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.'