Koschitzke applied for the pension and her husband disposed of the assets.

The second submission was that there was adequate consideration for the transfer of the properties since Mr and Mrs Koschitzke's sons (Richard and Steven) had worked on the property for minimal wages for 26 and 16 years respectively. Evidence was provided that there was an agreement (albeit not in writing) that the sons would perform the work at less than award wages with the expectation that the properties would ultimately be transferred to them.

The DFaCS argued firstly that s.1225A(1) is not limited to disposals only of assets of the person claiming a pension.

In relation to the 'agreement' between Mr Koschitzke and his sons, the DfaCS argued that:

> ...Richard and Steven were given no more than a 'hope' or an expectation 'in the nature of a loose family arrangement' that one day they might ultimately receive a transfer of the properties from their father.

(Reasons, para. 74)

As there was no agreement, then the sons' foregone wages could not be regarded as consideration for the transfer of the properties.

Findings

The Tribunal found firstly that s.1225A was not limited in the way suggested by Koschitzke's legal representative. The intention was clear, especially when read in conjunction with s.1223 and s.1064-G2.

In relation to the issues of adequate consideration, the Tribunal agreed with the DFaCS that there was no 'certain agreement' between Mr Koschitzke and his sons about the ultimate transfer of the properties, however, based especially on the evidence of Mr Koschitzke, the Tribunal was satisfied that there was an oral agreement to transfer the properties in consideration of foregone wages and that the sons acquired an equity sufficient to permit them to take legal action on the basis of that agreement if necessary.

Consequently the Tribunal found that a constructive trust existed between Mr Koschitzke and his sons and the transfer of properties was in accordance with an undertaking to transfer in exchange for foregone wages. Reliance was placed on the decision of *Kidner v Secretary Department of Social Security* (1994) 77 *SSR* 1132. The Tribunal considered and distinguished the case of *Secretary, Department of Social Security and May* (1998) 3(2) *SSR* 15, concluding that this case, although similar in that property was transferred in lieu of wages, was not relevant as the persons transferring and receiving the property were partners under a partnership agreement and there was no legal obligation to pay the foregone wages. Also in May there was no agreement that wages would be paid.

The Tribunal concluded that Mr Koschitzke disposed of some assets (ie, the properties). However he received adequate consideration for this in that the foregone wages of his sons for 26 and 16 years were in excess of $251,881.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

DSP: assets test; constructive trust or beneficial interest

SADTO AND SECRETARY TO THE DFaCS (No. 19990855)

Decided: 15 November 1999 by E.A. Shanahan.

Background

Sadto had received disability support pension (DSP) since 1979. In 1984 properties in Frankston (Queen Street) were registered in the name of Sadto and his mother and father. In 1993, following the death of Sadto's father, these properties were transferred to Sadto and his mother. Other properties in Frankston (David Street) and Rye were registered in 1990 and 1992 respectively in the names Sadto and his mother and father. In 1993 these properties were also transferred to Sadto and his mother.

Evidence given by Sadto's mother was that her son had not contributed to any of the properties, nor did he derive income from them. Sadto's evidence was that although he signed transfer documents, he was unaware that he had an interest in any of the properties

In 1997, Sadto's real estate assets were valued at $317,000 and his rate of DSP was reduced accordingly.

This decision was appealed to the Social Security Appeals Tribunal which on the basis of a re-evaluation in 1997, decided that the value of the assets was $222,333.31.

The issue

The issue in this appeal was whether Sadto had a beneficial interest in the properties or whether his role was one of trustee.

The law

It was argued for Sadto that his lack of knowledge about the property dealings, the fact that he did not contribute to the purchase or the decision to purchase the properties led to the conclusion that he had no beneficial interest in these properties. Despite an existing legal interest it was submitted that, instead, he held the properties as trustee for his mother.

It was proposed that the trust was created without a common intention. Cases referred to as authority were *Gissing v Gissing* (1971) AC 886, *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137. All three cases relate to constructive trusts.

The DFaCS conceded that Sadto did not contribute to the purchase or development of any of the properties, but his parents clearly intended that he would benefit by making him a co-owner.

Halsbury's Laws of Australia was referred to in relation to resulting trusts:

> The presumption of a resulting trust applies when one person pays for, or contributes to the payment for, property which is transferred to, or owned in shares with, another person, and the share of the transferee is greater than his or her contribution to the purchase price. In these circumstances the law presumes that the parties intend to own the property in shares in proportion to their contributions. The presumption of a resulting trust may be rebutted if ... the transferee proves that the transferor intended to confer beneficial ownership in the property.

(Reasons, para. 33)

In relation to constructive trusts, the DFaCS again referred to Halsbury:

> A constructive trust will be imposed where the sole owner's of properties refusal to recognise the existence of an equitable interest in another person amounts to unconscionable conduct.

(Reasons, para. 36)

The DFaCS concluded that there was clear intention of a gift that would benefit Sadto and in these circumstances neither a resulting or constructive trust could arise.

Findings

The Tribunal found that there was no evidence of a constructive trust or a resulting trust. Sadto's legal interest equated with a beneficial interest and as such the value of the properties was to be considered in the application of the assets test.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Parenting payment debt: income from business or employment; waiver

CROOK and SECRETARY TO THE DFaCS (No.19990923)

Decided: 8 December 1999 by Dr. E. Christie.

Background

Crook returned to Australia in 1997 after a ten year absence. He and his wife applied for family allowance and parenting payment in November 1997. At that time Centrelink advised him that his entitlements would be based on an annual income of $24,000 and provision of a profit and loss statement.

Having had extensive real estate experience, and believing he could re-establish such a career, Crook began work as an estate agent, on a commission-only basis, in October 1998. He contended that he was not an employee of the parent estate agent company as he was able to carry out activities to promote himself, and was anticipating high expenses in the first six months or so in the course of establishing himself in this career. On 20 November 1998 Crook was paid $8843 in commissions. Apart from this amount, and small earnings in March and June 1999, he received no other income in 1998-99. Crook had received a Centrelink letter in November 1997, although he did not read the notification obligations on the back of the letter. That letter included the advice that Crook's entitlements had been calculated on an income level of $254 a fortnight for each of Crook and his wife, and obliged him to notify Centrelink if he began work or if his income exceeded $60 a fortnight. As his income in 1998-99 did not exceed $24,000 he did not notify Centrelink of his employment or earnings. An overpayment occurred as Crook continued to be paid by Centrelink, his employment and earnings coming to light only after he lodged information with the Australian Taxation Office.

An overpayment was raised against Crook totalling $1243.80 for the period 8 October 1998 to 3 December 1998. This decision was affirmed by the Social Security Appeals Tribunal in March 1999. The critical issues were whether the income received by way of commission should be treated as income from a business or whether Crook was an employee. A further issue was whether the debt should be waived. It was argued by Crook that he had relied on the advice that his entitlement would be worked out on the figure of $24,000 per annum, and that if had been properly advised he would not have worked as a commission only real estate agent because he was aware of the high set up costs involved. He would have instead sought work as an employee.

The decision

The AAT, notwithstanding Crook's assertions, decided that though paid on commission Crook was an employee of the parent estate agent company, and was not carrying on a business. It said:

> The nature of Master/Servant, employer /employee/contractor relationship has been examined by the Courts over the years. A more "flexible" test is found in the decision of the High Court of Australia in ***Stevens v Brodribb Sawmilling Company Proprietary Limited*** (1985-1986) 160 CLR 16 wherein Mason J said at page 24:
>
> 'A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, at p 571; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395, at p 402; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, at p 404. In the last mentioned case Dixon J said:
>
> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."
>
> But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539, at p 552; *Zuijs' Case*; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR at p 401; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at p 218. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.'
>
> On consideration of all the factual evidence before the Tribunal, in terms of Mr Crook's duties and responsibilities at Richardson and Wrench, including the terms of the "Individual Employee Flexibility Agreement" as well as the "REIQ Employment Agreement" (Exhibit 5, Supplementary Submissions), Employer obligations and the relevant licence(s) held at the time the Agreement was entered into, the Tribunal concludes that, in his specific circumstances, Mr Crook was an employee of Richardson and Wrench and cannot be said to be carrying on a business for the purposes of the application of Section 1075 of the Act.

The AAT also concluded that the 1997 notification notice was sufficient to make Crook aware of his obligations to contact Centrelink should specific financial situations arise. By not reading the notification obligations on the reverse of the Centrelink letter sent to him in November 1997, Crook had contributed in part to the administrative error which led to the overpayment. As such, waiver of the debt under s.1237A could not occur. Further, the AAT noted the test of 'special circumstances' in *Beadle v Director General of Social Security* (1985) 26 *SSR* 321 — that to be 'special' circumstances need to be unusual, uncommon or exceptional. Crook's failure to read the notification obligations sent to him together with a consideration of the family's current financial position and employment prospects, led the AAT to conclude that special circumstances sufficient to justify exercise of the waiver contained in s.1237AAD did not exist.

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]