

and Fotiou, having nowhere else to go, moved in. He moved out in June 1988.

Nicol said she had changed her name to Fotiou as a form of protection due to marital difficulties and agreed she had held herself out to be Mrs Fotiou during the time they had been in business together. Nicol said she and Fotiou were friends but there was no romantic feeling between them and had never been any sexual relationship. They never shared meals and she did no domestic chores for him. She had received pension while the business was running but said it never made a profit.

The decision

The issue was whether Nicol was a widow within the meaning of s.43(1) of the *Social Security Act*. The Tribunal discussed the factors enumerated in *Tang* (1981) 2 SSR 15 and *Stoilkovic* (1985) 29 SSR 362 under the headings of permanence, exclusiveness, resource pooling, expense sharing, marriage, joint parents, sexual relationship, social life, perception of relationship and obligation.

Nicol and Fotiou were both found to be people prepared to be untruthful for financial gain. The Tribunal was satisfied that an emotional inter-dependence existed between them and they had lived together on a *bona fide* domestic basis.

Formal decision

The AAT affirmed the decision under review.

[B.W.]

Sole parent's pension: 'married person'?

STAUNTON-SMITH and SECRETARY TO DSS
(No. 6144)

Decided: 24 August 1990 by J.A. Kiosoglous, B.C. Lock and D.B. Williams.

Staunton-Smith appealed against an SSAT decision affirming a DSS decision to cancel her sole parent's pension in June 1989.

Mr and Mrs Staunton-Smith were married in August 1980. They separated in April 1981. In March 1989 Staunton-Smith moved into her husband's house. Staunton-Smith argued that even though they were living in the same house, they should be regarded as separated for the purposes of the *Social Security Act*, which would mean that she continued to be eligible for a sole parent's pension as

she was not a 'married person'.

The legislation

A 'married person' is defined in s.3(1) of the *Social Security Act*:

"married person" includes a de facto spouse but does not include –

- (a) a legally married person (not being a de facto spouse) who is living separately and apart from the spouse of the person on a permanent basis; or
- (b) a person who, for any special reason in any particular case, the Secretary decides should not be treated as a married person . . .

The evidence

The Tribunal noted that, when Staunton-Smith married, she had 3 children from a previous marriage, including one, P, who was a Downs syndrome child, requiring full-time care and attention. Staunton-Smith suffered from Addison's disease which weakened her, caused her to collapse frequently and sometimes required her to spend time in hospital; she was then unable to look after her son.

Mr Staunton-Smith gave evidence that it was mainly because of P that he had allowed his wife to move back in: he did not want P going to an institution when Mrs Staunton-Smith was unable to look after him.

It was agreed that Mr Staunton-Smith did look after P when Mrs Staunton-Smith was unable to.

Mr Staunton-Smith said that their relationship was not like that of a married couple because there was no sexual relationship, they did not share the whole house – it was more like two separate houses and they did not socialise together. Mr Staunton-Smith said it was as if he 'had a boarder living in the house'.

In 1984, Mrs Staunton-Smith had taken out a restraining order, restraining her husband from assaulting or threatening her.

Since moving in with her husband, Mrs Staunton-Smith had made one payment toward the electricity bill; and, since her pension was cancelled, Mr Staunton-Smith had paid all rent and electricity expenses. The Staunton-Smiths jointly owned a car and a boat, both subject to a family law claim.

The law applied

The AAT then referred to the factors in *Tang* (1981) 2 SSR 15 and concluded:

'[I]t appears that the relationship between the applicant and Mr Staunton-Smith, notwithstanding his character, is of a supportive nature and based on some financial, domestic and inter-personal cooperation. Notwithstanding their evidence to the contrary, the Tribunal finds that despite difficult circumstances there is a commitment between the couple. In the opinion of the Tribunal the applicant derives comfort and support from living under the same roof as Mr Staunton-Smith, to whom she is legally married. For different reasons, they have preferred living

under the one roof rather than separately. For a couple to be living together as man and wife it is not necessary for them to be completely happy. It is clear that this relationship is not ideal but neither partner has a strong desire to end the current situation. Their lifestyle is similar to that of man and wife and is, in fact, very similar to their marital relationship prior to their separation. The Tribunal finds, after consideration of the evidence relating to the total relationship, that the applicant is living "as his wife" and is therefore a "married person" pursuant to sub-s.3(1) of the Act.'

(Reasons, para. 21)

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Cohabitation

INFIELD and SECRETARY TO DSS
(No. 6121)

Decided: 17 August 1990 by D.P. Breen.

The AAT affirmed decisions to

- (1) cancel Infield's sickness benefit as from 17 December 1988,
- (2) raise an overpayment in respect of the whole sum received by Infield as sickness benefit from the date of grant 9 May 1988 to the date of cancellation, and
- (3) raise overpayment of the whole amount of unemployment benefit received by him during an earlier period from 22 February 1988 to 22 April 1988.

The ground for all these decisions was that Infield's wife was employed and earning income at a sufficient rate to disentitle her husband from receipt of the benefits he claimed.

Infield had failed to disclose his wife's earnings to the DSS. His case was that he and his wife had throughout the relevant period been living separately and apart under the same roof. This was the sole issue considered by the Tribunal, which did not cite the applicable legislation in its decision.

The Tribunal did not accept the evidence of Infield and his wife, finding them to be persons totally lacking in credibility. Although Infield had been receiving benefits at the married rate, he had at no time mentioned that he was estranged from his wife, nor that she was in gainful employment. Both Infield and his wife had made prior inconsistent statements on forms that they had submitted to the Department, showing 'a pattern of deceit and self-contradiction'.

[P.O'C.]