

The AAT decision in *Christian* (1987) 39 SSR 492, that the value of a person's property 'includes a valuation of that interest in property, whether it be legal and beneficial or beneficial only', was followed.

#### Family arrangements

The AAT further decided that family arrangements with respect to property could be capable of legal enforcement, and said that '[e]ach case must be examined on its own facts in order to determine the intentions of the parties': Reasons, p.3.

#### Oral declaration of trust

The AAT accepted that James' discussions with accountants, lawyers and family members when she purchased the unit evidenced an oral declaration of a trust. 'No special words are required to indicate the creation of a trust': Reasons, p.6.

#### Written manifestation of the trust

Section 34(1)(b) of the *Property Law Act 1969* (WA) required that

'a declaration of trust respecting any land or interest therein shall be manifested and proved by writing signed by a person who is able to declare the trust . . . '.

The AAT followed *Rochefoucauld v Boustead* [1897] 1 Ch 196, which held that a trust need not be declared in writing in the first instance. It is sufficient 'that there be a subsequent written manifestation as evidence of the existence of the trust': Reasons, p.7.

The AAT found sufficient written confirmation of the trust in a letter which James sent to the DSS on 23 November 1983, seeking assistance for her daughter, in which she said the unit was purchased for her daughter and grand-daughter to live in and to make provision for them.

Alternatively, the AAT was prepared to rely upon a document appended to James' December 1987 pension claim form in which she said that the unit was purchased for her daughter and grand-daughter. The AAT added that the terms of the trust could be clarified by looking to extrinsic evidence.

#### Formal decision

The AAT set aside the decision under review and remitted the matter with a direction that, as the applicant did not hold the beneficial ownership of the unit, its value should not have been included in the total value of her assets.

[D.M.]

## Assets test: 'value of property' — land

### MORIARTY and REPATRIATION COMMISSION

(No. 4951)

Decided: 10 March 1989

by M.D. Allen.

The Repatriation Commission, in applying the assets test to the Moriartys, took into account the market value of real estate without deducting agents' and solicitors' fees that would be incurred if the real estate were sold. The applicants applied to the AAT solely in relation to the Commission's refusal to make those deductions.

#### The legislation

The crucial provision in this case was s.54 of the *Veterans Entitlements Act 1986*, which requires the calculation of a 'pension reduction amount', where 'the value of the property of the person' exceeds a certain amount. [As far as is relevant to the decision in this case, this provision is identical to s.8 of the *Social Security Act 1947*.]

The AAT decided that the term 'value of the property' means 'what on normal valuation principles is regarded as the value of the land to an owner in possession': Reasons, para. 22; which is the market value without deduction for agents' or solicitors' fees.

*Manning v Shire of Yarrowonga* (1929) VLR 258 and *Re Firth and Minister for Capital Territory* (1978-80) 2 ALD 183 were cited as authority for the proposition that, in ascertaining the value of land, agents' fees were not a permissible deduction. Similar principles applied to solicitors' fees.

It was necessary to distinguish *Re Clarke and Repatriation Commission* (1987) 13 ALD 396, which followed the High Court's decision in *Commissioner of Stamp Duties (Queensland) v Lansdowne* (1927) 40 CLR 115.

In those two cases notional brokerage was deducted in valuing shares. The AAT distinguished those cases on the basis that, in the High Court decision, 4 of the judges referred to the necessity of using a broker to realise the market value of shares. By contrast there is no obligation to engage an agent or a solicitor when selling land.

The AAT also referred to *Cowling* (1986) 37 SSR 464, where it was said that, in applying the social security assets test, all property should be valued at its market value. According to the AAT, this decision was not authority for the proposition that shares and land must be valued in the same way.

#### Formal decision

The AAT affirmed the decision under review.

[D.M.]

## Supporting parent's benefit: living separately and apart

### MILAS and SECRETARY TO DSS (No. 4979)

Decided: 21 March 1989

by J.A. Kiosoglous.

The AAT set aside a decision of the DSS to cancel the applicant's supporting parent's benefit. The delegate had considered she was not an unmarried person pursuant to s.53(1) of the *Social Security Act 1947*, and accordingly was not qualified to receive the benefit under s.54 of the Act.

#### The facts

The applicant told the AAT she married in 1973 and there were 3 dependent children of the marriage. Problems in the marriage developed as early as 1977. Her husband was often unemployed and the family moved many times to seek employment for him. There were also problems between him and members of Milas' family. As the problems increased her husband became depressed and violent towards her.

In March 1983 her husband left his family. Milas said she had no idea where he had gone and had no contact with him for 9 months. She considered the marriage had broken down and the separation was permanent. On 23 March 1983 she applied for supporting parent's benefit. She heard nothing of