of constructive trust: it would not be a fraud for Rogers to deny that that she held Lot 2 on trust for her sons. She remained the legal and equitable owner of the land.

Disposition of property
The AAT pointed out that Rogers was not receiving regular repayments under the mortgage although the mortgage debt was recorded as reducing each year; and she was only receiving part of the rent for Lot 2. She was, it appeared, forgiving payment of those amounts and this amounted to a disposition of property under s.6.

Should the property be disregarded?
For Rogers to take advantage of s.7, and have some or all of her property disregarded, the discretion in s.7(1)(c) would have to be exercised in her favour.

The AAT said that this was not an appropriate case for exercising that discretion. The farming property owned by Rogers had the potential for subdivision, being close to Melbourne; and her son's farming enterprise was financially precarious. This was not a case where a viable farm property was required for the support of the next generation.

Moreover, the AAT said -

> 'to give Mrs Rogers the benefit of s.7 would be, ultimately, to continue the community's support for a property which is not viable.'

(Reasons, para.24)

Formal decision
The AAT affirmed the decision under review.

Assets test: equitable transfer

DINEEN and SECRETARY TO DSS (No. V87/43)
Decided: 26 November1987 by H.E. Hallowes, H.C. Trinick and G.F. Brewer.

Following the introduction of the assets test, the DSS decided that Michael Dineen's age pension should be reduced because of the value of his farm property.

The DSS subsequently decided that the property should be disregarded under the financial hardship provisions; but that his pension should be reduced because of 'deemed income' of 2.5% of the value of the property.

Dineen asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.6AD(1) of the *Social Security Act* provided that a person's property should be excluded from the assets test, where it was not reasonable to expect the person to sell, realise or use the property as security for borrowing, and where the person would suffer 'severe financial hardship' if the value of the property were taken into account for the purposes of the assets test.

Section 6AD(3) provided that, where property was disregarded under s.6AD(1), the person's pension should be reduced by the income which could reasonably be expected to be derived from that property.

The evidence
Between 1938 and 1948 Dineen, who was born in 1904, acquired 3 pieces of land, totalling 132.5 acres, which he operated as a dairy farm. Dineen's elder son, J, worked on the farm for board and keep from 1952. He was followed by the younger son, M, in 1958. Each of them worked away from the farm for a time but returned in 1970 and 1974.

In 1975, Dineen had retired from active involvement in the farm, and transferred 9 acres from one of the properties ('R') to J, who then established a poultry farm. J told the AAT that he expected title to the remainder of 'R' to be transferred to him on his father's retirement or death; and that, in the meantime, he had used the land as he liked, and had made improvements to the property.

M said that he had understood from 1969 that title to another of the properties ('W') would be transferred to him on his parents' death; and that he had completely taken over the running of that property in 1983 and made improvements to it.

Dineen said that, on the death of his wife in 1980, he had decided to transfer 'R' to J and 'W' to M but had not proceeded because of the costs involved. Dineen's will, made at that time, left 'R' to J, 'W' to M, and divided the third property between them, conditional on a bequest to his daughter; and, in the event of either M or J predeceasing Dineen, the properties were to go to Dineen's grandchildren by that son. Dineen told the AAT that he wanted his family to build upon the properties, one of which he had inherited from his own father; and that selling the properties was the 'last thing' he wanted to do.

In June 1987, Dineen executed a declaration of trust acknowledging that the properties in question had been held by him in trust for J and M since 1980.

Equitable transfer?
The major point argued on behalf of Dineen was that, at the time of the introduction of the assets test, he had ceased to be the beneficial owner of the property in question, because a trust had been created in favour of his sons.

The AAT decided that there had been, during the period under review, no equitable transfer of the properties; and that they had remained the property of Dineen.

First, no **express trust** had been created over the properties before June 1987. Dineen's declared intention to give the properties to his sons was not enough to create a trust, as the High Court had decided in *Olsson v Dyson* (1969) 120 CLR 365.

Secondly, no **constructive trust** had arisen over the properties in favour of Dineen's sons. There was no evidence of any common intention between Dineen and his sons that he held the properties in trust for them during their lifetime; nor had the sons acted to their detriment - the factors which decisions such as *Butler v Craine* [1986] VR 274 and *Thwaites v Ryan* [1984] VR 65 had said were essential. There had been no more than family arrangements, which had not been made to create a legal relationship.

Thirdly, Dineen had not intended to create a trust over the subject properties, but to transfer the properties by way of his will. Accordingly, until his execution of the declaration of trust in June 1987, no **implied trust** had arisen over the subject properties in favour of his sons.

Fourthly, the improvements made by Dineen's sons had not created an **estoppel by acquiescence** against Dineen. He had not encouraged his sons to make improvements for his advantage; nor had they expended money in any mistaken view as to their legal rights. So the present case did not involve the elements required to create such an estoppel, according to the decisions in *Chalmers v Pardoe* [1963] 1 WLR 677; *Morris v Morris* (1982) 1 NSWLR 61; and *NSW Trotting Club v Glebe Municipal Council* (1937) 37 SR (NSW) 288.

Fifthly, no contractual arrangement had been made between Dineen and his sons about the subject properties. Accordingly, there was no contract which might be rendered enforceable because of acts of **part performance** on the part of Dineen's sons.

Financial hardship
The AAT went on to decide that the property in question should be disregarded for the purposes of the assets test: it was not reasonable to expect Dineen to dispose of the property; and he would suffer 'severe financial hardship' if it was taken into account.

'Deemed income'
The AAT then decided that the annual rate of income which Dineen could be expected to derive from the properties was $40 an acre - a total of $4740.

This was based on the personal and financial situations of Dineen's sons.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that the annual rate of pension payable to Dineen be reduced by $40 an acre of the subject properties.

Assets test: financial hardship

LOWE and SECRETARY TO DSS
(No. N86/462)
Decided: 6 November 1987 by J.O. Ballard.

Following the introduction of the assets test in March 1985, the DSS decided that Heather Lowe's age pension should be reduced because of the value of her property.

After an appeal to an SSAT, the DSS decided that the value of the property should be disregarded but that, because of 'deemed income' from the property, Lowe's pension should be reduced. She asked the AAT to review that decision.

The legislation
At the time of the decision under review, s.6AD(1) of the *Social Security Act* provided that a person's property should be excluded from the assets test, where it was not reasonable to expect the person to sell, realise or use the property as security for borrowing, and where the person would suffer 'severe financial hardship' if the value of the property were taken into account for the purposes of the assets test.

Section 6AD(3) provided that, where property was disregarded under s.6AD(1), the person's pension should be reduced by the income which could reasonably be expected to be derived from that property.

The evidence
Lowe had inherited the property in question, 'E', of 142 acres, in 1942. In 1978 her son, P, leased the farm from her. Initially, P paid Lowe a yearly rent of $1000; but from 1981 the yearly rent was reduced to $700, following a fire which affected one of two other properties, 'W' and 'C', being worked by P.

Lowe and P lived in Lowe's house in a small town near the farming property, which was in poor condition; and P was only able to operate it as a farm by taking seasonal off-farm work. P had never made a profit on the three farming properties which he worked; and in the 1986 tax year he had made a loss of $2653.

P said that he could not afford a commercial rent for Lowe's property, which had been assessed by a stock and station agent at $2000. The same agent told the AAT that the three properties being worked by P were 'very marginal'; and that without Lowe's property the other two would not be viable.

Lowe told the AAT that she wanted to pass 'E' on to the next generation of her family; and she had made a will devising 'E' to her four children, including P.

Property to be disregarded
The Tribunal referred to the purpose of the assets test legislation, as stated in the Minister's Second Reading speech when introducing the legislation. The Minister had said:

> 'The majority of pensioners will be unaffected by the introduction of the assets test. Those who will be affected will be those who will be able to adequately support themselves without a pension.'

Taking that purpose into account, as allowed by s.15AB(2) of the *Acts Interpretation Act*, it would not be reasonable to require the applicant to sell or realise the property in question. Such a course of action could leave both Lowe and her son unable to support themselves.

The AAT also took the view that the property represented 'more than 50 years hard effort within the family'; and that Lowe had a responsibility to pass on the property to her children.

For these reasons, the AAT decided that the property should be disregarded under s.6AD(1) of the Act.

'Deemed income'
The AAT said that Lowe's son was making the most effective possible use of 'E'.

The AAT referred to *Allman* (1987) 38 *SSR* 474, where the AAT had said that an applicant should not derive an unfair advantage by deliberately under-utilising 'a perfectly good exploitable asset':

> 'Where, however, a property is being efficiently farmed and as much profit is being derived as is possible, then in our view it is unrealistic to look at any other figure as being a reasonable annual rate of trading income capable of being derived from the property.'

In *Copping* (1987) 39 *SSR* 497, the Federal Court had said that 'personal and family considerations . . . could not be excluded from consideration' when deciding what income it was reasonable to expect an applicant to derive.

It was reasonable, the AAT said, to expect Lowe's son to continue to farm 'E' in conjunction with the two other properties and he was 'making the most effective use of the land he could'. It was also reasonable for him to continue to live with his mother. Accordingly, the AAT said, the income arising under the arrangement between Lowe and her son represented the annual rate of income which could reasonably be expected to be derived from the property.

Because the property appeared to be recovering from the effects of drought and fire, it would, the AAT said, be reasonable to revert to an annual rent of $1000 from the date of this decision. But, up to the date of the decision, the rent of $700 a year should be taken as the 'deemed income'.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary with directions that the value of the property, 'E', should be disregarded; and that the annual rate of Lowe's pension should be reduced by $700 up to the date of the AAT's decision and $1000 from that date.

Mobility allowance

HASTINGS and SECRETARY TO DSS
(No. S86/276)

Decided: 28 October 1987 by R.A. Layton, J.A. Kiosoglous and B.C. Lock.

Roy Hastings, who was enrolled as a university student, applied for a mobility allowance. When the DSS rejected his application, he asked the AAT to review that decision.

The legislation
During the period under review (August 1985-September 1987), s.133RB(1) of the *Social Security Act* (renumbered s.146 from 1 July 1987) provided that a handicapped person was eligible for a mobility allowance, if -

(a) the person was, in the opinion of the Secretary, unable, by reason of physical or mental disability, to use public transport without substantial assistance; and

(b) the person was engaged (for at least 20 hours a week) in gainful employment or vocational training, which, in the opinion of the Secretary, would assist the person to find