

July 1996 be waived, but that those from July 1996 to May 1997 be not waived, and that deductions from Mrs Mulford's continuing entitlements not exceed \$20 a fortnight.

[P.A.S.]

## Sole parent pension: separately and apart from husband

SECRETARY TO THE DSS and MCNALLY  
(No. 13368)

**Decided:** 12 October 1998 by D.P. Breen.

### Background

In January 1997, the DSS cancelled payment of sole parent pension to McNally and raised an overpayment for the period December 1995 to October 1996.

### Issues

Was McNally living with her husband during the relevant period?

### Legislation

The AAT did not refer to the legislation in the decision.

Section 249 of the *Social Security Act 1991* (the Act) sets out the criteria for qualification for sole parent pension. Amongst other requirements, to qualify for a sole parent pension, a person must not be a 'member of a couple'.

'Member of a couple' is defined in s.4(2) of the Act. The issues that need to be considered when forming an opinion about whether someone is a 'member of a couple' or not are contained in s.4(3) of the Act. These include the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, the sexual relationship between the people and the nature of the people's commitment to each other.

### The 'evidence'

The DSS submitted that the SSAT erred in accepting McNally's subjective evidence of her living arrangements rather than the objective evidence supplied from independent sources.

The DSS sought to rely on the fact that McNally had paid a debt owed to the DSS by her husband. McNally justified

this action on the basis that she had received a District Court judgment for damages and:

'a substantial amount of the quantum of that judgment was intended as recompense for the person who had cared for her in her period of incapacity which led to the action. That person was her husband.'

(Reasons, para. 9)

The AAT accepted McNally's explanation of why she paid the debt. The AAT did not accept that McNally's action established the nature of the relationship during the relevant period.

The DSS also called evidence of the McNallys' living arrangements during the relevant period.

The AAT accepted the evidence of McNally's daughter and her husband, the McDonalds, that during the relevant period, McNally remained in a property that she and her husband owned and that Mr McNally resided in a 'drift in, drift out' kind of arrangement with the McDonalds.

The AAT noted that throughout the period there was a measure of contact between McNally and her husband. The AAT commented:

'That is hardly surprising. They were living in a small country town. They retained a common bond in the form of and in the personae of their children. There was also a measure of support by each for the other; he mowing the lawn . . . and doing some maintenance; she apparently, for at least some of the time, doing his washing and discharging other small functions in his favour. This is not surprising either. It is my experience that people who are not well off financially and who are less than bloody-minded towards each other in the face of domestic conflict, maintain the mutually supportive attitudes reflected in the evidence in this case. In addition, the house at 8 Frederick Street was, as I have said, owned by the McNallys, was the subject of a mortgage and would clearly have been their most valuable asset whilst at the same time being their most demanding commitment. There was a clear need and, flowing from it, a motivation, to preserve its value. His contribution to the preservation of the asset, and thus its value, would in itself motivate her to reciprocate in the small way reflected in the evidence.'

(Reasons, para. 18)

The AAT found that McNally had lived separately and apart throughout the relevant period. 'The facts of the matter and the history of the McNally relationship are such that McNally was entitled to the sole parent pension throughout the period she received it': Reasons, para. 20.

The AAT stated:

'I acknowledge that the Administrative Appeals Tribunal does not review the reasons of legal forums and processes below. We decide de novo the issues arising from the decision under review. I would observe, however, having read the reasons for the decision of the Social Security Appeals Tribunal under review in this matter, that whilst on the evidence before that Tribunal I might not have reached the same

conclusion, there is nothing so inherently unacceptable in the Tribunal's reasoning as to call for interference by this Tribunal with its fact-findings.'

(Reasons, para. 20)

### Formal decision

The AAT affirmed the decision under review.

[M.A.N.]

## Age pension income test: employee or carrying on a business?

DAVIDSON and SECRETARY TO THE DSS  
(No. 13236)

**Decided:** 24 August 1998 by D.W. Muller.

Davidson sought review of a decision to disallow as deductions from his gross income, losses, outgoings and depreciation relating to his activities selling real estate, for the purpose of assessing the rate of age pension to which he was entitled. Davidson was an aged pensioner who, in his spare time, sold real estate for Pine City Properties Pty Ltd. The deductions claimed by Davidson related to his car expenses, licence fees and mobile telephone costs. For the first three months of 1997 his gross income from real estate commissions was \$1720 and his expenses \$1712.68. His expenses had been allowed as deductions by the Australian Taxation Office. The DSS used Davidson's gross income for the purpose of assessing his entitlement to age pension, it having been determined that he was not carrying on a business.

### The legislation

Section 1072 of the *Social Security Act 1991* (the Act) requires the calculation of the rate of reduction to pension entitlement to be made on the basis of gross ordinary income from all sources without any reduction, unless a pensioner carries on a business.

If a pensioner carries on a business, the ordinary income from the business is reduced by the factors set out in s.1075 of the Act for the purpose of the income test. Those factors relate to allowable deductions for the purposes of ss.51, 54(1) and 82 AAC(1) of the *Income Tax*