

gainful employment or to carry on a profession, trade or business.

The evidence

Hastings, who was 62 years of age, was a qualified electrical engineer and health inspector. He had stopped working in 1980 because of his invalidity. He suffered from a number of physical disabilities which caused pain in his right ankle, back, right neck and shoulder, and left knee.

In 1985, Hastings commenced a course in 'labour studies' at a CAE in Adelaide. He experienced some difficulty using public transport, particularly towards the end of 1986, when he had aggravated his shoulder while attempting to park his car.

In 1987, Hastings had enrolled for an Arts degree at Flinders University, with the plan of transferring to Law studies at Adelaide University in 1988. He intended to use his legal qualifications, not for earning an income, but to allow him to undertake voluntary community work.

Hastings said that his disabilities effectively prevented him from travelling between his home and Flinders University by public transport; and he had, accordingly travelled by motor car.

The DSS conceded that Hastings was a 'handicapped person' to whom s.133RB applied; but argued that he was otherwise not eligible to receive a mobility allowance.

Transport for gainful employment or vocational training

The AAT noted the earlier decision in *Larkin* (1986) 30 SSR 377, where the AAT took account of the applicant's inability to use public transport generally - not only for work or training journeys.

However, the AAT decided not to follow this approach. It said that a mobility allowance was not paid for the use of public transport for social or other travel unconnected with gainful employment or vocational training:

'Therefore, whilst evidence as to difficulties experienced by a disabled applicant in using public transport for private or social outings is relevant in deciding whether the eligibility criteria are fulfilled, it is specifically relevant to consider difficulties in relation to public transport for gainful employment or vocational training. If the criteria are not fulfilled in relation to that

training or employment, then the applicant is not eligible for that allowance.'

(Reasons, para.27)

In this case, the evidence showed that Healey did not intend to use his tertiary qualifications for 'gainful employment'. That is, he did not intend to engage in work which would produce an income. The AAT rejected the argument, made on behalf of Healey, that 'gainful employment' meant employment other than paid employment which was of use to society:

'[Mobility allowance] is not a general disability allowance but is specifically an allowance paid with a focus on paid employment or training for paid employment.'

(Reasons, para.33)

It followed that, whatever difficulties Healey experience in using public transport, he was not eligible for mobility allowance because he had not been engaged in 'gainful employment' or training for 'gainful employment'.

Formal decision

The AAT affirmed the decision under review.

Supporting parent's benefit

CRAIG and SECRETARY TO DSS
(No. N87/403)

Decided: 4 December 1987 by
R.A. Hayes.

Sushila Craig asked the AAT to review a DSS decision to reject her claim for a supporting parent's benefit.

The legislation

The first question for the AAT was whether Craig, a married woman, was an 'unmarried person' as defined in s.83AAA(1) of the *Social Security Act*, that is, whether she was -

'a married person who is living separately and apart from his or her spouse'.

The second question was whether she had the custody, care and control of a child, so as to qualify for supporting parent's benefit under ss.83AAD and 6(1) of the Act.

The evidence

Craig was born in India in 1935. She had married in 1961 and come to Australia with her children in 1973, following her husband. According to Craig, their relationship had deteriorated following their move to Australia.

In 1980, they purchased a house with separate accommodation for Craig's husband. At this time, he was paying Craig \$250 a week to run the household and pay all bills; she bought and cooked his food; but he was re-

sponsible for all other aspects of his domestic care.

In October 1986 Craig's husband lost his job and told Craig that he could no longer give her any money. Craig then stopped cooking and shopping for her husband; and she lodged her claim for supporting parent's benefit.

Since then, Craig's husband had continued living in the separate accommodation in their jointly-owned house. Apart from a period of two months when he was away from Australia, he had paid all household bills - electricity, water and council rates - but had paid no money towards Craig's support.

Craig's youngest child, a daughter born in January 1972, lived with her. Her husband made no contribution towards the daughter's support and Craig was responsible for her day-to-day welfare.

Craig told the AAT that she regarded herself as separated from her husband. On the other hand, her husband did not regard himself as being separated from his wife, describing his separate accommodation as a practical arrangement necessitated by his shift-work.

'Living separately and apart'

The AAT noted that Craig and her husband had little day-to-day contact. Although they lived under the same roof, there were 'in effect two sepa-

rate residences'. There was no ongoing emotional commitment or support:

'The real "tie" between the applicant and Mr Craig is the latter's refusal to acknowledge that the marriage has broken down. Until a court says otherwise, Mr Craig will regard himself as married. But this belief cannot bind the applicant. She regards herself as separated from her husband. . .

Despite the evidence from both Mr Craig and the applicant that they are prepared to maintain the status quo, and not seek a dissolution of their marriage, I am of the opinion, when taking into account all the evidence presented to me, that the applicant is living separately and apart from her husband.'

(Reasons, p.12)

'Custody, care and control'

The AAT concluded that Craig had the custody, care and control of her daughter, because she made 'all relevant decisions concerning her daughter's welfare [and was] also responsible for her maintenance'.

Accordingly, Craig qualified for supporting parent's benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Craig was entitled to supporting parent's benefit from 24 November 1986.

LACE and SECRETARY TO DSS
(No. Q86/272)

Decided: 8 September 1987 by
J.B.K. Williams.

Audrey Lace was granted a supporting parent's benefit in 1982, following her separation from her second husband. This benefit continued until January 1985, when her youngest child turned 16. She was then granted unemployment benefit.

In April 1986, Lace claimed a Class B widow's pension. The DSS rejected her claim on the basis that she was living with a man as his wife. Lace asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.60(1)(b) of the *Social Security Act* provided that a widow who did not have the custody, care and control of a child but who was not less than 50 years of age, was qualified to receive a widow's pension.

Section 59(1) defined 'widow' to include 'a deserted wife' and to exclude 'a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him'.

'Living with a man as his wife?'

It was agreed that, because of her separation from her second husband, Lace was a 'deserted wife'. However, the DSS argued that Lace could not be a 'widow' because she was living with a man as his wife.

Lace had married her first husband, M, in 1956. They had 4 children; but separated in 1975 and were divorced in 1981. They had resumed living in the same house in March 1985.

By agreement between them, M (who was also on unemployment benefit) paid the rent of the house, Lace purchased all food, and other expenses were shared. Subsequently, the arrangement was varied so that Lace paid a substantial part of the rent. Lace also took responsibility for the cooking and general housekeeping.

Lace and M occasionally attended family gatherings together; but they had no other social life in common; nor did they have a sexual relation-

ship. They claimed that they did not hold themselves as married but conceded that they were known to neighbours and acquaintances as Mr and Mrs M.

Lace told the AAT that she intended to remain living with M because she could not afford independent accommodation. M said that the arrangement was simply to help each of them financially; and that he could not afford to stay in the rented house without Lace's financial contribution.

On the basis of this evidence, the AAT decided that Lace was living with M as his wife:

'... I find it difficult to escape the conclusion that the decision of the parties to live again under the same roof following some 19 years of earlier cohabitation, which was productive of four children and subsequently six grandchildren, is indicative of some commitment between them beyond that of two people - comparative strangers - who decided to live together under the same roof for the sole reason that it may have been productive of some financial benefit to them.'

(Reasons, p.9)

Although Lace and M were largely living separate lives, it was - 'not uncommon in marriage relationships for parties to drift away from each other physically and emotionally and yet retain common bonds.'

(Reasons, p.11)

Formal decision

The AAT affirmed the decision under review.

PETSCHENYI and SECRETARY TO DSS

(No. Q86/292)

Decided: 11 November 1987 by
J.B.K. Williams.

The AAT affirmed a DSS decision to recover \$6958 from Alexandra Petschenyi, representing an overpayment of supporting parent's benefit between January 1984 and February 1985.

Petschenyi had been granted supporting parent's benefit from December 1983, after claiming that she had separated from her husband. Her benefit was cancelled in February 1985, when she advised the DSS that she and her husband had reconciled.

In December 1985, Petschenyi made two statements that she and her husband had not been separated but had lived together throughout 1984. The decision that she had been overpaid was based on those statements, which Petschenyi later said were not true.

'Estranged'

The question for the AAT was whether Petschenyi had been 'estranged' from her husband between January 1984 and February 1985. If she had been, then she would have been treated as an 'unmarried person' under s.83AAA of the *Social Security Act* and so qualified for supporting parent's benefit under s.83AAC.

The term 'estranged', the AAT said

'must mean more than that the parties to a marriage are merely having differences: it must mean that the parties to a marriage have reached the point where the marriage has broken down.'

The AAT decided that Petschenyi's statements made in December 1985 should be treated as accurate. It found that Petschenyi had lived in her parent's home throughout most of 1984; that her husband had lived with his parents and regularly visited Petschenyi; that Petschenyi had regularly assisted her husband in his occupation as panel-beater and spray-painter, which he carried on part time from the house of his wife's parents; that they had, in mid-1984, entered into a contract in their joint names for the purchase of a motor vehicle and a contract for the construction of a new house; and that they had moved into the new house on its completion in December 1984.

These were, the AAT said, 'strong indications that the marriage had not been abandoned'.

Carer's pension: 'guardian'**TECHNAU and SECRETARY TO DSS**
(No. V87/182)

Decided: 13 November 1987 by
I.R. Thompson.

Gerda Technau asked the AAT to review a DSS decision to reject her claim for a carer's pension.

The legislation

At the time of the decision under review, s.33(1) of the *Social Security Act* provided that a person, who personally provided constant care and attention for a severely handicapped invalid

pensioner 'relative', was qualified to receive a carer's pension.

According to s.33(3), the term 'relative', in relation to a person, referred to blood and marriage relations of that person or to -

'(c) a person who is or has been a guardian of the first-mentioned person or a person to whom the first-mentioned person is or has been guardian ...'

The evidence

Technau, a 37-year-old woman, had set up a household to provide care and

support for people with health or social problems.

She had provided accommodation and care for a 30-year-old woman, K, for 2 years. K had suffered severe brain damage in 1979 which had left her with paralysis of her left side and impairment of her intellectual capacity.

K, who was an an invalid pensioner, had shown considerable improvement in her intellectual capacity while living with Technau; although her condition was now