

## Joint debtor: conviction and waiver

SECRETARY TO THE DSS and EDWARDS  
(No.13134)

**Decided:** 23 July 1998 by D.W. Muller.

Edwards' de facto wife, Roberts, was paid social security benefits totaling \$25,426.34 during the period 1 September 1992 to 4 May 1995. At various times she was paid jobsearch allowance, sickness benefit and disability support pension. She was not entitled to any of these payments, as she was living with Edwards as his wife, and from time to time in the relevant period worked as his receptionist. Edwards was a doctor who had issued her with medical certificates, to enable her to claim sickness benefit and then disability support pension.

The DSS decided to recover part of Roberts' debt by withholdings from Edwards' current entitlement to social security payments. The SSAT decided, by a majority decision, that although Edwards owed a debt to the Commonwealth under s.1224AB of the *Social Security Act 1991* (the Act), the right of the Commonwealth to recover the debt must be waived.

### The legislation

Section 1237AA(1) of the Act states:

'If:

- (a) a debtor has been convicted of an offence that gave rise to a proportion of a debt; and
- (b) the court has indicated in sentencing the debtor that it imposed a longer custodial sentence on the debtor because he or she was unable or unwilling to pay the debt;

the Secretary must waive the right to recover the proportion of the debt that arose in connection with the offence.'

Section 1224AB(1) states:

'If

- (a) a recipient is liable to pay a debt under section 1224 because the recipient contravened this Act; and
- (b) another person is convicted of an offence under section 5, 7A or 86 of the *Crimes Act 1914* in relation to that contravention;

the recipient and the other person are jointly and severally liable to pay the debt.'

### Effect of conviction of joint debtor

Edwards had been convicted of being directly and knowingly concerned in the commission of offences by Roberts (an offence under s.5 of the *Crimes Act*). Therefore, Edwards was a debtor within the meaning of that term in subsection 1237AA(1)(a) of the Act.

The magistrate, in sentencing Edwards, stated that he must take into account the amount involved, and that there was absolutely no possibility of repayment by either Edwards or Roberts. Edwards was sentenced to 12 months imprisonment.

The AAT held that this statement by the magistrate must have had some consequence, otherwise the magistrate would not have commented on Edwards' inability to repay the debt. The only possible consequence in this case was an increase in the length of the prison sentence.

As a result, the Secretary was required to waive Edwards' debt to the Commonwealth under s.1237AA(1) of the Act.

### Formal decision

The Tribunal affirmed the decision of the SSAT.

[A.B.]

## Member of a couple and waiver of debt: 'special circumstances'

'SRL' and SECRETARY TO THE DSS  
(No. 12875)

**Decided:** 11 May 1998 by R.P. Handley.

The DSS decided to recover a debt of \$44,494.70, which was an overpayment of wife pension. This decision was affirmed by an ARO and the SSAT. SRL appealed to the AAT.

### The background

SRL was born in Poland in 1946. Through a Polish friend who had migrated to Australia, she commenced a correspondence with D. Her Polish friend translated the letters. D was 28 years older than SRL. She married D by proxy before migrating to Australia in November 1979. She had to marry before she was legally permitted to leave Poland. On arrival, she discovered D was living in public housing and dependent on an invalid pension. SRL had been led to believe that he was 37 and financially comfortable. D could not speak Polish and she had no English skills.

On 22 November 1979, SRL signed an application for wife pension. D had initiated the claim, completed the form and sent it to the DSS. Wife pension was granted. On 4 August 1981, D started work as a caretaker, without advising the DSS. Both D and SRL continued to receive social security payments. SRL took English classes in 1980 but discontinued when her first son was born in 1981. She did not recommence English classes until 1993. In February 1983, she gave birth to a second son. Both birth certificates recorded D as the father, although SRL denied that they ever had a sexual relationship.

In February 1991, the DSS discovered that D had been in full-time employment since 4 August 1981. The DSS decided to seek repayment of SRL's wife pension. SRL claimed sole parent pension from 18 April 1991. She advised the DSS she had separated from D on 16 April 1991 due to domestic violence. She lived in a refuge from April to August 1991 when housing commission accommodation became available.

### SRL's evidence

SRL said she married and migrated to Australia having been misled by D. On her arrival at the airport, D was accompanied by a Polish-speaking solicitor. SRL told the AAT she went to the solicitor's office the following day saying that she wanted to return to Poland. She maintained she never shared a bedroom or a sexual relationship with D. He filled out the social security form and told her to sign it. No-one at the DSS spoke to her in Polish. All subsequent social security forms were completed by D but signed by her. She paid for her own food and paid D rent and made contributions for bills. They cooked separate meals. D was not present at the birth of her first son. D did not participate in the care of the children. She told the AAT that the children's father was a man with whom she had a 5-year relationship.

In 1983, SRL forged a letter from D to have the children included on her passport. Two months after returning to Poland, she was contacted by police and told they had to return to Australia. On return to Australia, she and the boys moved with D to a larger house in Marickville. D had the largest bedroom at the upstairs front of the house and SRL and the 2 boys each had separate bedrooms. SRL cooked for herself and her children. D cooked for himself and had a separate fridge. They bought and paid for food separately and did their own washing and ironing. SRL paid no rent but did all the cleaning except for D's bedroom. Each paid for their share of the bills, but