the applicant arriving in Australia.' There was 'positive evidence' (in the immigration medical report) that there was no such incapacity.

The AAT noted that a specialist had examined Dayal for the DSS and observed that his incapacity for work was due to his advanced age at the time of his arrival in Australia. The Tribunal said that, even if it accepted this opinion (which it did not), the opinion -

> 'would not be sufficient to disqualify the applicant under s.25. There must be a medical component in the applicant's incapacity . . . As an Australian applicant could not successfully claim entitlement to an invalid pension simply because he was old, so also it cannot be alleged against an applicant that he was incapacitated for work outside Australia only because he was old outside this country.'

(Reasons, para.23)

On this point, the AAT referred to the statement in *Sheely* (1982) 9 *SSR* 86, 'that the "permanent incapacity" must result from a medical disability'.

The AAT went on to conclude that, despite his age, Dayal had been capable of attracting an employer and undertaking full time employment when he arrived in Australia. His situation differed from the applicants in *Krupic* (1984) 23 *SSR* 279 (Krupic had significant medical disabilities when he arrived in Australia), *Blando* (1987) 39 *SSR* 494 and *Maniatis* (1986) 32 *SSR* 407 (Blando and Maniatis did not have a 'history of regular full-time appropriate work' up to the time of their immigration).

[P.H.]

Special benefit: foster parent

CHRISTIE and SECRETARY TO DSS
(No. S87/309)
Decided: 1 July 1988 by J.A. Kiosoglous.

Carmel Christie had been a member of the order of the Sisters of Mercy since 1950. She had spent most of her time in the order caring for young children, both in institutions and in a home environment.

In 1984, Christie arranged with the State Community Welfare Department (DCW) and the State Housing Trust (SAHT) to foster children in a house provided by the SAHT. She inquired at the DSS and was told that she would be eligible for supporting parent's benefit or special benefit.

In June 1985 she began fostering 2 children and applied to the DSS for supporting parent's benefit. The DSS rejected her application because she did not have legal custody of a child; and also refused to pay her special benefit. Christie continued to foster the children until August 1985. In October 1985 she took another child into her foster care.

Christie asked the AAT to review the refusal of special benefit.

The legislation

At the time of the decision under review, s.124(1) of the *Social Security Act* gave the Secretary a discretion to pay special benefit to a person if the Secretary was satisfied that the person was,

> 'by reason of age, physical or mental disability or domestic circumstances, or for any other reason, . . . unable to earn a sufficient livelihood'.

'Unable to earn'

Over the 3 years from June 1985, Christie acted as foster parent for several children. She relied on various sources for her support: family allowance and family income supplement from DSS; a grant from her order; part-time work as a house cleaner; and income support from DCW, paid only while she pursued her appeal rights against the DSS decision.

The AAT said Christie had conceded that she could earn a sufficient livelihood; but that, if she did this, she would be unable to continue as a foster parent. The AAT apparently regarded this as sufficient to show that she was unable to earn a sufficient livelihood 'by reason of her domestic circumstances or for any other reason': Reasons, para.22.

The discretion

However, the AAT said, the discretion in s.124(1) should not be exercised in Christie's favour. The AAT referred to *Te Velde* (1981) 3 *SSR* 23, where the Tribunal had said that a person's control over the circumstances which prevented the earning of a sufficient livelihood was relevant to the exercise of the discretion to grant special benefit.

The AAT also referred to *Conroy* (1983) 14 *SSR* 143, where the Tribunal had said that special benefit was not intended to provide public support for people who voluntarily committed themselves to full-time social welfare. The AAT said:

> '25. The Tribunal feels considerable sympathy for the applicant and the exceptionally good work that she has been doing. It would be tragic if her services in this field were lost. In fact the media is constantly making the community aware of the need for caring persons such as the applicant to cater for the homeless and needy children in our society. It is hoped that those in positions of influence would give consideration to the special needs for circumstances such as these to enable the applicant and people like her to continue the excellent work they do in providing a much needed facility for children. However in the light of the principles enunciated in the cases cited before this Tribunal it is not possible for the discretion to be exercised in the applicant's favour.'

Misleading advice

The AAT said it was not disputed that Christie had been given wrong advice by DSS officers; and it found that she had acted on that advice. Although this was not a case where the s.124(1) discretion should be exercised, the AAT 'hoped that the respondent will be able to recompense the applicant in some way for the first period... from June 1985 to August 1985': Reasons, para.26.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Cohabitation

HORVATH and SECRETARY TO DSS
(No. N87/926)
Decided: 17 June 1988 by C.J. Bannon.

Anna Horvath asked the AAT to review a DSS decision to cancel her widow's pension and recover an overpayment. The basis of these decisions was the belief of the DSS that Horvath had been living with a man, E, on a *bona fide* domestic basis for over 6 years since July 1980.

The facts

Horvath and E had shared accommodation since 1976 in different houses. They had always occupied separate bedrooms as did Horvath's children, who lived with them over different periods of time.

They maintained separate finances and each paid a share of rent, gas and electricity. Horvath paid more of these bills than E (presumably because of her children). They never pooled their moneys. They did not have a sexual relationship. Horvath did some cooking, cleaning and clothes washing for E, although he mostly looked after himself.

However, there was some evidence that suggested Horvath and E were living in a *de facto* relationship. In 1976 she used the name 'Anna E' when undertaking part-time employment. The AAT accepted Horvath's explanation that she had used this name to avoid disclosure of her earnings to the DSS. Therefore the AAT did not regard Horvath as having passed herself off as E's wife.

E had told his employer's insurers, when claiming worker's compensation, and the Taxation Office that he was married to 'Anna E'. The AAT decided that this could not be used against

Horvath because there was no evidence that she approved or condoned his statements.

Horvath had signed a statement written out by a DSS officer in December 1986 that she and E were 'living in a situation similar to that of a husband and wife as per Social Security Department's guidelines'. The AAT said that it was not prepared to treat this as an admission that Horvath lived with E as his wife on a *bona fide* domestic basis. On the day that she signed this statement, Horvath had told the DSS officer that she was not living as husband and wife with E and denied there was any sexual intercourse. The AAT also referred to 'the terminology of the document.. .. and the reference to guidelines', as reasons for discounting it. Thirdly, the AAT noted that Horvath was under considerable pressure to obtain a wife's pension, following the cancellation of her widow's pension and E's application for an invalid pension.

The fact that E had made a will in Horvath's favour (unknown to her) did not, according to the AAT, make her his *de facto* spouse.

Formal decision

The AAT decided that Ms Horvath had not been living with E as his wife, set aside the decision of the DSS, reinstated Horvath's widow's pension and decided that no overpayment was recoverable.

[D.M.]

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CLARKSON and SECRETARY TO DSS

(No. S88/78)

Decided: 24 June 1988 by R.A. Layton.

Fleur Clarkson asked the AAT to review a DSS decision to cancel her invalid pension on the ground that she was a married person, within the meaning of s.3(8), inserted into the *Social Security Act* in May 1987.

The facts

Clarkson and her husband were divorced in April 1985. A property settlement was concluded shortly after the divorce. Clarkson had moved out for some time after separating from her husband in 1981, but returned to live in the home for a variety of reasons early in 1984.

She had a 12-year-old son who was in the custody of the former husband, but who she considered needed her to look after him, as he was hyperactive. She also had suffered a serious accident in December 1985 (which rendered her permanently incapacitated for work) and she was bedridden for a significant period. Though she had recovered somewhat, she was still severely limited in her day-to-day activities.

The house in which Clarkson lived had added to it a large rumpus room with a separate entrance. This room had no connecting door to the main part of the house. She had used this room as her residence since returning to live in the house. Clarkson and her former husband did their own housework (cooking, cleaning etc); and he paid all household bills and Clarkson paid for her own personal items.

The legislation

Section 3(8) of the *Social Security Act*, which operates from 14 May 1987, provides that 'a person who would, apart from this sub-section, be an unmarried person' and was formerly a married person, 'shall be treated as a married person' where -

> '(b) the person is living in his or her former matrimonial home; and
>
> (c) the person's former spouse is also living in the same home;'

after 26 weeks or, if either party has begun property proceedings in relation to the former matrimonial home, after 52 weeks.

No discretion

The first issue addressed by the AAT was whether the words 'shall . . . be treated as a married person' are mandatory, or merely directory. If the former, then if s.3(8) otherwise applied to Clarkson, there remained no discretion in the DSS to pay her pension.

To determine this question, the AAT looked to the Explanatory Memorandum and Second Reading Speech accompanying the introduction of the *Social Security and Veterans' Entitlements Amendment Bill* 1987, and concluded that the legislative intention was

> 'to remove the difficulties associated with deciding whether former spouses living in the former matrimonial home should be treated as married after a specifically nominated period of time and to reduce the payment of pension after the expiration of that time if they continue to reside in the same home. To argue that "*shall* be treated as married" means "*may* be treated as married" at the discretion of the decision-maker or the Tribunal, would appear to defeat the intention of the legislature. Such interpretation would render the amendments meaningless and ineffective'

(Reasons, para.10).

The AAT pointed out that s.3(8) does not require the Tribunal to determine the nature of the interpersonal relationship between the parties as this would add nothing to the test laid down in s.43(1)(c), which defines a widow as -

> 'a woman whose marriage has been dissolved and who has not remarried; but does not include a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him'.

Instead, s.3(8) is concerned only with the physical circumstances of what constitutes living in the 'same home' and the 'former matrimonial home'.

'Formerly a married person'

The AAT considered in turn each component part of s.3(8). The words 'apart from this subsection' must refer back to the general definition of married person in s.3(1), while the requirement that a person be 'formerly a married person' can refer only to a person who was either legally married or living in a de facto relationship.

'Matrimonial home'

Next, it was pointed out that the words 'matrimonial home' are not defined in this Act. Nor are they defined in the *Family Law Act* 1975. However, relying on a series of cases decided under the latter Act (whilst acknowledging that interpretation of a phrase under one act does not necessarily dictate its usage under another), the Tribunal concluded that

> 'the matrimonial home has been regarded as mainly the structure or building in which both spouses live together, and in addition, any land, facilities or appurtenances related to that structure which either of them may have had a right to control or occupy. The structure or building could include a house, unit, flat, a portion of a house (such as in a boarding-house or rooms in a parent's or friend's house), whether such premises were owned, leased or otherwise legally occupied by them.'
>
> . . .
>
> 'In summary, then, the phrase "living in the former matrimonial home" in the context of sub-s.3(8) means dwelling or residing in the building or structure including any surrounding structures or land which the person or spouse formerly had a right to occupy or control during a period when the person was legally married or living in a de facto relationship.'

(Reasons, paras 38, 40)

The AAT also noted that 'if both spouses shift out from the "former matrimonial home" and go to live in another home together although still maintaining separate living arrangements, they would not be treated as "married" persons under this sub-section': para 44.

'Living in the same home'

The next matter considered was the requirement that the parties be 'living in the same home': s.3(8)(c). The AAT preferred an interpretation 'that for persons to be living in the same home, they must both be dwelling in the same area of the former matrimonial home': para.43. For example, the parties would not be 'living in the same home' (even though they were living in the 'former matrimonal home') if one of them was, for example, living in a self-contained 'granny flat' at the rear of the house. The AAT indicated that, to prevent a finding that the parties were 'living in the same home', there should be no

common areas, such as a common kitchen or bathroom.

The AAT said its broad interpretation was accepted by the DSS in its Pensions Manual guidelines [see paras 8.400 *et seq.* and, in particular, paras 8.440 and 8.450], and was consistent with the Explanatory Memorandum.

Evaluating the living arrangements

Applying this interpretation, The AAT suggested that the mere erecting of a wall, or blocking of a doorway or addition of a room would not normally be regarded as an alteration which changes the character in the absence of other circumstances.

Here, Clarkson and her former spouse were living in the 'former matrimonial home' as they are both dwelling or residing in the house, land and appurtenances in which they previously lived when they were married. The AAT did not consider the change to the functional use of the rumpus room as significant in altering its character from being the 'former matrimonial home', as the only areas of separate living were the rumpus room, now serving as a bedroom for the applicant, and the living room and bedroom used by the former husband.

For these reasons, the AAT held that the parties were living in the 'same home' and accordingly, s.3(8) required that Clarkson be treated as a 'married person'.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

MOURAD and SECRETARY TO DSS

(No. N88/135)

Decided: 6 June 1988 by B.J. McMahon.

The AAT *set aside* a DSS decision to cancel Mourad's supporting parent's benefit on the basis that she was not living separately and apart from her husband. Mourad and her husband were divorced, but the DSS believed that the divorce was an 'elaborate plot' designed to maximise benefits.

The legislation

In order to receive a supporting parent's benefit, a person must be an 'unmarried person' (*Social Security Act*, s.53). An unmarried person does not include a a 'de facto spouse': s.3(1).

Section 3(1) defines a de facto spouse as a 'person who is living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person'.

Still married?

The DSS contended that, notwithstanding that Mourad's marriage had been dissolved by the Family Court of Australia, she and her husband were still residing together on a *bona fide* domestic basis. It had been suggested by the DSS that since the parties had not undergone a divorce ceremony before an imam, the Family Court's decree could not effectively dissolve the marriage. However, this contention was rejected by the AAT (para.10) which found that at the relevant time the parties were not married.

A de facto marriage?

Accordingly, the only issue was whether she lived separately and apart from her former husband or whether she continued to be a 'de facto spouse' to him.

Mourad was a Lebanese migrant with no command of the English language and illiterate in her own language. The DSS had acted upon what it called inconsistencies in statements she and her former husband had made to the DSS.

Mourad, two of her children and a grandchild lived in a flat above a shop owned by the husband. The flat had no internal communication with the shop which could only be reached by a separate exit in the street.

Mourad sometimes assisted her former husband in the shop on a part time basis and this connection between them was considered significant by the DSS. However, the son gave evidence that he and his brothers had persuaded the father to have the applicant work in the shop to assist in her support.

The AAT found that there was no evidence to support the Department's contention that the parties were residing in the same accommodation. In fact, the husband lived with the older son and his family and had done so for some 3.5 years. It was pointed out that the delegate who made the decision to cancel the applicant's supporting parent's benefit had not had any opportunity to observe her or members of her family in person, unlike the AAT and the SSAT which had recommended upholding the appeal.

The AAT held that in order to uphold the DSS contention, it would be necessary to reject all the evidence submitted as 'a pack of lies' (para.21):

> 'Whatever confusions have arisen over the years from the many interviews that have taken place, at the end of the day the plain facts are that the applicant has made out a case of entitlement under the appropriate legislation, and the decision under review should therefore be set aside'.

(Reasons, para.23)

Formal decision

The AAT remitted the decision to the DSS with a direction that the applicant's supporting parent's benefit be restored from the date of cancellation.

[R.G.]

SHINE and SECRETARY TO DSS (No. D87/21)

Decided: 17 June 1988 by D.P. Breen.

Maisie Shine asked the AAT to review a DSS decision to cancel her supporting parent's benefit because it considered that Shine was living with a man, G, as his de facto spouse.

The law

The relevant parts of the legislation are outlined in *Mourad*. The AAT repeated that the proper approach to the resolution of questions involving whether or not people are living in a de facto relationship was outlined by the AAT, and on appeal, by the full Federal Court, in the case of *Lambe* (1981) 38 ALR 405; 4 ALD 362. In these cases, it was held that 'all facets of the interpersonal relationship' between the parties must be examined.

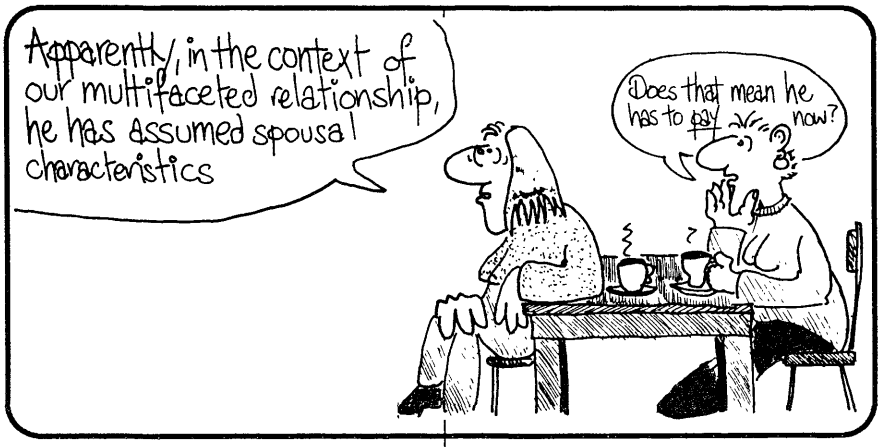
The facts

Shine had been receiving supporting parent's benefit since 1977, after she had left her husband. She had 5 children, the youngest of whom was the child of G. She and G had become acquainted through a group of friends in a country town. They had developed a sexual relationship and the child, Amelia, was born as a result.

The AAT's evaluation

The AAT accepted Shine as an honest person in the course of her evidence. By contrast, it was not so prepared to accept the evidence presented by the DSS. One of the two witnesses for the DSS, an Aboriginal Liaison Officer, had a longstanding relationship with both Shine and G. Indeed, Shine's counsel suggested that her evidence was unreliable because of a personal interest in G. In the event, the AAT did not find her evidence very helpful. When asked why she had reached a conclusion about the relationship between Shine and G, she said 'I just thought it was a known fact that they were de factos'(para.23).

The AAT accepted that the evidence disclosed 'a considerable degree of mutuality of interest' between Shine and G. For example, he used her address as his own, though explained this be reference to the fact that he spent the vast majority of his time in bush camp situations as a result of his employment. Moreover, in three consecutive years, he had claimed Shine as a housekeeper, and then as a de facto spouse on his tax returns. His evidence was that the latter declaration was an error by his accountant. The AAT commented:



'Of his statement to the effect that he made the claims at all because "it's the Government and you take them for all you can get", it must be borne in mind that in the context of income tax, such a view is widely representative of the Australian ethos.'

(Reasons, para.27)

Notwithstanding these factors, and evidence led of a tombstone on Shine's mother's grave which described her as 'in-law of Bill', the Tribunal held that all of the other evidence of support of Shine by G was explicable by his close attachment to his only child Amelia. Each of the instances of material support followed the birth of the child. By contrast, he had known Shine for many years before the birth and no such support had been previously forthcoming, other than small contributions when he was temporarily resident in her house.

The AAT accepted that Shine -

'is the disgruntled former wife of a husband who would not work and .... that she is not interested in again entering a relationship of or akin to marriage. He is a bushy, to use the vernacular, a bachelor but a man whose moral dictates decree that he should support a life which he in part created.'

(Reasons, para.33).

Formal decision

The AAT set aside the decision to cancel Shine's supporting parent's benefit and remitted the matter to the Secretary with the direction that Shine was eligible for supporting parent's benefit.

[R.G.]

Unemployment benefit:full time students

KARNIB and SECRETARY TO DSS
(No.N88/122)
Decided: 1 June 1988 by A.P. Renouf.

The AAT *set aside* a DSS decision that Ali Karnib had been overpaid $6403 by way of unemployment benefits paid between February and August 1986.

Karnib had arrived in Australia with his wife and 7 children in 1984. He attempted to find work without success. At the beginning of 1986, he enrolled as a full-time university student for a B.Sc. degree, in the hope of improving his chances of finding employment.

The AAT found that Karnib had continued to look for work and would have abandoned his studies if he had found a job. However, Karnib did not advise the DSS of his enrolment. When the DSS discovered that he was enrolled as a full-time student, it cancelled his unemployment benefit and claimed an overpayment.

The AAT said that earlier Tribunal decisions [which it did not name - but see, for example, *Collins* (1985) 27 *SSR* 328] established that a full-time student could be 'unemployed' within s.107(1) of the *Social Security Act*. Because Karnib intended to give up his studies if he found employment and he took reasonable steps to find work during the relevant period, he had been qualified for unemployment benefit.

The introduction, from 3 June 1986, of a new provision, s.133, did not affect Karnib's eligibility: that provison had disqualified from unemployment benefit a full-time student receiving a TEAS allowance, or not receiving such allowance because of poor academic results. But Karnib was not receiving TEAS because he had refused an offer of TEAS in May 1986. In any event, the AAT noted, s.133 did not affect unemployment benefit granted prior to 1 July 1986 until 1 January 1987.

[P.H.]

Assets test: severe financial hardship

NAGLE and SECRETARY TO DSS
(No. N87/831)
Decided: 30 June 1988 by I.R. Thompson.

Eileen Nagle was granted an age pension in November 1978. She had spent the last 40 years of her life caring for her brother, who suffered from cerebral palsy, was grossly disabled and required constant care. When the assets test was introduced, the DSS cancelled Nagle's pension. She asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.6AD(1) of the *Social Security Act* [now s.7(1)] provided that a person's property was to be disregarded for the purposes of the assets test where the person could not reasonably be expected to sell or realize the property or use it as security for borrowing (para (c)) and the Secretary was satisfied that the person would suffer 'severe financial hardship' if the property was taken into account (para (d)).

The DSS guidelines declared that a single person with readily convertible assets exceeding $6000 would not generally be regarded as a person who would suffer 'severe financial hardship' as required by s.6AD(1)(d). On the basis of that guideline, the DSS had concluded that Nagle could not meet the requirement of s.6AD(1)(d).

S.6AD(3) of the Act [now s.7(4)] provided that, where property was disregarded for the purposes of the assets test, the annual rate of pension payable to the person was to be reduced by the amount of income 'that could reasonably be expected to be derived' from the disregarded property.

'Severe financial hardship'

Nagle and her brother lived on a farm of 607 hectares, owned as tenants in common by Nagle and another brother, L, who managed the farm for the support of Nagle, L and L's family. In the tax year ended 30 June 1985, Nagle derived $6241 from the farm and $1078 from investments; in the 1985-86 tax year she derived $2104 from the farm and $1254 from investments; and in the 1986-87 tax year she derived $4042 from the farm and $1206 from investments.

In January 1985, Nagle had liquid assets of $16 942; and at the date of the hearing of this review those assets amounted to $19 894.

The AAT said that, taking into