

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 person's 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.

[M.C.]

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

understanding of woman or a female does not include a transsexual who has not adopted the anatomical features of the sex which he or she seeks to achieve'.

The AAT said that until legislation was passed by the Commonwealth Parliament that stated otherwise, it was bound by the Federal Court decision. Applying the reasoning of the Full Court of the Federal Court in *SRA*, SRDD was a pre-operative transsexual. She had had her testicles removed, but not her penis and she did not have an artificially constructed vagina. Accordingly, she was not a woman for the purposes of the *Social Security Act 1991*.

Formal decision

The SSAT decision was affirmed. SRDD was not eligible for age pension.

[H.B.]

Age pension: secret trusts and declarations of trust

KOMESAROFF and SECRETARY TO THE DFaCS
(No. 19990741)

Decided: 7 October 1999 by B. G. Gibbs.

Background

Mrs Komesaroff received a property in Armadale under her mother's will.

Mr and Mrs Komesaroff claimed age pension in 1994 and advised DSS that Mrs Komesaroff owned 100% of the land. However, the property was incorrectly recorded as trust property and pension was granted.

On 30 June 1997 the property was sold to Mrs Komesaroff's daughter-in-law, Mrs Sally Gardener for \$450,000. The proceeds were disposed of as follows:

- gift to her daughter Ruth \$182,000.00 to help her purchase a property;
- payment of school fees totalling \$9,810.00 for Ruth's children;
- purchase of a unit in her own name in Armadale, with the balance of the purchase money;
- mortgage retained for the sum of \$150,000.

In 1998, the property was assessed as the personal asset of Mrs Komesaroff, and the proceeds from the sale of the property assessed as a personal asset.

The Department decided that from this date, Mr and Mrs Komesaroff were no longer entitled to age pension and their claim for payment under the Pension Loan Scheme was also refused.

Both decisions were appealed to the SSAT which affirmed the decisions.

The issue

The issue in this appeal was whether the value (or proceeds from the sale) of the house situated in Armadale should be taken into account in assessing Mr Komesaroff's entitlement to age pension.

The law

The provisions of the *Social Security Act 1991* considered by the AAT were those relevant to asset testing for age pension and pension loan scheme purposes, namely, s.11(4)(b)(i)(ii), s.44(2), Pension Rate Calculator A at the end of s.1064, s.1118(1)(b), and s.1133(2).

The Tribunal also heard submissions on the common law position in relation to circumstances giving rise to a secret trust and a declaration of trust.

The legal submissions

The Department argued that the will clearly passed the property to Mrs Komesaroff 'for her own use absolutely' and that there was no trust created in relation to the house.

Various authorities were referred to in relation to the creation of a secret trust, for example, *Wills and Intestacy in Australia and New Zealand* (second edition):

The person who alleges the existence of a secret trust has the burden of proving it. The standard of proof is the ordinary civil standard. In Australia it has been said that all the elements must be established to the reasonable satisfaction of the court.

For a secret trust to be completely constituted the testator must, while alive:

1. manifest an intention that a particular person other than the legatee is to be benefited;
2. communicate that intention to the legatee; and
3. be induced by the acquiescence of the legatee to make or retain the disposition in the will to the legatee.

It is important that these things be done in the testator's lifetime. If the legatee to whom a will appears to give property beneficially has heard nothing in the testator's lifetime about the testator's wishes the legatee is entitled to the legacy beneficially because in taking it there would be no fraud on her or his part..

(Reasons, para. 18)

Mr Komesaroff referred to a previously made statement indicating that he

had advised that if the property was left to Mrs Komesaroff with the intention that it should be applied for the benefit of the grandchildren then a legally enforceable trust would be created.

In his submission the question of whether there was a secret trust was not relevant as there was an express declaration of trust whereby the property was held by Mrs Komesaroff as trustee for the benefit of the testator's grandchildren. Mr Komesaroff went on to explain:

What my wife did by her declaration, or statement, in November, was to acknowledge and to provide the written evidence to enable that trust to be enforced if it was so intended by the beneficiaries under the trust.

It wasn't a new trust, it was an acknowledgment of a trust which at that stage perhaps did not comply with the requirements of writing to establish the trust.

(Reasons, para. 32)

Findings

The Tribunal found that there was no secret trust, noting that this finding was not necessary since Mr Komesaroff had conceded that this was not in issue.

It also found that on the evidence there was no Declaration of Trust. The Tribunal referred to *The Ballarat Trustees Executives and Agency Company Ltd v Perry* (1911) VLR 318 and concluded that a 'Declaration of Trust must be clear and unequivocal': Reasons, para. 34, and that in this situation Mrs Komesaroff did not make such a Declaration.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Family payment: debt due to underestimate of income

CLARK and SECRETARY TO THE DFaCS
(No. 199900809)

Decided: 27 October 1999, by J A Kiosoglous.

Clark sought review of a decision of the SSAT affirming a decision to raise and recover a debt of family payment for the period 15 August 1996 to 23 April 1998.