

ments) but relied upon *Haldane-Stevenson* and other decisions to the effect that the definitions from the *Income Tax Assessment Act* are not necessarily applicable to the *Veterans' Entitlements Act*.

The AAT relied on s.119 of the *Veterans' Entitlements Act*, which required it to act in accordance with substantial justice and the substantial merits of the case, and without regard to legal forms and technicalities, to hold that the 3 investments were in fact one investment and therefore escaped the provisions of s.37J.

Having made this finding, the AAT noted the Repatriation Commission's concession that it was possible to read the decision of the Federal Court in *Garvey* as authorising the set off of one investment loss against profits made from other investments spanning the same period. The AAT doubted that this was the correct understanding of *Garvey* and *Haldane-Stevenson*; but, in the light of the fact that the Commission was prepared to make this concession, the Tribunal was not prepared to rule against the concession. However, rather than applying the concession itself, the AAT decided to leave that aspect of the matter to the Commission.

Formal decision

The AAT set aside the decision of the Repatriation Commission and remitted the matter to the Commission to recalculate the applicant's entitlements, having regard to the losses incurred over the period of the second investment.

[Editors' note: After dealing with the facts of the case, the AAT noted that s.37D of the *Veterans' Entitlements Act* deems a product rate of return on market linked investments of 11%, irrespective of the actual return, including situations where there is an actual loss. The AAT said:

'This seems so unfair a result that I suggest that consideration be given to amendment of these complex legislative provisions.'

The same situation applies in relation to the *Social Security Act 1991*.]

[A.A.]

Cohabitation

SECRETARY TO DSS and BUTTON

(No. 7673)

Decided: 23 December 1991 by B.H. Burns.

The DSS asked the AAT to review an SSAT decision setting aside a DSS decision to cancel Button's sole parent's pension in December 1990. The DSS had decided that Button was living in a *de facto* relationship and so came within the definition of 'married person' in s.3(1) of the *Social Security Act 1947*. As a consequence she did not qualify for the pension claimed.

The principles to be applied

In determining whether there existed a 'marriage-like relationship' the AAT had to refer to s.3A of the Act. That section set out a number of factors which had to be considered including matters affecting the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, any sexual relationship between the people, and the nature of their commitment to each other.

Section 43A also provided that, where a person in receipt of, or claiming, sole parent's pension had shared a residence for the last 8 weeks with a person of the opposite sex then they may be required to satisfy the DSS that they are not living in a *de facto* relationship.

The facts

The Tribunal found that Button had lived in a marriage-like relationship with Mr V while residing at the residence of Mr V's parents until March 1988. In that month they moved to a Housing Trust house. In November 1989 Mr V moved out of the house as the result of arguments and fights. There was little contact between Button and Mr V until the birth of their son in August 1990. After the birth Mr V visited Button's house to see his son for short periods.

In January 1991 Mr V returned to live in the house with Button. Mr V had left his vehicle parked at the house during his absence and, combined with his visits to see his son, this supported the conclusion reached by the DSS that Button and Mr V were still in a *de facto* relationship.

The cancellation of Button's pension in December 1990 caused her financial hardship. This brought about the return of Mr V to the house in

January 1991 on the basis that he would pay \$80 per week rent and \$20 maintenance for his son. After his return he bought his own food, did his own washing and cleaning, ate by himself and did not have a sexual relationship with the respondent.

Was there a marriage-like relationship?

The AAT concluded that a marriage-like relationship did not exist in this case. There was no joint ownership of real estate. The house was leased in Button's name only. The household expenses of Button and Mr V were separate.

Button and Mr V had separate lives. Mr V did not adopt any meaningful responsibility for the care and support of his son apart from the maintenance payment and playing with him. Button was effectively the only carer for her son.

They did not engage in any joint social activities and their friends did not consider them to be in a marriage-like relationship. There was no sexual relationship between them.

While there had been a marriage-like relationship until November 1989, the relationship now was that of landlady and lodger 'brought about by financial necessity', said the AAT.

The AAT also commented that s.43A did not apply in this case as Button and Mr V had not shared a house between November 1989 and January 1991. To be applicable, s.43A required the couple to have shared a house for at least 8 weeks.

Formal decision

As the legislation had been amended since the SSAT's decision, it was necessary to set aside the SSAT decision and substitute a decision that since December 1990 Button was a 'single person' within the meaning of the *Social Security Act 1947* and was qualified for sole parent's pension.

[B.S.]

HUCKER and SECRETARY TO DSS

(No. 7656)

Decided: 15 January 1992 by T.E. Barnett, S.D. Hotop and R. Joske.

Merle Hucker applied to the AAT to review a DSS decision to reject her claim for invalid pension to be paid at the rate for a single person. The DSS had decided that she was a married person within the meaning of the *Social Security Act 1947*.

The facts

Mrs Hucker married Colin Hucker in February 1954. She still lived in the same house. She claimed that in 1973 Mr Hucker attempted to strangle her during a domestic dispute. Afterwards, she said, she withdrew from the matrimonial relationship to the extent that she became separated under one roof. She claimed that this brought her under the exclusion in s.3(1) of the Act which provides that a person is not a married person if the person is 'living separately and apart from the spouse of the person on a permanent basis'.

The AAT examined the nature of the relationship prior to 1973. From early in the marriage, Mrs Hucker and her husband had shared few activities, because she was pursuing her job as a nurse on full-time night shift. While this assisted in child care arrangements and Mrs Hucker arranged rosters to ensure that weekends off coincided with those of her husband, the AAT commented that 'clearly these work arrangements must have put great strain upon her health and on family relationships'. Mrs Hucker also maintained separate finances, ran her own car and had the lease of the house in her name. Her husband provided small amounts for food and housekeeping.

After the assault in 1973, these arrangements did not change; but they then moved into separate bedrooms and had no sexual relationship or friendly physical contact. They both considered the marriage to be over at this time. They lived fairly separate lives, but still ate their evening meals together, Mrs Hucker doing the cooking.

The separate existence was assisted by Mrs Hucker continuing to work night shift. When she retired for health reasons in 1985, her savings ran out after the purchase of a few household items and the payment of rent and accounts. Mr Hucker increased the amount of rent he paid over this period and took on more housework as the applicant's health deteriorated. Although he complained about the extra payments, Mr Hucker also took on the payment of the applicant's medication and health insurance.

Mrs Hucker expressed no desire to move out of the home as she said she

had nowhere else to go and did not want to live alone. She also did not seek a divorce because of the cost and she could see no advantage in doing so.

The AAT's decision

The AAT was not satisfied that Mrs Hucker and her husband had been living separately and apart on a permanent basis since the date of her claim for invalid pension. The AAT commented:

'Although the marriage seems to the Tribunal to be unsatisfactory and unsatisfying to all concerned it is still a marriage. It seems to have been this way even before the 1973 assault and that assault did not seem to create any sudden significant change, except that the Tribunal accepts that sexual relations ceased permanently at that time and this is certainly a significant factor.

The relationship settled down after the fight to become a very permanent and stable relationship – even though it was not very friendly . . .'

(Reasons, p.10)

The Tribunal also considered the matters in s.3A of the Act. The AAT referred to the joint responsibility for household expenses, the sharing of housework and the fact that the Huckers continued to hold themselves out as a married couple to strangers for the benefit of their children. Although there was little affection, Mr Hucker had continued to provide support during his wife's ill health and she relied upon his presence to give her a sense of security.

The AAT noted that there was no sexual relationship, but said that 'this is not so unusual for people of their age'. However, the Tribunal noted that this took on greater significance because of the assault in 1973. In relation to the Huckers' mutual commitment, the AAT commented that their actions diverged from their words:

'Both claim to have no love and commitment to the other and that they wish the relationship would stop. On this matter at least they both sound as though they are in complete agreement. The tribunal is aware however that both have a financial advantage to gain from expressing that view because if the Tribunal finds that the marriage relationship is finished each of them will gain financially as the joint household income will be increased. Against their spoken profession of undying animosity however is the undeniable fact that they have chosen to remain together for so many years when it would have been quite easy for them to separate as they had financial independence and their family had grown up.'

(Reasons, p.11)

The Tribunal also seems to have been influenced by the view that 'their demeanour indicated . . . that they were acting out a role of hardline animosity to a greater extent than they actually felt'. The final comment made by the AAT was:

'As the couple have become older and as the applicant's health has deteriorated it has become more difficult to distinguish this unhappy relationship between two long time legally married persons from hundreds of other unhappy marriage relationships.'

(Reasons, p.12)

Formal decision

The AAT affirmed the decision under review.

[B.S.]

[Comment: There are some causes for concern with the reasoning in this case. First, is it implicit in the Tribunal's reasons that only marriages which commence happily can lead to separation under one roof? In a way the applicant appears to be penalised for entering into an unhappy marriage which requires (presumably) more effort on her part when she later wishes to separate than might be the case with a person who had entered a happy relationship. The comments made by the Tribunal do not acknowledge many of the realities of women who are or have been victims of domestic violence. For example, there was little discussion of just how easy it would have been for the applicant to leave the home. It also seems implicit in the reasons that it was her responsibility to leave when the husband appeared to be the perpetrator of the violence. Second, in assessing the quality of relationship, the Tribunal adopted a rather stereotyped view of older people on the matter of sex. To say that the absence of a sexual relationship is not unusual in people of the applicant's and her husband's age without any evidence being led on the sexuality of older people is perhaps not a reliable guide to the assessment of the absence of a sexual relationship in these cases. B.S.]