required such agreements to be in writing.

The Heidelberg home

Cummane had been the sole proprietor of the family home in Heidelberg. In 1986 she orally agreed to transfer it to another son, Peter, in exchange for his agreeing to build (at his expense) a granny flat extension onto the house in which Cummane would live.

A solicitor was consulted about drafting a legally enforceable deed to encapsulate this agreement but this was not pursued. A purchase price of $95 000 was agreed, but that money was to be paid to Cummane's other children and on stamp duty. Cummane was to receive no money under this agreement. The house was valued at $140 000. Cummane lived in the self-contained granny flat, which cost between $68 000 and $72 000 since it was completed in early 1987.

The AAT decided that Mrs Cummane acquired a right in the granny flat which came within the ordinary meaning of s.6AA(1)(a)(iv). It was satisfied that there was an intention to create a legal relationship and that Cummane's right to residence, though not in writing, could be implied from the circumstances.

Because s.6AA(1)(a)(iv) applied, s.6AC(12) prevented Cummane's right to residence being regarded as consideration for the purposes of s.6AC(10) and therefore its adequacy was not an issue to be considered. This meant that the value of the disposed property (the house) was to be included as part of Cummane's assets after deduction of the value of Mrs Cummane's right of residence in the granny flat, which was excluded by s.6AA(1)(a)(iv).

Hardship

The AAT refused to apply the hardship provision, s.6AD [now s.7], because Cummane was owed $10 000 on the sale of the Torquay house, owned another unit in Torquay unencumbered and was employed at a fortnightly wage of $346 as a family counsellor.

Formal decision

The AAT affirmed the decision relating to the Torquay house. The decision relating to the Heidelberg home was set aside and remitted to the DSS for reconsideration in accordance with directions relating to valuing Cummane's right to residence and deducting that value from her assets.

[D.M.]

Assets test: property of the person

MARSHALL and SECRETARY TO DSS

(No. 4934)

Decided: 21 February 1989

by J.A. Kiosoglous.

Richard Marshall's age pension was reduced in August 1986 because of the application of the assets test. He applied to the AAT for review of that decision. The only issue for determination by the Tribunal was whether certain farming property registered in Marshall's name should be regarded as his for the purposes of the assets test.

The facts

Marshall owned five adjoining 100 acre blocks of farming property. Four of those blocks were registered in his name alone and one was registered in the name of his son and himself.

Marshall was aged 81 years and retired from active farming in 1972. His son had worked on the farm for 30 years and had done so alone since the applicant's retirement. Since 1973 the applicant was paid rent by his son for the purposes of carrying on the business of farming. His son had paid Marshall rent for the land since 1973, had maintained and added to the equipment and had made improvements to the property.

Marshall told the AAT that he had not gifted the land to his son because he knew of elderly people who had done this and then found themselves homeless. Marshall and his wife had no intention of leaving the property, where they had lived for 50 years, but they had willed the entire property to their son. Marshall said that his son had the sole use and benefit of the land and he considered that morally, the land was his son's.

Constructive trust?

The AAT firstly decided whether a constructive trust in favour of the son existed and applied *Butler v Craine* [1986] VR 27A at 283 where it was held that:

> 'the essential elements of a constructive trust of the kind here relied on are:
>
> (1) the parties to it must form a "common intention" as to the ownership of the beneficial interest in real property;
>
> (2) the claimant of the beneficial interest must have acted to his, or her, detriment consequent on the formation of the common intention;
>
> (3) it must appear that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property.'

(Reasons, para. 13)

Without elaborating, the AAT simply stated that it was 'satisfied that the constituent elements of a constructive trust, as set out in *Butler v Craine* are not present in this case and that such a trust cannot be said to exist'. (Reasons, para 13)

Ultimate control

The AAT then decided that Marshall at all times had ultimate control over the land, although the precise significance of this to the question in issue was not spelt out. This decision was based on the following facts: Marshall at all times remained the registered owner of the property, his son paid rent for use of the land, and the reasons for not gifting the land indicated a clear intention to retain ultimate control over the property until his death.

Formal decision

The AAT decided that the property was correctly included as Marshall's asset and affirmed the decision under review.

[D.M.]

Invalid pension: married person

KEENAN and SECRETARY TO DSS

(No. 4910)

Decided: 7 February 1989

by R.K. Todd.

Vicki Keenan applied for invalid pension in November 1985 claiming she was separated from her husband. The claim was rejected on the grounds that she was a married person and her husband's income had to be taken into account.

The facts

The applicant married in 1976. In 1981 she received a letter from her husband's solicitor which stated her husband proposed to separate from her but that, until the family house was sold, the separation would occur under the

one roof. The house was put on the market but not sold.

In early 1982 the husband left the house and in April 1982 the wife applied for and was granted sickness benefit. In the latter part of 1982 the husband returned to the family house and her benefit was terminated. It was agreed he would pay her $100 per week for housekeeping and taking care of his letters and some work documents.

The husband again left the home in early 1985 and she again applied for and received sickness benefit. In August 1985 she asked him to return because of her illness. He did so and paid her $20 to $30 per week for doing his washing. As a result of her November 1985 invalid pension claim the DSS accepted she was 85% permanently incapacitated for paid work but was considered as married.

The decision

The AAT examined s.3(1), 3(5), 3(8) and s.33(1) and (12) of the *Social Security Act*. It found Keenan had not established that she and her husband were separated under the one roof as there was no corroboration of her evidence. Even had she proved separation under the one roof under s.3(1), the inclusion of s.3(8) meant she would still be treated as a 'married person' after 26 weeks unless property proceedings were instituted.

The AAT used the factors listed in the *Annotated Social Security Act* (4th edn) to assess the nature of the relationship and to conclude that a 'marriage of sorts' existed.

Under s.3(5) of the *Social Security Act*, a wife is deemed to receive 50% of the aggregate of her income and that of her husband. The AAT had encouraged the applicant to call her husband as a witness. She had failed to do so and no evidence regarding his income was available. Since she had failed to establish a fact crucial to her case the AAT said it had no choice but to reject her claim and affirm the decision under review.

[B.W.]

Assets test: 'deemed income'

HUGHES and SECRETARY TO DSS

(No. 4917)

Decided: 10 February 1989

by R.A. Balmford.

The AAT *affirmed* a DSS decision to grant Sufiya Hughes a family allowance for her child from 15 August 1987 and not from the date of the child's birth, 19 April 1987.

Hughes had contacted a DSS office shortly after the birth of her child and had been told that she would have 6 months in which to lodge her claim for family allowance. Section 102(1)(a) of the *Social Security Act* then allowed a 6-month period for the lodging of claims for family allowance.

However, the *Social Security and Veterans' Entitlements Amendment Act* 1987 amended s.102(1)(a) from 1 July 1987. The amended section provided that family allowance would only be payable from the first day of the family allowance period during which a person lodged a claim for the allowance. The Bill for this Amendment Act had been introduced into Parliament at the time when Hughes was advised by the DSS office that she would have six months in which to lodge her claim.

At that time, s.135TA(1) prevented the grant or payment of any allowance, 'except upon the making of a claim for that... allowance', which, according to s.135TB(1), was required to 'be made in writing'.

Hughes eventually lodged her claim for family allowance on 26 August 1987 (that is, a little over 4 months after the birth of her child) and the DSS then decided, in accordance with the amended s.102(1)(a), that the allowance should be paid to her from 15 August 1987.

An 'accrued right'?

Hughes argued that the Amendment Act had not taken away her 'accrued right' to family allowance, which was protected by s.8(c) of the *Acts Interpretation Act* 1901. That section provides:

> '8. Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not -
>
> ...
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed.'

The AAT referred to a decision of the Privy Council, *Abbott v Minister for Lands* [1895] AC 425, where the following observation had been made:

> 'Their Lordships... think that the mere right (assuming it to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by the individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.'

The AAT said that it was satisfied that the intention of Parliament in passing the Amendment Act had been to change the law; and that any substantive entitlement to the payment of family allowance for a period prior to the family allowance period during which the claim was lodged had been removed by the Amendment Act.

[At that time, s.135TA(1) prevented the grant or payment of any allowance, 'except upon the making of a claim for that... allowance', which, according to s.135TB(1), was required to 'be made in writing'.]

[P.H.]

Invalid pension: lump sum preclusion period

TRIKILIS and SECRETARY TO DSS

(No. 4930)

Decided: 21 February 1989

by H.E. Hallowes.

Steve Trikilis claimed invalid pension on 28 September 1987. In so doing he advised he had settled a claim for compensation on 23 September 1987 for $35 000. The award was made pursuant to the *Accident Compensation Act* 1985 (Vic.).

The DSS accepted his claim on medical grounds but decided his compensation award precluded him from receiving pension from 23 September 1987 until 14 March 1989.