

Debt: statute barred; waived

KIDD and SECRETARY TO DSS
(No. 10697)

Decided: 31 January 1996 by D.W. Muller.

The DSS raised and sought recovery of a debt of \$28,036 incurred by Kidd because she received the widows pension when she was living in a marriage-like relationship. This decision was affirmed by the SSAT on 10 May 1994.

Between 20 May 1975 and 15 January 1981 Kidd received \$22,309 in widows pension. On 5 May 1975 Kidd began living with Michael Kidd in a *de facto* relationship. Between 22 May 1978 and 10 October 1980 Kidd was also paid \$6431 in unemployment benefits under a false name. The total overpayment after adjustment was calculated to be \$28,036, and Kidd signed an acknowledgment of this debt on 27 January 1982. Over the next few years Kidd repaid \$400 and withholdings were made from her sole parent benefit.

On 13 February 1985 the DSS wrote to Kidd asking for repayment of the outstanding amount. Kidd pleaded guilty to a number of offences under the *Social Security Act 1947* on 20 March 1986. The magistrate found that Kidd had no capacity to repay the debt, and a period of imprisonment would be appropriate. On appeal the judge agreed that Kidd had no capacity to repay the debt, and that it was unlikely the DSS would pursue the debt. The appeal was dismissed.

On 22 April 1986 the DSS wrote off the widows pension debt. Kidd continued to repay the debt until October 1986. In December 1986 the DSS requested repayment of the widows pension debt. After her release from prison Kidd was interviewed by the DSS. She told the DSS officers that her solicitor had advised her not to repay any more of the debt. In April 1987 the DSS wrote to Kidd about the debt. Her solicitor replied that it would be difficult for Kidd to repay the debt. In May 1987 the DSS prepared an internal memo about the debt, but Kidd heard no more until 29 November 1993, when the DSS advised that she owed a debt of \$26,596, and the DSS would be withholding money from her pension.

Kidd's present financial situation indicates that she is not destitute but struggles financially.

Statute barred

On behalf of Kidd it was submitted that the debt was statute barred because a period of 6 years had passed since any action for recovery had taken place. Also, Kidd had been convicted of an offence in relation to the debt and the court had imposed a custodial sentence because of her inability to repay the debt. Kidd still did not have the capacity to repay the debt.

The DSS argued that there were other reasons besides Kidd's inability to repay the debt to explain why the custodial sentence had been imposed. Also, in May 1993 the DSS had mistakenly attempted to recover the debt from another person in the Northern Territory. However, no documentary evidence was put before the AAT to support this submission. The DSS also argued that legislation relating to the 6-year time limit commenced in 1985, and recovery of this debt commenced in 1982. Therefore the 6-year time limit did not apply because the relevant section, s.1231 of the *Social Security Act 1991*, referred to recovery commencing not recommencing.

The AAT found that an assumption by both parties that the court had only taken into account the widows pension debt and not the unemployment benefit debt was incorrect. The documentation showed that the unemployment benefit debt had been calculated in April 1981, and Kidd had acknowledged this debt in January 1982. The AAT concluded that the DSS had put both overpayments before the court in 1986, and the court had imposed a custodial sentence in relation to the total debt because Kidd was unable to repay that debt.

Section 1231(1) of the Act provides that action for recovery of a debt is not to be commenced after 6 years from the day on which the debt arose. Exceptions are set out in s.1231(2B), (2C), (2D) and (2E). Section 1231(2E) provides that if certain actions, review or activity occur within the 6 years, then the 6 years is extended from the date of that activity. Activity includes 'internal Departmental activity for the recovery of the debt'. Section 251 of the *Social Security Act 1947* is a similar provision. The AAT found that s.1231(2E) is meaningless unless the term 'commenced' also means 're-commenced':

'Recovery of the total overpayment by way of deductions from Mrs Kidd's pension should not have been commenced later than six years after 28 April 1987 when the last internal Departmental activity relating to action for the recovery of the debt or overpayment occurred.'

(Reasons, para. 3)

Other activity on the file was 'incomprehensible scribbblings', and the alleged

activity in May 1993 would have been too late. The DSS was statute barred from recovering the debt.

Waiver

The AAT also considered whether the debt should be waived under s.1237(3) of the Act. This section provides that the DSS must waive the debt if a person is convicted of an offence and the court indicates that it has imposed a longer custodial sentence because the person was unable or unwilling to repay the debt. This was clearly so in this case. Therefore the debt must be waived.

Formal decision

The AAT affirmed the decision to raise the debt, but set aside the decision to recover the debt and substituted its decision that the debt be waived, and that recovery of the debt is statute barred.

[C.H.]

[Editor's note: The formal decision of the AAT is unusual. If recovery of a debt is statute barred, then it should not be necessary to waive the debt.]