

## Supporting parent's benefit: separation under same roof

WEATHERALL and SECRETARY TO DSS

(No. 4983)

Decided: 7 February 1989 by

R.K. Todd.

The AAT affirmed a DSS decision that Wendy Weatherall was not eligible for supporting parent's benefit because s.3(8) of the *Social Security Act* obliged the DSS to treat her as a married person.

### The facts

Weatherall, aged 24, suffered from Charcot-Marie-Tooth disease, the debilitating effects of which prevented her caring adequately for her 3 children. At the time of the hearing the children were aged 5 and 3 years, and 8 weeks.

Weatherall's former husband was the father of the two eldest children. He and the applicant had been in a *de facto* relationship until mid-1987, when he moved out of the house. He moved back because of Weatherall's health problems and to care for the children. It was not contested by DSS that the applicant was living separately and apart from her former husband.

After Weatherall's benefit was cancelled, domestic accounts and food were paid for by her former husband.

### The legislation

Section 3(1) of the *Social Security Act* defines 'married person' as excluding a person who the Secretary decides, 'for any special reason', should not be treated as a married person. This definition is to operate 'unless the contrary intention appears'.

Section 3(8) provides that 'a person who would, apart from this sub-section, be an unmarried person', and was formerly a married person, 'shall be treated as a married person' where -

'(b) the person is living in his or her former matrimonial home; and

(c) the person's former spouse is also living in the same home'

after 26 weeks (or 52 weeks where property proceedings have been taken).

Section 54 provided that, to qualify for supporting parent's benefit, the person must be a 'supporting parent'. Section 53(1) provided that, 'unless the

contrary intention appears', for the purposes of the Part of the Act dealing with supporting parent's benefit

"supporting parent" means an unmarried person . . .

"unmarried person" means - . . .

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

### The arguments

It was argued by Weatherall's representative that s.3(8) should be read as subject to the discretion in s.3(1)(b), which had been intended to prevent hardship in unusual cases. The *Social Security Act* is beneficial legislation and should be construed beneficially.

Relying on s.15AB of the *Acts Interpretation Act*, Weatherall's representative also referred to the legislative history of s.3(8). In his second reading speech, the Minister described the purpose of this sub-section as being to reduce the 'risk of wrong payments and welfare fraud'. The Minister also stated the Government's 'deeply held commitment to disadvantaged people' and 'to protect and improve their living standards we must ensure that social security payments are well targeted'. It was argued that the purpose of s.3(8), to reduce welfare fraud while still ensuring that welfare payments were appropriately targeted, would be served by reading the sub-section as subject to the discretion in s.3(1)(b).

It was further argued that s.3(8) is a general provision because it deals with a whole category of recipients and should be read subject to the specific provisions of s.3(1)(b). Further, it was said, whilst s.3(8) does not contain the phrase 'unless the contrary intention appears', all definitions in legislation are to be read as subject to that qualification.

The Secretary must then determine under s.3(1)(b) whether there 'is any special reason' not to treat the applicant as a 'married person'. In exercising the discretion, it was argued, considerations similar to those in determining 'special circumstances' should be taken into account. There were special reasons in this case, and Weatherall was the kind of person the Act was designed to assist.

It was also argued that the use of the word 'means' in the s.53(1) definitions indicated that those definitions were exhaustive for that part of the Act.

### The decision

The Tribunal accepted the DSS submission that it should follow the fundamental principle of statutory interpretation that an Act of Parliament

should be read as a whole. The definition of 'married person' contained in s.3(1) must be read subject to s.3(8). Section 3(1) is a general provision because it is a definition section for the whole Act.

The definition of 'married person' in s.3(1) applies throughout the Act unless there is some contrary expression of intention in another provision. Section 3(8) contains such an intention . . . 'where: (a) a person who would, apart from this subsection, be an unmarried person was formerly an unmarried person . . .'. The AAT said despite what is said elsewhere, this provision will treat a person as married where certain conditions are satisfied.

Section 3(1) being subject to s.3(8), said the Tribunal, it is then necessary to determine whether, once the conditions in s.3(8) are satisfied, the person must be treated as a married person. The use of the word 'shall' indicates there is no discretion.

In this case the conditions in s.3(8) had been satisfied. Weatherall was formerly a married person; she still lived in the house where she and her former *de facto* spouse lived, and the former spouse lived in that house with her. She must be treated as a married person and since she resided there with her former spouse for over 26 weeks and there were no pending property proceedings between them, she was no longer entitled to supporting parent's benefit.

In dismissing the argument based on the legislative history, the AAT said the definition of 'married person' in s.3(1) is prefaced with the words 'unless the contrary intention appears'. The contrary intention does appear in s.3(8) which prevails over s.3(1). It was therefore not necessary to determine if there were any 'special reasons'.

The final argument raised on behalf of Weatherall (that the definitions in s.53(1) displaced s.3(8)) was described by the AAT as 'very telling'. However the Tribunal rejected this argument, describing it as 'tortuous', and one which 'ignores the fact that the meaning of the provisions in issue is, in my opinion, clear': Reasons, para. 26.

### 'Targeting' social security

The AAT concluded by observing that one purpose of s.3(8) was to 'target' social security payments. The sub-section left no discretion to deal with exceptional cases:

'In that sense they are "targeted", but one target that they have certainly found is Wendy Weatherall. She is a handicapped person for whom life is a terrible struggle.

Her former husband is a classic battler of humble bearing and minimal means. Out of a sense of fundamental decency and responsibility, and with no sense of restoring a marriage relationship, he came back to the house to help the applicant with the physical burdens of caring for the children and of carrying out the basic tasks around the house that she cannot manage. The consequences for the children and for the applicant of this decision, one that I have concluded is inescapable, are likely to be serious.'

[B.W.]

## Handicapped child's allowance: late claim

**FLETT and SECRETARY TO DSS (No. 4933)**

**Decided:** 21 February 1989

by J.A. Kiosoglous.

The AAT *affirmed* a DSS decision not to backdate payment of handicapped child's allowance granted to Susan Flett.

Flett's child was born in February 1983. In 1985, the child was diagnosed as an asthmatic. Flett said that she had found it necessary to give the child constant care and attention in their home from January 1986. However, after examining the medical evidence, the AAT concluded that the child's disability had not been sufficiently severe to warrant payment of handicapped child's allowance from January 1986.

Flett lodged her claim for handicapped child's allowance on 18 February 1987 and the DSS granted this claim from the next allowance pay-day, 15 March 1987, in accordance with s.102(1)(b) of the *Social Security Act*, as it then stood.

In this appeal, Flett sought payment of the allowance from January 1986 and, although the AAT said that she had not been qualified for the allowance from that earlier date, the AAT considered whether there might be 'special circumstances' which would authorise backdating of the allowance to some date prior to February 1987. (At the time, s.102(1)(a) and s.105R permitted backdating of handicapped child's allowance where 'special circumstances' could be shown for the delay in lodging the claim.)

Flett told the Tribunal that she had first learned of the existence of handicapped child's allowance in March 1986. In May 1986 she had asked her child's treating specialist whether she would qualify for the allowance. That specialist had told her she would not be eligible. Flett had accepted that advice until February 1987, when a financial counsellor had told her that she might qualify.

The AAT said that Flett's ignorance of the existence of the allowance was not a 'special circumstance': the AAT referred to the earlier decision *Scrivener* (1986) 31 SSR 386.

Nor was the misleading advice given to Flett by her child's treating specialist a 'special circumstance':

'Doctor Godfrey was not a professional welfare adviser nor was he an employee of the respondent. He offered his opinion as a medical specialist that Matthew's medical condition could not qualify him for an allowance. This does not constitute "special circumstances".'

(Reasons, para. 22)

In support of this conclusion, the AAT referred to the Tribunal's decision in *Corbett* (No. 2) (1986) SSR 387.

Flett also claimed that her family circumstances had made it difficult for her to learn about the existence of handicapped child's allowance. She was responsible for caring for two children and her invalid parents. The AAT said that these were not sufficient to constitute 'special circumstances'.

[P.H.]

**HALL and SECRETARY TO DSS (No. 4745)**

**Decided:** 9 December 1988

by J.O. Ballard.

Hall appealed against a DSS decision to refuse to backdate a handicapped child's allowance for her son C.

### The legislation

The allowance was granted in January 1987 and the AAT applied the legislation in force prior to 16 December 1987, which allowed backdating of such a claim if there were 'special circumstances' (formerly s.88 of the *Social Security Act*).

### The evidence

C was born in April 1978 and was first seen by a Dr Chan in November 1981. He had said that C suffered from

frequent bed wetting, psychological problems, tonsillitis, bilateral flat feet and failure to gain weight.

Hall had applied for a handicapped child's allowance for another child, R, in 1982. She told the AAT that she had also tried to apply for an allowance for C at that time, but that a DSS officer had told her C would be ineligible because he was not in a wheelchair nor unable to read or write. Hall's present husband said that he had seen the officer place the application for C in the bin.

Since then, Hall had moved around from town to town, in Queensland and Western Australia, trying to avoid her abusive first husband. Hall said that she had been told by a doctor and private welfare organisations that C was not eligible for a handicapped child's allowance.

Hall and her husband were both invalid pensioners and Hall was illiterate.

Hall's husband identified the DSS officer who had dealt with their claim as Mrs D. She gave evidence to the AAT about the procedures for dealing with claims.

Mrs D said that in no circumstances would a counter officer not accept a claim. She was positive she had not torn up any claim forms, but did not recognise Mr and Mrs Hall.

### 'Special circumstances'?

The AAT decided not to accept the evidence of Mr Hall. It observed that he had had many dealings with the DSS, including an overpayment matter about which he was still angry. The AAT said:

'With Mr Hall's history of dealings with the Department I cannot believe that he would have allowed the occurrences he now describes in 1982 [sic] to stand unchallenged to 1987.'

The Tribunal also found that any incorrect advice as to C's eligibility for handicapped child's allowance did not amount to special circumstances. It noted that Hall's solicitor had declined to argue that social isolation was relevant in this case to establishing 'special circumstances'.

### Formal decision

The AAT affirmed the decision under review.

[J.M.]