

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-