Cohabitation

MILLS AND LYLE and SECRETARY TO DSS

(No. 7134)

Decided: 8 July 1991 by T.E. Barnett.

In July 1990, the DSS decided that the invalid pensions being paid to Leah Mills and David Lyle at the single rate to each of Leah Mills and David Lyle should be paid at the married rate because they were living in a marriage-like relationship.

On review, the SSAT affirmed that decision. Mills and Lyle asked the AAT to review the decision.

In October 1989, Lyle had offered temporary accommodation to Mills, who suffered from a serious spinal disability. They (and Mills' son) had continued to share accommodation since then.

In early 1990, they moved together from Newcastle to Perth, at the request of Lyle's daughter, who lived there. In Perth they signed leases as joint tenants and insured their personal effects under a joint household insurance policy; they kept their funds in a joint savings account (which was closed as soon as they were advised that the respondent saw this as an indication of a *de facto* marriage); and they shared the cost of running the household.

Mills continued to suffer from a serious spinal disability and, according to medical evidence, could not care for herself; and Lyle suffered from severe arthritis.

Each of them continued to provide care and support for the other; neither regarded their relationship as like a marriage and there was no sexual or romantic relationship.

The AAT observed that Mills' and Lyle's joint leasehold and insurance policy were not strong indications of a marriage-like relationship because there were 'sound economic reasons' for these arrangements. The sharing of household expenses was what would be expected of any 2 independent persons living in the same house and receiving identical incomes.

The relationship between Mills and Lyle had commenced, the AAT said, as a way of caring for a disabled person and 'care and support for the disabled has remained the outstanding characteristic of the relationship': Reasons, p. 11. The relationship was —

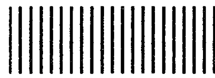
> 'bonded by the mutual respect, trust and care which has grown up between the two applicants as they have helped each other to overcome their respective disabilities. The fact that during this process they have developed a strong friendship is not sufficient to satisfy the tribunal that this is a marriage-like relationship.'

(Reasons, pp. 11-12)

Formal decision

The AAT set aside the decision under review and substituted a decision that Mills and Lyle were not living in a de facto or marriage-like relationship within the meaning of the *Social Security Act*.

[P.H.]



SECRETARY TO DSS and MORRIS

(No. A90/97)

Decided: 10 May 1991 by B.M. Forrest.

The DSS applied for review of a decision made by an SSAT to set aside a DSS decision to raise and recover an overpayment of supporting parent's benefit amounting to $49 357 paid from 27 October 1977 to 5 March 1987. The DSS claimed Morris was not entitled to the benefit on the grounds that she was the *de facto* spouse of C. and was living with him as his spouse on a *bona fide* domestic basis.

The facts

Morris had 2 children from her marriage which was dissolved in February 1977. She was granted a supporting parent's benefit from 27 May 1976. On 13 July 1977 she had a daughter, M., to C.

In September 1977 Morris and the 3 children moved to Coolac at C's invitation. Morris said that in return for cleaning she received free accommodation for herself and the children. The house had 4 bedrooms and Morris said she shared a room with M. She contributed about one-third towards the cost of electricity, paid for all her own and the children's food. She said she had no joint bank accounts or shop trading accounts with C. and had her own social life. She denied having had sexual intercourse with C. since moving to the house in 1977.

In May 1986 a DSS officer visited the house and shortly thereafter Morris moved into a caravan parked in the grounds of the residence. About 6 months later she moved back into the house. Following investigation of her domestic circumstances the Department cancelled her benefit from 5 March 1987.

The cases

The AAT said that, in determining whether Morris was living with C. on a *bona fide* domestic basis, it needed to take into account 'all facets of the interpersonal relationship' (*Lambe* (1981) 1 *SSR* 5). It followed *Stoilkovic* (1986) 29 *SSR* 363 which set out all the elements to be taken into account. They are: dwelling under the same roof; permanence; exclusiveness; sexual intercourse; mutual society and protection; relationships within that household and whether those relationships show the indicia of a family unit; the way in which the relationship is presented by the parties to the outside world; financial support and the nurture and support of the children of the relationship.

The decision

The AAT found objective evidence of a marriage-like relationship. Morris and C. shared accommodation on a permanent basis, they both contributed to the support of their daughter and both were involved in parenting even if this was only to argue about M's welfare. There was evidence of sharing of resources (a car) and household expenses (electricity), and in the community they were regarded as not any different from any other married couple.

The AAT found it to be of no significance that Morris did not use C's surname:

> 'In an age when it is not uncommon for a woman to retain her maiden name although married, I think it may be said to be even less significant in the circumstances of the respondent having been previously married with children of that marriage'.

(Reasons, p.10)

There was a subjective belief on the part of Morris that her relationship was marriage-like. Morris had made a number of false statements in entitlement review forms which, although breaches of the Act, did not of themselves establish the existence of a marriage-like relationship. The AAT found much of the evidence given by C. and Morris was not credible.

The AAT concluded that Morris had been living with C. as his spouse during the relevant period and was not entitled to benefits.

Waiver

The AAT said it is not implicit in the DSS decision to demand recovery of the overpayment that the question of waiver has been considered. The letter of demand sent to Morris by the DSS was simply the first step in the recovery process.

Before any further steps were taken, Morris should be given a reasonable opportunity to place any further material as to her immediate circumstances before the DSS. In exercising its discretionary power the DSS would be required to take into account as a paramount consideration the fact that Morris had received public moneys to which she was not entitled (*Hales* (1982) 8 *SSR* 73).

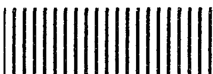
This was not a case which involved innocent mistake. The financial circumstances of Morris did not indicate that she was able to repay the debt in full and the prospects of recovery would have to be considered as limited to recovery of part of the debt over a long period. The AAT considered it appropriate to make a recommendation that she be allowed to repay by reasonable monthly instalments to be determined by the Department.

Formal decision

The AAT set aside the decision under review and affirmed the DSS decision to raise and recover as a debt due to the Commonwealth an overpayment to Morris of supporting parent's benefit amounting to $49 357.

The AAT recommended that the DSS allow her to make payments in reduction of the debt by reasonable monthly instalments to be determined by the DSS, and that the question of waiver be deferred for future consideration.

[B.W.]



RABBETS and SECRETARY TO DSS

(No. A90/96)

Decided: 23 April 1991 by B.G. Gibbs, D.B. Travers and N.T. Attwood.

Betty Rabbets asked the AAT to review an SSAT decision that Rabbets was living in a marriage-like relationship with her husband between 1 October 1980 and 5 January 1989 and that payment of supporting parent's benefit made to her were a debt due to the Commonwealth under s.246(1) of the *Social Security Act* and should be recovered.

The decision under review

On 24 November 1990, the DSS decided to assess Rabbets as residing in a marriage-like relationship with her husband from 31 July 1980 to 5 January 1989 and to recover all supporting parent's benefit paid to her for that period.

The facts

The Rabbets were married in 1969 and lived together until 1980. They had 3 children. In January 1980 they separated for a period when Mr Rabbets was absent from Canberra for approximately 9 months. He moved back to Canberra at the end of September 1980.

Mrs Rabbets was paid supporting parent's benefit from 31 July 1980. She had noted on her application that her husband paid her $40 per week maintenance. On the basis that in December 1988 Mrs and Mr Rabbets were registered at the same address on the electoral roll, and as a result of further investigations the Department cancelled the benefit. An overpayment was raised for 31 July 1980 to 5 January 1989.

Mrs Rabbets told the AAT that in October 1980 her husband who had been working in Cooma, returned home and she moved to her parents' home. She returned to her own home in late 1985 after her father had a stroke. Upon her return her husband occupied an extension to the house.

In March 1988, her daughter married and was anxious about the welfare of her brothers. As a consequence Rabbets and her husband attempted a reconciliation. Mrs Rabbets said that, while living with her parents, she declared on her social security review forms that she was residing at the address of her own home because she was concerned that her parents' pensions might be affected.

The extension to the house was paid for by a loan in joint names. On the loan form she represented herself as married and that she was employed as a cleaner.

On 11 December 1986 Mrs Rabbets and her husband received a second joint loan for the purchase of a motor vehicle. This loan document also noted her as married. details of a joint bank account were also given to the AAT. In his taxation forms for 1984 to 1988 Mr Rabbets declared that his wife was living with him and was dependant upon him. Evidence was also given by neighbours and family members.

The legislation

The relevant sections at the time the granting of supporting parent's benefit was made were ss.83AAA and 83AAC. These later became ss.53 and 54.

Until September 1985, the legislation allowed a married person to qualify for supporting parent's benefit if the person was living apart from her or his spouse because they were estranged. From September 1985, a married person could qualify if living separately and apart from her or his spouse.

The cases

The AAT followed *Pavey* (1976) 10 ALR 259, in which Watson J said:

> 'What comprises the marital relationship for each couple will vary. Marriage involves many elements some or all of which may be present in a particular marriage - elements such as dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both parties in public and private relationships.'

It also cited *Lambe* (1981) 1 *SSR* 5 to the effect that all facets of the interpersonal relationship need to be taken into account. The AAT listed the matters for consideration set out in *Stoilkovic* (1986) 29 *SSR* 363 (see *Morris* in this issue of *SSR*).

Findings

The AAT said the material before it and the evidence given by the Rabbets revealed them to be people who, on their own admission, were prepared to falsify the truth when it was to their financial advantage to do so. It said:

> 'Where falsification of the truth has been evidenced in respect of any one facet doubt is inevitably cast on whether they are witnesses of truth as to all of the other issues relevant to their relationship.'

(Reasons, para. 46)

The AAT found that they had lived together under the one roof from 1 October 1980 to December 1985. The relationship had a permanent quality but there was no evidence before the AAT from which it could conclude that a sexual relationship existed. They had the joint use of a motor car between 1980 and 1986 and, at least from December 1985, there was evidence of a shared family existence. They presented themselves to the outside world as married as evidenced by the taxation and loans documents. Throughout the relevant period, there was financial support between them and the children were afforded support and nurture by both parents.

Waiver

The AAT said that while s.251 empowered the Department to waive recovery of debts owed to the Commonwealth, it was of the view that Mrs Rabbets had been paid benefit which she should not have been paid and waiver was not appropriate.

Formal decision

During the whole of the period 1 October 1980 to 5 January 1989 Mrs

Rabbets was not living separately and apart from her husband but was living in a marriage-like relationship with him. The AAT thus affirmed the decision under review.

[B.W.]

Family allowance arrears: date of effect of decision

SECRETARY TO DSS and MOORE (No. Q90/455)

Decided: 25 February 1991 by D.F. O'Connor J.

The Department sought review of a decision that Mrs Moore be paid family allowance from the first allowance pay day after the date of lodgement of claim.

The facts

On 20 April 1989, Mrs Moore claimed family allowance in respect of her 2 children. She stated that the combined taxable income of her husband and herself for the 1987-88 year was $74 000. That income exceeded the allowable threshold. She advised that she had ceased employment on 25 December 1988. Following advice from the DSS, she completed a form headed 'Reduced income' which estimated that her family taxable income for the 1988-89 year would total $63 562. On 25 May 1989 she was advised by letter that she could not be paid family allowance because that income exceeded the allowable income.

On 8 February 1990. Moore lodged a further claim for family allowance which showed that the actual total combined taxable income for 1988-89 was $46 087. At the same time, she made a statement that her previous estimate of income had been too high and she asked that any arrears of family allowance owing be paid. Her claim was granted from 8 February 1990 only.

On 9 March 1990, Moore wrote to the DSS saying that she wished to appeal against that decision. On 25 May 1990 a review officer affirmed the decision. Moore sought review by the SSAT on 9 June 1990.

The SSAT decided that family allowance was payable from 20 April 1989, because she met the qualifications, although her rate of entitlement under the income test was nil. In the light of the new evidence as to her income for 1988/89, her rate could be adjusted to the maximum rate from the date of her April 1989 claim. However, the SSAT's decision took effect only from the date of lodgment of her appeal, as she had applied more than 3 months after being notified of the original decision. Therefore she would not get arrears for the period prior to 9 June 1990.

The legislation

Qualification for family allowance is set out in s.87 of the *Social Security Act* 1947. Payment of family allowance is subject to an income test set out in s.85. The income test is based on the taxable income of the person claiming family allowance (combined with the taxable income of that person's spouse, if married) in the previous financial year. Section 85(7) is an ameliorating provision which provides that where —

> 'the taxable income of the person for the year of income in which the request is made (in this sub-section called "the current year of income") is likely to be at least 25% less than the taxable income of the person for the last year of income of the person;'

payment of family allowance may be made based on the current year income rather than the taxable income of the previous year.

Section 158(1) provides that the grant or payment of family allowance shall not be made except upon the making of a claim for that allowance. Section 158(2) provides that where a claim is made and the claim cannot be granted because the person is not qualified or eligible to receive payment of a pension, benefit or allowance, the claim shall be deemed not to have been made.

Section 168(4) deals with the date of effect of certain determinations made by the Secretary under s.168(3) granting a claim. Section 183 deals with the date of effect of decisions of the SSAT determining an application for review.

Date of effect of Tribunal decision

The AAT found that the SSAT erred in stating that the decision under review was the decision made on 15 February 1990 (presumably, the determination granting her claim of 8 February 1990). The decision under review was that of the review officer made on 15 June 1990 affirming that decision.

In concluding that it was the decision of the review officer under s.174, and not the original decision, that was the 'decision under review' by the SSAT, the AAT noted that s.175(1) provides—

> 'Where a person gives the applicant notice under sub-section 174(2), the notice shall include:
>
> a) a statement to the effect that the applicant may, subject to this Act, apply to the SSAT for *review of the person's decision*'. (emphasis added).

Moore had applied for review by SSAT within 3 months of notification of the review officer's decision, and therefore s.183 did not affect her entitlement to any arrears.

The powers and discretions available to the AAT and SSAT are (with certain exceptions) those conferred on the Secretary (s. 182(4) and (5)). The powers and discretions available to the Secretary in deciding to increase the rate of family allowance from a nil rate to the maximum rate are set out in s.168(3) and (4). The date of effect of the decision made on review by the SSAT was to be determined in accordance with s.168(4)(a), and was 'the day on which the previous decision took effect'. That date was 8 February 1990, the date from which Moore had already been paid, so no arrears would be payable. The AAT added that even if the original determination of May 1989 was taken to be the 'decision under review', because more than 3 months had elapsed between notification and the lodging of an application for review, arrears would still be payable from a date not earlier than the date of the application for review.

Criticism of income test provisions

The AAT again criticised the operation of the family allowance and family allowance supplement income tests, as it had previously done in *Meadows* (1989) 52 *SSR* 693, *Chaplin* (1990) 55 *SSR* 733 and *Lines* (1990) 56 *SSR* 750. Moore would have received family allowance from May 1989 if she had not overestimated her income. The Act makes no provision for the backdating of family allowance payments in those circumstances.

Formal decision

The AAT set aside the decision of the SSAT and reinstated the decision of the review officer.

[*Editorial Comment:* There has been some uncertainty as to which decision is the subject of an SSAT review when the primary decision has been affirmed by a review officer. O'Connor J found in Moore that the SSAT should have reviewed the latter decision.

The question of which decision is the subject of the SSAT's review has important implications for the ability of