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*

vitae of the marriage still exists, a favourable exercise of the old s.29(2)(b) discretion would be appropriate on the grounds that "special reason" was demonstrated.'

(Reasons, para.19)

The AAT said that, ordinarily, 'substantial financial hardship' should be shown; but the nature of a particular illness or infirmity could 'be such as to overshadow the importance of considerations of financial hardship': Reasons, para.19.

Turning to the present case, the AAT noted that there was medical evidence that Mrs Trail could not possibly return to live in her own home and that it was 'extremely unlikely' that she could now recognize any person. This evidence was sufficient, the AAT said, to establish 'special reason' within the old s.29(2)(b):

'The nature of Mrs Trail's illness, Alzheimer's disease, is such that the marital relationship with Mr Trail has been totally destroyed . . . The present application falls outside the common run of cases by reason of the nature of Mrs Trail's illness and its effects upon the *consortium vitae* of the Trails' marriage . . .'

(Reasons, para.24)

These factors were also sufficient, from 21 September 1984, to exclude Mr and Mrs Trail from the definition of 'married person' under para.(b) of the s.6(1) definition.

The AAT said that the old s.29(2)(a) was not available unless the parties to the marriage had formalized their separation through a written agreement or a court order. However, its replacement in September 1984 by para.(a) of the s.6(1) definition of 'married person' had effected a significant change. It was now possible for married persons, who were living apart because of illness or infirmity, to be treated as unmarried even though there was no formal separation agreement or order, so long as there was a physical separation and a destruction of the matrimonial relationship, as the High Court had explained in *Main* v. *Main* (1949) 78 CLR 636.

In the present case, the AAT said, Mr and Mrs Trail had to be regarded as 'living separately and apart . . . on a permanent basis'. There was no mutual recognition between them; they were 'physically and permanently living separately and apart'; there was, and could be, no intention to resume a common life; and none of the elements of the marital relationship remained: Reasons, para.25.

Because Mr and Mrs Trail should be treated as unmarried, all his superannuation should be attributed to Mr Trail and none to Mrs Trail.

A 'bona fide' application

The AAT concluded with the following observations:

'26. It should be noted that Mr Trail does not stand to benefit personally under the Act. He will be assessed as a single person on the basis of his own income. As a result, his own pension entitlement will drop. In the absolute sense he will benefit because he will not have to provide for his wife to such a degree as previously. However, Mr Trail's claim is purely *bona fide*. There has been no rearrangement of his finances to gain the maximum benefit for himself. Understandably, he has felt penalized for having "done the right thing" throughout his life by careful planning through superannuation and by caring for his wife during her decline. He ought not to be forced into the ignominy of a divorce of the woman he once loved but who for all intents and purposes is now dead to him. Such a course of action is not required of persons "living apart" under informalised one-roof separations.'

(Reasons, para.26)

Formal decision

The AAT set aside the decision under review on the basis that Trail had shown 'special reason' within the old s.29(2)(b); and remitted the matter to the Secretary with a direction that Mr and Mrs Trail were 'living separately and apart . . . on a permanent basis' within the para.(a) exception to the definition of 'married person' in s.6(1).

Cohabitation

FRENDO and SECRETARY TO DSS (No.V85/472)

Decided: 23 January 1986 by I.R. Thompson.

Yvonne Frendo applied for review of a DSS decision to cancel her widow's pension in April 1985 on the basis that she was living 'in a situation similar to that of a married couple' with Z.

Section 59(1) of the *Social Security Act* provides that 'widow' 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'.

Frendo met Z in 1978 or 1979. When she became pregnant to Z, he organized for her to move into a flat and visited her occasionally. Their daughter was born in January 1980 and Frendo moved into a house found for her by Z. She was granted a widow's pension in April 1980.

Although there were some inconsistencies in Frendo's evidence, it appeared that, between 1980 and March 1984, Z visited her occasionally, and had stayed once or twice for a couple of months. When he stayed, he either slept in his car or in the spare bedroom. He made no contribution to the rent, food or utilities' bills nor did he pay regular maintenance for their daughter.

In March 1984, Frendo had been assaulted and raped in the back yard of the house and Z had then moved in, to provide some security. He paid rent. Frendo said they had no sexual relationship and did not go out together. She sometimes did his washing and sometimes shared a meal together. Frendo acknowledged that other people called them Mr and Mrs Frendo, and their daughter's school reports were addressed in this way.

The Tribunal emphasized, as the AAT had in *Lambe* (1981) 1 *SSR* 5 (approved by the Federal Court (1981) 38 ALR 405), the need to look at all facets of the relationship, not just the question of financial support, in order to assess whether 2 people were living as husband and wife. The Tribunal also noted the decision in *Donald* 14 *SSR* 140, which had stressed the relevance of the history of a relationship, in order to assess its nature at a particular time.

The Tribunal was concerned with inconsistencies in Frendo's evidence and questioned her veracity. It concluded that rather than having a single sexual encounter, Frendo and Z had established a sexual relationship prior to their daughter's birth. It regarded Z's presence at the birth as significant and concluded that 'since 1980 he and the applicant have displayed a degree of commitment to one another and that there has been an exclusiveness in their relationship'. Although the Tribunal felt Z was not an ideal husband,

'the applicant persisted in providing him with support and in living with him. She is still not willing to leave him because of her solicitude for him. He is not willing to leave her and, if she moved, he would move with her ... Although Mr. Z failed to provide the applicant with any financial security and very little financial support and although his manner of life was such that most persons would have regarded him as an unsatisfactory husband, I am nevertheless satisfied that the nature of the relationship in which they were living together throughout 1985 was akin to marriage ...'

(Reasons, para.37-8)

Formal decision

The AAT affirmed the decision under review.

CHAPMAN and SECRETARY TO DSS (No.V85/236)

Decided: 21 February 1986 by J.R. Dwyer, J.F. Brewer and L.J. Cohn.

The AAT *affirmed* a DSS decision to cancel a widow's pension held by a woman, on the basis that she was living with a man, S, as his wife on a *bona fide* domestic basis although not legally married to him.

Chapman had been granted a widow's pension in April 1983, at which time 2 of her children were living with her. At about this time,