

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.

The law

According to s.249 of the *Social Security Act 1991*, to be qualified for a SPP a person must not be a member of a couple. According to s.4(3) when deciding if a person is a member of a couple, regard is to be had to the following:

- (a) the financial aspects;
- (b) the nature of the household;
- (c) the social aspects of the relationship;
- (d) any sexual relationship; and
- (e) the nature of the persons' commitment to each other.

Section 4(4) provides that if a person is receiving a SPP, has been living with a member of the opposite sex for at least 8 weeks, and is not married to that person and either:

- (a) a child of both persons lives with them;
- (b) they jointly own the residence;
- (c) they are joint lessees of the residence with at least a 10-year lease;
- (d) they own joint assets of more than \$4000;
- (e) they have joint liabilities of more than \$1000;
- (f) they were previously a couple; or
- (g) they have previously shared a residence,

then the DSS must not form the opinion that the person is not in a marriage-like relationship, unless the weight of opinion supports this.

A marriage-like relationship

The AAT referred to a number of earlier AAT decisions which had closely analysed the nature of a marriage-like relationship. In *Donald and Director-General of Social Security* (1983) 14 SSR 140 the AAT had said that the essential quality of a marital relationship was the commitment of the parties to each other. In *Parkin and Secretary to the DSS* (decided 18 December 1995) the AAT had found that although the relationship which existed was unsatisfactory for both parties, it remained in essence a marriage-like relationship. It was argued by the DSS that the situation in *Parkin* was similar to the situation in this case. There was a substantial financial commitment as well as a personal commitment to provide for each other. There was also a commitment to maintain their present living arrangements indefinitely. Neither party had any intention of establishing a close friendship with a member of the opposite sex.

Section 4(4) set out circumstances under which the DSS:

'must not form the opinion that the claimant or recipient does not have a marriage-like relationship with the other person unless, having regard

to all the matters referred to in subsection (3) the weight of evidence supports the formation of an opinion that the claimant or recipient does not have a marriage-like relationship with the other person.'

(Reasons, para. 17)

This is often referred to as 'the reverse onus of proof'.

The AAT found Sammut and Victor satisfied s.4(4) because they had a child, had previously been a member of a couple, and had previously shared a residence. The AAT next considered the criteria set out in s.4(3).

- (a) *Financial arrangements*: The evidence shows a pooling of resources. The house in which Sammut lives is owned by her. It used to be jointly owned by Sammut and Victor. They share expenses, and this shows an ongoing commitment to each other.
- (b) *Nature of the household*: the household arrangements are shared except for the sleeping arrangements. Sammut cleaned etc. inside while Victor was responsible for outside.
- (c) *Social aspects*: the Sammuts' social life is limited.
- (d) *Sexual relationship*: There is no sexual relationship.
- (e) *Commitment*: The Sammuts live in a family situation for the sake of Bradlee.

The AAT was satisfied that Sammut and Victor Sammut were living in a marriage-like relationship.

Section 24(2)(d)

Pursuant to s.24(2)(d) a member of a couple can be treated as not being a member of that couple in the special circumstances of the case. The AAT referred to the decisions on special circumstances and decided that there must be some factors which take this case outside the common run of cases. The AAT found that neither the particular marital break-up, nor the circumstances of Bradlee brought Sammut's situation outside the common run of cases.

Formal decision

The AAT decided to set aside the SSAT decision and affirmed the original DSS decision.

[C.H.]

Assurance of support debt

SANTA ANA and THE SECRETARY TO THE DSS (No. 11869)

Decided: 14 May 1997 by D.W. Muller, M.M. McGovern and S.M. Bullock

The SSAT affirmed a DSS decision to raise and seek recovery of a debt owed by Santa Ana, because social security payments had been made to his mother Dominga Santa Ana between 12 May 1987 and 27 April 1989. Santa Ana had signed an assurance of support in relation to his mother.

The facts

Santa Ana signed an assurance of support on 27 April 1982. His mother came to Australia in 1983 and left 6 months later because she could not get on with Santa Ana's wife. Santa Ana and his wife separated and Santa Ana bought his wife's share of the family home. This resulted in an increased mortgage burden. Dominga Santa Ana returned to Australia on 4 March 1987. She lived with her son for a while, and then due to a break down in their relationship she went to live with her daughter. In May 1987 she applied for a special benefit which was granted. The DSS notified Santa Ana and advised him that he would be liable to repay the money. Santa Ana supplied certain information requested by the DSS.

Dominga Santa Ana was granted Australian citizenship in April 1989. Between 1987 and 1989 Santa Ana was asked to provide information on his financial circumstances on 2 occasions. The DSS did not follow its guidelines and give Santa Ana a quarterly statement of his debt.

Is there a debt?

The AAT found that Santa Ana had signed an assurance of support in relation to his mother and the legal formalities had been complied with. Therefore Santa Ana was liable to repay any social security payments made to his mother during the currency of the assurance, which in this case was 10 years. Because Dominga Santa Ana became an Australian citizen in 1989 she gained an entitlement to a social security payment in her own right. The application for citizenship was approved in October 1988, so the debt should cease then because it was from that date she was accepted as a member of the Australian public.