forbearance or promise sufficient to establish the existence of a binding contract.'

The AAT said that any arrangement made between Lomax and his children at the time of the transfer of the property was a 'family arrangement' and there was 'no binding contract' with respect to the domestic help which the children gave to Lomax and his wife.

Accordingly, half the value of the two home units in excess of $4000 should be included in the value of Lomax's assets.

Misleading advice

Lomax told the Tribunal that he had sold his home and purchased the 3 home units, transferring 2 of them to his children, in order to ensure that he and his wife could live close to his children, so that the children could care for them. He explained that, if he had not adopted this course of action, he and his wife would probably have been obliged to enter institutional care.

Lomax told the AAT (and the AAT accepted) that he had discussed this proposed course of action with a DSS officer before the sale of his principal home. Lomax said that the officer had advised him that the proposed course of action would not affect his age pension entitlement.

The AAT said that the wrong advice given to Lomax by a DSS officer was not something which the Tribunal could take into account in deciding whether there had been a disposal of property under s.6(10) of the Act.

However, that advice would be relevant to the discretion, given by s.7 of the Act, to disregard a person's assets in cases of severe financial hardship. In this context, the AAT referred to the Federal Court decision *Trimboli* (1989) 49 *SSR* 645 where the Court said that the exercise of a discretion —

> 'in an appropriate case can substantially put a pensioner who does not commence court proceedings in the same position as one who does and thereby prevent an anomalous situation arising.'

However, the Tribunal said, the advice given to Lomax by the DSS officer was not the only factor which persuaded him to sell his family home and move into a home unit. And it was not the only factor which affected the exercise of the discretion under s.7 of the *Social Security Act*. In particular, the Tribunal noted that Lomax had income from other sources (which amounted to $9482 a year). On that basis, the AAT decided not to exercise the discretion to disregard any part of Lomax's property, including the 2 home units transferred to his children.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

'Capitalised maintenance income'

SECRETARY TO DSS and WESTERMAN

(No. A89/28)

Decided: 14 September 1989 by R.K. Todd.

In August/September 1988, Anne Westerman, who was in receipt of a widow's pension, received from her former spouse a lump sum of $5000 in lieu of 125 weeks of periodical maintenance. The DSS appealed to the AAT against an SSAT decision to treat only $3500 of a total amount of $5000 as 'capitalised maintenance income'.

The legislation

Section 3(1) of the *Social Security Act* contains the following definition:

> '"capitalised maintenance income", in relation to a person, means maintenance income of the person:
>
> (a) that is not a periodic amount or a benefit provided on a periodic basis; and
>
> (b) the amount or value of which exceeds $1500;'

This definition was inserted into the Act by s.4 of the *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act* 1988.

The argument

The DSS argued that the effect of this definition was to exclude amounts of $1500 or less from consideration but, once a maintenance lump sum exceeded $1500, the whole of the amount, including the first $1500, should be taken into account.

Westerman argued that only the amount of lump sum maintenance that exceeded $1500 should be included as capitalised maintenance income. This argument had been accepted by the SSAT.

The DSS argued in the AAT that, if Parliament had wanted to exclude the first $1500, it would have done so explicitly as it had elsewhere in the *Social Security Act*. The DSS cited s.48(3)(a)(ii), which refers to 'the amount (if any) by which the annual rate of maintenance income of the widow exceeds the annual maintenance free area of the widow'. (This amendment was made by the same amending Act which had inserted the definiton of capitalised maintenance.)

The SSAT had stated in its decision that to treat the amount in the way the DSS suggested led to a substantial (and unfair) decrease in pension for someone who received $1501 dollars as a lump sum as compared to someone who received $1500. The SSAT had also calculated the effect of taking account of $5000 rather than $3500 as capitalised maintenance; the DSS challenged the amounts calculated.

The AAT decided not to enter into its own calculations and said that neither view led to such an absurdity or ambiguity in the legislation which would entitle the Tribunal to refer to extrinsic materials to assist in ascertaining the meaning of the legislation. However, the Tribunal went on to consider the Explanatory Memorandum to the amending Act.

Extrinsic materials

The Tribunal noted that the same amending Act had inserted precisely the same definition of 'capitalised maintenance income' into the *Veterans' Entitlements Act*. However, two different explanations of the definitions were given in the Explanatory Memorandum - one for the section inserting the definition into the *Veterans Entitlement Act* and another for the section inserting the definition into the *Social Security Act*.

The DSS argued that the explanation given in relation to the Veterans Entitlement Act amendment supported its contention. The Tribunal said:

> 'All this makes clear to me is how dangerous resort to such materials can be. The two explanations may not on their face be inconsistent, but having regard to the applicant's stance and submissions in the matter it seems to me that on one reading they could be. The legislative provision is said to be ambiguous, but the extrinsic material may be more so. That two differently expressed explanations should be given, in one document, of an identical statutory phrase no doubt reflects the fact that Explanatory Memoranda are not drawn by Parliamentary counsel but by officers of the relevant department. To attribute their statement of what was the intention of the legislation to the intention of the draftsperson or Parliament itself is, in my respectful opinion, worrying in these circumstances, but s.15AB(2) of the *Acts Interpretation Act* now encourages that course. But in this case, who will explain the explainer?'

(Reasons, para. 13)

Plain meaning

The AAT concluded that the plain meaning of the words was clear, so that it was unnecessary to refer to extrinsic materials. It also accepted the DSS argument that, if it had been intended to exclude the first $1500 of lump sum maintenance, there was an obvious way to do it, following the model of s.48(3)(a) noted above. To treat the whole of the lump sum as capitalised maintenance 'did not lead to an abusrdity or incongruity' because amounts below $1500 would be treated as maintenance income, which was dealt with elsewhere in the Act.

Formal decision

The AAT set aside the SSAT decision and substituted a decision that the whole of the $5000 received by Westerman constituted capitalised maintenance income.

[J.M.]

Carer's pension: care in home

KINSEY and SECRETARY TO DSS (No. 5361)

Decided: 8 September 1989 by H.E. Hallowes.

Ruth Kinsey was granted a carer's pension from March 1987 on the basis that she was caring for her adult daughter, who was a severely handicapped person in receipt of invalid pension, in their home.

In August 1988, the DSS cancelled Kinsey's carer's pension on the ground that she was no longer providing care to her daughter in the same home.

Kinsey asked the AAT to review that decision.

The legislation

Section 39(1) of the *Social Security Act* provides that a person is qualified to receive a carer's pension if the person 'personally provides constant care and attention for another person in a home of the person and of the other person', where that other person is severely handicapped and receiving an age or invalid pension.

The evidence

It was not disputed that Kinsey provided constant care and attention to her daughter, aged 28, who suffered from a severe disability, requiring constant supervision. It was also accepted that providing this care placed Kinsey under a great deal of stress. Initially, Kinsey had shared her house with her daughter and her daughter's family (a husband and child) but had been able to finance the purchase of the flat next door, demolish the fence between the two properties and install an 'intercom'.

Kinsey divided her time between her own house and the flat next door, attending to domestic chores in both places, eating her meals in either dwelling. She maintained that her 'home' was the house and flat.

Kinsey explained that she had used the money provided by the carer's pension —

> 'to pay someone to sit with [her daughter] and help me with a little housework so I can get a much needed break. My health is not the best and my husband suffers from diabetes and schizophrenia and there is no-one else to help us'.

The AAT's decision

The Tribunal said that it would be 'regrettable' if Kinsey, because of lack of financial support, was 'unable to get the relief she needs to enable her to have some respite from her demanding duties'. However, the AAT said it had to apply the *Social Security Act* to the facts as found in each case.

The AAT referred to comments made in *Dickeson* (noted in this *Reporter*) and *Todd v Nicol* [1957] SASR 72, where some attempt had been made to define what was meant by a 'home'.

The Tribunal concluded that Kinsey's home was her house, rather than the flat occupied by her daughter, and that, accordingly, the care provided by Kinsey was no longer provided by Kinsey in her own home.

The AAT noted that the 2 dwellings had different keys and were on different titles, the flat was being purchased in the name of Kinsey's daughter and her husband and had been bought to provide some independent living for her daughter. The AAT expressed its conclusion as follows:

> 'I am satisfied that there are two households in this application, both run by the applicant, rather than one household. The applicant's heart is with her daughter rather than the flat in which her daughter resides.
>
> 22. As when the question as to whether a person is a "married person" for the purposes of the Act is determined, what constitutes a person's "home" is not a matter of checking criteria to see whether or not they are satisfied but rather it is a matter of deciding the relationship of a person to a place, which is the centre of their affection and attention, where they ordinarily sleep and keep their personal possessions. The answer to the question emerges from the facts found on the evidence in each particular case. The answer will depend on the person's past experiences and their changing circumstances. Mrs Kinsey has a relationship with [the house] which is her home. Her care and concern for her daughter does not extend that relationship to her daughter's flat. Nor does her daughter have the same relationship with [Kinsey's house] as she had before she moved to the flat.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Sickness benefit: medical certificates

SIMIC and SECRETARY TO DSS (No. 5169)

Decided: 22 June 1989 by J.A. Kiosoglous.

Miroslav Simic was granted sickness benefits in December 1985. He left Australia in September 1986 to visit his dying father in Yugoslavia.

Before leaving Australia, Simic provided the DSS with a medical certificate, to the effect that he was incapacitated for work from September to November 1986.

For various reasons, Simic did not return to Australia until August 1987. In the meantime the DSS cancelled his sickness benefit from December 1986 because no further medical certificates relating to his incapacity for work were lodged.

Shortly after his return to Australia, Simic applied for and was granted sickness benefit from 26 August 1987. He requested payment of benefits for the period from December to August 1987 and produced several documents in Serbo-Croatian, which he said were medical certificates relating to his incapacity for work during his time in Yugoslavia. He also produced a certificate from an Australian doctor (Dr K), dated January 1988, to the effect that Simic had been incapacitated for work between September 1986 and August 1987.