On the basis of this evidence, the AAT said it was not satisfied that the applicant and the father of her child had a commitment to each other of the type which was an essential characteristic of a marital relationship:

> 'There is a commitment by the Applicant and separately by Mr Roberts to [their child] but that is no substitute for the mutual commitment being the essential characteristic of the marital relationship.'
> (Reasons, p.18)

Accordingly the applicant could not be regarded as a 'married person' and remained eligible for supporting parent's benefit.

**Re CORKER and SECRETARY TO DSS**
**(No.W86/134)**
**Decided:** 7 May 1987 by R.D. Nicholson, J.G. Billings and N. Marinovich.

The AAT *affirmed* a DSS decision to assess the rate of invalid pension payable to Corker, a 58-year-old woman, on the basis that she was living in a marriage-like relationship with a 67-year-old man, with whom she had been sharing accommodation for some 5 years.

The two were tenants in common of the house in which they lived; had made mutual wills; shared household expenses and chores; and the man provided Corker with a measure of security in case of breakdown in her health. The AAT decided that these elements of the relationship were enough to qualify the relationship as equivalent to a marriage, despite the lack of any sexual relationship.

In the course of its Reasons, the AAT made some comments on the administration and the impact of the cohabitation rules:

> 'The terminology of these definitions [of "married person" and "de facto spouse"] is unfortunate as their impact on this Applicant demonstrates. She objects strongly to being told that she is in a de facto relationship. The use of the word "de facto" clouds the issue in the eyes of the public to whom it is applied because the real question under the Act is whether or not there is a spousal relationship between the two persons for the purpose of determining the rate of pension applicable to them.
> . . .
> '[T]he Tribunal [must] inquire into the nature of the relationship, including the sexual relationship, between them now and in the past, a type of inquiry long ago made largely inapplicable in family law matters. Not only is the inquiry of the Tribunal made into sensitive areas, but it also requires the Tribunal to form a judgment on the basis of objective evidence as to the existence of one of the most subjective states imaginable. . .
> 'An additional unsatisfactory feature of the application of the provisions is potentially apparent in this matter. If a spousal relationship is found to exist, the consequence could be a deterrent towards elderly people living together in circumstances which can be construed as spousal so that their rate of pension may be lowered. There is an obvious community loss in this because at a time of enormous cost and inadequate facilities for aged care, discouragement would be given to self-help home-care of a private nature. . .'

# Assets test: disposition of property

**CHRONIS & CHRONIS and SECRETARY TO DSS**
**(No. N86/184)**
**Decided:** 20 February 1987 by R.A. Hayes, J.H. McClintock and G.R. Taylor

The AAT *affirmed* a DSS decision to include in the value of the applicants' assets, for the purpose of the assets test, two properties they had gifted to their children. This resulted in the applicants' invalid pension and wife's pension being paid at a reduced rate.

Section 6AC(9)(b) of the *Social Security Act* exempts from calculation the value of any disposition of property that took place within five years of the time that the person became qualified for the pension but before the time that the Secretary is satisfied that the person 'could reasonably have expected' that they would become eligible for the pension. This was the relevant section in this case.

The Tribunal turned to the evidence that at the time of the disposition Mr Chronis had not worked for eight months, he had attempted to return to work but had been prevented by his health, he had little expectation of working in the near future, he was in receipt of sick pay from his employer and that the medical advice was that his condition was of a long term nature.

The Tribunal concluded that Mr Chronis could reasonably have expected that he would become eligible for the invalid pension in the near future. Thus s.6AC(9)(b) could not operate to exempt the value of the property for the purpose of the assets test.

The AAT also determined that the hardship provisions did not apply to the applicants. It was not appropriate to disregard the value of the gifted property nor was it unreasonable to expect the applicants to sell or realise the capital investment in what had been previously their family home and which was now leased to their son for $20.00 per week.

**Re MURPHY and SECRETARY TO DSS**
**(No.Q86/155)**
**Decided:** 9 April 1987 by D.P. Breen.

Bridget Murphy held an age pension. She was also the life tenant and co-trustee of the estate of her late husband; and her son was the remainderman - that is, he was to receive full title to the estate on his mother's death.

The capital value of the estate was being eroded by inflation and Murphy saw her son as having a real need for the modest capital remaining in the estate: he and his family could not afford to move out of the caravan in which they were living. Murphy then executed a deed of release, in her capacity as life tenant of the estate, authorising the trustees to transfer the remainder of the estate to her son. The DSS treated this as a disposition of the income which Murphy had been receiving from the estate ($2,185 a year) and decided that her age pension should continue to be reduced accordingly. Murphy asked the AAT to review that decision.

**The legislation**

Section 6AC(11) of the *Social Security Act* defines a disposition of income (which is to have no effect for the purposes of the income test - the income disposed of being deemed to remain income of the pensioner: s.6AC(5)) as a course of conduct that diminishes, directly or indirectly, the pensioner's income, where the pensioner's motive was to qualify for a higher rate of pension or fringe benefits, or where the pensioner receives no or inadequate consideration.

Under Queensland legislation, the transfer of the estate could have been made without Murphy's consent as life tenant if the Supreme Court had so ordered: s 62(5), *Trusts Act* 1973 (Qld).

**No disposition of income**

In these circumstances, the AAT decided, the applicant had not engaged in a course of conduct that had diminished directly or indirectly her rate of income:

'In my view, in her capacity as life tenant under the will, she signed a document which allowed her, in her other capacity as co-trustee, lawfully and properly, together with the other co-trustee, to discharge her functions and duties. Inter alia, she avoided the costs to the estate which would have been incurred had the trustees been forced to apply, under s.62(5) of the *Trusts Act*, to the Court for an order which I have no doubt the Court would have made in all the circumstances.'

**Formal decision**
The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the applicant had not disposed of income when she executed the deed of release in her capacity as life tenant.

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**Re TOWNS and SECRETARY TO DSS**
**(No.N86/582)**
**Decided:** 10 April 1987 by R.A. Hayes.

Mr and Mrs Towns, who held an age pension, asked the AAT to review a DSS decision that they had made a dsposition of property when they paid their son $12 000, and that this amount should be included in their assets for the purposes of the assets test.

**The legislation**
Section 6AC(1) of the *Social Security Act* provides that, where a married pensioner disposes of property, half the value of that property is to be maintained in the value of the pensioner's assets.

Section 6AC(10) provides that a pensioner is taken to have disposed of property where the pensioner has diminished the value of her or his property for no or inadequate consideration or with the motive of qualifying for a higher rate of pension or fringe benefit.

**No disposition**

The pensioners argued that the payment of $12 000 had been a reimbursement for the improvements which their son had made to a farming property owned by the pensioners but worked by their son on his own account for some 10 years.

The AAT noted that the applicants had retained full legal and beneficial interest in their farming property. The improvements made to the property by their son, valued at $43 700, had accordingly increased the value of their property.

'I find that the course of conduct undertaken by the applicants has not diminished, either directly or indirectly, the value of their property, that is, the funds have been used to undertake improvements of a capital nature to their property. Does it make any difference that the applicants have achieved this result by channelling the funds through the hands of their son? I think not. The son benefits from his parent's use of their assets to improve their property. But it is still their property which they have improved.'
(Reasons, p.6)

They had not, therefore, engaged in a course of conduct which had diminished the value of their property and had not disposed of property within s.6AC of the Act.

**Formal decision**
The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the rate of pension payable to the applicants be assessed in accordance with the Tribunal's findings.

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**Re FRENDO and SECRETARY TO DSS**
**(No.V86/364)**
**Decided:** 27 April 1987 by H.E. Hallowes, G. Brewer and L.S. Rodopoulos.

Georgina Frendo, who had migrated to Australia from Malta in 1966, was granted an invalid pension in 1977.

In 1985, she and her husband sold their home and from the proceeds Frendo gave her son and her daughter $30 000 each.

The DSS decided that these gifts amounted to dispositions of income and included their value in Frendo's assets for the purposes of the assets test. Frendo asked the AAT to review that decision.

**The legislation**
This matter involved the disposition of property provisions of s.6AC of the *Social Security Act*, set out in *Towns*, also noted in this issue of the *Reporter*.

**Consideration for payments?**
Frendo told the AAT that the gift to her son had been to enable him to begin to construct his own home, in which he had promised to accommodate Frendo and her husband; and the gift to her daughter had been by way of a dowry.

Frendo told the AAT that it was implicit in her (Maltese) culture that parents provide a dowry for their children; and that adult children looked after the welfare of their parents; but that she would have expected her son to look after her and her husband even if she had made no payment to him.

Expert evidence on Maltese law and family obligations established that, in Malta, children were legally obliged to maintain their indigent parents; that a son had no claim against his parents for a dowry; but that a daughter did have such a claim. It was a matter of family (as opposed to legal) obligation for parents to provide a dowry for their daughter and, to a lesser extent, for their son; there was also a family obligation on children to help their parents; but this obligation would not be destroyed if parents failed to provide a dowry.

**Disposition without consideration**
The AAT decided that the applicant had disposed of property within s.6AC(10) of the Social Security Act: although she had not disposed of property with the purpose of obtaining pension at a higher rate, but for the purpose of fulfilling an obligation to provide for her son and daughter, she had received no consideration for the payments. In particular, the offer made by her son to provide her and her husband with free accommodation could not be regarded as providing consideration for the payment to her son because that offer had not been intended to create a legally enforceable obligation.

**Formal decision**
The AAT affirmed the decision under review.