

MEMORANDUM OF ADVICE
RE: JOY COLES v. REPATRIATION COMMISSION

Robert Bax & Associates
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ATTENTION: MR A. McGINNESS

My Instructing Solicitors act on behalf of Mrs Joy Coles who is the applicant in an Application for Review to the Administrative Appeals Tribunal (“the Tribunal”) and I am briefed to advise on her prospects of succeeding in that Application for Review.

The issue for determination by the Tribunal is whether the applicant is entitled to a war widow’s pension as provided for in the *Veterans’ Entitlements Act* 1986 (“the Act”).

BACKGROUND

The applicant is the widow of the late Mr Donald Coles who was a “veteran” as that term is defined in the *Act*. He was born on 11 June 1924.

The veteran served in the Australian Army from 20 November 1942 until 13 July 1946. All of this service constitutes both “operational service” and “eligible war service” as those terms are defined in the *Veterans’ Entitlements Act* 1986 (“the VEA”).

The veteran died on 12 April 1995. The cause of death was recorded as being that of mylodysplasia (of years duration) and ischaemic heart disease (of years duration).

On 16 February 2001 the applicant lodged an informal claim with the respondent for the acceptance of the death of the veteran being related to service. She lodged with the respondent a formal claim for a war widow’s pension on 21 March 2001. On 30 August 2001 the respondent rejected her claim on the basis that she was not a dependent as defined in the VEA. On 24 September 2001 the applicant lodged with the Veterans’ Review Board an Application for Review of Decision in respect of the decision of the respondent of 30 August 2001. On 24 May 2002 the Veterans’ Review Board affirmed the decision of the respondent of 30 August 2001. Then on, 29 July 2002, the applicant lodged with the Tribunal an Application for Review of Decision.

The applicant and the veteran married on 4 October 1947 and were divorced on 8 October 1980. They had separated on 24 April 1978.

OPINION

A preliminary issue for determination by the Tribunal is whether the applicant can succeed even if the Tribunal finds that the veteran’s death was sufficiently related to his service during World War II. This issue arises because the applicant and the veteran were divorced in 1980, some 15 years before the veteran’s death.

The VEA provides that benefits can be provided to, inter alia, a “dependent” of a veteran.

A “dependent” is defined in s.5E of the *Act* as follows:

“The partner, or a widow or widower ... of the veteran.”

The term “partner” is defined as:

“In relation to a person who is a member of a couple, means the other member of the couple”.

The phrase “member of a couple” is defined in s.5E(2) as follows:

“A person is a *member of a couple* for the purposes of the Act if:

the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or
all of the following conditions are met:
the person is living with a person of the opposite sex (in this paragraph called the *partner*);
the person is not legally married to the partner;
the person and the partner are, in the Commission’s opinion (formed as mentioned in section 11A), in a marriage-like relationship;
the person and the partner are not within a prohibited relationship for the purposes of section 23B of the *Marriage Act* 1961.”

Additionally, for the purpose of sub-paragraph 2(b)(i), a person may be treated as “living with” another person:

“(3) For the purposes of subparagraph 2(b)(i), a person is to be treated as *living with* another person during:

any temporary absence of one of those persons;
an absence of one of those persons resulting from illness or infirmity;
if the Commission is of the opinion that they would, but for the absence, have been living together during that period.”

In forming an opinion for the purposes of the *Act* whether two people are living together in a marriage-like relationship, Section 11A provides guidance as to whether two people are living together in a marriage-like relationship in that it provides that regard is to be had to all the circumstances of the relationship including, in particular, the following matters:

“(a) the financial aspects of the relationship, including:

any joint ownership of real estate or other major assets and any joint liabilities; and
any significant pooling of financial resources especially in relation to major financial

commitments, and
 any legal obligations owed by one person in respect of the other person; and
 the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

any joint responsibility for providing care or support of children; and
 the living arrangements of the people; and
 the basis on which responsibility for housework is distributed;
 the social aspects of the relationship, including:
 whether the people hold themselves out as married to each other; and
 the assessment of friends and regular associates of the people about the nature of their relationship; and
 the basis on which the people make plans for, or engage in, joint social activities;
 any sexual relationship between the people;
 the nature of the people's commitment to each other, including:
 the length of the relationship; and
 the nature of any companionship and emotional support that the people provide to each other; and
 whether the people consider that the relationship is likely to continue indefinitely; and
 whether the people see their relationship as a marriage-like relationship."

A most important factor mitigating against the Tribunal concluding that at the relevant time the applicant and the veteran were not in a marriage-like relationship is that the applicant and the veteran each received the old age pension at the single rate. This is particularly significant because it shows that the parties themselves saw themselves as single people. To argue to the contrary now would have at least two results (a) it would affect the applicant's creditability in the eyes of the Tribunal and (b) mean that she would be liable to refund the overpayment made as a result of receiving pension at the single and not married rate.

Between 1980, when the applicant and the veteran divorced, and the death of the veteran in 1995, the veteran and the applicant owned no property jointly, there was there any pooling of financial resources, no mutual legal obligations, and there was no sharing of household expenses. Such is the evidence of the applicant Christopher Donald Coles, Kim Elizabeth Coles, Robert George Coles, Patrick Donohue and Jean Isabel Ferris. Hence, it is most unlikely that the Tribunal will conclude that they were in a marriage-like relationship.

The applicant states that after the veteran became sick he spent a great deal of time with her. However, it is also noted that when the applicant left the veteran she went to live in Richmond and then she moved to the South Coast of New South Wales while the veteran lived at a number of addresses in and around Bathurst before moving into an "aged people's one bedroom unit near Bathurst" and then transferring to two different nursing homes also in Bathurst.

Mrs Jean Ferris says that the veteran had been very ill for last years of his life and for the most part was looked after by the applicant and that the veteran had spent much of his time with the applicant following her move to the South Coast.

Mr Patrick Donohoe says that the veteran had refused to recognise the divorce and spent 50 – 60% of his time at the applicant's house, and that during his last illness the applicant cared for him both physically and emotionally.

When the veteran was hospitalised in 1987 in Bathurst, he gave his next of kin as his daughter, Kim. When the veteran was admitted to hospital in 1993 he apparently stated that his next of kin was his son (who was then living in Western Australia). It was his daughter who notified the Department of the veteran's death.

In all of the material in the veteran's file held by the respondent, there is only one occasion when his address given is that of Fisherman's Paradise. Additionally, the veteran's file indicates that he continually referred to his marital status as "divorced".

As a result of these facts and the definitions referred to above, I am of the opinion that the applicant cannot succeed in this Application for Review of Decision because, simple put, she was not "living with" the veteran since 1980, some 15 years before his death. She is not assisted by s.5E(3) because it could not be seriously argued that 15 years constituted a "temporary absence" and the evidence does not indicate that she was absent from the veteran as a result of illness or infirmity, but rather, because the relationship between the applicant and the veteran had broken down.

In conclusion therefore I am of the opinion that as the evidence currently stands the applicant does not have reasonable prospects of succeeding before the Tribunal.

If you have any questions in relation to any of these matters please do not hesitate to contact me.

With Compliments

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Chambers
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