James had lodged with the DSS: in each of these documents, James had written that the unit had been purchased for her daughter and grand-daughter.

Sufficient evidence of oral declaration

The Federal Court first concluded that there had been sufficient evidence before the AAT from which the AAT could find that James had declared a 'present irrevocable trust'. The Court said that the evidence might have raised competing inferences, but the Tribunal's determination was an available conclusion. The Court commented:

> 'On the material before it, it was possible for the Tribunal to conclude that the respondent had declared that she held the property on trust for her daughter as to a life interest — in respect of which the daughter was to make a contribution to outgoings — and thereafter for her grand-daughter in remainder and that the instructions in her will to her executors confirmed that declaration and did not create the trust.'

(Reasons, pp. 10-11)

The effect of the Property Law Act

Section 34(1) of the *Property Law Act* 1969 (WA) provides, in para. (a), that no interest in land can be created or disposed of except in writing signed by the person creating or conveying the interest or by will or by operation of law; and, in para. (b), that a declaration of trust respecting any land 'shall be manifested and proved by writing signed by a person who is able to declare the trust or by his will'.

The Secretary argued that s.34(1)(a) prevented the creation of any equitable interest in land unless that interest was created in writing or by will or by operation of law. However, the Court said that, in its view —

> 'the proper construction of paras. 34(1)(a) and 34(1)(b) does not require a declaration of a trust in land to be treated as a special class of equitable interest only capable of being created in writing and further, to be manifested and proved by writing signed by the declarant. Paragraph 34(1)(b) would be either an odd exception, or otiose if para. 34(1)(a) were to be construed as including the declarations of trust in respect of land specifically provided for in para. 34(1)(b).'

(Reasons, p.16)

Accordingly, it was not necessary for the equitable interest to be created by writing; but it was necessary for it to be 'manifested and proved by writing' signed by James. The Court said that this requirement, stated in para. 34(1)(b), could be satisfied by a combination of documents capable of being read together:

> 'Any informal writing may stand as evidence of the existence of a trust, including correspondence from third parties, a telegram, an affidavit or an answer to interrogatories. The date of creation of the writing is not material. It may come into existence after the declaration of the trust.'

(Reasons, pp.16-17)

The Federal Court noted that the AAT had found the necessary writing in a letter from James to the DSS in 1983 and a further document attached to her application for pension in December 1987.

The Court said that, in addition, the evidence could have been found in James' application for review of the DSS decision, where James had written that she had provided the unit as a home for her daughter, the deeds having been left in James' name to protect her daughter. In combination, the Court said —

> 'those documents may have provided writing to confirm an intention to create a trust, to identify the daughter and grand-daughter as objects of the trust, to identify the home unit as the property subject to the trust, and to state the terms of the trust to be a life estate for the daughter with the remainder to the grand-daughter.'

(Reasons, p.17)

However, the Federal Court pointed out that the AAT had resorted to oral evidence to augment, rather than clarify, the writing upon which James relied to satisfy the requirements of s.34(1)(b) of the *Property Law Act*. This oral evidence 'supplied elements that were missing in that writing'. By relying on that oral evidence, the AAT had misunderstood the requirements of s.34(1)(b) of the *Property Law Act* and had 'erred in law in its finding that the requirements of the paragraph were satisfied'.

Accordingly, the matter should be returned to the AAT for further hearing and determination on this issue. The AAT should receive such further evidence as it saw fit in order to decide whether s.34(1)(b) of the *Property Law Act* has been satisfied. That evidence could include James' will and any other writing which she might have prepared relating to her daughter's and grand-daughter's interests in the unit.

Formal decision

The Federal Court allowed the appeal and remitted the present matter to the AAT for further determination according to law, the AAT to receive such further evidence as to it seemed fit.

Carer's pension: providing care in the same home

KINSEY v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 5 June 1990 by Gray J.

This was an appeal, under s.44 of the *Administrative Appeals Tribunal Act*, from the decision in the AAT *Kinsey* (1989) 51 *SSR* 673.

The AAT had affirmed a DSS decision to cancel Kinsey's carer's pension because Kinsey was no longer providing care to her severely handicapped adult daughter in the same home.

Until May 1988, Kinsey's daughter (who suffered from a severe mental illness) had lived with her husband and child in Kinsey's house, where Kinsey provided daily care for her. In May 1988, Kinsey's daughter, the daughter's husband and her child moved into a unit on an adjacent block of land, which was on a separate title from Kinsey's house.

Kinsey continued to provide care for her daughter and her daughter's child as well as for her own husband (who was also disabled) dividing her time between her own house and her daughter's unit.

The DSS had then decided that Kinsey could no longer qualify for carer's pension because she was not providing care to her daughter 'in a home of the person and of the other person', as required by s.39(1) of the *Social Security Act*. The AAT had affirmed that decision, on the basis that Kinsey's house and her daughter's flat could not constitute the one home.

More than one 'home'

The Federal Court said that 'it would be necessary to stretch the meaning of the expression "home" to include such a situation' as that involved in the present case:

> 'The concept of a home is a nebulous one to some extent but is difficult to apply to two separate dwellings, each with its own facilities complete, owned and occupied by separate family groups, simply because there is ease of access between them and one person performs household duties, sleeps and eats in both.'

(Reasons, p.8)

But the Court decided that the AAT had made an error of law in failing to consider whether Kinsey had two homes, her own home and her daughter's unit, and provided care to her daughter in the latter 'home':

'[I]t is possible for a person to have more than one home. Nothing in s.39(1) of the Act seems to preclude the recipient of a carer's pension from having more than one home, so long as that recipient provides care for another person in a home which is both the home of the recipient and of the person for whom care is provided. In my view, the Tribunal erred in law in failing to determine whether the flat . . . , by itself, was a home of the applicant and of [her daughter].'

(Reasons, pp.8-9)

Formal decision

The Federal Court allowed the appeal and remitted the matter to the AAT to determine whether Kinsey's daughter's flat was a home of Kinsey and her daughter for the purposes of s.39(1) of the *Social Security Act*.

[P.H.]

Separation under one roof: deemed 'married'

WEATHERALL v SECRETARY TO DSS
(Federal Court of Australia)

Decided: 20 July 1990 by Neaves J.

This was an appeal under s.44 of the *Social Security Act*, from the AAT decision in *Weatherall* (1989) 48 *SSR* 620.

The AAT had affirmed a DSS decision that Weatherall was not eligible for supporting parent's benefit, because of the operation of s.3(8) of the *Social Security Act*.

The legislation

Section 3(8) provided that 'a person who would, apart from this sub-section, be an unmarried person', and was formerly a married person, 'shall be treated as a married person' where —

'(b) the person is living in his or her former matrimonial home; and
(c) the person's former spouse is also living in the same home.'

after a specified period.

Section 54 of the Act provided that, to qualify for supporting parent's benefit, a person must be a 'supporting parent'.

According to s.53(1), the term 'supporting parent' meant, 'unless the contrary intention appears . . . an unmarried person'.

The term 'unmarried person' was defined in s.53(1) so as to include 'a married person who is living separately and apart from his or her spouse'.

The facts

Weatherall, who was 24 years of age, suffered from a disease which prevented her from caring for 3 children. Her former *de facto* husband, who was the father of her 2 eldest children, had separated from Weatherall but, when she had developed her serious disease, he had moved back into the house which they had formerly occupied together in order to look after the children.

Since Weatherall's former *de facto* husband had moved back into the house, they had continued to live quite separate lives.

The s.31(1)(b) discretion

The AAT had decided that the discretion, contained in s.3(1)(b) of the *Social Security Act* to treat a 'married person' as not married 'for any special reason' could not be used to escape the effect of s.3(8). The Federal Court agreed with this aspect of the AAT's decision: the Court pointed out that s.3(8) was to be applied to a person who would, apart from that sub-section, be an 'unmarried person'. Accordingly, the fact that the discretion in s.3(1)(b) might be exercised in favour of a person, so as to treat that person as unmarried, would only provide the foundation for the operation of s.3(8).

Not ineligible for supporting parent's benefit

However, the Federal Court concluded that the application of s.3(8) to Weatherall in the present case did not have the effect of making her ineligible for supporting parent's benefit; and that the AAT had made an error of law in coming to the conclusion that s.3(8) had made her ineligible.

The Federal Court pointed out that, under s.53(1), a 'supporting parent' was an 'unmarried person' with a qualifying child. The term 'unmarried person' was also defined in s.53(1) as including 'a married person who is living separately and apart from his or her spouse':

'It did not follow that a person who was required by the operation of s.3(8) to be treated as a "married person" fell outside the purview of the expression "unmarried person" in s.53(1). Indeed, the contrary was the position. Certain married persons were expressly included within that expression.'

(Reasons, p.17)

The Federal Court said that, if s.3(8) were to be effective to exclude a person living under the same roof as her former spouse from eligibility for supporting parent's benefit, it would need to be differently drafted. It could, for example, have deemed such a person not to be living separately and apart from her or his spouse or not to be an 'unmarried person'. But s.3(8) was not drafted in those terms:

'[T]herefore, the sub-section could not operate to exclude the person concerned from entitlement to a supporting parent's benefit under Part VI of the Act.'

(Reasons, p.18)

Formal decision

The Federal Court set aside the decision of the AAT and decided that, during the period from December 1987 to November 1988, Weatherall was qualified to receive supporting parent's benefit.

[P.H.]