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,

she moved to Melbourne where she lived in a boarding house, managed by S. In October 1983, Chapman and S. advised the DSS that they intended to marry and confirmed that advice in February 1984.

In January 1985, Chapman and S, Chapman's 2 children and S's son moved out of the boarding house into a jointly rented house and the DSS then cancelled Chapman's pension.

In support of her application for review, Chapman and S told the AAT that they had become engaged to marry in mid-1984 but had broken off their engagement by the time that they moved into the jointly rented house in January 1985. They also told the AAT that they had occupied separate rooms in that house, taking individual responsibility for their washing, cooking, cleaning and shopping and had each part half of the household bills.

However, notes taken by the chairman of the SSAT during an appeal before that Tribunal in February 1985 indicated that their engagement had not been broken off at that time and that their domestic arrangements had been more consistent with a shared life style.

Chapman and S agreed that, to the outside observer, they had the appearance of a family unit and said that Chapman's children treated S as their father. Chapman also told the AAT that she and S had a continuing sexual relationship; but that her reason for living with S was primarily financial. On the other hand, S said that they continued to live together because there was still a very close friendship between them and because Chapman's children had come to depend on him.

On the basis of this evidence, the AAT concluded that Chapman and S and their respective children were living as a family unit, in which Chapman and S lived as man and wife on a *bona fide* domestic basis although not legally married. The AAT referred to the general difficulty of deciding whether unmarried people were living as man and wife:

> 'It is our view that the changing of community attitudes to the sharing of accommodation by persons of different sexes and the growing variety of household structures both within and outside formal marriages have led to the words of the Act now being most difficult to apply.

> We do not pretend to see a solution to the problem but we feel that it requires further consideration by policy makers.'

(Reasons, para.47)

The AAT indicated that an important reason why it had concluded against Chapman was its substantial doubts as to her credibility. There were conflicts and inconsistencies between the evidence given by Chapman and S and between their evidence and the notes taken at the SSAT hearing.

Handicapped child's allowance: eligibility

DAWSON and SECRETARY TO DSS (No.W85/53)
Decided: 14 February 1986 by H.E. Hallowes.

Dawson asked the AAT to review a DSS refusal to pay her handicapped child's allowance for her son, R, who was 15.

R suffered from recurrent ear infections, enuresis, hearing difficulty and some school attendance problems. Dawson said she had to get up to R every night, change his bed, comfort him when his ears ached, and give him extra assistance with schoolwork. Extra costs incurred include washing costs, replacement of bed linen, cost of ear drops plus petrol for regular attendance at hospital.

The legislation

The AAT concentrated on the question whether Dawson could qualify under s.105JA, which provided (at the relevant time) that the Secretary could grant a handicapped child's allowance to a person who had the custody, care and control of a 'handicapped child', if the Secretary was satisfied that the person provided care and attention only marginally less than constant, and that the person was suffering severe financial hardship.

According to s.105H(1), a 'handicapped child' is a child with a physical or mental disability requiring care and attention only marginally less than constant.

Section 105L gives the Secretary a discretion to determine the rate of allowance to be paid for a 'handicapped child', but not exceeding $85 a month.

'Constant care and attention'

The AAT adopted the explanation of the phrase 'constant care and attention' from *Youssef* (1981) 5 *SSR* 55: 'if the need for care and attention is continually recurring the statutory requirement is satisfied'.

The AAT noted that, although R had recurrent ear infections, he was old enough to tell his mother when these occurred and she did not have to be continually watchful, except for supervising his swimming: this care and attention was not continually recurrent.

The AAT said that extra time spent with R on his homework was not as a result of a physical or mental disability, but arose out of his dislike of school. On the other hand, his bed-wetting did constitute a physical or mental disability, and the care and attention needed because of this, together with the ear infections, indicated that he was a child who required care and attention only marginally less than the care and attention that he would need if he were a severely handicapped child; and that need was likely to continue for an extended period.

Severe financial hardship?

During the relevant period, Dawson's *de facto* spouse was either on unemployment benefit, or on a basic income from labouring work. The AAT examined the DSS guidelines on financial hardship, and the AAT decision in *Nannup* (1985) 28 *SSR* 342, which considered these inappropriate where the family was large (there were 6 dependent children in Dawson's household), and the extra costs involved in the care of Robert. The AAT the concluded that Dawson was subject to severe financial hardship.

Formal decision

The Tribunal set aside the decision under review, and directed that Dawson be granted handicapped child's allowance pursuant to s.105JA, at a rate to be determined by the Secretary.

Family allowance: late claim

OZCAGLI and SECRETARY TO DSS (No.V84/425)
Decided: 16 December 1985 by H.E. Hallowes

Melek Ozcagli appealed against decisions of the DSS to refuse to allow backpayment of family allowance for 2 of her children.

Ozcagli applied for student family allowance for her 18-year-old son, H, in February 1983 and payment commenced in March 1983. In September 1983, Ozcagli applied for family allowance for her daughter, M, born in September 1982. Payment commenced in September 1983. Ozcagli requested payment for H from November 1980, when he turned 16, and payment for M from September 1982, when she had been born.

The evidence

Ozcagli had arrived in Australia in 1970 with 2 children. Two others were born in Australia. She had limited under-