Marriage-like relationship: ex-spouses sharing a residence

HOUSE and COOTE and SECRETARY TO THE DFaCS (No. 19990929)

Decided: 10 December 1999 by M.T. Lewis.

The AAT reviewed two SSAT decisions to pay pensions at the married not the single rate. House received a carer's pension and Coote received disability support pension (DSP). The DFaCS decided to pay both at the married rate, having determined that theirs was a 'marriage-like relationship'.

The facts

House and Coote married on 12 September 1981 and divorced in May 1998. House gave birth to a son, Nathan, on 7 August 1980. There was inconsistent evidence as to when House and Coote separated and for what periods they reunited. However, their evidence was that they currently lived together as Coote had a significant back injury and no-one else to look after him. House cared for him in return for board and lodging.

House claimed sole parent pension (SPP) on 24 December 1990, stating that she had separated from Coote. However, she requested cancellation of SPP on 6 May 1991 reporting that she had returned to live with him. On 2 October 1992, a property settlement, noting a separation date of 28 March 1992 was registered with the Family Court. The marital home was transferred to House and the business to Coote. In May 1993, House advised the DFaCS she had separated from Coote and on 11 June, she again claimed SPP.

On 16 June 1994, Coote advised the DFaCS he had moved from Perth to his mother's home in NSW. House told the DFaCS on 5 September 1994, that she had also moved to Charlestown, NSW. On 10 October 1995, House and Coote moved into a house together and Coote told the DFaCS he was paying House $100 weekly for board. A departmental note indicated that these living arrangements were satisfactory and that there was no need for further review as Coote required constant care which was provided by his ex-wife. House claimed a carer's pension when her son turned 16 and her SPP finished. A departmental social worker assessed her as eligible for carer's pension, but at the married rate. Ultimately, it was this decision to pay them both at the married rate which was under review.

The legislation

Section 4(2) of the *Security Social Act 1991* provides that a person is a member of a couple if legally married and not living separately from that person, or, if he or she is in a relationship with a person of the opposite sex, which is, in the opinion of the secretary a 'marriage-like relationship'. Section 4(3) lists various factors to be considered in deciding whether the couple are in a 'marriage-like relationship' including any joint ownership of property, pooling of resources, sharing of household expenses, joint responsibilities and obligations, the living arrangements, the social and sexual aspects of the relationship and the degree of companionship and emotional support.

The evidence

In his evidence, Coote said he met House on a cruise in 1979 and married her in September 1981. He suspected that Nathan was not his child but accepted him as his son. He said the marriage broke up due to financial pressures when he lost his business. At about the same time, he injured his back. He told the AAT he moved in with House in NSW as his mother could not cope with the degree of care he required and because he could not afford to pay for his nursing care. In return for $100 a week, House prepared his food, did all the housework and looked after him. He paid all his car expenses. He showed the AAT his will which named his two daughters from a previous relationship as beneficiaries. He told the AAT that he and House had last had a sexual relationship in 1991 or 1992.

In her evidence, House insisted that Coote was not Nathan's father. She said that Nathan had known this for two years. She told the AAT the marital breakdown had nothing to do with the collapse of the business, but that it occurred simply because they 'didn't get on'. She said they had not had a sexual relationship for a very long time. Like Coote, she was unsure and inconsistent about the separation dates.

She told the AAT she imposed various conditions about privacy and independence before agreeing to live with him and look after him. She said he had his own bedroom, lounge-room, television, his own lockable bathroom, and separate crockery. They very occasionally watched television together and rarely ate together. When asked about the permanence of the current arrangements, she said he could leave at any time but he could not get anyone to look after him. She paid all the bills which were in her name. She said she looked after him because he had no-one else and 'she wasn't one to turn anyone away'.

A neighbour, Gail Skelly, provided the AAT with a written statement in which she noted House and Coote lived separate lives and did not live as a couple. She said she was not a close friend, but that House and her occasionally had coffee in each other's homes. Coote did not accompany House on these occasions. House never spoke of her and Coote doing things together and they did not seem to have a social life.

Submissions

The DFaCS submitted that there was a pooling of resources and expenses. The DFaCS conceded that they had separate living arrangements but noted that they occasionally watched television and ate meals together. It submitted that the division of household labour was typical of many heterosexual relationships. The DFaCS submitted that there was a close daily interaction between them and a clear commitment on Coote's behalf to be a parental carer for Nathan.

The DFaCS referred the AAT to the case of Anderson (AAT No. 8261A, 4 June 1993) which looked at the significant degree of joint responsibility for two children in deciding there was a marriage-like relationship. The DFaCS also referred to the significant shared social history in terms of the marriage, the failed business, the rearing of Nathan and the contemporaneous move to NSW as evidence of a relationship. Further, the DFaCS referred to the pooling of expenses and the significant support they provided for each other to argue that this was a 'marriage-like relationship'.

Marriage-like relationship

The AAT commented that there were sufficient inconsistencies in both their evidence to warrant 'real concern' about their credibility. It suggested they had both tried to tailor their evidence to prove they were not living in a 'marriage-like relationship'. However, the AAT decided there was sufficient consistency on the central issues to allow for a factual assessment. Despite the apparent tailoring of their accounts, the AAT did not feel obliged to disregard their evidence.

The AAT noted there was no joint ownership of real estate or other assets and no joint liabilities. It found that there was no pooling of resources for major financial commitments. The AAT did not accept the DFaCS submission that the payment of board and lodging should be seen as a

pooling of resources. The AAT was satisfied that since September 1996, Coote had not shared joint responsibility for Nathan's care. It accepted their evidence as to their separate living arrangements, finding that this was consistent with House being Coote's carer. The AAT accepted that they rarely engaged in joint social activities. Despite the inconsistencies about the dates and periods of separation, the AAT found there were significant periods of separation both in Western Australia and New South Wales. There appeared to be little evidence of mutual companionship. The AAT said that, at the most, there was evidence of mutual emotional support and concern. It found that the relationship bore little resemblance to a marriage-like relationship.

Formal decision

The SSAT decisions were set aside. The AAT was not satisfied that House and Coote had a marriage-like relationship. They were entitled to pensions at the single rate.

[H.B.]

Order to stay implementation of SSAT decision: prejudice, hardship and prima facie merits of case

SECRETARY TO THE DFaCS and SRKK
(No. 19990846)

Decided: 11 November 1999 by B. Gibbs.

The issue

The DFaCS sought a stay of implementation of an SSAT decision concerning the rate of special benefit (SB) to be paid to SRKK. The DFaCS had determined in July 1999 that the appropriate rate of SB was the 'at home' rate, whilst in August 1999 the SSAT decided that the rate should be the maximum rate of youth allowance for an independent person living away from home, and should include a component for rent assistance if qualified. The effect of the SSAT decision was that, if implemented, SRKK would be paid SB at a considerably higher rate than that applicable to a child living at home. The DFaCS sought a stay of that decision from the AAT.

Background

SRKK was an 8-month-old infant wholly dependent on his mother, who as a non-resident was herself ineligible to receive social security payments. In April 1999 an Apprehended Violence Order was obtained by SRKK's mother against SRKK's father. In May 1999 SRKK and his mother moved to a women's refuge, where they lived on a rent-free basis, but in September 1999, then moved again to rental accommodation provided by St George Women's Housing Scheme. Under this housing scheme, rent was normally charged but at the time of the Tribunal hearing was being waived. The sole income to the family was the SB paid to SRKK, at the 'at home' rate of $146 per fortnight. It was asserted that this rate was insufficient for even SRKK's basic needs, and that even in the absence of rent payments considerable expenses had been incurred associated with the changes in the family's living circumstances.

The DFaCS accepted the obligation to pay income support to SRKK, but contended that the independent rate of SB was intended to apply only where higher expenses were incurred when young persons were living away from their families. The DFaCS further contended that rent assistance under the *Social Security Act 1991* (the Act) is not payable to young persons under 25 years who are living with their parents, and that to implement the SSAT decision would therefore be unfair as SRKK was living at home with his mother, and would continue to do so. To implement the SSAT decision would, the Department contended, be unfair and inequitable in that it would place SRKK in a better financial position than dependent children of Australian residents. The DFaCS also argued that, if a stay of implementation of the SSAT decision was refused, it would be unable to recover any moneys paid to SRKK if the Department was ultimately successful following full review by the Tribunal.

The law

The Act provides that debts may arise as a result of review of decisions by the AAT:

> **1223.AB.** If:
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> (a) a person applies to the Administrative Appeals Tribunal under section 1283 for review of a decision; and
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> (b) the Administrative Appeals Tribunal makes an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975; and
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> (c) as a result of the order, the amount that has in fact been paid to the person by way of social security payment is greater than the amount that was payable to the person;
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> the difference between the amount that was in fact paid to the person and the amount that was payable to the person is a debt due to the Commonwealth.

In *Secretary, Department of Social Security and Glanville* (1994) 81 *SSR* 1178 the AAT had decided that s.1223AB did not apply where the Department was (as in this case) the applicant.

The provisions of s.41(2) of the *Administrative Appeals Tribunal Act 1975* enable the AAT to make an order staying or otherwise affecting the implementation of a decision where this is considered '... appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

The decision

The AAT stated that in determining whether a stay should be granted, the principles of prejudice, hardship and the merits of the substantive application for review, should be considered. The AAT acknowledged that the Department may be unable to recover any moneys paid to SRKK if the SSAT decision were not stayed, but accepted that this consideration must be balanced against the assertion that considerable hardship to SRKK would result if the stay were granted. The AAT concluded that, whilst there was need to have regard to the merits of the Department's substantive application, this required only the establishment of whether there was a prima facie case by the Department. Against this, considerations of hardship must be weighed, which in this instance were accepted by the Tribunal as outweighing the prejudice concerns raised by the DFaCS.

Formal decision

The AAT refused to grant the application for a stay order.

[P.A.S.]