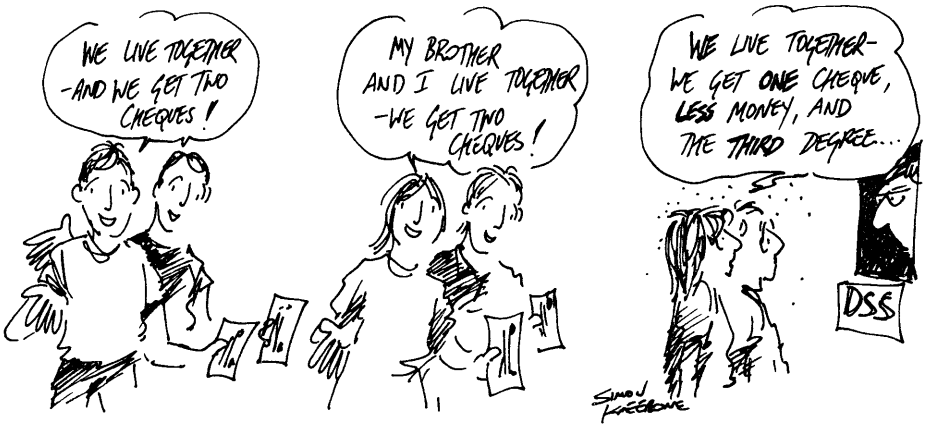
married are assessed on a joint basis and those who are not are assessed as individuals. We recognise that these are two extreme views. It may be that a more acceptable compromise can be formulated, but if it relies on "marriage type relationships" being "recognisable" it will continue to be fraught with difficulties.'

The AAT noted that the decision to recover the overpayment from Stuart had been made under s.140(2) - that is, by deductions from his current unemployment benefit. This section had recently been amended (from 1 November 1985) so that now s.140(2) provided that an overpayment must be deducted from a current pension or allowance unless the Secretary took action under s.146(1) to waive the debt. The AAT suggested that, under the new provisions, there was still a discretion in the Secretary not to recover any overpayments which might have been caused by the inefficiency of the DSS.



Assets test

SMITH and SECRETARY TO DSS (No.N85/282)

Decided: 6 December 1985 by J.D.Davies J, J.O.Ballard and A.P.Renouf.

Smith, who was 69 years of age, had held an age pension prior to the introduction of the assets test on 21 March 1985. On that date, the DSS cancelled Smith's pension because it had assessed the combined value of his assets and his wife's assets at $203 854. Smith asked the AAT to review the decision.

Of the total assets, Smith owned $24 000 and the remainder (including the principal home) belonged to his wife. Smith told the AAT that, if he no longer received an age pension, he would have to live off his small amount of capital, which would last only 3 years; and that he would then have to separate from his wife in order to requalify for age pension.

The assets test for married people

The AAT pointed out that, under s.6(3) of the *Social Security Act*, the property of a married person was taken as half the value of the property of that person and her or his spouse. Accordingly, when applying the assets tests in Smith's case, the DSS had to look at the property owned by Smith's wife.

Because there was a 'matrimonial home' (which was to be disregarded under s.6AA(1)(a)(ii)), only the first $50 000 of Smith's half share of the value of the assets could be disregarded (under s 6AE(c)); and this brought Smith within the assets test.

Discretion to disregard assets

The AAT said, finally, that there was no basis on which the discretion in s.6AD could be exercised so as to disregard the value of any other items of Smith's or his wife's property. Under this section, the Secretary can disregard the value of property if the pensioner cannot sell or realise the property or use it as security for borrowing money and if the Secretary is satisfied that the pensioner would suffer severe financial hardship through the application of the assets test. The AAT pointed out that Smith's wife owned several pieces of property which could be sold or which could be used as security for borrowing money. Accordingly, even if Smith were to suffer hardship through the application of the assets test, there was no basis for disregarding any of the property in question other than the matrimonial home.

JAMIESON and SECRETARY TO DSS (No.T85/31)

Decided: 10 December 1985 by R.C.Jennings, J.D.Horrigan and L.J.Cohn.

Jamieson had been granted a widow's pension in February 1985. In March 1985, when the assets test came into effect, the rate of that pension was reduced from $215.80 a fortnight to $34.80 a fortnight, because the DSS had valued Jamieson's assets (excluding her principle home) at $119 260. Jamieson asked the AAT to review that decision.

The discretion to disregard assets

Jamieson claimed that the DSS should have exercised the discretion in s.6AD of the *Social Security Act* to disregard some of her property in calculating the total value of her assets.

Section 6AD gives to the Secretary a discretion to disregard the value of any property if the property in question cannot be sold or realised and cannot be used as security for borrowing money and if the Secretary is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purpose of the assets test.

Jamieson said that one of her properties (valued at $45 000) was used by her as a 'respite care centre'. It was operating at a loss and she intended to set up an association to manage the centre, to which she planned to give or lease the property in question. She argued that, because of the use of this property and of her intention to transfer it to an association, she could not sell or realise the property nor could she use it as security, nor could she reasonably be expected to sell, realise or use the property as security.

The AAT agreed that the property in question was property which Jamieson could not reasonably be expected to sell, realise or use as security but, the AAT said, Jamieson could not successfully claim to be suffering severe financial hardship while she continued to own a number of properties (other than the respite care centre) which were yielding very little return. The AAT calculated the return from these other properties, which included a large block of land and a house at 2.96% of their value):

> '17. We do not believe that the recipient of such a small return from property with those values can successfully claim severe financial hardship whilst she continues to enjoy rights of ownership. Whatever her reasons for retaining them they are clearly not being used to anything approaching their reasonable economic advantage. No satisfactory explanation for failure to use them to such advantage was offered to the Tribunal.
>
> 18. In our opinion the assets test is designed to discourage such uneco-

nomic use. Social security benefits are not a substitute for income which can reasonably be derived from property which is available for such a purpose or which might be reasonably be sold.'

Even if the discretion in s.6AD were available and had been exercised in Jamieson's favour, the AAT said, the result would actually have disadvantaged Jamieson. This was because s.6AD(2) provided that a combined assets and income test was to be applied in the case of a pensioner, some of whose property was disregarded as under s.6AD.

Formal decision

The AAT affirmed the decision under review.

Handicapped child's allowance: late claim

SEWELL and SECRETARY TO DSS (No.W84/108)

Decided: 20 November 1985 by J.A.Kiosoglous, I.A.Wilkins and J.G.Billings.

Lily Sewell gave birth to the third of her 4 children, B, in April 1970. Shortly after her birth, B began to suffer severe asthma and it was necessary for Sewell to provide close care and supervision to B.

Between 1972 and 1979, Sewell and her children lived in a remote town in Western Australia where there was no DSS office. In 1977 she and her first husband separated and she applied for and was granted supporting parent's benefit in 1978. (Sewell later told the AAT that she had not known of this benefit until advised to apply for it by a State Housing Commission officer.)

In 1979, Sewell and her children moved to Perth, where she had regular contact with the DSS, 2 hospitals (one of them a children's hospital) and welfare agencies. None of the people with whom she consulted told her about handicapped child's allowance.

In 1980 Sewell married again but, because of health problems suffered by Sewell, B and her fourth child, the marriage suffered and she and her second husband separated. in 1983, when Sewell was staying a a woman's reffuge, another resident told her that she could be eligible for handicapped child's allowance for B.

When Sewell claimed that allowance, the DSS granted it on the basis that B was a 'handicapped child'. The DSS did not deny that Sewell would have been eligible for this allowance from November 1977, when eligibility was extended to 'handicapped children'. But the DSS refused to backdate payment of the allowance. Sewell asked the AAT to review that decision.

The legislation

Section 102(1) of the *Social Security Act*, in combination with s.105R, provides that a handicapped child's allowance is payable from the time when the claim is lodged; or from the time of eligibility if the claim is lodged within 6 months after the date of eligibility or if there are 'special circumstances'.

'Special circumstances'

Sewell claimed that there were 'special circumstances' to explain her delay in claiming the allowance. These consisted of her physical isolation between 1972 and 1979, her 'disastrous' financial situation between 1977 and 1983, the substantial costs involved in caring for B and the failure of various advisers to tell her about her eligibility for the allowance.

A social worker from the children's hospital which Sewell had visited regularly said that it was only in the last 2 or 3 years that asthmatic children had been regarded as fitting within the description of 'handicapped children'; but the social worker conceded that it had been an oversight on the part of the hospital not to tell Sewell of her eligibility in the past few years.

The AAT concluded that there were sufficient 'special circumstances' to justify backdating payment of the allowance by nearly 6 years (to November 1977):

> 'We arrive at this result on a fine balance, taking into account the applicant's state of awareness of the existence of the allowance, her degree of financial hardship, the physical hardship she suffered both personally and in her family circumstances, the geographical isolation she experienced . . . until 1978/79, and the lack of advice given to her in respect of B's problems despite frequent contact with hospitals, doctors and other medical and welfare personnel.' (Reasons, para.11)

The need for law reform

The AAT said that there had been a marked increase in the number of applications to the Tribunal for backdating of handicapped child's allowance. There was several reasons for this development: the wording of the legislation, poor publicity and inter-departmental communications, and a low take-up rate for the allowance.

There was also a particular problem with children whose handicap took some time to be recognised or accepted by parents, medical and departmental authorities.

The AAT said that, as time passed, the period for which backdating was possible also increased (the date of eligibility often being the date from which the allowance was first introduced in 1974 or was extended in 1977); and the possibility of larger lump sum arrears payments also increased.

The Tribunal said that the results of applications to the AAT in this area suggested that the length of the period for which backdating was sought was very influential. In 12 cases where the period in question was 3 years or less, all the applicants were successful (except for one where the AAT had decided that the child was not 'handicapped'). But in 33 cases involving a greater period, the success rate dropped away significantly, and only 8 applicants had been successful. The AAT indicated that, in its opinion, the 'all or nothing' framework of s.102(1) made it more difficult for applications in respect of relatively long periods to succeed.

Formal decision

The AAT set aside the decision under review and substituted a decision that there were 'special circumstances' to support payment of the allowance for the period from November 1977 until September 1983.

Income test: superannuation payment

LEWIS and SECRETARY TO DSS (No. S84/131)

Decided: 20 September 1985 by J. A. Kiosoglous, F. A. Pascoe and J. T. B. Lynn.

Geoffrey Lewis left his employment with the Commonwealth Public Service in January 1984 and was granted unemployment benefit from March 1984.

On 24 April 1984, Lewis received a superannuation payment of $2632 from the Commonwealth Superannuation Fund, of which $482 represented accumulated interest and the balance represented his contribution to the fund. The DSS decided that the full amount of this payment should be treated as 'income' of Lewis during the week of 24 April 1984 and that, accordingly, no unemployment benefit was payable to Lewis during that week. This decision was then varied so as to treat only the interest component as 'income'; but this still had the effect of eliminating Lewis'