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.'

Whether a loan?

Clarke sought to make a distinction between a loan and a debt. He argued that the payment of $140,000 could not be regarded as a loan to Forkids because Mrs Clarke had agreed to the payment in order to avoid repossession of the Benalla property. He agreed that Forkids owed a debt to Mrs Clarke but this was not a loan because it was not documented, there was no agreement as to payment of interest or method of repayment. Clarke also submitted that the payment was not a gift.

Clarke suggested the payment be categorised as a payment made for the purposes of acquiring a suitable residence. There was no intention to artificially obtain a pension and the moneys were not paid voluntarily but under duress from the Bank.

The DSS submitted that the payment was either a loan or a gift and ss.1122 and 1123 of the *Act* caused the payment to be taken into account when calculating the rate of pension. The DSS argued that the payment of $140,000 was an interest free loan to the Trust. Although the origin of the moneys was Mrs Clarke's property, the moneys obtained were joint assets for the purposes of the Act. The payment of the moneys disposed or diminished the combined assets.

The AAT was satisfied that the payment by Mrs Clarke to the Bank was a loan and should be taken into account in calculating entitlement to rate of pension. The Tribunal found that there was an implied agreement to pay the amount. The fact that the method or occasion of payment and the absence of an interest rate is not material. The Tribunal referred to *Gordon and Secretary, Department of Social Security* (1992) 27 ALD 381.

The AAT relied on the fact that Forkids liability to Mrs Clarke is recorded in an assets and liability statement dated April 1996. These records were prepared by Clarke who was an accountant. The payment was clearly not a gift as gifts do not incur liability for repayment. 'The distinction drawn by Mr Clarke between loans and debts is artificial. A loan, at least in this case, is a debt': Reasons, para. 15.

> 'For the purposes of s.1123 the sum of $140,000 constitutes an 'asset' which has been "disposed" or "diminished" and for the purposes of sub-paragraph (b), there has been no consideration or inadequate consideration in moneys worth for the disposal or diminution of assets.'

(Reasons, para. 16)

The AAT did not accept that the payment could be categorised 'for the purpose of acquiring a suitable residence' either as a fact nor as a proposition in law. The Tribunal also disregarded as irrelevant the submission that the Trust did not have the capacity to repay the loan.

Formal decision

The Tribunal affirmed the decision under review

[M.A.N.]

Newstart allowance and additional parenting allowance: assets test, property of partner

SCHOKHOFF and SECRETARY TO THE DSS (No. 11877)

Decided: 19 May 1997 by S.A. Forgie.

Schokhoff sought review of two decisions:

- a decision of the SSAT which affirmed the DSS decision to raise and recover a debt. The amount of the debt was varied at the hearing so that an amount of $11,675 of newstart allowance (NSA) paid between 23 March 1993 and 30 May 1994 was sought to be recovered.
- a decision of the SSAT which varied a DSS decision to cancel additional parenting allowance and to raise and recover a debt of $2782.80, being additional parenting allowance paid from 5 July 1995 to 21 December 1996.

The DSS conceded that this debt was not recoverable. Therefore, the only dispute at the AAT was whether additional parenting allowance was correctly cancelled.

The issue

The central issue to both decisions was whether a house and land situated in Ireland ('the Irish property') was an asset of Mrs Schokhoff. Mrs Schokhoff's father left the Irish property to her in his will. He died and probate of his will was granted. Before his death he executed an indenture with the aim of transferring his beneficial interest in the Irish property to Mrs Schokhoff. Schokhoff submitted that the indenture was not a valid transfer. It was not in dispute, however, that some time after her father's death, Mrs Schokhoff had sold the Irish property. Schokhoff submitted that his wife had transferred the proceeds of the sale to her father's estate, as required, because of family difficulties over the terms of her father's will.

The asset: the Irish property

The AAT found that Mrs Schokhoff's father had validly transferred his beneficial interest to her under the indenture. In the alternative, it found that she had inherited the Irish property under the will. The AAT said that the value of the Irish property could not be disregarded for the purpose of calculating Mrs Schokhoff's assets, contrary to Schokhoff's submission. He had sought to rely on s.1118(1)(b) or s.1118(1)(j) of the *Social Security Act 1991*.

The disposal of the asset

The AAT also held that the proceeds of sale equivalent to $96,000 were available to Mrs Schokhoff, and were part of her assets. If she had transferred the money to others, the AAT said that s.1126 of the Act applied, which meant that she had disposed of assets above 'the disposal limit' of $10,000. Therefore $86,000 must be regarded as part of the Schokhoffs' joint assets for 5 years after disposal, and that meant at all times relevant to the decisions under review.

The AAT concluded that, although Schokhoff qualified for NSA, it was not payable to him under s.608(1)(6) of the Act because the value of his assets exceeded his 'assets value limit' as set out in s.611(2), as the value of Mrs Schokhoff's assets, had by virtue of s.112(1), to be taken into account.

The AAT found that Schokhoff had omitted to declare the Irish property as part of his assets. Therefore, there was a debt of $11,635.18 due to the Commonwealth under s.1224 of the Act.

Additionally, as NSA was not payable to Schokhoff, it had been correctly cancelled under s.660I.

As to additional parenting allowance, he did not satisfy the assets test because his assets were above the value limit of $167,500 applicable at the time, as assessed under s.1068 A-B. This meant that additional parenting allowance was not payable, and it had been correctly cancelled.

The formal decision

The AAT decided in relation the first decision:

- to vary the SSAT decision so that the debt was reduced to that amount paid between 23 March 1993 and 3 May 1994; and