

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

SRL paid for the telephone as she mostly used it.

Three years after moving to Murrumbidgee, D purchased the house. SRL did not contribute to the house loan repayments. D did not accompany SRL and the children to birthday parties and had no involvement in their care if they were sick. He did not help with their homework and had no contact with the school. SRL told the AAT that D did not like her elder son because of his behaviour.

In 1986, SRL, D and the boys went on a holiday to Singapore as D was apparently too sick to travel alone. D had one room and the others slept in a separate room.

SRL told the AAT that D commenced paid work in about 1981. In 1991, the Federal Police visited while D was at work and searched the house. D was later taken in for a police interview. D apparently tried to get SRL to lie to the police and threatened that he would kill her if he lost the house. He chased her around the house with a knife. A police officer telephoned during this abuse. She came and took SRL and her children to a refuge. A social worker helped her complete an application for sole parent pension. Before this, she had no knowledge of sole parent pension or women's refuges.

She again visited Poland in 1993 to attend her daughter's wedding. She and the boys returned because the boys missed Australia.

SRL told the AAT she had various health problems including insomnia, depression, high blood pressure, difficulty walking and disc problems. As at the date of the hearing, she received disability support pension. The boys had to help with the housework, such as vacuuming, hanging out the washing and carrying groceries.

SRL told the AAT her financial situation was poor and that she only had \$45 in savings. At the time of the hearing she owed money for the telephone and electricity bills and her son's school fees. She also owed \$200 to a friend who had lent her money.

The legislation

Section 24(1) of the *Social Security Act 1991* (the Act), provides that where a person is married to another, and that person is not living separately and apart from the other person, and the Secretary is satisfied that there is a special reason why that person should not be treated as a member of a couple, then the Secretary may determine that they not be treated as a member of a couple.

Section 1237AAD of the Act states that the Secretary may waive recovery of

the debt if satisfied that the debt did not result from the debtor or another knowingly making a false statement or failing to comply with the Act, there are special circumstances other than financial hardship alone warranting a waiver, and it is more appropriate to waive than write off the debt.

Submissions

SRL conceded that she was a 'married person' as defined by the Act. However, she argued that, pursuant to s.24, she should not be treated as a member of a couple as there were special circumstances warranting an exercise of the Secretary's discretion. If not a member of a couple, she was not eligible for wife pension. SRL submitted, however, that the debt should be written off or alternatively waived. It was submitted that her initial claim should be treated retrospectively as a claim for special benefit. It was argued on her behalf that her English was very poor up to 1993 and at the AAT hearing it was still idiosyncratic. Her poor English skills were confirmed by two independent witnesses and by Detective Constable Walker. Accordingly, she was not responsible for the fraudulent completion of pension claim forms completed by D but signed by her. Walker also gave evidence that D was a 'highly paranoid and very aggressive man'. She thought 'he was not a pleasant man. I did not think he was 'all there.' It was submitted that the DSS should waive the debt because there were special circumstances in addition to financial hardship.

The DSS argued there were inconsistencies in the evidence of SRL and they could not be fully explained by her poor English. She was not without initiative, having admitted to forging D's signature on a passport application, allowing her and the boys to move to Poland. It was pointed out that the family had travelled to Singapore together on holiday. The DSS submitted that the discretion in s.24 should not be exercised and SRL should be regarded as a member of a couple. The discretion to waive the debt pursuant to s.1237AAD did not apply as D had knowingly made false statements. The DSS suggested it was unlikely that SRL had no knowledge of the content of the pension forms she signed. The DSS said her financial state did not amount to severe hardship.

Should the s.24 discretion be exercised?

Was there a 'special reason' such that SRL should not be regarded as a member of a couple? The AAT referred to *Le Huray* (1996) 2(4) SSR 55 where Jenkinson J considered the decision maker

should have regard to both the purpose of the Act and the facts in seeking a just outcome. In *Beadle* 26 SSR 321 the Federal Court indicated the circumstances must be unusual, uncommon or exceptional. In *Reid* (1981) 3 SSR 31 the AAT considered whether the decision maker would be achieving or frustrating the ends of the Act. However, the decision maker must respond to any special reason rendering the application of the general rule unreasonable or inappropriate in terms of the Act.

The AAT found no reason to doubt the credibility of SRL. It noted that her evidence as to the 'unusual' relationship with D was corroborated by two witnesses. There was no pooling of resources, D and SRL lived separate lives. The AAT accepted that D was not the biological father of the two boys. He provided no support and did not help in their care. The AAT accepted that SRL's English was poor and that she had signed the forms after D completed them. The AAT found that her English was 'far from perfect' at the hearing and that an interpreter played a significant role in aiding communication. It found she did not knowingly mislead the DSS or make false representations. The DSS made no attempt to interview SRL when she applied for wife pension. The evidence indicated that D dominated and intimidated her. The AAT accepted she did not know of sole parent pension or refuges until the intervention of the police and refuge workers.

The AAT had 'no doubt' that the circumstances of the relationship between D and SRL were unusual or extraordinary. If found there was a special reason why it was appropriate to exercise the discretion conferred by s.24 to treat her as not a member of a couple. To not do so would impair her welfare and create an unjust outcome as it was D, not SRL who was responsible for the fraud.

Accordingly, SRL was not qualified to receive wife pension and had been overpaid.

Should the debt be recovered?

The AAT considered whether the debt should be waived in accordance with s.1237 AAD due to special circumstances. The debt did not arise as a result of a false statement or failure to comply with the Act, but because of the Tribunal's decision to exercise the discretion under s.24(1) of the Act to treat SRL as not being a member of a couple. As to special circumstances, the AAT was satisfied that the relationship between D and SRL was unusual or extraordinary. In *Groth* (1996) 2(1) SSR 10 the Federal

Court indicated that there must be circumstances that 'take it out of the usual or ordinary case' where 'something unfair, unintended or unjust had occurred'. In addition to the relationship between SRL and D, the AAT noted SRL's deteriorating health and that, at the current rate of deductions from her disability support pension, the overpayment was unlikely to be recovered in her lifetime.

The AAT considered it appropriate to waive recovery of the debt in the special circumstances of the case.

Formal decision

The SSAT decision was set aside. SRL was not a member of a couple and had been overpaid. The debt should be waived as there were special circumstances.

[H.B.]

Sole parent pension: marriage-like relationship

STEPHENSON and SECRETARY TO THE DSS
(No. 13185)

Decided: 14 August 1998 by H.E. Hallowes.

Stephenson's sole parent pension (SPP) was cancelled on 2 May 1997. At the time of the AAT hearing, Stephenson shared a house with David Stephenson and her 2 children, Alice and Edith. She failed to advise the DSS at the time of her application for SPP that a male also lived there. She subsequently told the DSS he lived there but maintained they lived separate lives and were not a couple. Her reasons for this claim were that they did not share a bedroom, they did not have a regular sexual relationship, they lived separate lives and did not socialise together. In July 1995, Stephenson changed her name from Owens (her mother's name) to Stephenson. She told the AAT she did this because of her mother's reputation in the district.

Her daughter Alice was born on 7 May 1995 and Edith was born on 31 December 1996. She conceded that David was the father of her 2 children but maintained that they did not have a 'marriage-like relationship'. Her mother who resided with her when she first applied for SPP, moved out of the household in

May 1997 on Stephenson's 19th birthday. It appears her mother initially had a relationship with David. Stephenson initially regarded him as a 'protector'. When he first moved into the household he had prevented the sexual abuse that her mother failed to prevent.

On 22 April 1997, Stephenson told the DSS she would share premises with David until they were married. However, she continued to maintain they were not a couple but that David's status in the household was that of a boarder.

David had told the SSAT that he had a relationship with Stephenson's mother, Owens and that Stephenson had been infatuated with him since she was 13. They commenced a sexual relationship when she was 16.

The legislation

Section 249(1)(a)(i) of the *Social Security Act* states that a person is entitled to SPP if not a member of a couple. Section 4(2) provides that a person is a member of a couple, for the purposes of the Act if:

- that person has a relationship with a person of the opposite sex, and
- they are not legally married, but
- the relationship is a marriage-like relationship, and
- they are both over the age of consent, and
- they are not in a relationship prohibited by s.23B of the *Marriage Act 1961*.

Section 4(3) sets out the matters to be considered by the Secretary to the DSS in deciding whether there is a marriage-like relationship. These factors include whether there is joint ownership of real estate, significant pooling of income, sharing of everyday household expenses, joint responsibility for the care of children, the basis of the division of household, whether they hold themselves out as married, the assessment of friends and regular associates of the relationship, any joint social activities, any sexual relationship, the length of the relationship, the nature of the companionship and support between the two, and whether they consider that the relationship is likely to continue indefinitely.

Findings

The AAT found that there was an emotional connection between Stephenson and David which sometimes involved sex. There were no joint assets or liabilities. There was no joint bank account. Although David paid board, there was no 'significant' pooling of resources, there being no evidence that Stephenson's money was ever made available to David. She had the sole responsibility for the care and welfare

of the children and she was solely responsible for the housework. The AAT considered that following the departure of her mother from the household, Stephenson assumed responsibility for the household. She did not consult a partner in making decisions for the household. Responsibilities were not discussed and distributed. Stephenson did not hold herself out as a member of a couple in a long-term relationship and there was no independent evidence as to a commitment between the two. David had his own friends and they did not socialise together.

David had arrived in her life as a protector who managed to stop her sexual abuser. The AAT found that the relationship changed in May 1997 when her mother left the house. Edith was 2 months old at the time. The AAT was satisfied that the weight of the evidence indicated Stephenson then had to assume responsibility for her life for the first time. David retreated from the household and into his bedroom, his mental health having deteriorated. The AAT accepted that sex occurred occasionally. Their companionship and emotional support had diminished since her mother's departure.

The AAT found Stephenson's evidence to be credible, despite her lack of honesty about David residing in the house when she first applied for SPP. Stephenson and David did not have a marriage-like relationship. She was not a member of a couple.

Formal decision

The decision under review was set aside. In substitution the AAT decided, having had regard to all the matters referred to in subsection 4(3) of the Act, that the weight of the evidence supported the formation of the opinion that Stephenson did not have a marriage-like relationship with another person and on and from 2 May 1997 she was entitled to be paid SPP.

[H.B.]