

Administrative Appeals Tribunal Decisions

Age pension: sale of home

ANSTIS and SECRETARY TO THE DFACS
(No 9990760)

Decided: 13 October 1999 by
S.A Forgie.

Background

Anns was in receipt of age pension when she decided to sell her home. Members of her family made inquiries about how Centrelink treated the liquidated proceeds of the sale for calculating age pension. The advice given was that when a person sells a principal place of residence and intends to buy another one within 12 months, the value of the liquidated sum is not taken into account for assets testing purposes. Any income earned from that sum or deemed under the Act is not similarly exempted.

Anstis sought to have the proceeds disregarded for all purposes under the *Social Security Act* (the Act) during the 12 months period. Her son wrote on her behalf: 'If the proceeds are deemed I fail to see how this is disregarding them'.

Centrelink proceeded to assess the rate of Anstis's age pension taking into account the proceeds of the sale of the home in applying the income test and Anns sought review of that decision.

The legislation

The provision that was most directly raised for interpretation was the meaning of 'or the purposes of this Act' in s.118(2) of the Act which provides:

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- (a) a person sells the person's principal home; and
 - (b) the person is likely, within 12 months, to apply the whole or a part of the proceeds of the sale in acquiring another residence that is to be the person's principal home;
- as much of the proceeds of the sale as the person is likely to apply in acquiring the other residence is to be disregarded during that period for the purposes of this Act.

The issue

The AAT identified the issue as being whether the proceeds of the sale of Anns's home, which she intended to use within the following 12 months in the purchase of another, should be 'disregarded for the purposes of the Act'. The AA posed the question: 'Are those pur-

poses limited to the application of the assets test or do they extend to the application of the income test?'

The framework of the Act

The AAT approached the resolution of the question through a detailed exegesis of the legislation. The Tribunal pointed out that it was adopting the approach taken by the SSAT of looking at the whole of the Act, and that included the headings of Parts, Divisions and Subdivisions.

The AAT pointed out that the Act is divided into Chapters. Chapter 1 deals with formal matters such as definitions. Chapter 2 then sets out the provisions for the different kinds of pensions and benefits, including, as in Anstis' case, age pension. Section references then lead to the relevant Rate Calculator, whether for pension, benefit or allowance — Rate Calculators being found in Chapter 3. Rate Calculators set out the working method for assessing a rate to be paid, applying assets and income tests. Under the Act it is necessary to apply both the assets and income tests. The test that produces the lower rate of social security payment is the one that is applied.

The AAT pointed out that within the various Rate Calculators an ordinary income test is provided for. In the case of age pension it is at Module E, and Note 2 to point 1064-E1 provides as follows:

the application of the ordinary income test is affected by provisions concerning:

- the general concept of ordinary income (sections 1072 and 1073);
- business income (sections 1074 and 1075);
- deemed income from financial assets (sections 1076 to 1084);
- income from income streams (sections 1095 to 1099D);
- disposal of income (sections 1106 to 1112)

Ordinary income is further defined within the definition section of s.8(1) being income that is not maintenance income or an exempt lump sum.

Not only, however, are income testing provisions to be found in the Rate Calculators, there are general provisions elsewhere in Chapter 3 which assist in determining a person's ordinary income, notably in Part 3.10. It is in Part 3.10 that s.1072 is to be found. It provides that a person's 'ordinary income ... is a

reference to the person's gross ordinary income', except for reductions set out in the Act. Another Division of Part 3.10 goes on to deal with the deeming of income. These provisions are found in Division 1B of Part 3.10. A person who has financial assets is taken for the purposes of the Act to receive ordinary income on those assets in accordance with the provisions of the Part.

The AAT pointed out that s.1076(2) provides that a person who has financial assets is taken to have received ordinary income on those assets in accordance with the section. The practical effect of s.1076(3) and (4) is that the 'total value of the person's financial assets must be calculated': Reasons, para. 22.

A financial asset is defined as meaning a 'financial investment' or a 'deprived asset' and financial investment bears the meaning given in s.9 of the Act. However, no part of the Act deals with how the value of a person's financial assets is to be calculated.

Equally, nothing in the Act specifies how the value of a person's assets is to be determined, though 'property' is defined in the broadest terms in s.11(1) of the Act.

The AAT said that if the heading to Part 3.12 (where s.1118(2) is to be found) were determinative of the matter there would be no question that the 'purposes of the Act' were limited to the application of the assets test. However, the heading to s.1118 does not limit its application to the assets test but refers more broadly to 'calculating the value of a person's assets' rather than referring to the assets test itself. Certain other references within the section also extend the purposes beyond merely asset testing. For instance where assets disposed of are to be taken into account, these become 'deprived assets' within the meaning of that term in s.9(4) of the Act and then fall within 'financial assets' in s.9(1). The AAT pointed out that 'financial assets' have relevance for income test purposes in the Act but not for assets testing. What this means, the AAT said, is that it is clear that the 'purposes of the Act' where used elsewhere (in s.1125 and s.1126 as examples) can be seen to extend beyond merely asset testing to income testing as well.

The AAT said therefore, that s.1118:

is not intended to be limited in its application to the assets tests specified in the Act. It is intended to be limited to those situations in

which there is need to calculate the value of a person's assets.

(Reasons, para. 35)

When the various inclusions and exclusions within s.1118 are examined it becomes clear that despite being placed in a Part of the Act dealing with provisions relating to the assets test, it is not limited to that. Looked at contextually, the 'purposes of the Act' are those requiring a person's assets to be valued — which in the Act may be an exercise required for either income testing or asset testing (as well as other purposes). The fact that s.1118(2) of the Act does not have the words: 'In calculating the value of a persons assets' present in s.1118(1), should not lead to the conclusion that s.1118(2) should be read more widely than s.1118(1). The remaining provisions of s.1118 are concerned with the valuation of assets, and the heading of the Division points also to that conclusion.

The effect of s.1118(2) is to exclude the proceeds of sale from the value of assets. Section 1076, however, requires that regard be had to the total of a person's financial assets. Once the proceeds were deposited in a bank account and were a financial investment and a financial asset (s.9 of the Act) they had to be taken into account. The Tribunal stated that the concept of 'asset' and 'financial asset' are not interchangeable and must be read as separate entities. Where s.1118(2) speaks of 'assets' it is not referring to 'financial assets'. While the proceeds of sale of a house are to be disregarded for determining the value of a person's assets it does not mean they are to be disregarded in determining whether they are financial assets.

The Tribunal stated that the conclusions, though for different reasons, were consistent with *Thomas and Secretary to the DFACS* (unreported decision of the AAT dated 17 November 1998) and *Aconley and Secretary to the DSS* (1996) 2(5) SSR 67.

The AAT noted that in any event actual income earned on the proceeds would have to be taken into account as 'money earned derived or received by any means for Mrs Anstis' own use or benefit' and was not excluded from the definition of income in s.8 of the Act: Reasons, para. 44.

Formal decision

The AAT affirmed the decision under review.

Female age pension: pre-operative transsexual, gender reassignment

SSRD and SECRETARY TO THE DFACS
(No. 19990626)

Decided: 25 August 1999 by
B.J. McMahon.

SSRD was born a male on 20 January 1936. However, as she considered herself female, the AAT referred to her as a woman. The issue to be considered was whether she was eligible for age pension. Section 23(5C) of the *Social Security Act 1991* provided that a female is eligible for age pension at 60 years and 6 months. A male is eligible at 65 years. At the time of the AAT hearing, SRDD was 63 years and three months and was not eligible for age pension if male but was eligible if female. SRDD sought review of a SSAT decision that she was not eligible for age pension.

Background

As a young person SRDD was drawn to feminine clothing. In her early years, she felt and behaved as a woman, but was physically male. Her gender confusion led to isolation from mainstream society and her evidence was that this led to associations with convicted criminals. She was in prison from 22 June 1982 to 29 January 1996.

Whilst in prison, she corresponded with a professor who advised her about gender reassignment and hormone treatment. Through the prison doctors, she took hormone treatment for 18 years. She consulted the prison psychiatrist and discovered the possibility of gender reassignment surgery. In August and September 1987, she underwent an operation known as an orchidectomy. In this procedure, the testes are removed, thereby reducing the male hormones in the blood. This caused a decreased muscular mass and a change in the muscle/fat ratio together with the development of breasts. Although SRDD had her testicles removed, had developed breasts and presented as a woman, she had not undergone surgery to remove the penis and construct a vagina.

Her general practitioner wrote that she was 'a bona fide transsexual woman. She has been living as a woman, full time, for more than twenty years, and receiving female hormone treatment during that time...' A consultant physician who examined her on 27 June 1997

wrote: 'She has breast development, no testicles and a smaller than normal phallus. She does not present as a normal male and passes as a female and can never function as a male'.

The legislation and case law

Part 5A of the *Births Deaths and Marriages Act 1995* (NSW) dealt with 'change of sex' and defined 'gender reassignment surgery' in s.32A as a surgical procedure where a person's reproductive organs are altered to assist a person to be considered a member of the opposite sex.

The AAT referred to *SRA* (1993) 77 SSR 1130, a decision of the Full Court of the Federal Court which considered whether a transsexual male had become a woman. In that case, Lockhart J defined sex reassignment surgery as 'a surgical procedure, which alters the genitals and other sexual characteristics of a person so that the person will appear outwardly as a person of the opposite sex ... Sex reassignment surgery for male-to-female transsexuals involves the removal of the external male organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics.' Lockhart J declared that three-step surgery involving the removal of the penis, the removal of the testicles and the construction of an artificial vagina were necessary before a male to female transsexual could legally be considered a woman. Heerey J agreed with this finding. Black CJ was not as explicit in his reasoning. He described post-operative male-to-female transsexuals as people who have undergone surgery 'so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change'. He later said that a person who had had a sex change had undergone surgery so that the 'external genital features ... are now in conformity with the person's psychological sex'. The AAT said that his reasoning also supported a view that three-step surgery was required.

The Federal Court explicitly rejected the argument that primacy should be given to psychological factors in determining gender, stating that full gender reassignment surgery was necessary. Lockhart J found that a male-to-female transsexual who had undergone full three-step surgery can accurately be described as a woman. He said 'a woman or a female ... includes a person who, following surgery, has harmonised psychological and anatomical sex'. Lockhart also stated that 'the ordinary

[M.C.]