Federal Court decisions

Maintenance income: Relevance of Family Law Act

SECRETARY TO DSS v TEMMEN

(Federal Court of Australia)

Decided: 13 May 1992 by Sweeney J.

This was an appeal from the AAT's decision in *Temmen* (1992) 69 *SSR* 992.

The AAT had held that Temmen's maintenance income did not include the annualised value of property transferred to Temmen by her former husband under an agreement approved by the Family Court under s.86 of the *Family Law Act 1975*.

The legislation

Section 10(1) of the *Social Security Act 1991* defines 'non-cash housing maintenance', which is in turn defined to mean -

> 'maintenance income of the person that is not cash maintenance and is received in relation to the provision of a residence that is, or is to be, the person's principal home'.

The Family Law Act

The AAT had come to its conclusion on the basis that, although the property transfer appeared to be 'non-cash housing maintenance' within s.10(1) of the *Social Security Act*, the agreement was covered by s.87A of the *Family Law Act* and, according to s.87A(2), was 'taken not to make provision for the maintenance of a party to the relevant marriage or of a child of the marriage'.

Sweeney J held that the property transfer was 'non-cash housing maintenance' within s.10(1) of the *Social Security Act*. He went on to conclude that s.87A(2) of the *Family Law Act* did not operate to defeat that result:

> 'The applicant submitted, in my opinion correctly, that the tribunal erred in law in finding that "the effect of s 87A precluded that view". He contended that s 87A was introduced as part of a legislative scheme designed to ensure that agreements between parents made under the *Family Law Act* did not have the effect of transferring to the state their responsibility to provide for the maintenance of their children, whereas the construction adopted by the Tribunal would have produced the opposite effect. Had the legislature intended that the 1991 provision in the Act be read subject to the terms of s 87A, introduced in 1987, it could have done so quite simply.'

(Reasons, pp. 8-9)

Sweeney J noted that the DSS had not argued that every transfer of an interest in a house by one spouse to another necessarily amounted to maintenance income; but had submitted that it had been open to the AAT to find on the facts before it that the transfer involved in the present case was covered by s.10 of the 1991 Act.

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and affirmed the decision of the SSAT.

[P.H.]

Background

Disability and sickness legislation

In **Background** (1993) 71 *SSR* 1031 Anne Anderton, an Adelaide lawyer, discussed some of the difficulties of interpretation presented by certain provisions of the *Social Security (Disability and Sickness Support) Amendment Act* 1991. Mr John Bowdler, Deputy Secretary, Programs, has written to the editors on behalf of the DSS taking issue with some of the tentative interpretations proposed by Anne Anderton.

The Department is particularly concerned that non-medical factors, such as those identified in *Panke* (1981) 2 *SSR* 9 should not be imported into the interpretation of provisions of the new legislation, except to the limited extent specifically authorised by the legislation. The Department argues that the Second Reading Speech and Explanatory Memorandum to the Act make it clear that one of the main intentions of changing the legislation was to reverse the prominence given to non-medical factors in interpretation of the invalid pension criteria under the old legislation.

In assessing whether an applicant for disability support pension satisfies the test of 'continuing inability to work', it is relevant to determine the types of work for which the person is 'currently skilled' (s.94(2)). Mr Bowdler points out that the Department's interpretation of that phrase, as described in Ms Anderton's article, has recently been endorsed by the AAT in *Chami* (reported in this issue). In that case the AAT accepted, without discussing alternative interpretations, that the work for which Mr Chami was 'currently skilled' included a specified list of occupations in which he had no prior experience.

Section 94(2) states that to qualify for DSP the medical condition must prevent the person working for at least two years. Anne Anderton pointed out that the legislation is silent as to the commencement date for the two-year period. The Department disagrees with her tentative conclusion that the period is measured from the date of decision. The Department's view is that the two years is to be measured from the date of potential eligibility (or ineligibility) – that is, from the date of claim, where the question is whether a person qualifies for a grant of pension; or from the date of the Department's review, when the question is whether an existing pension should be cancelled.

[P.O'C]