

11-3-94
PROPERTY (ANNUAL) SURVIVOR TO A COMMISSIONER -
COMMISSIONER SUBSEQUENTLY NOT ENTITLED -
PROPERTY WILL BECOME BY CLAIMANT TO
- PERMISSIBLE DEDUCTIONS

CPAG

★ 23/95

DGR/SH/11

Commissioner's File: CIS/069/1994

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 10 May 1990 is erroneous in point of law and accordingly I set it aside. As I consider it expedient to make fresh findings of fact and to give such decision as I consider appropriate in the light of them, I further decide that the claimant is not entitled to income support as from 26 September 1989.

2. This is an appeal by the claimant, brought out of time with the leave of a Commissioner, against the decision of the social security appeal tribunal of 10 May 1990. In view of the extraordinary length of time that has elapsed since the decision under appeal was given, and the absence of contemporary documentation, I directed an oral hearing. At that hearing the claimant, who was not present, was represented by Mr A Platt from the Bulwell Advice and Information Centre, whilst the adjudication officer appeared by Mrs S Rabash of the Solicitor's Office of the Department of Social Security.

3. Owing to the inordinate length of time for this appeal to be brought, it is not surprising that much of the contemporary documentation has long ago been destroyed. It is extremely difficult, then, to piece together the history of the matter with any certainty. It would seem that in February 1989 the claimant, who was then in receipt of income support, transferred her home to her daughter on the understanding that the latter would look after her and pay off the mortgage of some £6,000.

At some time thereafter the adjudication officer disallowed income support. The terms of that decision are not known. However, it would appear to have been appealed to "the Nottingham appeal tribunal" who seemingly upheld the adjudication officer. There is nothing to suggest that their decision was ever challenged. Instead, the claimant appears to have made a fresh claim for income support on 26 September 1989. What seems to have sparked off this claim is the fact that at some unknown date prior thereto the claimant had been evicted from her home by her daughter and rehoused by the local authority "in a warden-aided bungalow". The decision of the adjudication officer on this second claim has not been preserved, but clearly the claim was disallowed. For an appeal was made on 8 November 1989, and on 10 May 1990 the tribunal upheld the adjudication officer's decision.

4. The tribunal made the following findings of fact:-

" 1. The facts as set out in paragraphs 1 to 7 under the heading 'summary of facts' in section 5 of Form AT2 and in the various documents referred to therein are accepted.

2. Since her appeal the claimant is now living in a disabled person's flat and her income comprises Retirement Pension and Attendance Allowance."

The tribunal gave as the reasons for their decision the following:-

" 1. The Tribunal had regard to the Statutory Provisions and Commissioners Decisions referred to in Sections 2 and 3 respectively of Form AT2.

2. The Adjudication Officer presented his case on the basis that the only issue before the Tribunal was as to whether, having regard to the decision of the previous Tribunal that the claimant had dispossessed herself of her property for the purpose of securing income support, the notional capital arising therefrom had been reduced below the £6,000 limit and on that basis and having regard to the very low rate of income support to which the claimant would otherwise have been entitled, it was clear that the outstanding notional capital was still very much in excess of £6,000 so that the claimant had not yet reduced her capital to become entitled to benefit.

3. However, the Tribunal gave further consideration as to the question arising from the disposal of the property but on all the evidence before them, and in particular having regard to the claimant's apparent knowledge of circumstances affecting income support entitlement, the Tribunal saw no reason for arriving at a different conclusion from that of the Nottingham Appeal Tribunal."

5. Manifestly, to understand properly the findings and reasons for decision of the tribunal of 10 May 1990, it is necessary to

have sight of the Form AT2 and the various documents referred to therein, and to see the decision of the Nottingham appeal tribunal. However, all the relevant documents have long ago been destroyed. It would seem, however, that the issue before the Nottingham appeal tribunal was whether the claimant ceased to be entitled to income support by reason of her having deprived herself of the capital represented by her flat for the purposes of securing entitlement to income support, or, as in this case, continuance of entitlement to income support, within regulation 51(1) of the Income Support (General) Regulations 1987 [S.I.1987 No.1987]. I am not clear as to what turned on this issue because, if the claimant did deprive herself of her flat for the aforesaid purpose, the result would have been that she would have been deemed to be still in possession of the property, and as that property was her home, it was the subject matter of a disregard. I find it mystifying as to why the claimant was deprived of income support by the Nottingham appeal tribunal, as it would appear to me that whether or not she did dispossess herself of the flat for the purpose of ensuring continued entitlement to income support, nothing at that stage turned on it. She had done nothing to bring about disentitlement. However be that as it may - for this is not a matter before me -, the tribunal of 10 May 1990 very properly considered the issue afresh. There was before them a claim from a different commencement date, and by then the claimant had been evicted, so that the flat was no longer a home, and there could be no question of a disregard on that account. It had become very much an issue as to whether or not the claimant was caught by regulation 51(1). (This assumes, of course, that the claimant had divested herself of her beneficial interest in the property, something which is considered and rejected later in this decision.) The tribunal were satisfied that the claimant had deprived herself of the property for the purposes of continuing to be entitled to income support. Unfortunately, the tribunal have not explained why they reached that conclusion, and Mr Platt contends that I should set aside the tribunal's decision for breach of regulation 25(2)(b) of the Adjudication Regulations. The difficulty, of course, is that in the absence of the relevant documentation it is impossible properly to evaluate the adequacy of the tribunal's reasoning. It might well have been perfectly clear, in the light of that documentation, why the tribunal reached the conclusion they did. However, to ensure that the claimant has no cause for grievance, I will, albeit with some hesitation, set aside the tribunal's decision as being in breach of regulation 25(2)(b) of the Adjudication Regulations.

6. Mr Platt urged me not to remit the matter to a new tribunal for rehearing, but to determine the appeal myself. He pointed out that the claimant's physical condition was such that she would be unable to attend a rehearing, and in view of the present animosity prevailing between her and her daughter, it was unlikely that the daughter could be prevailed upon to attend. Moreover, it was doubtful whether any further evidence of any significance would emerge over and above that recorded in the chairman's note of evidence and that which he was himself able to recite to me. Mrs Rabash did not dissent from this approach.

Nearly five years have elapsed since the decision of the tribunal, and I consider that this matter should be disposed of as quickly as possible. Accordingly in the circumstances I will determine the appeal myself. I rely on the evidence before me, such as it is, together with certain additional statements made by Mr Platt from his investigations of the circumstances of this case.

7. What is clear from the chairman's note of evidence, as supplemented by Mr Platt's recital of the arrangement made between the claimant and her daughter (as he had ascertained the position from his enquiries), was that the transfer of the property was not an outright gift by the claimant to her daughter of her home without strings. She imposed two conditions, namely (1) that her daughter would look after her in the flat and (2) that she would pay off the mortgage of some £6,000. The second condition was complied with, but manifestly not the first. For, in the event, the daughter evicted the claimant, and the latter had to be rehoused as a homeless person. Accordingly, in my judgment, this was a case of a gift subject to a condition subsequent, namely that donee would look after the donor in the flat. That condition was unfulfilled, and then consequently the gift failed. The law on this point is succinctly stated in Halsbury's Laws of England 4th Edition, Volume 20, paragraph 50:-

"Gifts may be made subject to conditions either precedent or subsequent. A condition precedent is one to be performed before the gift takes effect. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift."

Accordingly, in my judgment, when the subsequent condition failed, namely when the claimant was evicted, the gift came to an end, and the daughter held the property on trust for the claimant.

8. Mr Platt informed me that the title deeds conveying the property to the daughter gave no indication of any condition, but were in a form consonant with an unqualified gift. However, I do not think that really materially affects the issue. If there was a condition, there was a condition, and the fact that it was not referred to in the transfer deed cannot affect this issue. Mr Platt also pointed out that, after the claimant had been evicted, she had endeavoured to regain her property and had taken legal advice. She had in the event been told that she would not succeed, and as a result had withdrawn a "caution" registered against the property. Mr Platt suggested that I should treat the transaction as an outright gift. However, in the light of the evidence, I can do no such thing. There clearly was a condition imposed. I do not know what information was put to the claimant's legal advisors nor do I know whether Counsel's opinion was taken nor whether the question of a condition and its effect was properly considered. I can only look at the facts as they appear to me and make legal inferences therefrom. But at least the attempt by the claimant to recover her property

supports the view that she never meant there to be an outright gift; she meant the gift to be subject to the condition that she be looked after in the flat.

9. Accordingly, I am satisfied that, as at the date of the second claim, the claimant had the beneficial interest in the property. I now have to decide whether that value exceeded the statutory maximum of £6,000. A letter from the Nottinghamshire County Council dated 5 October 1993 states that the estimated value of the house was £35,000. In the absence of any other evidence, I will accept that as correct. Certainly, neither Mr Platt nor Mrs Rabash sought to persuade me otherwise. There must be deducted from this, 10% for the expenses of sale, pursuant to regulation 49(a)(i), but how is the mortgage which was repaid by the claimant's daughter to be treated? Is it an incumbrance secured on the property to be deducted pursuant to regulation 49(a)(ii)? The daughter paid off the mortgage, but I do not know exactly at what stage. If she discharged it prior to her taking a transfer of the property, then it would appear that there was a statutory transfer of the mortgage to her (see section 115(2) of the Law of Property Act 1925) and the mortgage remained secured on the property, with the result that it was deductible. But if the daughter discharged the mortgage after she had taken the transfer, it would seem that, as on the face of it she appeared "entitled to the immediate equity of redemption" there could be no statutory transfer. However, I consider that nothing will turn on this in practice. For the daughter would be subrogated to the rights of the mortgagee in accordance with normal equitable principles. The property would still be subject to the incumbrance of a mortgage. The law is conveniently summarised in paragraph 508 of Volume 28 of Halsbury's Laws of England in footnote 6, which reads so far as is relevant as follows:-

"The ordinary and typical example of subrogation is that 'where A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor': Burston Finance Ltd v. Speir Way Ltd [1974] 3 All ER 735 at 738 [1974] 1 WLR 1648 at 1652, per Walton J. This is similar to the statutory transfer of a mortgage where the receipt for mortgage money indicates that payment has been made by some person not immediately entitled to the equity of redemption: see the Law of Property Act 1925, s.115(2), -.... See also Ghana Commercial Bank v. Chandiram [1960] AC 732 at 745, [1960] 2 All ER 865 at 871, PC, per Jenkins LJ: 'it is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit'; see also Butler v. Rice [1910] 2 Ch 277; Chetwynd v. Allen [1899] 1 Ch 353."

Accordingly, there has to be deducted from the value of the property the mortgage repaid together with interest due thereon from time to time.

10. However I do not think that this concludes the extent of the deductions. I think I should also make a deduction in respect of any costs likely to be incurred by the claimant in obtaining possession of the property, and not recovered from the daughter. Normally, where someone holds property on trust for another, the latter can simply call for its transfer, and the costs involved are de minimis but if, as would appear to be the case here, there is animosity between the parties, and the transfer is likely to be resisted, the possibility has to be envisaged of some court proceedings involving costs, and the possibility that not all of those costs will necessarily be recovered. This must affect the market value of the property. I have no idea as to the daughter's means or her capacity or willingness to pay costs. But even allowing for this further deduction, I am satisfied that, as at the date of the second claim for income support, the claimant still had assets substantially in excess of £6,000. No costs reasonably envisaged could possibly reduce the net value, after deduction from £35,000 of the 10% for the expenses of sale, and the repayment of the mortgage (together with any accrued interest), below the capital limit of £6,000. It follows from what has been said that as at 26 September 1989 the claimant had actual capital in excess of the statutory maximum, and was not entitled to income support. Moreover, there is no evidence before me to suggest that the claimant's capital has at any time from 26 September 1989 to the date of my decision fallen below the relevant statutory limit (currently £8,000), so that the claimant has throughout continued to be disentitled to benefit.

11. My decision is set out in paragraph 1.

(Signed) D.G. Rice
Commissioner
(Date) 21 March 1995