Assets test: oral declaration of trust?

BRYSON and SECRETARY TO DSS
(No. 5405)
Decided: 2 November 1989 by W.J.F. Purcell.

Mr and Mrs Bryson appealed against a SSAT decision, affirming a DSS decision that they were the owners of property worth $85 000 (apart from their principal home) which, because of the assets test, reduced the rate of age pension they received.

At the AAT hearing the Brysons conceded that the house had been correctly valued. But they argued, as they had at the SSAT, that although they were the registered owners of the property, they were not the owners in equity, but trustees under an oral declaration of trust.

The Brysons' elder son, R, suffered from psychiatric problems. R left home at 24 to live with his girlfriend and the Brysons purchased the property now in dispute for R's security.

The Brysons said that they discussed this with their other son, G, and the arrangement was that both sons would benefit equally, R receiving the house and G a hairdressing salon which Mrs Bryson owned. Legal title to the house was retained by the Brysons, partly to avoid the house being claimed by R's partner.

In July 1983 the Brysons made new wills, leaving all their property to each other, with a proviso that if either predeceased the other, the estate was to go their sons in equal shares. These were witnessed by neighbours. The Brysons told the AAT that they had soon realised they had done nothing about the house for R and added a codicil to their wills stating:

> 'If at the date of my death I am the sole registered proprietor of the house property situated at . . . then I give the said house property to my eldest son [R].'

The Brysons witnessed each other's signatures but no independent witness had signed them which made the codocils invalid.

The Brysons argued that these codicils were sufficient evidence in writing of the trust orally declared in 1972 to fulfil the writing requirements of the South Australian *Law of Property Act* 1936-1975.

The AAT did not accept that the Brysons intended to create a trust in favour of Richard and concluded:

> 'In my opinion the applicants intended at all material times to retain possession, control and ownership of the property. They wanted to provide accommodation for Richard, but not the power over the disposition of the property... The alleged trust in respect of the property was no more than an ex post facto attempt to overturn a pension decision which the applicants found unpalatable.'

(Reasons. para.21)

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]

Assets test: financial hardship

NOBLE and SECRETARY TO DSS
(No. 5463)
Decided: 27 October 1989 by J.A. Kiosoglous.

Mr and Mrs Noble appealed against a decision that their age pensions should be cancelled because of the assets test.

The evidence

The Nobles owned three Crown Lease properties, divided into two Lots separated by a road. They lived in a house on Lot 1. For some time one of their sons had operated their farm and they had received no financial benefit from it. During that time he had borrowed some $110 000. He then left the property and the Nobles recommenced farming operations. Although it appeared that the Nobles were not legally responsible for their son's debts, they felt obliged to continue to make repayments.

In 1987, Mrs Noble inherited $30 000. She spent $15 000 of that paying off some of her son's debts and lent $9500 to two daughters. The rest was used for living expenses.

At the time of the hearing the Nobles had some $660 in the bank and life assurance policies with a surrender value of $5506. Mr Noble also received a war disability Pension of about $90 a fortnight. The land was valued at $241 000, they owned a car worth $1600, household contents valued at $9500 and the plant and plant improvements were valued at something less than $45 000. The Nobles also had some 48 bales of wool which they were hoping to sell for some $40 000. Mr Noble stated that this money would be used to pay off his son's outstanding debts. The Nobles also earned $5500 annually from leasing their land to a neighbour for cropping.

'Severe financial hardship'

The issue in this case was whether the Nobles could come within the 'severe financial hardship' provision in s.7 of the Social Security Act. Broadly, this provides that if a person has property that they cannot sell or cannot reasonably be expected to sell, and it cannot be used as security for borrowing and they would otherwise suffer severe financial hardship, the Secretary may disregard this property for the purposes of the assets test.

The DSS accepted that the Nobles could not be expected to sell their property because of their long term attachment to it. The AAT did not accept, however, that they were suffering severe financial hardship.

The AAT said that the Nobles currently had a gross income of $47 500, though this could vary depending on the price of wool. It noted that the current annual rate of pension was approximately $5600 each. The Tribunal said it understood the compassionate reasons why a loan of $9500 was made to their daughters and that the chance of repayment was remote but 'the lending of such a relatively large sum of money is not consistent with people experiencing severe financial hardship': Reasons, para.16.

The AAT accepted that the Nobles were honest and sincere in trying to repay their son's loan; but said that this was his responsibility:

> 'By their action in seeking themselves to meet their son's obligation and by designating their entire wool cheque to repay the loan to the bank the applicants are in fact choosing to put themselves in a position of financial difficulty . . .
>
> The facts in this present matter demonstrate that Mr and Mrs Noble's resources provide them with a joint income far in excess of the maximum pension, and hence they cannot be described as being in severe financial hardship so as to bring into operation on their behalf the provisions of s.7 of the Act.'

(Reasons, para.19)

Formal decision

The Tribunal affirmed the decision under review.

[J.M.]