Federal Court decisions

Cohabitation

SECRETARY TO DSS v HILTON
(Federal Court of Australia)
Decided: 18 April 1991 by Davies J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Hilton* (1990) 60 *SSR* 825.

A majority of the AAT had decided that Hilton was not living in a *de facto* relationship with the man with whom she had shared a house for some 4 years. The DSS attacked that decision in this appeal as perverse, in the sense that no reasonable decision-maker could have come to that conclusion.

During the period in question, Hilton and the man had lived in the same house, as had 2 children of whom they were registered as the parents; Hilton had adopted the man's surname; they had been registered (with the same surname) as joint tenants of a property; and they were known to Hilton's parents as a married couple.

The majority of the AAT had described Hilton's evidence as 'inconsistent'; the dissenting member (who would have found a *de facto* relationship) described her as not credible; and all AAT members noted that the man in question had proved a poor witness because of memory loss.

However, the majority had found that the relationship between the respondent and the man was that of friendship; their sexual relationship had not been exclusive; they had separate social lives; and they kept separate households.

In the Federal Court, Davies J indicated that, even on the findings made by the majority of the AAT, he would have found the existence of a marriage-like relationship.

However, although the AAT's decision was not one which the judge would have reached, there was evidence before the AAT (Davies J said) on which it was entitled to make its findings of fact; and neither those findings nor the conclusion drawn from them were so fanciful and perverse that no reasonable tribunal could have come to them.

Davies J observed that one of the tribunal's findings of fact was open to criticism: this was the finding that the man, although registered as the father of 2 of the respondent's children, was not their biological father. Such a finding, Davies J said, was inappropriate in the absence of appearance on behalf of the children. However, as the parentage of the children was not a critical point, this aspect of the matter did not affect the tribunal's decision.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Waiver of AUSTUDY overpayment

SECRETARY TO DSS and MIGOTTO
(Federal Court of Australia)
Decided: 24 July 1991 by Heerey J.

Anna Migotto received an overpayment of AUSTUDY under the *Student Assistance Act* 1973 during 1989. Late in that year, she was granted sickness benefits; and the DSS decided to recover the AUSTUDY overpayment by reducing the rate of her sickness benefits.

On appeal, the AAT decided that the Secretary could waive recovery of the AUSTUDY overpayment under s.251(1) of the *Social Security Act*. The DSS appealed to the Federal Court (under s.44 of the *AAT Act*) against that decision.

The legislation

Section 246(2) of the *Social Security Act* authorises the recovery, by deductions from a current pension, allowance or benefit, of any amount paid to a person 'under a prescribed educational scheme that should not have been paid'. AUSTUDY is a prescribed educational scheme.

Section 251(1) of the *Social Security Act* allows the Secretary to write off or waive recovery of debts arising or payable 'under or as a result of this Act'; and s.251(4) includes in that class of debts a debt arising under the *Veterans' Entitlements Act* and an assurance of support debt.

No legislative authority for waiver

Heerey J. said that, before a debt to the Commonwealth could validly be waived, specific statutory support was needed; and he referred to *The Case of Dispensations* (1604) 145 ER 224; and s.1 of the *Bill of Rights* 1688 (Eng).

Heerey J. held that the debt owed by Migotto, resulting from overpayment of AUSTUDY, was not payable 'under or as a result of the [*Social Security*] *Act*'.

The exclusion of the debt owed by Migotto was confirmed by s.251(4), which deemed a very limited category of debt to be debts arising or payable under the *Social Security Act*:

> 'The limited terms of ss.(4) point against a conclusion that the power to waive . . . extends to all debts due to the Commonwealth, or to all debts which the Commonwealth seeks to recover by deduction from payments under the Social Security Act.'

(Reasons, pp. 6-7)