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 relationship. 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

similar to that of a child with mild mental retardation and, according to her doctor, she was not able to make decisions for herself.

It appeared that, over the 2 years, Technau had provided close supervision and control of K's daily activities. She had done this in a way which actively involved K in decisions about her welfare and activities.

From 8 July 1986 to 14 July 1987, K was certified as an infirm person under the *Public Trustee Act* 1958 (Vic.); but no order was made for any person to have control over K's personal affairs.

On 28 August 1987, an order was made under the *Guardianship and Administration Board Act* 1986 (Vic.) for the Public Trustee to be appointed as 'plenary administrator' of K's estate (s.46) and for Technau to be appointed 'limited guardian' of K 'for the sole purpose of ensuring that K has accommodation appropriate to her needs' (s.22).

Following the making of this order, Technau had again applied for and been granted a carer's pension.

'A guardian'?

It was not disputed that K was a severely handicapped person; and that Technau was providing constant care and attention for her. The central issue was whether Technau was K's 'guardian' before 28 August 1987, so that she could be treated as a 'relative' of K for the purposes of s.33(1).

The AAT said that the term 'guardian' should be given its normal legal meaning, as the Tribunal had decided in *Wain* (1987) 39 *SSR* 495.

For one person to be the guardian of another, the latter must be incapable of managing her or his own affairs. In the case of an infant, this incapacity was imposed by law. In the case of a person with a mental defect, there was no legal incapacity unless the person had been found (usually by a court) to be incapable of managing her or his own affairs.

For a person to a 'guardian' in the ordinary legal sense, that person -

> 'must . . . be recognised by law as having both the powers and the duties of a guardian by reason either of parenthood or appointment.'

(Reasons, para.26)

The AAT said that administrative considerations supported this view of the term 'guardian' - that it referred to a formal legal relationship:

> '. . . claims for carer's pension have to be dealt with in a prompt and expeditious manner by many different officers in the DSS throughout Australia, initially by junior and relatively inexperienced officers. Few of those making decisions in respect of those claims at any level in the Department are legally qualified. It is, I think, to be assumed that Parliament intended the provisions of the Act to be readily applicable by those officers. Where, therefore, there are several possible meanings which a word or phrase in the Act may bear, the meaning which renders the provisions of the Act readily applicable by such officers should, I consider, all other considerations being of equal weight, be preferred.'

(Reasons, para.24)

In the present case, the AAT said, there was no doubt that K had been incapable of managing her own affairs before 28 August 1987; and that Technau managed most of her affairs. Technau had undoubtedly 'acted with great compassion and in a most responsible manner' to K's considerable benefit. But, prior to 28 August 1987, she did not have the legal status of guardian; and was not K's 'relative' within s.33(1): Reasons, para.27.

Formal decision

The AAT affirmed the decision under review.

Overpayment: waiver

GOODWIN and SECRETARY TO DSS (No. A87/88)

Decided: 3 December 1987 by J.O. Ballard.

Christine Goodwin asked the AAT to review a DSS decision to recover from her an overpayment of supporting parent's benefit, amounting to $1644.

Goodwin admitted that she had been overpaid but asked the AAT to exercise the power to waive recovery given by s.186(1) of the *Social Security Act* (as renumbered from 1 July 1987).

The legislation

Section 186(1) authorises the Secretary to -

> (a) write off a debt under the Act;
> (b) waive or defer the right of the Commonwealth to recover the whole or part of a debt under the Act; or
> (c) allow a debt under the Act to be paid by installments.

Waiver of recovery

Goodwin had been overpaid when the DSS paid her supporting parent's benefit without regard to her income from casual employment. Goodwin claimed that she had advised the DSS by telephone of her employment but the DSS had no record of the notification; and she had not referred to this employment in an entitlement review form lodged by her at the time.

G had now re-married: her husband was paying maintenance to his former wife for the support of 3 children by that marriage; Goodwin had 2 children and was expecting a third child; and the household income came from her husband's job as a bus driver.

In August 1987, a DSS officer wrote to Goodwin, stating that 'the debt is written-off subject to recovery within the next 6 years. This period, however, can be reviewed at any time.'

The AAT pointed out that the Secretary's power, under s.186(1)(a), to write off a debt, was not conditional:

> '[T]here is no power under that paragraph to write off subject to recovery within the next 6 years to be reviewed at any time, apparently at the respondent's whim. Thus the letter purporting to write off under paragraph 186(1)(a) of the Act is itself in error.'

(Reasons, para.11)

However, the AAT said, this was a proper case in which to waive recovery under s.186(1)(b). Goodwin's financial circumstances were 'appalling' and there was no prospect of recovering the overpayment. As there was no evidence of fraud on her part, those considerations were decisive.

Formal decision

The AAT set aside the decision under review and waived recovery of the whole of the overpayment.

Rent assistance: rent in advance?

WHELAN and SECRETARY TO DSS (No. V86/698)

Decided: 30 October 1987 by I.R. Thompson, L.J. Cohn and G.F. Brewer.

Mr and Mrs Whelan had lived in a flat owned by Vasey Housing Ltd (Vasey) since 1972. In 1975, they were granted an age pension and a wife's pension. They subsequently applied for rent assistance on the basis that their weekly rent consisted of $25 plus some part of $4250, the sum which they had paid to Vasey before they moved into the flat.

The DSS refused to treat their rent as more than $26 a week; and they asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.30A(1)(b) of the *Social Security Act* provided that a person was qualified to receive rent assistance if, *inter alia*, 'the person pays, or is