

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and substitute my own decision that there was no entitlement to recover overpaid income support from the estate of the deceased claimant.
2. This appeal arises out of a decision made on 18 March 2002 determining that an overpayment of income support amounting to £5,039.97 had been made to the claimant from 18 August 1997 to 9 September 2001, both dates inclusive, and that that amount was recoverable from the claimant's estate. The appeal is brought by the claimant's widow, who is also his personal representative.
3. The claimant was a retired clergyman, who was born on 16 February 1924 and who died on 9 September 2001. On 4 August 1996 he suffered a stroke, as a result of which he was admitted to hospital. On 14 August 1996 he executed an enduring power of attorney appointing his wife as his attorney under the Enduring Powers of Attorney Act 1985, with general authority for her to act on his behalf. It is apparent from his signature on the document that by that time he was already extremely infirm. In February 1997 the claimant moved to a nursing home, intending to stay there temporarily while his home was assessed for the adaptations necessary to make it suitable for wheelchair use.
4. On 20 February 1997 a claim for income support was completed in Form SP1. The claim form was signed by the nursing home manager, whom I shall call "Mrs M". The form also purported to be signed by the claimant, but a comparison of the signature on the form with the signature on the Enduring Power of Attorney puts it beyond doubt that the signature on the claim form is not his. On 3 March 1997 Mrs M was visited by an officer of the Benefits Agency and completed a form applying to the Secretary of State to be appointed to exercise any rights of the claimant under the Social Security Acts. On the same date the interviewing officer signed the declaration on the claim form stating that he had read back the entries on the form based on the information given by the customer, and that the customer had agreed that they were correct. Mrs M signed the 'customer's signature' box in the section of the form containing the interviewing officer's declaration.
5. The claim form stated that the claimant's savings were £674, in a building society account, and on 25 March 1997 income support was awarded on that basis. However, the Inland Revenue declaration made after the claimant's death stated that £4,000 worth of gilt edged stock had been purchased and registered in the claimant's name on 11 January 1995. By virtue of regulation 53 of the Income Support (General) Regulations 1987, as in force at the relevant time, capital in excess of £3,000 attracted tariff income and the overall capital limit was £8,000, but for claimants living permanently in a nursing home those amounts were £10,000 and £16,000 respectively.
6. The Inland Revenue declaration also stated that on 15 August 1997 a further £12,000 worth of gilt edged stock had been purchased and registered in the claimant's name.

The claimant's wife had stated in the course of a telephone conversation on 11 March 1997 that the intention was for the claimant to return home when the adaptations to his house had been completed, although on 6 April 1998 the nursing home confirmed that he had become a permanent resident. However, even if the claimant had become a permanent resident by the date of the second purchase of gilt edged stock, the combined value of his gilt edged holdings, valued in accordance with the guidance in *R(SB) 18/95*, exceeded the capital limit for income support.

7. Following the claimant's death and the discovery of the holdings of gilt edged stock, a decision was made superseding the decision awarding income support, on the ground that it had been given in ignorance of a material fact. An overpayment recoverability decision was also made in the following terms:

"Our decision is that (the claimant) was not entitled to, or was entitled to a reduced award of Income Support as shown on the Schedule.

As result, an overpayment of Income Support has been made from 18 August 1997 to 09 September 2001 (both dates included) amounting to £5,039.57.

On 3 March 1997 (Mrs M) on behalf of (the claimant) misrepresented the material fact that his only capital was valued at less than £3000 when his actual capital exceeded that amount.

As a consequence, Income Support amounting to £5,039.57 from 18 August 1997 to 09 September 2001 (both dates included) was paid which would not have been paid but for the misrepresentation.

Accordingly, that amount is recoverable from the estate of (the claimant)."

8. The claimant's widow appealed by letter dated 4 April 2002, contending that the money (i.e. the gilt edged stock) had been hers and had been registered in her husband's name because he had held the account with their stockbrokers. She also stated that she had paid her husband's debts and had paid for the work necessary to make it possible for her husband to make home visits. In answer to the point in the Secretary of State's submission to the tribunal that the claimant's wife could have paid his debts out of his capital assets, the claimant's wife wrote on 12 August 2002 stating that she did not sell the gilt edged stocks because they carried a good rate of interest. However, the claimant's wife did not attend the hearing of the appeal on 30 September 2002. The tribunal dismissed the appeal, holding that there was no evidence that the claimant held the gilt edged stock in trust for his wife, and that Mrs M, as the claimant's appointee, had innocently misrepresented the details of his capital.
9. I granted leave to appeal on 24 February 2003. In a submission dated 2 April 2003 the Secretary of State's representative supported the appeal, but submitted that the amount of income support overpaid was nevertheless recoverable, not as a result of the appointee's misrepresentation, but because of the failure of the claimant's wife to disclose the second purchase of gilt edged stock on 15 August 1997.
10. I agree that the overpayment recoverability decision cannot be sustained on the basis on which it was originally made. Although there is no evidence of the making of the

appointment, it must be assumed that the claim in this case was made by Mrs M as the claimant's appointee. In *CIS/2178/2001* a Tribunal of Commissioners applied *R(IS)5/2000* in holding that that a claimant (and therefore the claimant's estate-see *Secretary of State v Solly* [1974] 3 All ER 922) is liable to repay benefit overpaid as a result of a misrepresentation or failure to disclose by the claimant's appointee, unless the benefit has been retained by the appointee.

11. If the claimant was beneficially entitled to the gilt edged stock purchased in January 1995, there would be an overpayment of income support in the period from 20 February 1997 to 18 August 1997 because of the failure to take into account the tariff income resulting from the claimant's capital in excess of £3,000 (although evidence which has now been produced by the claimant's widow indicates that the actual amount of gilt edged stock purchased in January 1995 was £6,111.63) However, a decision was apparently made not to recover any benefit overpaid in that period, although the reasons for the decision given in paragraph 6.13 of the submission to the tribunal are difficult to understand.
12. The actual overpayment recoverability decision related to the period after the second purchase of gilt edged stock, which had not taken place when the claim was made and which could therefore not be the subject of any misrepresentation on the claim form. The overpayment recoverability decision did not rely on any 'order book' misrepresentation, and it has not been established that payment of benefit was in fact made at a post office. I therefore consider that there is no basis for holding that the appointee made any misrepresentation with regard to the second purchase of gilt edged stock. Since she had no way of knowing about the second purchase of gilt edged stock, I consider that overpaid benefit cannot be recovered on the basis of the appointee's failure to disclose the purchase.
13. I also consider that the claimant's estate cannot be held liable for any overpayment of on the basis of any failure by the claimant's widow to disclose the second purchase of gilt edged stock in her capacity as the holder of the power of attorney. In *CA/1014/1999* there were also concurrent appointments of an appointee under regulation 33 of the Claims and Payments Regulations and of an attorney under an Enduring Power of Attorney, but there were doubts as to the validity of the grant of the Power of Attorney. Mr Commissioner Jacobs held that it was unnecessary to resolve that issue, because the inaction of the attorney (who was the claimant's daughter) could not be attributed to the claimant (paragraph 33):

"The Power of Attorney conferred on the attorney general authority to act on behalf of the claimant in relation to his property and affairs. In simple terms, that allowed the attorney to act on the claimant's behalf, but it did not impose on her a duty to act. An attorney's duty to disclose and the consequences of a breach of that duty are governed by the law of agency. There is no authority that an attorney's failure to disclose at all in circumstances like this case is a breach of duty. So, that failure cannot be attributable to the claimant. The position would be different if she had made a partial disclosure to the Department of Social Security. In that case, she would be under a duty to make complete disclosure and her failure to do this would be attributable to the claimant."

Since there is no evidence that the claimant's appointee made any representations at any time concerning the claimant's capital, I consider that there is no basis for holding the claimant's estate liable for overpaid benefit on the basis of the attorney's inaction.

14. The claimant's widow appeal was, in fact, on the basis that the claimant was not the beneficial owner of the gilt edged stock. Her letter of appeal suggests that she had assets which were separate from those of her husband, from which she discharged his debts, although in her letter of 12 August 2002 she appeared to accept that the gilt edged stock was her husband's property, and it also appears that it was treated by his personal representatives as his property on his death. In the submission to the tribunal the assumption was made (at para. 6.17) that the power of attorney had been used to purchase assets in the name of the deceased, but no attempt was made to determine the ownership of the money from which the purchases of gilt edged stock were made. The claimant's widow contended that the gilt edged stock was registered in the claimant's name because he held the account with the stockbrokers. In reply to the Secretary of State's representative's submission of 2 April 2003, the claimant has produced a copy of a letter from the stockbrokers enclosing the certificate relating to the January 1995 purchase of gilt edged stock. That letter shows the amount of gilt edged stock purchased as £6,111.63 and the account holder as the claimant, but it also bears the words "A/C...", followed by the name of the claimant's widow.
15. The evidence which the claimant's widow has now produced does support her case that she was the beneficial owner of at least the gilt edged stock which was purchased in January 1995. However, that evidence was not before the tribunal and the claimant's widow chose not to attend the hearing of the appeal. In those circumstances, I regard the tribunal's finding that the gilt edged stock was not held on a resulting trust for his wife as inevitable. However, for the reasons I have given, I do not consider that the overpayment recoverability decision against the claimant's estate can be sustained in respect of the purchase of gilt edged stock in August 1997. I therefore allow the appeal and set aside the tribunal's decision, and substitute my own decision that there was no entitlement to recover overpaid income support from the estate of the deceased claimant.
16. It does not necessarily follow that there is no entitlement to recover any overpayment of benefit from the claimant's widow in her personal capacity, but I agree with the Secretary of State's representative that there would need to be a new overpayment recoverability decision, carrying separate rights of appeal. When deciding whether there are grounds for such a decision, the Secretary of State will no doubt have regard to the decision of deputy Commissioner Sir Crispin Agnew of Lochnaw Bt QC in *CSDLA/1282/2001*, in which he held, applying *CA/1014/1999*, that an attorney is not generally personally liable for a failure to disclose in cases where there has been an appointment under regulation 33 of the Claims and Payments Regulations. Any question of the personal liability of the attorney would also require careful consideration of the ownership of the beneficial interest in the relevant capital assets, having regard, in particular, to the source of the money used for their purchase.
17. In *CA/1014/1999* Mr Commissioner Jacobs drew attention to the difficulties which may arise when there is an appointment under regulation 33(1) of the Claims and Payments Regulations running concurrently with a power of attorney. Since there can

be an overlap between the authority of an appointee and of an attorney under an enduring power of attorney, there is a risk that the powers may be exercised in inconsistent ways. Furthermore, as this case illustrates, the claimant may escape liability to repay overpaid benefit because the appointee may be unaware of relevant transactions entered into by the attorney on the claimant's behalf which the attorney is under no duty to disclose.

18. In paragraph 6.24 of the submission to the tribunal the Secretary of State stated that Mrs M was made appointee because she was named in Part 3 of the SP1 claim form, and that if the Benefits Agency had been aware of the Power of Attorney a different course might have been taken. In paragraph 6.25 the submission writer states that the claimant's widow was aware of the income support claim because she was contacted by telephone on 11 March 1997. However, she might not have been aware that it was intended to make an appointment under regulation 33(1) of the Claims and Payments Regulations, or that the powers exercisable under the appointment overlapped with her powers under the power of attorney. In order to avoid the difficulties which can arise when there are concurrent appointments authorising different persons to exercise a claimant's rights under the Social Security Acts, it seems to me to be desirable that in future inquiries should be made to establish whether there is an existing power of attorney before any appointment is made under regulation 33(1) of the Claims and Payments Regulations.

**(Signed) E A L BANO
Commissioner**

9 March 2004