Disability support pension: illness separated couple

SECRETARY TO THE DSS and PORTER
(No. 11804)

Decided: 24 April 1997 by S.D. Hotop.

Porter suffered a stroke in July 1992 following surgery to remove an aneurysm behind her right eye. She had been hospitalised since the stroke. In February 1993 Porter applied for and was granted DSP at the married rate. In June 1993, Porter was made a permanent patient at the Moora District Hospital. A staff member from the hospital wrote to the DSS advising that Porter would 'always be a nursing home patient'. Subsequently, Porter received DSP at the single rate plus rent assistance. In May 1995, her DSP rate was reduced because of her husband's income. In September 1996, Porter was transferred to 'the Lodge' for frail aged patients where her accommodation costs were $363 a fortnight. The cost of her clothing, toiletries an other necessities was estimated at $40 a fortnight. After her pension rate was reduced, Porter received $277.30 a fortnight, considerably less than her living expenses.

Her husband underwent triple bypass heart surgery in January 1993 and subsequently developed a hernia on the surgery scar. He also had carpal tunnel syndrome. He told the AAT he still worked as a shearer. In the 1994–95 financial year, his taxable income was $29,568. He gave evidence that his anticipated income for the 1995–96 and 1996–97 financial years would be roughly the same.

In a letter dated 23 May 1995, Porter requested that DSP be paid to her at the single rate. A delegate of the DSS decided in August 1995 that Porter was entitled to DSP at the single rate because she was a member of an illness-separated couple, but that the 'halving provisions' of the Act were applicable because of her husband's income. This decision was affirmed by an ARO. The SSAT set aside this decision and held that Porter was to be treated as not being a member of a couple for the purposes of calculating her rate of DSP.

Evidence at the AAT hearing established that the hospital accommodation fee for nursing home patients was calculated by the Health Department at 87.5% of the single rate of the age pension.

The legislation

Section 4(2) of the *Social Security Act 1991* provides that a person is a member of a couple if the person is legally married and is not, in the Secretary's opinion living separately and apart on a permanent or indefinite basis. Section 4(7) of the Act provides that an illness-separated couple is one where they are unable to live together in the matrimonial home because of illness or infirmity of either or both of them, and their inability to live together results in their living expenses being greater than they would otherwise be, and that inability is likely to continue indefinitely. Section 24(1) of the Act provides that a legally married person may be treated as not a member of a couple where the Secretary is satisfied that special reasons exist.

Submissions

The DSS conceded that the Porters were an illness-separated couple. However, it argued that the discretion conferred by s. 24(1) to treat a person as not being a member of a couple should not be exercised in the case of an illness-separated couple. In the alternative, it was submitted that in the event that the discretion conferred by s.24(1) was exercisable, there was no 'special reason' why Porter should be treated as not being a member of a couple.

Porter did not accept the DSS concession that she was a member of an illness-separated couple. It was argued that Porter was not to be treated as a member of a couple because of the SSAT decision that the discretion in s.24(1) applied. The main argument for Porter was that the discretion conferred in s.24(1) should be exercised because of her financial circumstances and her physical illness.

Findings

The AAT did not accept the submission for the DSS that the discretion in s.24(1) was inapplicable to an illness-separated couple. Because her husband continued to be supportive of her both financially and emotionally, the AAT found that Porter was not living separately and apart from her husband on a permanent or indefinite basis. The AAT indicated that the discretion conferred in s.24(1) of the Act must be exercised for the purpose for which it was conferred, and having regard to the scope and object of the Act. The AAT said that the purpose of s.24(1) was to ensure that the welfare of a 'member of a couple' would be promoted rather than impaired in accordance with the general object of the Act.

Special reasons

If Porter was treated as a member of a couple, her income would be approximately $170 a fortnight, which was approximately $234 less than her essential fortnightly expenditure. However, if the discretion in s.24(1) was exercised, Porter would receive approximately $23 a fortnight more than her essential fortnightly expenditure. If Porter was treated as a member of an illness-separated couple Mr Porter would have to make up the shortfall between her income and her essential living expenditure. The AAT found that Mr Porter's income only marginally exceeded his own reasonable expenses and that making up the shortfall for his wife would impose a 'substantial financial burden' on him causing 'severe financial hardship': Reasons, para. 42.

The AAT indicated that having regard to the financial circumstances of both Porter and her husband, the rate payable to a member of an 'illness-separated couple' would be 'substantially inadequate and inappropriate, having regard to the scope and object of the Act': Reasons, para. 43. Accordingly, the AAT was satisfied there existed a 'special reason' why Porter should not be treated as being a member of a couple for the purposes of the Act.

Formal decision

The AAT affirmed the SSAT decision.

[H.B.]

Sole parent pension: special widow

SECRETARY TO THE DSS and DAGHER
(No. 12329)

Decided: 23 October 1997 by G. Ettinger.

Dagher sought review of an SSAT decision which had set aside a DSS decision not to pay arrears of sole parent pension (SPP) for the period 22 September 1994 to 25 December 1995. The SSAT had found that Dagher was a 'special widow'.

The facts

SPP was paid to Dagher from 6 July 1989. He travelled overseas on 29 September 1993 and was paid SPP until 22 September 1994 when it was cancelled. Dagher returned to Australia on 13 May 1996, and requested payment from the DSS of SPP from 22 September 1994

until 25 December 1995. It was agreed that Dagher had a 'SPP child' during the required period.

Dagher had been married and his wife died. Both Dagher and his wife were Australian residents.

The law

According to s.1214(1) of the *Social Security Act 1991*, if a person who is receiving the SPP leaves Australia and is not a 'special widow', the SPP will be cancelled after 12 months. Section 1214(4) provides that the person will continue to receive the SPP overseas if the person is a 'special widow'. 'Special widow' is defined in s.1214(6) as:

> 'For the purposes of this section, a woman is a special widow if:
>
> (a) a man dies; and
>
> (b) immediately before his death:
>
> (i) the man was legally married to the woman; and
>
> (ii) the man and the woman were members of the same couple; and
>
> (iii) the man and the woman were both Australian residents.'

Special widow

The AAT identified the issue to be addressed as whether Dagher, a man, could be characterised as a 'special widow'. Dagher argued that men and women should be treated the same.

The AAT was referred to s.23 of the *Acts Interpretation Act 1901* which states that 'words importing a gender include every other gender'. It was also asked to decide if the *Sex Discrimination Act 1984* applied to the *Social Security Act*. The SSAT had found that not to apply s.23 of the *Acts Interpretation Act* would breach ss.22 and 26 of the *Sex Discrimination Act*. These sections provide that it is unlawful to discriminate against another person, or to exercise any power of the Commonwealth because of the person's sex. Pursuant to s.40 of the *Sex Discrimination Act*, the *Social Security Act 1947* is exempt from the provisions of the *Sex Discrimination Act*.

The AAT accepted that a reference to the *Social Security Act 1947* included a reference to the 1991 Act because of s.10 of the *Acts Interpretation Act*. This allows a reference to a repealed Act to be a reference to the Act which replaced it. A statement by the Commonwealth Attorney-General to Parliament supported the conclusion that the *Social Security Act 1991* was meant to be exempt from the *Sex Discrimination Act*. He advised that 'many social security payments which appear to be discriminatory in principle on the basis of sex are designed to meet special needs or address special disadvantage'.

The DSS argued that the language of s.1214(6) specifically referred to 'woman' whereas the rest of the section was gender neutral referring to 'persons'. There was a clear intention for the definition of 'special widow' to be gender specific. The AAT took into account the Second Reading Speech introducing this section into the *Social Security Act*, which referred to the amendment overcoming 'categories of benefits based on moral judgments'.

The SSAT had also considered the impact of the *International Covenant on Economic, Social and Cultural Rights*, which Australia had ratified. It provides that all rights, including social security rights, are to be exercised equally by men and women, except where it would promote the general welfare of a democratic society.

The AAT stated that to find that s.1214(6) contained no contrary intention to s.23 of the *Acts Interpretation Act*, it would need to find that the gender-specific language used was left there in error. The AAT conclude that the legislature intended the definition of 'special widow' to be gender specific.

> 'That the notion of "special widow" has been retained whereas other forms of supporting parent pension benefit have, on a policy basis, been made non-gender specific, seems illogical to say the least.'

(Reasons, para. 27)

Although the AAT agreed with the SSAT that to ensure the welfare of children of a sole parent on the basis of the gender of that parent was outmoded, it stated that to change this was a matter of policy.

Formal decision

The AAT set aside the SSAT decision and substituted its decision that Dagher's SPP had been correctly cancelled by the DSS.

[C.H.]

Income from family trust: in the financial year

SECRETARY TO THE DSS and PAPAMIHAIL (No. 12205)

Decided: 12 September 1997 by L.S. Rodopoulos.

Papamihail claimed jobsearch (now newstart) allowance in January 1996 after completing a design course in 1995. Documentation supplied with the claim showed a distribution of $18,000 from a family trust in June 1995. The DSS decided that this payment was income for the purposes of calculating any rate of payment, until June 1996. The SSAT decided the moneys should be held as received in the form of periodic payments during the 1995 calendar year only. That is, Papamihail would have been entitled to a benefit from date of claim.

The issue

Income is defined in s.8(1) of the *Social Security Act 1991* (the Act) as:

> '(a) an income amount earned, derived or received by the person for the person's own use or benefit; or
>
> (b) a periodical payment by way of gift or allowance; or
>
> (c) a periodical benefit by way of gift or allowance.'

Section 1074(1) provides:

> 'If a person receives, whether before or after the commencement of this section, an amount that is not:
>
> (a) income in the form of periodic payments; or
>
> (b) ordinary income from remunerative work undertaken by the person; or
>
> (c) a return from an accruing return investment; or
>
> (d) a return from a market-linked investment;
>
> the person is, for the purposes of this Act, taken to receive one fifty second of that amount as ordinary income of the period during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.'

Papamihail argued that the funds she received related to the previous financial year (1994–95). Further she said she did not know she was a beneficiary of the family trust; because the amount she received from her parents was given to her intermittently. She gave evidence that the amounts were considered by her to be loans, though her evidence on this point, according to the AAT, seems to have been vague.