Maintenance income test

YOUNG and SECRETARY TO DSS (No. 6663)

Decided: 12 February 1991 by H.E. Hallowes.

Thelma Young was in receipt of an age pension and was, for the purposes of the *Social Security Act*, an unmarried person with no dependent children. The DSS had reduced her pension when she notified them she was receiving maintenance from her husband, using the maintenance income test provisions, rather than the ordinary income test provisions. The money was paid by Young's husband out of his superannuation payments.

Young appealed against this decision to the AAT.

The legislation

Section 33(12) of the *Social Security Act* provides that the rate of pension is reduced by 50% of the sum of the amount by which a person's annual income exceeds $40 per week and the amount per annum by which her annual rate of maintenance income exceeds the annual maintenance free area of $15 per week.

'Maintenance income' is defined in s.3(1) of the Act to mean, amongst other things, an

> 'amount of a payment, or the value of a benefit received by the person . . . from the person's spouse or former spouse for the maintenance of the person'.

Section 3(1) further provides that a payment or benefit received from a person includes a payment or benefit receieved —

> '(i) directly or indirectly from the person;
>
> (ii) out of any assets of, under the control of, or held for the benefit of, the person; and
>
> (iii) from the person under or as a result of a court order, a court registered or approved maintenance agreement or otherwise;'

Maintenance Income?

Counsel for Young argued that the money she received was not 'maintenance income' as the money was paid from Mr Young's superannuation entitlement and was therefore in the nature of a property settlement. She further argued that the definition of maintenance income in its entirity only made sense if it referred to child maintenance and the maintenance of a person with dependent children.

The AAT rejected both these arguments. It said that, whilst superannuation may be treated as property rather than maintenance under the *Family Law Act*, the *Social Security Act* contained its own definition of maintenance income which had to be applied. The fact that Mr Young used his superannuation payments as the source of payments to Mrs Young did not prevent these payments being made for Mrs Young's maintenance.

Maintenance income could not be confined to payments for children or to those with children, the AAT said, as the definition applied to age pensioners as well as sole parent pensioners. The AAT said that it understood the frustation Young might feel at the application of the Act to her and stated:

> 'Men or women receiving maintenance payments have the rate of their pension calculated under more stringent provisions that those who receive money from investments or as a result of their own endeavours. This appears to be an anomaly in welfare legislation . . .'

(Reasons, para. 16)

Formal decision

The decision under review was affirmed.

[J.M.]

Maintenance income test: SSAT jurisdiction

HADDON and SECRETARY to DSS (No 6759)

Decided: 21 March 1991 by R.A. Balmford.

Fiona Haddon asked the AAT to review a decision of the SSAT affirming a DSS decision that payments of maintenance received by her were not 'saved' by the savings provisions introduced at the time of the introduction of the maintenance income test in 1988.

The legislation

The maintenance income test was introduced by the *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act* 1988, which came into force from 17 June 1988.

That Act imposed a separate income test for maintenance income and introduced a series of definitions into the *Social Security Act* of maintenance income, in-kind maintenance income and in-kind housing maintenance income.

Section 21 of the amending Act was a transitional provision which applied to people who, at the time of the introduction of the new income test, were receiving maintenance income. It operated to save the amount of the pension they were receiving in the 'final pre-amendment period', i.e., the fortnight ending on the day before the amending Act came into effect.

The facts

Haddon was granted supporting parent's benefit in March 1987. She had a maintenance consent agreement with her ex-husband, under which he was to pay the rent on her property directly to the estate agents.

After Haddon's husband defaulted on that agreement, a new order was made in March 1988, and he was required to pay $50 per week for each of their 2 children with the intention that it be used for rent. A further order made in May 1988 was similar, but made no mention of rent.

In May 1988, the Child Support Agency took over enforcement and since that time, payments had been regularly made.

On her sole parent review forms, Haddon had not indicated that she received any maintenance until the form lodged on 4 August 1988. On earlier forms, including those lodged 10 February 1988 and 1 May 1988, she had answered 'no' to the question asking whether she received any maintenance for herself or her children.

The issues

The AAT set out 2 issues: first, whether Haddon was receiving a qualifying pension and had maintenance income in the final pre-amendment period so that s.21 (the savings provision) applied to her; and, secondly, if she had been receiving a qualifying pension and maintenance income in the final pre-amendment period, had she notified the DSS of this so that s.21 could be applied?

While there was no dispute that she was receiving a 'qualifying pension' in that period, the question of whether she 'had' maintenance income was more complex. The AAT pointed out that the statutory language used, ('had' maintenance income rather than 'received' maintenance income) was clearly intended to extend the scope of maintenance to in-kind maintenance (in this case, to the provision of accommodation, or payments to a third party) in addition to any direct payments made to the person.