the AAT that he had adopted the same course as M, of having his parents registered on the title of allotment 1, as a precautionary measure to ensure that if he died his parents would receive the land.

Following this transaction, A married and built a house for his wife and family on allotment 1. A met all the outgoings on the allotment and made all the payments on a loan of $45 000 raised to pay for the construction of the house.

Legal or equitable interest?

The AAT said that the 1974 transaction, which led to Mr and Mrs Ventra and M becoming the registered proprietors of the 5-acre block of land, had created a resulting trust over that land in favour of M:

> 'It was M's money alone which was used to purchase the land, and therefore a presumption arises that the trust of a legal estate resulted to the purchaser (*Snell's Principles of Equity*; 28th edn, *Calverley* v *Green* (1985) 59 ALJR 111).

(Reasons, para.30)

On the other hand, the May 1979 transaction, by which A had been registered as a proprietor of allotment 1, had not created a resulting trust over that land in favour of A, who had not advanced any moneys towards the purchase of the allotment. Nor had that transaction led to an implied trust over the allotment in favour of A, as M had intended to give the allotment to A rather than to create a trust in A's favour.

However, the AAT said, the circumstances did give rise to a constructive trust over allotment 1 in favour of A: A had at all times behaved as though he were legally entitled to the property, having constructed a house on the allotment, paid for all outgoings and generally acted to his disadvantage. Mr and Mrs Ventra had never acted as the legal or beneficial owners of the property. In this situation, it would be unconscionable for Mr and Mrs Ventra, as holders of a legal interest in the allotment, to retain the beneficial interest and it would be a fraud for them to deny the trust in favour of A.

The AAT referred to *Follone* (198) and *Frendo* (1987) 38 *SSR* 483, where the AAT had said that -

> 'it is only legally enforceable agreements that may be considered and that family arrangements *per se* do not constitute legal transactions. In this application for review, however, it is clear that the applicants and their sons intended to create legal relations between themselves, and that these transactions which were entered into were not merely an informal family arrangement which did not give rise to legal obligations. Legal relations, albeit different from those which appeared on the titles, were intended to be created.'

(Reasons, para.36)

It followed that, although Mr and Mrs Ventra held a legal interest in the land, they did not hold the beneficial interest. Accordingly, the value of the property should not be included in the value of the their assets for the purpose of the pension assets test.

Formal decision

The AAT set aside the decision under review and substituted a decision that the land in question was not property of the applicants for the purposes of the pension assets test.

Invalid pension: permanent incapacity

BLANDO and SECRETARY TO DSS (No.N86/765)

Decided: 9 June 1987 by G.P. Nicholls.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a woman who had migrated to Australia from the Philippines in 1982, when she was 72 years of age. Up to the time of her departure from the Philippines, Blando had worked on the domestic staff of a local family. On her arrival in Australia, she made some attempt to find work but was offered no employment.

The DSS did not dispute that she Blando was permanently incapacitated for work but there was a difference of medical opinion as to whether her incapacity had arisen before or after her arrival in Australia. According to s.25(1) of the *Social Security Act*, an invalid pension cannot be granted to a person who became permanently incapacitated for work outside Australia (except during a temporary absence).

The AAT said that, at the time of her arrival in Australia, Blando had been 12 years beyond the age at which Australian women become qualified to receive age pension. Accordingly, she could not be treated as able to attract an employer who would engage her in full-time remunerated work - the test of incapacity for work laid down in such decisions as *Panke* (1981) 2 *SSR* 9. She should, therefore, be regarded as being permanently incapacitated for work at the time of her arrival in Australia and prevented from qualifying for invalid pension by s.25(1).

In coming to this conclusion, the AAT endorsed such earlier decisions as *Krupic* (1984) 23 *SSR* 279 and *Maniatis* (1986) 32 *SSR* 407, where it was said that s.25(1) should be strictly applied to persons who immigrate to Australia at an age beyond the normal working age in the Australian workforce.

REILLY and SECRETARY TO DSS (No.V86/695)

Decided: 6 August 1987 by H.E Hallowes, G.F. Brewer and D.M. Sutherland.

The AAT *affirmed* a DSS decision to reject a claim for invalid pension lodged in May 1986.

At that time and at the time of the DSS decision, s.23 of the *Social Security Act* provided that a person should be deemed 'permanently incapacitated for work', and so qualified for invalid pension under s.24, if the degree of the person's permanent incapacity for work was not less than 85%.

By the *Social Security and Veterans' Entitlements Act* 1987, s.23 of the *Social Security Act* was repealed and replaced, as from 1 July 1987, by a new s.23, which provides that a person will be regarded as permanently incapacitated for work, first, if the degree of the person's permanent incapacity for work is not less than 85%; and, second, if 'at least 50% of that permanent incapacity is directly caused by a permanent physical or mental impairment of the person.'

The AAT decided that the new s.23 was irrelevant to this matter. It pointed out that s.135TB(2) of the *Social Security Act* made it clear that the relevant date for determining the applicant's eligibility for invalid pension was the date on which he had claimed invalid pension.

The AAT also pointed to s.8 of the *Acts Interpretation Act*, which provides that, in the absence of a contrary intention, the repeal of whole or part of an Act 'shall not . . . affect any right privilege obligation or liability acquired, accrued or incurred under any Act so repealed'. The AAT said:

> 'By lodging a claim, the applicant asserted his right to an invalid pension. Although at the date of lodgment the applicant's right may have been "inchoate or contingent" . . . and subject to administrative determination, it was nevertheless an "accrued" or "vested" right for the purposes of the relevant rules. . . We are satisfied that the legislation to be applied to this application in determining whether the applicant is qualified to receive an invalid pension is the legislation as it stood on the date of the applicant's claim for invalid pension on 28 May 1986. Any other conclusion could be productive of grave injustice to an applicant qualified for but wrongly denied a pension at the date of his claim.

The presumptions against retrospectivity are intended to avoid any such injustice.'

(Reasons, para.16)

However, the AAT then decided that the evidence did not support a finding that Reilly was at least 85% permanently incapacitated for work when he lodged his claim. Insofar as he was unable to obtain work, this arose more from the limited range of jobs currently available in the labour market than from his medical disability.

Carer's pension

WAIN and SECRETARY TO DSS (No.N87/199)
Decided: 3 July 1987 by A.P. Renouf.

Wain's friend, C, was suffering from acquired immunity deficiency syndrome/cryptococcal meningitis and was an invalid pensioner. Between July 1986 and January 1987, when C died, Wain lived with and cared for C. As a result, Wain was obliged to give up his unemployment benefit.

Throughout this period, no relative of C was available to provide him with the necessary care and attention. C regarded Wain as his guardian and, from October 1986, Wain held a general power of attorney executed by C. W did not need to exercise the power of attorney until the week before C's death.

Wain applied to the DSS for a carer's pension for the period from July 1986 to January 1987. The DSS refused that application but paid Wain special benefit at the unemployment benefit rate. Wain asked the AAT to review that decision.

The legislation
Section 33(1) of the *Social Security Act* provides that a person who personally provides constant care and attention for a severely handicapped 'relative', who is an invalid pensioner, in their mutual home is qualified for a carer's pension.

The DSS accepted that Wain would have been qualified for carer's pension if C had been a 'relative'.

Section 33(3) defines 'relative' as including a person to whom the carer is a 'guardian'.

Under s.124(1) the Secretary may grant a special benefit to a person if the Secretary is satisfied that the person is unable to earn a sufficient livelihood.

Section 125 gives the Secretary a discretion to determine the rate of special benefit payable to a person --

> 'but not exceeding the rate of the unemployment benefit or the sickness benefit which could be paid to that person if he were qualified to receive it.'

'Guardian' is a technical legal term
The AAT noted that 'guardian' was not defined in the *Social Security Act*. It should, therefore, be given its ordinary legal meaning. The AAT said that this approach was supported by the detailed listing of other 'relatives' in s.33(3):

> 'It would be inconsistent with the nature of these parts of the definition to say that the remaining part, that dealing with "guardian", uses the term in a more liberal sense.'

(Reasons, para.17)

The AAT continued that a common element in most definitions of 'guardian' was that 'a guardian manages the affairs of a person who is incapable himself of so doing': Reasons, para.18.

In this case, C had remained capable of handling his own affairs until shortly before his death, although he had chosen to confer this task on Wain:

> '19. The problem, as the Tribunal sees it, is that the delegation by C of the management of his affairs to the applicant did not negate his capacity to do so himself. While C may at this time never have intended to resume the management of his affairs, he retained the right to do so because the power-of-attorney he had given to Mr Wain was revocable at will.
>
> 20. I conclude in this way that the relationship between Mr Wain and C was not one of guardian and ward as ordinarily understood in law, except for a few days before C's death.'

It followed, the AAT said, that Wain could not qualify for carer's pension apart from the week before C's death. The AAT commented:

> 'The Act, as it now stands, may not represent a sufficient response to the AIDS problem as regards carers but the Tribunal does not have the authority to remedy any deficiency which exists in the Act.'

(Reasons, para.23)

The AAT concluded that Wain had been qualified for special benefit while caring for C; and that, because he had given up his unemployment benefit to do so, the appropriate rate of special benefit was the unemployment benefit rate.

Formal decision
The AAT set aside the decision under review and remitted the matter to the respondent with a recommendation that Wain was qualified for carer's pension only for the last week of C's life.

[The *Social Security Act* is to be amended to overcome the restrictive impact of the definition of 'guardian' adopted in this decision. According to an announcement made at the time of the 1987 Budget:

> 'Carer's Pension will be extended to people who are not close relatives but who are providing constant care and attention to severely physically or mentally disabled age or invalid pensioners living in the same home.'

However, this change is not to come into effect until 1 February 1987.]

Income test

McCORMACK and SECRETARY TO DSS (No.V86/469)
Decided: 13 July 1987 by H.E. Hallowes.

McCormack had been granted an invalid pension in May 1984 on the basis that she was permanently blind.

Although she was married, she was paid at the single rate because her husband was not a pensioner. In October 1985, her husband was granted an age pension and, as a result of this grant, McCormack's pension was reduced to the married rate.

McCormack asked the AAT to review that decision.

The legislation
At the time of the DSS decision, s.28(1A) of the *Social Security Act* provided as follows:

> 'Subject to this Part, the maximum rate of age pension or invalid pension is -
>
> (a) in the case of an unmarried person or a married person whose spouse is not in receipt of a prescribed pension - $4,778.80 per annum; and
>
> (b)in any other case - $3,985.80 per annum.'

Sex discrimination?
McCormack argued that the reduction of her pension was inconsistent with the *Sex Discrimination Act* 1984, which had been intended 'to eliminate . . . discrimination against persons on the ground of sex, marital status . . .'

However, the AAT pointed out that s.40(2) expressly exempted the *Social Security Act* from the reach of the *Sex Discrimination Act*.

A 'prescribed pension'
McCormack also argued that her hus-