

'special circumstances' was an unsatisfactory one and urged that consideration be given to the amendment of s.102(1). A more appropriate phrase may be 'sufficient cause' which is found in s.119(3) of the Act. Combined with a discretion as to the determination of the appropriate date from which payment shall be made, that criteria may resolve some of the difficulties such as encountered in the present case.

Formal decision

The AAT affirmed the decision under review.

CARMICHAEL and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/264)

Decided: 29 June 1983 by R. Balmford.

Connie Carmichael was granted family allowance from 15 September 1981 in respect of her stepson, B. She and her husband had taken custody of B from her husband's mother, on 1 January 1980. The latter had been in receipt of family allowance for B until Carmichael lodged

her application for family allowance. The DSS wrote to the applicant on 15 October advising her that she may wish to claim arrears of family allowance. She subsequently claimed arrears from 1 January 1980. The claim was rejected on the basis that the claim had not been lodged within six months of the date she took custody of her stepson, as required by s.102(2) of the *Social Security Act*. Carmichael applied to the AAT for review of that decision.

The legislation

Section 102(2) reads:

Where a family allowance is granted to a person by reason of that person having assumed the custody, care and control of a child who, immediately before that person assumed his custody, care and control, was a child in respect of whom a family allowance was paid, the family allowance shall be payable from and including the date on which the claim for family allowance is lodged, but, where the claim is lodged within six months after the date on which the first-mentioned person assumed the custody, care and control of the child, or, in special circumstances, within

such longer period as the Director-General allows, the family allowance shall be payable from and including that date.

'Special circumstances'

The applicant thus had to show special circumstances to enable the Director-General to allow a longer period than six months from 1 January 1980 for the lodging of her claim.

The AAT referred to its decision in *Wilson* (1981) 3 SSR 27, *Faa* (1981) 4 SSR 41 and *De Graaf* (1981) 3 SSR 26 (see *Messina* this issue).

Carmichael had thought that the grandmother had been putting the family allowance payments into a bank account for her stepson. She also had felt that it was for her husband's mother to notify the department when B left her care, custody and control.

Neither of these factors amounted to 'special circumstances' according to the AAT.

Formal decision

The AAT affirmed the decision under review.

Cohabitation

CHAPMAN and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/99)

Decided: 5 July 1983 by J.B.K. Williams.

Chapman was granted widow's pension on 15 June 1977. On 3 February 1981 that pension was cancelled on the basis that as she was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him' she was no longer a 'widow' as defined in s.59(1) of the Act. (The legislation is set out in *Pearce*, this issue.) The DSS also claimed an overpayment of \$5125.30 recoverable under s.140(2) as she had received her pension as a result of not informing the DSS of her *de facto* spouse. Chapman applied to the AAT to review the decision.

Having regard to the principle in *Lambe* (1981) 4 SSR 43 that 'all facets of the interpersonal relationship' need to be taken into account the AAT was satisfied that Chapman was living in a *de facto* relationship. She had moved into the same house with G in July 1979 and had resided with him until he left in August 1980. They shared a common bed and had a sexual relationship. She became known by his name and they went out together socially. He provided some financial support. (Chapman had her widow's pension reinstated when G left and the deductions under s.140(2) were made from that pension.)

Formal decision

The AAT affirmed the decision under review.

PEARCE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/54)

Decided: 23 May 1983 by I. R. Thompson, W. B. Tickle and H. E. Hallows.

In December 1975 Barbara Pearce separated from her husband. She was granted a widow's pension on 11 August 1976. On 3 August 1977 she was divorced from her husband. She lived with her mother until at least 22 April 1979, when her mother died.

Sometime after her mother's death she moved, with her daughter, into a house with Mr A. They resided together until May 1980. Pearce then moved to her brother's house and three months later A also moved into that house. He left in February 1982.

On 16 June 1980 the DSS cancelled the widow's pension granted to Pearce and on 26 November 1980 sought to recover overpayment of that pension paid since 1979 when she first resided with A, presumably because she was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him' and so excluded from the definition of widow in s.59(1) of the *Social Security Act*:

'widow' includes—

...
(c) a woman whose marriage has been dissolved and who has not remarried;

...
but does not include a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

Pearce applied to the AAT for review of the decisions by the DSS.

Evidence of cohabitation

There was conflicting evidence before the Tribunal as to whether or not Pearce and A were cohabiting. Pearce had stated to a

DSS field officer on 24 April 1980 that she was in a *de facto* relationship with A. She denied this was true at the hearing.

The Tribunal concluded, after hearing evidence by A and Pearce's younger sister, that while Pearce may have wanted her relationship with A to develop, he had no such intention.

In deciding whether that finding led to the conclusion that Pearce was living with A as his wife on a *bona fide* domestic basis the Tribunal referred to its earlier decisions in *Waterford* (1981) 1 SSR 1, *RC* (1981) 4 SSR 36, and *Lambe* (1981) 1 SSR 5. These cases establish the general principle that:

in order to determine whether a woman comes within the expression 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him', all facets of the interpersonal relationship of the woman and the man with whom she is allegedly living as his wife need to be taken into account. [*Lambe* (1981) 1 SSR 5 at 6]

The AAT found that certain necessary elements for the existence of a marriage in the present case were absent. They were:

- (1) permanence;
- (2) commitment by A to either the applicant or her child;
- (3) financial support; and
- (4) real emotional support for the applicant by A.

(Reasons, para. 24)

Thus they concluded Pearce was at no time living with A as his wife on a *bona fide* domestic basis and was at all times qualified to receive widow's pension.

Formal decision

The AAT set aside the decision under review with a determination that at all times throughout 1979, 1980, 1981 and 1982 the applicant was a widow for the purposes of Part IV of the *Social Security Act* and

remitted the matter to the DSS to calculate the rate of pension payable to the applicant between 16 June 1980 and March 1983 when she commenced to receive supporting parent's benefit.

VASSALLO and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/140)

Decided: 1 June 1983 by C. E. Backhouse, L. G. Oxby and I. Prowse.

Maria Vassallo was granted a supporting parent's benefit in October 1979, shortly after she had taken possession of a Housing Commission house and regained custody of her two children who had been in foster care for about two years.

In February 1981, following a series of neighbourhood disputes, she and her children moved to the house of F, a 54-year-old man on invalid pension who was also a distant relative.

In August 1981, the DSS decided to cancel her supporting parent's benefit because she was living with F as his wife and, therefore, excluded from the definition of 'supporting mother' in s.83AAA (1) of the *Social Security Act*. (The definition excludes a woman who is 'living with a man as his wife on a bona fide domestic basis although not legally married to him'.)

Following an unsuccessful appeal to an SSAT, Vassallo asked the AAT to review that decision.

The AAT's assessment

The Tribunal found that Vassallo and F had begun to live together because of mutual convenience: she needed to move her home and he required some care, because of his incapacity. However, F had provided Vassallo and her children with financial support. Other factors, which the Tribunal referred to as their 'domestic arrangements', were—

living under the same roof, the performance of household tasks, the sharing of the evening meal and outings together [and] the elements both of permanence and of exclusiveness . . . in the relationship.

On the other hand, the AAT found that Vassallo and her children always used her surname, not F's, and that there was no sexual relationship between Vassallo and F.

However, the Tribunal placed considerable reliance on the actions of Vassallo and F during April/May 1982, after the SSAT had rejected her appeal and while she was waiting for the AAT appeal hearing:

- Vassallo applied for a wife's pension (as the de facto wife of an invalid pensioner) but F's invalid pension was cancelled;
- F lodged a claim for unemployment benefits, describing Vassallo as his 'de facto'; and
- F claimed sickness benefit, again describing Vassallo as his 'de facto', and was paid at the married rate between May 1982 and February 1983.

The AAT concluded that Vassallo had been living with F 'as his wife on a bona fide domestic basis since February 1981 although not legally married to him'.

Formal decision

The AAT affirmed the decision under review.

[**Comment:** The approach taken in this matter is disturbing: the various applications for pension and benefit, at the married rate, were made *after* final cancellation of Vassallo's supporting benefit, when she and her children had no income. Extracts from her transcript of evidence to the AAT show that her grasp of English was rather restricted; but neither that limitation nor her possibly desperate financial situation in April/May 1982 was taken into account by the Tribunal.]

DONALD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/33)

Decided: 25 May 1983 by I. R. Thompson.

Jean Donald and Mr B jointly purchased a house in 1979. They made this arrangement because Donald did not have enough money to buy a house independently. There was a strict arrangement as to household duties, each was to provide his/her own personal requirements. While Donald agreed to do the cleaning and cooking for both of them, they agreed to share the gardening, B doing the heavier work. They had separate bedrooms. B contributed the main part of the mortgage repayments. (Donald was in receipt of sickness benefit until March 1982 but had contributed half of the \$3000 deposit on the house.)

In January 1982 Donald had applied to the DSS for a widow's pension. This was denied on the basis that she was living with B in a *de facto* relationship of husband and wife and so did not come within the definition of widow set out in s.59(1) of the *Social Security Act*. (The relevant part of s.59(1) is set out in *Pearce*, this issue.) Donald appealed to the AAT against this refusal.

De facto relationship

The AAT found that no romantic attachment or sexual relationship existed between Donald and B. There was some degree of mutual inter-dependence but their arrangement was primarily one of convenience.

The AAT referred to the Federal Court decision in *Lambe* (1981) 4 SSR 43, and to its own decisions in *Tozer* (1982) 10 SSR 99, *Waterford* (1981) 1 SSR and *Sturges* (1983) 13 SSR 132. In particular, the Tribunal quoted at length from *Sturges* where the applicant was also the joint owner of a house with a man alleged to be her *de facto* husband. That case emphasised the importance of looking at the circumstances in which the relationship came into existence and the way in which it had evolved.

In the present case, according to the Tribunal, the relationship had 'never been any more like the marital relationship than it is now'. While there were certain characteristics of a marriage, the joint ownership of a home, the leaving of each of their interests in that house to the other in their wills and the provision of domestic services by Donald, there were also facts inconsistent with a marriage relationship. These were the lack of any emotional or sexual involvement and a commitment from the start to maintain financial and social independence.

The AAT therefore concluded that the

'quality and degree of their commitment to one another has never been such as is characteristic of the marital relationship'.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that at all times the applicant was qualified to receive a widow's pension under s.60 of the Act.

LYNAM and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q82/176)

Decided: 5 July 1983 by J.B.K. Williams.

Lynam had his unemployment benefit cancelled on 19 September 1981 on the basis that, having regard to the income of his 'spouse' he was disqualified from receiving the benefit by virtue of the income test in s.114 of the Act. He applied to the AAT to review that decision.

Section 114 provides:

(1A) Where an unemployment benefit . . . is payable to a person . . . whose income exceeds \$6 per week, the rate per week of that benefit shall be reduced . . .

. . .

(3) For the purpose of sub-section (1A), the income of a person shall include the income of that person's spouse . . .

Section 106 defines 'married person' and 'spouse' to include 'a dependent female'.

Section 106 also defines 'dependent female' to mean—

a woman who is living with a man (in this Part referred to as her husband) as his wife on a *bona fide* domestic basis although not legally married to him.

Lynam had jointly purchased a house with Mrs W and Mr Z in about 1977. Later Mr Z moved out but Lynam and Mrs W continued to reside in the same house. Expenses were shared equally, however when Lynam lost his unemployment benefit Mrs W became the sole supporter of the household. Lynam denied the existence of any sexual relationship with Mrs W. They rarely ate together and there was little evidence of a common social life. This evidence was supported by Mrs W as was the claim that she only supported him financially because he had no money.

Needs of the applicant

In looking at the phrase "a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him" the AAT considered that the needs of the applicant are of crucial significance.

The evidence showed financial inter-dependence between Mrs W and Lynam. That Mrs W supported Lynam when he lost his benefit

. . . indicated . . . a bond between them of a kind usually found in a marriage relationship. (Reasons, p.10).

As to the joint ownership of the house, that too made the case one resembling a marriage relationship. Even though Mrs W had expressed dissatisfaction with her support of Lynam:

Joint ownership of the house would preclude her from evicting him but that also is a fac-

tor in a marriage relationship where joint ownership of a house and the financial considerations involved in leaving the matrimonial home often compel the parties to remain residing under the same roof despite matrimonial difference.

(Reasons, p.11).

This focus on the needs of the applicant was premised on the distinction drawn between provisions of the Act governing eligibility for benefit and those provisions governing the amount of pension. *De facto* relationships had been discussed in the context of the former provisions but not in regard to the latter according to the AAT. It was in *Lambe* (1981) 4 SSR 43 that the Federal Court

had drawn this distinction. In *Lambe* it was said that the provisions dealing with rates of pension were concerned with the particular circumstances of the *qualified* person. Thus need alone became of crucial significance.

The reasoning appears to be that while Lynam was qualified to receive unemployment benefit, because he was financially supported by Mrs W the relationship with her became a *de facto* one for the purposes of s.114.

Formal decision

The AAT affirmed the decision under review.

[Comment: The AAT did not refer to

the decision in *Sturges* (1983) 13 SSR 133. In that case the same question fell for consideration under s.114 where the applicant lost her benefit having regard to the income of her *de facto* spouse. There the AAT drew no distinction between the eligibility provisions and the income test provisions. They referred to *Lambe* as requiring that all facets of the interpersonal relationship need to be taken into account. In *Sturges* a house was jointly owned, but an independent financial existence, separate social life and an absence of any sexual relationship precluded the AAT from regarding a *de facto* relationship as in existence. BS]

Supporting parent's benefit: 'supporting mother'

'W' and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. V82/374)

Decided: 21 June 1983 by R. Balmford.

Miss W obtained an order from the Victorian County Court in April 1981 allowing her to adopt J. This order was obtained under s.10(2) of the *Adoption of Children Act 1964* (Vic.) which allows the Court to make an adoption order in favour of one person in 'exceptional circumstances'. The exceptional circumstances in this case were Miss W's training as a mothercraft nurse, her close attachment to J (J was born with a condition which affected her physical and intellectual development and Miss W worked at the hospital where J was born and had looked after her there) and her experience with intellectually handicapped people.

Miss W subsequently gave up work and applied for supporting parent's benefit. This claim was rejected on 1 June 1981 on the basis that she did not have a qualifying child within the meaning of the Act in her care, custody and control. An SSAT upheld her appeal but a delegate of the Director-General affirmed the original decision to reject her claim on 3 August 1982. Miss W applied to the AAT for review of that decision.

'Supporting mother'

To qualify for supporting parent's benefit it is necessary to be a supporting father or a supporting mother under the Act. Section 83AAA(1) defines 'supporting mother'. It reads (so far as is relevant):

'supporting mother' means a woman (whether married or unmarried) who –
(a) has the custody, care and control of a child, being a child who –

- (i) was born of that woman; or
- (ii) in the case of a woman who is a married woman living apart from her husband or a woman who has ceased to live with a man as his wife on a bona fide domestic basis although not legally married to him – was an adopted child of, or in the custody, care and control of, that woman on the relevant date . . .

As Miss W had never married nor lived with a man as his wife the DSS claimed that her eligibility fell to be determined under paragraph (a)(i). As the child was not 'born of' her, her claim was rejected.

The AAT agreed with this conclusion. The Tribunal could not accept the applicant's argument that the effect of s.32(1) of the *Adoption of Children Act* (Vic) was to deem J to be a child born of Miss W. Section 32(1) reads in part:

Subject to the Act and to the provisions of any other Act that expressly distinguishes in any way between adopted children and children other than adopted children, upon

the making of an adoption order –

- (a) the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock . . .

It was clear, according to the AAT, that the definition of 'supporting mother' in the *Social Security Act* did distinguish between a child born of a woman and an adopted child. The ordinary grammatical sense should be given to the words in a statute except to avoid some inconsistency or absurdity. Paragraph (a)(i) in s.83AAA(1) referred to non-adopted children, paragraph (a)(ii) to adopted children. This created no inconsistency.

Reform

The AAT commented that:

. . . consideration could be given to amending the Act in order that an adopting single parent might, for the purposes of the Act be equated with a natural parent. Such an amendment would be consistent with the clear intention that adopting and natural parents should be so equated for all purposes which is manifested by the Victorian *Adoption of Children Act* and indeed by the corresponding Acts in all States and major Territories.

(Reasons, para.19)

Formal decision

The AAT affirmed the decision under review.

Income test

GREEN and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. N82/49)

Decided: 27 June 1983 by C.E. Backhouse.

On 10 February 1982 Mr Green's invalid pension and Mrs Green's wife's pension were cancelled by the DSS. This was because Mrs Green refused to complete part of an Entitlement Review Form sent to her husband which required her to state her income. Mrs Green was in full-time employment and the evidence before the Tribunal showed that she financially supported her husband. The applicant applied to the AAT to review the cancellation.

The legislation

Section 29(2) of the Act provides that in assessing the rate of pension the income of a spouse should be taken into account. It reads:

29(2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall –

- (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
- (b) unless, for any special reason, in any particular case, the Director-General otherwise determines, be deemed to be half the total income of both.

Ante-nuptial agreement: a 'special reason'?

Mr Green and his wife had entered into an ante-nuptial agreement the day before their marriage in 1964. The agreement provided *inter alia* that there was to be no community of property between the parties, and that each would be liable for his or her own debts. It also gave Mrs Green exclusive rights in her property owned before, and that acquired after, the marriage. There was no obligation on Mrs Green to maintain her husband although there was such an obligation imposed on the applicant in relation to his wife.

It was argued by Mr Green that the existence of the agreement constituted a 'special reason' under s.29(2) as to why