO THE DEETYA
and D. & M. SLADE
(No. 11789)

Decided: 21 April 1997 by K.L. Beddoe.

Background

The respondents applied for AUSTUDY in 1996. Their applications were initially refused on the basis of the application of the actual means test (AMT), then were granted for a brief period as the respondents' mother held a Health Care Card. Eligibility was subsequently reviewed and again refused on the basis of the AMT. The family's actual means were found by the DEETYA to be \$49,073, in excess of the relevant thresholds for each child.

The issue

The respondents' mother owned real estate in Western Samoa, gifted to her by her father in 1975, and valued at \$AUD45,000.

The principal issue concerned whether the land in Western Samoa owned by the mother of the respondents should be deemed an 'asset' for the purposes of the application of the AMT and so the determination of eligibility for AUSTUDY.

The legislation

The AMT applies where a student has a 'designated parent'. This term is defined in Regulation 12L to mean a parent who (among other things) '... (b) has an interest in: (I) an asset located outside Australia ...'

Section 12K(1) of the *Student and Youth Assistance Act 1973* provides that

a student who has a designated parent is ineligible for Austudy unless the actual means of the parent is less than or equal to the after tax income of a notional parent.

Meaning of asset

The AAT accepted the evidence that the mother of the respondents was the owner of real estate in Western Samoa, and that the relevant property was not village land nor leased or subject to any charges to other persons. The AAT noted that 'asset' is not defined in the AUSTUDY Regulations for the purposes of regulation 12L, and concluded that an 'asset' should be construed as '...any proprietary right available for payment of debts ...': Reasons, para. 39. As such, an 'asset' would exclude an article having no commercial value, a right incapable of liquidation or conversion to the financial benefit of the owner, or a property subject to a charge or trust for the benefit of another person.

The AAT concluded that the respondents' mother did have an interest in an asset outside Australia — the land in Western Samoa — and was therefore a 'designated parent' for AUSTUDY purposes. In turn the application of the AMT to the family's situation was appropriate.

Treatment of loan

The AAT considered the evidence of the father of the respondents regarding the actual expenditures of the family for the calendar year 1996, and accepted that the family had lived beyond its means in that year and had survived by borrowing \$6000 and selling two motor vehicles. Noting that the purpose of the AMT was '...to establish the financial capacity of a family rather than have regard to the family's taxable income as assessed for taxation purposes', the AAT concluded that '...financial capacity is to be measured by the amount of expenditure and by the amount saved for the relevant year ...' and is '...not reflected in an amount borrowed but rather in the repayment of [any] loan': Reasons, para. 28. The AAT, therefore, reduced by \$6000 the family's total actual expenditure to reflect the amounts borrowed by the family during 1996. This brought the family's actual means below the relevant benchmark figures.

Formal decision

The AAT affirmed the decision of the SSAT that the Slades' actual means were less than the after tax income of a notional parent.

[P.A.S.]