

ing installments of SPP. She was sentenced to 18 months imprisonment, and a reparation order for \$17,922.20 was made. The debt was reviewed and affirmed (with minor variation to the amount of the debt) by an Authorised Review Officer and the SSAT in November 1988.

The evidence of Williams, who is Aboriginal, was that she was abused physically, sexually, emotionally and racially by the father of her child, prior to meeting Morrison. She and he initially formed a 'boyfriend-girlfriend' relationship, but later sought to purchase a house, which Williams was able to finance through an ATSI loan only if she and Morrison had lived at the one address. Hence the variation in the documentary and her own evidence as to the date their cohabitation commenced. After moving to the jointly-purchased property, Williams expected to cease drawing SPP because Morrison would include her in his unemployment pension as his spouse — however he did not do so and further refused to support her or her child or to meet the mortgage repayments or other costs associated with the house.

Williams sought employment as a stripper, notifying the DSS of this in July 1989. Subsequently Candice's paternal grandmother initiated custody proceedings in the Family Court owing to her concerns about Candice's care, in the course of which allegations of sexual abuse of Candice by Morrison were made. Williams left Morrison and the SPP was restored. Shortly after the Family Court proceedings in May 1991 which granted her custody of Candice, Williams and Morrison resumed cohabitation, but separated finally in March 1993 after Williams was charged with the criminal offenses.

The law

Section 4(3) of the *Social Security Act 1991* sets out the factors which must be taken into consideration when determining whether a particular relationship can be categorised as marriage-like. The relevant waiver provisions are contained in s.1237AA of the Act which requires that debts be waived where the debtor has been convicted of an offence and 'the court indicated in sentencing . . . that it imposed a longer custodial sentence on the debtor because he or she was unable or unwilling to repay the debt . . .' Section 1237AAD provides that waiver must occur where the debt did not arise from a false statement or failure to comply with a provision of the Act, and 'there are special circumstances (other than financial hardship alone) that make it desirable to waive . . .' and where it is more

appropriate to waive than write-off the debt. Section 1236 allows a debt to be written off in whole or in part.

Member of a couple

After reviewing the documentary and oral evidence, and the several requirements of s.3 of the Act, the AAT found that there was evidence to support the existence of a marriage-like relationship between Williams and Morrison for the period from June 1989 (the date of her change of address) until the separation at the time of the sexual abuse allegations, and again for the period of resumed cohabitation after the Family Court proceedings (although this latter period was irrelevant to the debt in question). The AAT accepted that there was a great deal of unhappiness in the relationship at these times, but concluded:

'[t]he Tribunal accepts the fact that the applicant may have accepted . . . a very unsatisfactory and sometimes almost intolerable relationship because she was psychologically dependent upon Morrison and was suffering the effects of domestic violence. This does not mean however, that the "marriage aspect" of the relationship had ceased.'

(Reasons, para. 38)

The AAT, therefore, concluded that amounts of SPP paid to Williams were a debt.

Waiver/write-off

The AAT accepted that Williams' principal motivation in claiming SPP to which, it was admitted, she knew she was not entitled, was her fear that she would be unable to support herself and her child. Referring to s.1237AA the AAT concluded that the sentencing magistrate had taken into account Williams' inability to pay a substantial fine, but not her inability or unwillingness to repay the debt by instalments, a conclusion reflected by the imposition of the reparation order. The AAT concluded that waiver on the basis of s.2337A was not permitted.

Referring to the s.1237AA provisions, the AAT concluded that it was precluded from waiving the debt because Williams had knowingly made false statements to the DSS and had knowingly failed to comply with the provisions of the Act. As to write-off, the AAT noted Williams' depressive illness, her most basic assets, and that her modest expenditures to support herself and (now) 2 children exceeded her only income source, being social security payments, and concluded that:

' . . . having this debt hanging over her for many years into the future will dampen any . . . incentive [to find an independent source of income] and is likely to worsen her depressive condition and adversely affect her ability to raise her children effectively.'

(Reasons, para. 52)

Formal decision

The AAT decided to set aside the decision under review and substitute its decision that:

- SPP payments to Williams between 2 June 1989 and 2 August 1990 were an overpayment;
- the DSS is to recover this debt; and
- the balance of the debt owing is to be written off.

[P.A.S.]

Widow B pension: member of a couple; waiver and write-off

SECRETARY TO THE DSS and GRAY-CORKING (No. 12002)

Decided: 2 July 1997 by M.T. Lewis.

The issue

In May 1994 the SSAT affirmed the earlier decision of the DSS that Gray-Corking owed a debt of \$4996.20, but directed that recovery of the debt be waived. The debt had arisen because Gray-Corking, it was contended by the DSS, had lived in a de facto relationship with Malcolm Gray-Corking from 22 April to 21 October 1993, but did not notify the DSS of this until 18 October 1993.

Background

Gray-Corking met Malcolm Gray-Corking, whom she later married, while on an overseas trip after the death of her first husband. They became friends, and returned separately to Australia in early 1993 and April 1993 respectively, after which they shared accommodation. Gray-Corking had initially intended to finalise her affairs and return permanently to England. However, a few months later they established a flower growing business, and then married on 18 December 1993. Despite considerable investment, the business never returned a profit, leaving large debts including an overdraft and mortgage.

In October 1993 Gray-Corking notified the DSS of her de facto status, indicating that she had not done so previously as she had been unsure whether her partner would be accepted as an Australian resident. Until that acceptance, she understood his formal status to be a 'tourist' in Australia.

Gray-Corking had been sent a series of letters from January 1992 to September 1993 requiring her to notify of various changes of circumstances, including any change in her marital or de facto status. None of the letters had specified the letters to be a 'Recipient Notification Notice', although all included notification obligations.

The law

Section 362 of the *Social Security Act 1991* provides that a person is eligible for a widow B pension if, amongst other things, she is not a member of a couple. The relevant considerations for determining this are included in s.4(3) of the Act. Section 389 of the Act empowers the DSS to issue to a recipient of widow B pension a notice requiring notification of any change in circumstances. Sub-Section (3) of that section requires '(3) A notice under sub-section (1) . . . (e) must specify that the notice is a recipient notification notice given under this Act'. The waiver provisions of the Act, contained in s.1237, were amended by the introduction of s.1237AAD effective from 1 January 1996 which provided:

'The Secretary may waive the right to recover all or part of a debt if the secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - (i) making a false statement or a false representation; or
 - (ii) failing or omitting to comply with a provision of this Act . . . and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.'

Member of a couple

Applying the decision of *Gellin and Secretary, DSS* (1993) 30 ALD 768 which considered provisions substantially similar to s.389(3)(e) of the Act, the AAT concluded that the various letters sent to Gray-Corking sufficiently complied with the legislative requirements. Gray-Corking was required, as a result to notify the DSS of changes in her circumstances as outlined in the letters sent to her.

The AAT noted the evidence of the financial arrangements between Gray-Corking and her husband-to-be prior to the decision to establish their business, their household arrangements, the absence of a sexual relationship, and the fact that Gray-Corking did not consider in the initial months that she and her husband-to-be were a 'couple'. They did not go out together or present themselves socially as a couple. The AAT concluded that the marriage-like relationship commenced in June 1993 when their business

was established. Gray-Corking therefore remained qualified for widow B pension until 17 June 1993, but ceased to be qualified thereafter, and a debt existed from that date until the DSS was notified of the relationship in October 1993.

Waiver/write-off

The AAT next considered whether the debt should be waived or written off. The Tribunal noted the amended requirements as to waiver and write-off contained in s.1237AAD of the Act. The AAT referred to the decision of *Callaghan and Secretary, DSS* (decided 18 November 1996) which found that the word 'knowingly' in s.1237AAD must be construed as meaning that the

' . . . person has actual knowledge, rather than constructive knowledge . . . [which is] to be ascertained by reference to the statements of the person as to his or her actual state of knowledge at the time and to events surrounding the false statement or the act or omission.'

(Reasons, para. 47)

Applying this reasoning, the AAT concluded that there was no evidence that Gray-Corking read any of the letters or knew of her obligation to notify the DSS of her relationship. She was under a misconception about the significance of the residency status of her husband-to-be. The AAT determined that Gray-Corking was ' . . . merely naive about her responsibility to disclose . . . rather than the debt arose because she knowingly failed to comply . . .': Reasons, para. 48. However, the AAT concluded that misunderstanding the law was not a situation which could be said to be unusual, uncommon or exceptional so as to amount to special circumstances which would justify waiver (see *Beadle and Director-General of Social Security* (1984) 6 ALD 1). In relation to write-off, the AAT noted the considerable financial difficulties faced by Gray-Corking and her husband, but that there was no evidence available as to their weekly income and outlays, essential information in the determination of whether recovery is feasible.

Formal decision

The AAT set aside the decision and substituted the decision that Gray-Corking was eligible for widow B pension until 16 June 1993, but not thereafter, and remitted the matter to the DSS with directions that the debt be recalculated and that Gray-Corking's financial capacity in respect to recovery of the debt be determined.

[P.A.S.]

Sole parent pension: member of a couple

SAMMUT and SECRETARY TO THE DSS
(No. 11998)

Decided: 1 July 1997 by L. Rodopoulos.

Sammut's sole parent pension (SSP) was cancelled by the DSS because she was a member of a couple. This decision was set aside by a majority of the SSAT on review.

The facts

Sammut commenced a relationship with Victor Sammut in 1967. They were not legally married. They had 6 children, and the youngest, Bradlee, was born in 1990. From 1990 to 1993 Victor Sammut was in prison. In February 1995 the family moved to a new home. The Sammuts separated in June 1995, and she was granted the SPP.

Bradlee had been diagnosed as suffering from attention deficit and other psychological disorders. Victor Sammut visited Sammut once a week to help out with Bradlee, and to take Sammut shopping. Sammut did not have a car. This arrangement was expensive and Sammut, who was ill, was unable to cope with Bradlee. It was agreed that Victor Sammut would return to the family home. He would live in his own room and be responsible for buying his own clothes. There would be no sexual intercourse. They would live separate lives except for the joint care they gave to Bradlee. Sammut told the AAT that she was hopeful of a reconciliation. Bradlee's psychologist advised that it would be in Bradlee's interest for his parents to live together.

Sammut lived in a small country town. She hoped to move to a larger town where more resources were available for Bradlee's care. This depended on Sammut being able to obtain housing in the larger town. If housing became available, Victor would stay in their house until it was sold. Sammut would move to the larger town with Bradlee.

It was argued on behalf of Sammut that her situation constituted special circumstances. If Bradlee had not needed special care, it would not have been necessary for Victor Sammut to return to the family home. The AAT saw its task as deciding whether Sammut and her husband were living in a marriage-like relationship.