

SOCIAL SECURITY

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Opinion

The Federal Court's decision in *Kintominas* (1991) 63 SSR 891 affirmed that those making decisions under the *Social Security Act* are required, when assessing the value of a pensioner's assets, to take account of equitable interests held by other persons which diminish the value of the pensioner's title. Where these interests arise by operation of law without any deliberate act of creation by the legal owner, it can be a difficult task to identify and quantify them. These difficulties may be compounded by problems of evidence and credibility.

In *Aronovitch* (page 931 this issue) the AAT accepted with some reluctance evidence of prior statements by the applicant and her mother as establishing that Aronovitch's mother had provided the whole of the funds used to purchase land in Aronovitch's name. The AAT found that this gave rise to a resulting trust, Aronovitch holding a bare legal title as trustee for her mother.

Resulting trusts arise in a recognisable class of cases. Constructive trusts also were once thought to be confined to defined categories, the most important one being where equity imposed the trust to prevent the legal owner from resiling from a common intention that another would have a proprietary interest in the property. But since *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137, the High Court has asserted the role of the constructive trust as a remedial device which may be imposed irrespective of the intentions of the parties in order to restrain the legal owner from an unconscionable denial of the rights of another.

Some comments by Deane J in *Baumgartner* suggest that in this class of case the other person cannot be said to have an equitable interest in the property until a court has declared a constructive trust. If this is correct, it does not accord with Einfeld J's remark in *Kintominas* that it would be unreasonable to require the person to sue for a declaration of interest before it can be taken into account by the Secretary.

The complexity of applying equitable principles is illustrated in *Tokolyi* (page 930 this issue). The AAT declined to accept a pensioner's contentions that she held property subject to a constructive trust for her sons and that her payments to them from proceeds of sale should therefore not be treated as a disposal of her property. In its Reasons the AAT considered both the conventional and the remedial forms of constructive trust, as well as whether a lesser form of equitable right arose under the doctrine of promissory estoppel.

Jurisdictional issues concerning review of overpayment decisions continued to arise. In *Sinclair* (page 939) the AAT held that there was no reviewable decision when a delegate calculated an overpayment debt but no recovery action on the part of DSS followed. In *Mariot* (page 937) the AAT followed *Campbell* and *Pommersbach* ((1992) 65 SSR 912 and 914) in holding that a decision to recover included by implication a decision not to waive, both decisions being reviewable.

[POC]

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The *Social Security Reporter* is published six times a year by the Legal Service Bulletin Co-operative Ltd. Tel. (03) 544 0974 ISSN 0817 3524
Editors: Peter Hanks, Pam O'Connor

Contributors: Peter Hanks, Regina Graycar, Denny Meadows, Jenny Morgan, Brian Simpson, Beth Wilson, Pam O'Connor, Allan Anforth and Christine Heazelwood.

Typesetting & Layout: Kasia Graphics

Printing: Thajo Printing, 4 Yeovil Court, Mulgrave.

Subscriptions are available at \$35 a year, \$25 for Alternative Law Journal subscribers. Please address all correspondence to Legal Service Bulletin Co-op, C/- Law Faculty, Monash University, Clayton 3168.

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