

'[I]t is possible for a person to have more than one home. Nothing in s.39(1) of the Act seems to preclude the recipient of a carer's pension from having more than one home, so long as that recipient provides care for another person in a home which is both the home of the recipient and of the person for whom care is provided. In my view, the Tribunal erred in law in failing to determine whether the flat . . . , by itself, was a home of the applicant and of [her daughter].'

(Reasons, pp.8-9)

Formal decision

The Federal Court allowed the appeal and remitted the matter to the AAT to determine whether Kinsey's daughter's flat was a home of Kinsey and her daughter for the purposes of s.39(1) of the *Social Security Act*.

[P.H.]



Separation under one roof: deemed 'married'

WEATHERALL v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 20 July 1990 by Neaves J.

This was an appeal under s.44 of the *Social Security Act*, from the AAT decision in *Weatherall* (1989) 48 SSR 620.

The AAT had affirmed a DSS decision that Weatherall was not eligible for supporting parent's benefit, because of the operation of s.3(8) of the *Social Security Act*.

The legislation

Section 3(8) provided 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 a specified period.

Section 54 of the Act provided that, to qualify for supporting parent's benefit, a person must be a 'supporting parent'.

According to s.53(1), the term 'supporting parent' meant, 'unless the contrary intention appears . . . an unmarried person'.

The term 'unmarried person' was defined in s.53(1) so as to include 'a married person who is living separately and apart from his or her spouse'.

The facts

Weatherall, who was 24 years of age, suffered from a disease which prevented her from caring for 3 children. Her former *de facto* husband, who was the father of her 2 eldest children, had separated from Weatherall but, when she had developed her serious disease, he had moved back into the house which they had formerly occupied together in order to look after the children.

Since Weatherall's former *de facto* husband had moved back into the house, they had continued to live quite separate lives.

The s.31(1)(b) discretion

The AAT had decided that the discretion, contained in s.3(1)(b) of the *Social Security Act* to treat a 'married person' as not married 'for any special reason' could not be used to escape the effect of s.3(8). The Federal Court agreed with this aspect of the AAT's decision: the Court pointed out that s.3(8) was to be applied to a person who would, apart from that subsection, be an 'unmarried person'. Accordingly, the fact that the discretion in s.3(1)(b) might be exercised in favour of a person, so as to treat that person as unmarried, would only provide the foundation for the operation of s.3(8).

Not ineligible for supporting parent's benefit

However, the Federal Court concluded that the application of s.3(8) to Weatherall in the present case did not have the effect of making her ineligible for supporting parent's benefit; and that the AAT had made an error of law in coming to the conclusion that s.3(8) had made her ineligible.

The Federal Court pointed out that, under s.53(1), a 'supporting parent' was an 'unmarried person' with a qualifying child. The term 'unmarried person' was also defined in s.53(1) as including 'a married person who is living separately and apart from his or her spouse':

- 'It did not follow that a person who was required by the operation of s.3(8) to be treated as a "married person" fell outside the purview of the expression "unmarried person" in s.53(1). Indeed, the contrary was the position. Certain married persons were expressly included within that expression.'

(Reasons, p.17)

The Federal Court said that, if s.3(8) were to be effective to exclude a person living under the same roof as her former spouse from eligibility for supporting parent's benefit, it would need to be dif-

ferently drafted. It could, for example, have deemed such a person not to be living separately and apart from her or his spouse or not to be an 'unmarried person'. But s.3(8) was not drafted in those terms:

- '[T]herefore, the sub-section could not operate to exclude the person concerned from entitlement to a supporting parent's benefit under Part VI of the Act.'

(Reasons, p.18)

Formal decision

The Federal Court set aside the decision of the AAT and decided that, during the period from December 1987 to November 1988, Weatherall was qualified to receive supporting parent's benefit.

[P.H.]