evidence might not be very substantial. It was, the AAT said, -

> 'To say the least, unusual for a small close family to arrange its affairs in such a way that the Taxation Department receives more money by way of income tax than it would receive in the absence of the arrangement.'

(Reasons, para.24)

The AAT noted that Mr and Mrs Bradnam's investment advisor, R, had been aware of the possible pension implications of setting up the trust and transferring the money to it. The AAT said that, in deciding whether Mr and Mrs Bradnam had deprived themselves of income for the purpose of obtaining pensions at higher rates, it was entitled to take into account the material which their advisor had before him. That point had been established in *Nadenbousch* (above). The AAT came to the following conclusion:

> 'There is no statement of [Mr and Mrs Bradnam's] intention on which I can rely to balance against the inevitable conclusion to which I am led by the facts before me. In all the circumstances I find that Mr and Mrs Bradnam deprived themselves of income in order to obtain a pension at a higher rate than that for which they would otherwise have been eligible.'

(Reasons, para.25)

Formal decision

The AAT affirmed the decision under review.

Mobility allowance: eligibility

LARKIN and SECRETARY TO DSS (No.V85/282)

Decided: 13 February 1986 by J.O. Ballard

Colleen Larkin was a young woman who suffered from a degree of mental retardation and had been granted an invalid pension in 1979. In December 1984 she began to attend a sheltered workshop in a country town some 30 kilometers from her home. There was no public transport between her home and the workshop and she travelled to and from the workshop in her own car. She applied to the DSS for a mobility allowance and, when the DSS rejected her application, she sought review by the AAT.

The legislation

Section 133RD(1)(a) of the *Social Security Act* provides that a person may qualify for a mobility allowance if she is -

> 'in the opinion of the Secretary, permanently unable, or unable for an extended period, by reason of [her] physical or mental disability, to use public transport without substantial assistance . . .'

'Unable . . . to use public transport'

The AAT found that Larkin had 'very great deficiencies in her mental processes' and that she was capable of using public transport only if she was given a week's instruction for each distinct journey.

The AAT said that it was not relevant that there was no public transport available between Larkin's home and the sheltered workshop - the principal reason for the DSS' rejection of her application. Such a narrow view was, the AAT said, 'unwarranted':

> '[T]he provision refers to the use of public transport generally and not to any limited use for a specific journey between home and work.'

(Reasons, para.18)

The Tribunal said that, in deciding whether a person was 'unable . . . to use public transport', the appropriate question was whether the person could not reasonably be expected to make use of public transport - essentially the same test as was applied to a person's inability to earn a livelihood for the purposes of special benefit, as in *Te Velde* (1981) 3 *SSR* 23.

In the present case, Larkin could not reasonably be expected to use public transport without at least a week's tuition for each specific route or new journey. That tuition had to be described as 'substantial assistance' in the sense that it was more than trivial or minimal.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Larkin was entitled to mobility allowance.

Married persons: 'special reason' to treat as single

TRAIL and SECRETARY TO DSS (No.S85/50)

Decided: 16 January 1985 by J.A. Kiosoglous.

Charles Trail, who was 77 years of age, and his wife, who was 79 years of age, had been granted age pensions in 1973 and 1972. Their pensions had been paid at the married rate and had been reduced by taking into account Mr Trail's superannuation income.

From 1980, Mrs Trail's health deteriorated and in May 1984 she was diagnosed as suffering from Alzheimer's disease. She was no longer mobile, unable to care for herself and was incontinent. She was then admitted to a nursing home.

The DSS then decided that single rate pensions should be paid to Mr and Mrs Trail, but that each pension should still be reduced by taking account of Mr Trail's superannuation income. Mr Trail asked the AAT to review that decision.

The legislation

Section 28(1A) of the *Social Security Act* fixes two rates of age pension - a higher rate for 'an unmarried person' and a lower rate for a married person whose spouse is also receiving a pension.

Section 28 (1AAA) authorizes the Secretary to pay the higher rate of pension to married pensioners where the Secretary is satisfied that their living expenses are higher because illness or infirmity has prevented (and will continue to prevent) them living together.

Section 28(2) establishes the pension income test, under which the rate of age pension is to be reduced by reference to the pensioner's income.

Prior to 21 September 1984, s.29(2) provided that the income of a husband or wife should be taken as half the total income of the husband and wife -

> '(a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
>
> (b) unless, for any special reason, in a particular case, the Secretary otherwise determines . . .'

From 21 September 1984, that provision was replaced by s.6(3), which provides for 50% of the total income of a married couple to be attributed to each married person; and s.6(1), which excludes from the definition of 'married person' -

> '(a) a legally married person . . . 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 determines in writing should not be treated as a married person . . .'

The discretion to disregard income

The AAT first rejected a DSS argument that s.28(1AAA) was an exhaustive statement on the question of separation by reason of illness or infirmity:

> 'The old s.29(2)(b) discretion is a residual "catch-all" discretion which may apply to any situation in which "special reason" is demonstrated in relation to applications under Part III of the Act. In cases where the *nature* of that illness or infirmity has the effect of rendering the marriage of the applicant and the ill or infirm spouse a "dead marriage", that is, where it cannot meaningfully be said that the *consortium*