parent being mislead about the income of the other parent.

- Legislative amendment should be introduced so that a new assessment period commences from the point in time where a child's income exceeds the threshold for FTB eligibility. The parent should be regarded as entitled to the FTB paid until that point in time.
- Recovery through tax refunds should not occur in the year in which the return is lodged, with only debts that remain for the preceding year collected in this way.
- The legislative requirements for waiver of debts occurring through administrative error should not include the additional test of severe hardship. Debts occurring under the social security law may be waived if the debt occurred solely through administrative error and the payments were received in good faith. The family assistance legislation also includes this ground for waiver, but has the additional requirement that the debt can only be waived for this reason if recovery would otherwise cause the debtor severe financial hardship.
- The existence of a family assistance debt occurring through the reconciliation of income, maintenance income, child income or the shared care rules should not exclude the person from receiving an advance of income support or FTB.
- Debts which are less that the amount of the advance requested should not prevent a person from obtaining an advance.
- Consideration should be given to extending the deadline for the lodgement of claims for family assistance and for lodgement of tax returns if the person has obtained an extension of time for lodgement from the Australian Taxation Office.
- Where a person has been receiving family assistance by instalments, lodgement of a tax return after the deadline should not preclude the person from receiving a top up to which they would otherwise be entitled.
- The administration of family assistance should be improved to make it clear that actual entitlement cannot be determined until after the end of the financial year when actual income is known, by specifically describing instalments paid during the year as an advance or prepayment, by explaining that adjustments (debts or top ups) once actual income is known is a necessary consequence of electing to have FTB paid fortnightly, and keeping families better informed throughout the year about the implications of any changes to income estimates.

The Report noted that the new system represents a significant shift, with the notion of a reconciliation at the end of a financial year when actual income is known, being analogous to the tax system. Viewed in this way families that incur debts are experiencing what is a generally accepted feature of the tax system. However, it was noted that the PAYG system, for various reasons, results in proportionally lower debts. Debts were an inherent feature of the new system and, significantly, the most disadvantaged families are the most likely to receive larger debts under the new FTB system should their circumstances change. The need to address ways of preventing or reducing debts for such families is paramount.

The Report may be viewed at the website of the Commonwealth Ombudsman — www.comb.gov.au

[A.T.]

Administrative Appeals Tribunal

Age pension: meaning of principal home

SECRETARY TO THE DFaCS and KULSHRESTHA
(No. 2003/227)

Decided: 6 March 2003 by S.A. Forgie and Dr E. Eriksen.

The issue

The issue before the Tribunal was whether Kulshrestha's principal home was that part of the property which was numbered 47 Braeside Avenue or the whole of the property being No. 47 and No.47A Braeside Avenue.

Background

In 1980, Kulshrestha built a house at 47 Braeside Avenue and he extended it in 1987. He built the house to 'live and die in' as his father had done before him and extended it to accommodate his growing family. The house comprised three levels. One part of the house could be separated from the other by locking a door connecting the two laundries situated on the ground floor. That part which comprised the house as originally built was numbered 47A and had its own driveway and letterbox. The other side of the house also had its own driveway and letterbox and was numbered 47.

Number 47A had been leased at various times over the years and at the time of the Tribunal hearing was leased. All utilities apart from water were metered separately and charged separately. The tenants had exclusive use of the rooms situated in No. 47A and Kulshrestha had exclusive use of the remainder situated in No. 47.

The law

The legislation relevant to the issue for determination was s.1118(1) and s.11 of the *Social Security Act 1991* (the Act). These provisions allow certain assets to be disregarded and define 'principal home'.

Submissions

The Department argued that the question for determination was the purpose for which the property was used rather than the nature of the property itself. Relying on cases such as *Stewart and Secretary to the DFaCS* (1987) 11 ALD 470, *Bowden and Repatriation Commission* (1992) AAR 325 and *Di Primio and Secretary to the DFaCS* (1993) 31 ALD 233, the Department submitted that it was possible to apportion a property between that used for a person's principal home and that used for other purposes. The Department noted that *Secretary, Department of Employment, Education, Training and Youth Affairs v Ovari (2000)* 98 FCR 140 had been considered against a background that there was no evidence or finding that some physical part of the property was used exclusively for business purposes.

For Kulshrestha, it was contended that whilst *Ovari* concerned the AUSTUDY Regulations it centred on an identical definition of 'principal home'. The reasoning in *Ovari* did not provide for apportionment of the principal home, a view also adopted by the Tribunal in *Hewitt and Secretary to the DFaCS* (2002) 68 ALD 552. Kulshrestha pointed to the finding in both *Ovari* and *Hewitt* that the market

value of the property was neither diminished nor increased by its partial use for income generating purposes.

Consideration

The Tribunal referred to *Ovari* and noted that the Federal Court had begun its consideration of apportionment with the words, 'Provided the property in question is properly characterised as a principal home', and made it clear that it is not appropriate to ask first whether a place is used for business purposes. The Tribunal found that the first question to ask is whether or not the place is the person's principal home. If it was decided that a place is a person's principal home, the Tribunal concluded that there was no room to apportion any part that may be used for business purposes.

The Tribunal noted that the Federal Court in *Ovari* had not explained the meaning of 'principal home'. After referring to dictionary definitions, the Tribunal concluded that a person's principal home was the place of residence that is their chief or first and foremost residence. The Tribunal also noted that the expression had been subject to consideration in other cases, and that in *Clark and Secretary, Department of Social Security* (4 November 1996, No. 2968 unreported) it was said that, 'A characteristic of a person's home is that he usually resides there. It is by no means necessary, however, that they go hand in hand.' The AAT also referred to the judgment of Wilcox J in *Hafza v Director General of Social Security* (1985) 60 ALR 674 which, in considering what is meant by 'a person's usual place of residence', said: 'Physical presence and intention will coincide for most of the time. But few people are always at home ... The test is whether the person has ... a continuing association with the place ... together with an intention to return to that place and an attitude that that place remains home.'

Findings

Having regard to the principles in the authorities and to the ordinary meaning of the expression, the Tribunal found that No. 47 was the place where Kulshrestha cooked, ate, slept, washed himself and his clothes and generally lived. It was the place where he usually resided and it was the place that he regarded as home. In contrast, No. 47A was subject to a tenancy agreement, and his tenants had exclusive possession. The Tribunal found that Kulshrestha was not entitled to enter that part of the building at will. His right to enter was in accordance with the terms of the lease and in so far as the law permitted him to do so. Thus he could not carry out daily activities at No. 47A. The Tribunal found that in relation to No. 47A, Kulshrestha was a landlord and his tenants, rather than him, were the people for whom it was a home. The Tribunal concluded that Kulshrestha's principal home was limited to No. 47 and did not encompass the whole of the building.

The Tribunal conceded that its findings might appear contrary to the conclusion reached by the Tribunal in *Hewitt*, but stated that any apparent inconsistency was attributable to the findings of fact as to the boundaries of the principal home. The Tribunal noted that in *Hewitt*, the finding was that the whole of the property was Ms Hewitt's principal home but that she had let part of it. The Tribunal noted the distinction, that on the facts of the present case, it had not found that the whole of No. 47 and No. 47A was Kulshrestha's property. It was not the case, that he had let part of it in the way in which a person might let a room or two to a boarder in their home. On the contrary, the Tribunal had found on the facts, that only No. 47 and so only part of the building, was his principal home.

Formal decision

The AAT set aside the decision and substituted its decision that for the purposes of the *Social Security Act 1991*, the principal home of Kulshrestha was No. 47 Braeside Avenue.

[G.B.]

Assets test: loan to company; whose debt?

SECRETARY TO THE DFaCS and HAMAM
(No. 2003/197)

Decided: 28 February 2003 by Cr Wright QC.

Background

Hamam and her husband were directors of a company ICOG International Pty Ltd. In June 2000 they agreed to borrow money from the Bank of New Zealand and then lend that money to the company.

The Department deemed income on the basis of the loan which in turn affected the rate of parenting payment. On review, the SSAT decided that the rate of parenting payment should not be calculated by taking into account the deemed income from the loan on the basis that the debt to the bank was 'entirely the company's debt'.

Issues

The sole issue in this appeal was whether the loan to the company was an asset which was then subject to the deeming rules.

Findings

The Tribunal considered s.1122 of the *Social Security Act 1991*.

It concluded that Hamam and her husband borrowed money from the bank and then on-lent this to the company within the meaning of this section.

The Tribunal concluded that it made no difference whether Hamam and her husband stood to make a profit from this process and concluded that the loan must be assessed as an asset and income deemed under s.1078 of the Act.

The Tribunal went on to state that the facts did not support the conclusion of the SSAT that the debt to the bank was the company's debt and stated that the question to be asked was: 'Has it been shown that the benefit-applicant has lent money to another person or entity'. It found the answer to this question was yes and set aside the decision of the SSAT.

Formal decision

The AAT set aside the decision of the SSAT and decided that the rate of the parenting payment assessed by the applicant was the correct rate payable.

[R.P.]

Family trust payments: whether loans or distributions

BERGER and SECRETARY TO THE DFaCS
(No. 2003/169)

Decided: 21 February 2003 by B.J. McCabe.

Background

Berger was a beneficiary of a family trust and owned shares in the Trustee Company. The trust owned her home. Berger drew some cash from the trust and was liable to pay rent to the trust in respect of her occupation of the home. The weekly rent was debited against a loan account, although there was no formal loan agreement in place. Berger did not declare income received from the family trust while she was in receipt of a disability support pension and an aged