

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.