until 25 December 1995. It was agreed that Dagher had a 'SPP child' during the required period.

Dagher had been married and his wife died. Both Dagher and his wife were Australian residents.

The law

According to s.1214(1) of the *Social Security Act 1991*, if a person who is receiving the SPP leaves Australia and is not a 'special widow', the SPP will be cancelled after 12 months. Section 1214(4) provides that the person will continue to receive the SPP overseas if the person is a 'special widow'. 'Special widow' is defined in s.1214(6) as:

> 'For the purposes of this section, a woman is a special widow if:
>
> (a) a man dies; and
>
> (b) immediately before his death:
>
> (i) the man was legally married to the woman; and
>
> (ii) the man and the woman were members of the same couple; and
>
> (iii) the man and the woman were both Australian residents.'

Special widow

The AAT identified the issue to be addressed as whether Dagher, a man, could be characterised as a 'special widow'. Dagher argued that men and women should be treated the same.

The AAT was referred to s.23 of the *Acts Interpretation Act 1901* which states that 'words importing a gender include every other gender'. It was also asked to decide if the *Sex Discrimination Act 1984* applied to the *Social Security Act*. The SSAT had found that not to apply s.23 of the *Acts Interpretation Act* would breach ss.22 and 26 of the *Sex Discrimination Act*. These sections provide that it is unlawful to discriminate against another person, or to exercise any power of the Commonwealth because of the person's sex. Pursuant to s.40 of the *Sex Discrimination Act*, the *Social Security Act 1947* is exempt from the provisions of the *Sex Discrimination Act*.

The AAT accepted that a reference to the *Social Security Act 1947* included a reference to the 1991 Act because of s.10 of the *Acts Interpretation Act*. This allows a reference to a repealed Act to be a reference to the Act which replaced it. A statement by the Commonwealth Attorney-General to Parliament supported the conclusion that the *Social Security Act 1991* was meant to be exempt from the *Sex Discrimination Act*. He advised that 'many social security payments which appear to be discriminatory in principle on the basis of sex are designed to meet special needs or address special disadvantage'.

The DSS argued that the language of s.1214(6) specifically referred to 'woman' whereas the rest of the section was gender neutral referring to 'persons'. There was a clear intention for the definition of 'special widow' to be gender specific. The AAT took into account the Second Reading Speech introducing this section into the *Social Security Act*, which referred to the amendment overcoming 'categories of benefits based on moral judgments'.

The SSAT had also considered the impact of the *International Covenant on Economic, Social and Cultural Rights*, which Australia had ratified. It provides that all rights, including social security rights, are to be exercised equally by men and women, except where it would promote the general welfare of a democratic society.

The AAT stated that to find that s.1214(6) contained no contrary intention to s.23 of the *Acts Interpretation Act*, it would need to find that the gender-specific language used was left there in error. The AAT conclude that the legislature intended the definition of 'special widow' to be gender specific.

> 'That the notion of "special widow" has been retained whereas other forms of supporting parent pension benefit have, on a policy basis, been made non-gender specific, seems illogical to say the least.'

(Reasons, para. 27)

Although the AAT agreed with the SSAT that to ensure the welfare of children of a sole parent on the basis of the gender of that parent was outmoded, it stated that to change this was a matter of policy.

Formal decision

The AAT set aside the SSAT decision and substituted its decision that Dagher's SPP had been correctly cancelled by the DSS.

[C.H.]

Income from family trust: in the financial year

SECRETARY TO THE DSS and PAPAMIHAIL (No. 12205)

Decided: 12 September 1997 by L.S. Rodopoulos.

Papamihail claimed jobsearch (now newstart) allowance in January 1996 after completing a design course in 1995. Documentation supplied with the claim showed a distribution of $18,000 from a family trust in June 1995. The DSS decided that this payment was income for the purposes of calculating any rate of payment, until June 1996. The SSAT decided the moneys should be held as received in the form of periodic payments during the 1995 calendar year only. That is, Papamihail would have been entitled to a benefit from date of claim.

The issue

Income is defined in s.8(1) of the *Social Security Act 1991* (the Act) as:

> '(a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance.'

Section 1074(1) provides:

> 'If a person receives, whether before or after the commencement of this section, an amount that is not:
>
> (a) income in the form of periodic payments; or
>
> (b) ordinary income from remunerative work undertaken by the person; or
>
> (c) a return from an accruing return investment; or
>
> (d) a return from a market-linked investment;
>
> the person is, for the purposes of this Act, taken to receive one fifty second of that amount as ordinary income of the period during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.'

Papamihail argued that the funds she received related to the previous financial year (1994–95). Further she said she did not know she was a beneficiary of the family trust; because the amount she received from her parents was given to her intermittently. She gave evidence that the amounts were considered by her to be loans, though her evidence on this point, according to the AAT, seems to have been vague.

The evidence of the family accountants was that payments were not regular but on an 'as needs basis'. They also attested that there was no loan account.

Payment as a lump sum or periodical payment

The AAT considered other relevant cases in the area including *Duckworth & Duckworth and Secretary to the DSS* (1995) 87 *SSR* 1266 and *Secretary to the DSS and Browne* (1992) 68 *SSR* 966 which deal with the legislative consequences under the Act of distributions from family trusts — though the principle is somewhat misstated by the AAT in the Reasons as: 'income is treated as impacting in the following financial year as from the date of payment' (sic): Reasons, para.16.

Although there is no clear finding to this effect in the Reasons, there are indications that the AAT considered there was no 'actual' distribution from the family trust, and that moneys received by Papamihail from her parents were unrelated to the distribution from the family trust. Regardless, Papamihail had a legal entitlement to the moneys and they should be treated as a lump sum to which s.1074 applied.

Formal decision

The AAT set aside the decision of the SSAT and substituted the decision that the $18,000 distribution from the family trust be held as ordinary income taken to be received weekly for the 12 months following the distribution. The effect of this was that Papamihail was ineligible to receive an allowance until 30 June 1996.

[M.C.]

Home child care allowance, parenting allowance: income, waiver

WILLEMS and SECRETARY TO THE DSS (No. 11962)

Decided: 7 May 1997 by S.A. Forgie.

Willems sought review of a decision of the SSAT which had affirmed the DSS decision to raise and recover a debt of $1704.60 being home child care allowance (HCCA) and parenting allowance paid for the period 29 September 1994 to 12 October 1995.

The facts

Willems omitted to declare that she was receiving the partner service pension from the Department of Veterans Affairs in a DSS form relating to her HCCA claim. She was granted HCCA and advised to notify the DSS if her personal income exceeded $10.85 a fortnight, and if she received payments from any government department other than the DSS. After HCCA was replaced by parenting allowance, the DSS advised Willems that she had to notify if her total personal income exceeded nil per fortnight.

When Willems' daughter turned 16 years of age, and became eligible for AUSTUDY, Willems wrote to the DSS and referred to her service pension. The debt was then raised.

The debt

The first issue was whether there was a debt. The AAT said that Willems had been qualified for HCCA under s.906 of the *Social Security Act 1991*. She had also been qualified for parenting allowance under s.905 of the Act. However, while a person may be qualified for either allowance, it may not be payable to her if the rate is nil.

As to HCCA, the AAT set out s.929(1) of the Act which provides a method statement to determine the rate of payment. It referred to s.927(1) and (2) and said that a person's ordinary income includes a payment by way of service pension. As Willems was in receipt of a partner's service pension of $272 a fortnight, that amounted to ordinary income for the purposes of the Act, and she was not entitled to HCCA.

As to parenting allowance which became payable when the Act was amended in 1994, the AAT said that the rate of payment is to be determined under the Rate Calculator at s.1068A-D21. When these provisions are applied to William's income of $272 per fortnight, there was no entitlement to parenting allowance.

Willems had not provided correct information as to her service pension in her HCCA form, and therefore had not complied with s.916 of the Act. In relation to her parenting allowance she failed to comply with a notice issued to her under s.950 of the Act, by not advising of her service pension.

It followed, said the AAT, that the amounts paid by way of HCCA and parenting allowance were both debts due to the Commonwealth under s.1224(1).

Waiver

The AAT said that the debt arose because of Willems' error and not because of an administrative error by the DSS. Therefore the provisions of s.1237A(1) could not be used to waive the debt.

The AAT also found that Willems had knowingly failed or omitted to comply with provisions of the Act in relation to both the HCCA and parenting allowance debt. It concluded therefore that the debt could not be waived under s.1237AAD.

The AAT found in the alternative, that there were no special circumstances in this case making it desirable to waive the debt within the meaning of paragraph 1237AAD(b).

Formal decision

The AAT decided to affirm the decision under review.

[G.H.]

Assets test: moneys paid to discharge liability of trust

CLARKE and SECRETARY TO THE DSS (No. 12151)

Decided: 25 August 1997 by J. Handley.

Background

In 1993 Clarke married his current wife who owned a residential property. Around 1996, Forkids Pty Ltd, the trustee of the NFD Clarke Family Trust was in debt to the Commonwealth Bank. Clarke's wife sold her property and from the proceeds paid $140,000, the amount owed by Forkids, to the Commonwealth Bank. The Clarkes are the sole directors of Forkids and the sole beneficiaries of the Trust. Forkids is the registered owner of the Clarkes current residential property in Benalla.

The DSS decided that the payment of $140,000 was a loan and an asset and assessed deemed income from the disposal of assets for the purposes of assessing Clarke's rate of pension.

Issue

Was the sum of $140,000 a loan or gift to Forkids?

The legislation

Section 11(1) of the *Social Security Act 1991* defines an asset and s.1122 says:

> 'If a person lends an amount after 27 October 1986 the value of the assets of the person for the purposes of this Act includes so much of the amount as remained unpaid but does not include any amount payable by way of interest under the loan.'