

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Muriel Smiles (Miss)

Supplementary Benefit Appeal Tribunal: Wood Green

Case No: 06/82

[ORAL HEARING]

DECISION OF THE TRIBUNAL

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Decision

1. Our decision is that the decision of the supplementary benefit appeal tribunal ("SBAT") dated 28 October 1982 is erroneous in point of law. We set it aside and refer the case to a social security appeal tribunal for determination in accordance with our directions: Social Security (Adjudication) Regulations 1984, regulation 27 [SI 1984 No. 451].

Representation

2. Leave to appeal to the Commissioner on a point of law against the decision of the SBAT was granted by a Commissioner. The Chief Commissioner directed that the appeal should be heard by a Tribunal of Commissioners. The claimant, who did not appear, was represented by Mr Mark Rowland of counsel instructed by Mr Roger Smith, Solicitor, of the Child Poverty Action Group. The supplementary benefit officer was represented by Mr John Mummery of counsel, instructed by the Solicitor's Office, Department of Health and Social Security.

Nature of the appeal

3. This appeal relates to the proper method of treating a claimant's life interest in a trust fund when calculating his capital and income resources.

4. An important, and common, complication occurs when that life interest arises under a Will or settlement containing a power to pay over capital to the claimant, at the trustees' discretion.

The facts

5. The life interest and discretionary power with which this appeal is concerned are contained in a Will dated 11 June 1973 which was made by the claimant's mother. This appoints a named solicitor, and a husband and wife ("Brian" and "Dorothy") to be her executors and trustees and (by clause 3) gives her Residuary Fund, after payment of expenses and any debts and legacies, upon the following trusts:

- "(a) to set aside the sum of Ten thousand Pounds (hereinafter called "my Daughter's Fund") and to invest the same in any of the investments hereby authorised and to pay the income to be derived therefrom to my Daughter [the claimant] during her lifetime and on her death to hold my Daughter's Fund or the balance thereof as shall remain having regard to the next preceding clause UPON TRUST for my Niece Audrey of and the said Dorothy in equal shares absolutely.
- (b) I DIRECT that my Trustees shall have full right and power in their absolute discretion to use any part of the capital of my Daughter's Fund as they may consider necessary for the maintenance and benefit of my said Daughter AND I DIRECT that my Trustees shall not be accountable under any circumstances to any beneficiary who may be entitled to participate under this my Will in respect of the exercise of my Trustees discretion as aforesaid.
- (c) To hold the residue of my Residuary Fund UPON TRUST for the said Audrey and Dorothy absolutely in equal shares.

4. IN THE EVENT of either of the said Audrey and Dorothy dying in my lifetime leaving a child or children who survive me and who attain the age of eighteen years such child or children shall take and if more than one equally between them per stirpes the share in the capital of my Daughter's Fund and my Residuary Fund which his her or their parent would have taken had she survived me AND PROVIDED FURTHER that in the event of either of them the said Audrey and Dorothy dying in my lifetime without leaving a child or children who survive me and who attain the age of eighteen years THEN I DIRECT that the whole of the capital of my Daughter's Fund and my Residuary Fund shall pass and belong to my surviving niece or her child or children as the case may be absolutely."

The other clauses of the Will are not relevant to this appeal.

6. The date of the Testatrix's death, whether her Will was proved and if so by whom, whether any named beneficiary other than the claimant survived her, and the state of the families of the beneficiaries are not stated anywhere in the case papers and nothing is indicated about the ages of anyone other than the claimant. There are no findings by the SBAT on these material points.

7. There was evidence before the SBAT that the Trust Fund was set up by an investment with the Abbey National Building Society of the sum of £10,000 on the 11th March 1981 since when the claimant had had credited to her Post Office account the sum of £100 on the 4th September 1981, £100 on the 8th December 1981 and £441.79 on or about 19th January 1982; and that as at 6th April 1982 there were current arrangements for all interest credited to the Building Society account to be remitted automatically to the Post Office account.

8. According to the supplementary benefit officer, up to the week commencing 21 June 1982 the claimant had received supplementary benefit because she had submitted medical evidence of her incapacity for work. She was a resident in Part III accommodation.

The relevant law

9. Paragraph 1 of Schedule 1 to the Supplementary Benefits Act 1976 (as amended) provides that "a person's resources shall be calculated in the prescribed manner"; that "regulations may provide for a person to be treated as possessing resources which he does not possess and for disregarding resources which a person does possess"; and that regulations may also provide that "a person whose resources or a prescribed part of them exceed or exceeds a prescribed amount shall not be entitled to supplementary pension or allowance".

10. The relevant regulations are the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No. 1527] (which we shall call the "1981 Resources Regulations") which came into operation on 23 November 1981. The amounts mentioned in regulations 6(2) and 7 have since been increased.

11. (1) Regulation 3(2) of the 1981 Resources Regulations provides:

"(2) For the purposes of these regulations resources shall consist of capital resources and income resources"

(2) Regulations 4(6)(7) and (8) provide:

"(6) A member of the assessment unit shall be treated as possessing the whole or any appropriate share calculated in accordance with paragraph (8) of any resources held under a trust, whether created by virtue of a statutory provision or otherwise, under which the trustees have any express or implied discretion to pay him, or apply for his benefit, any income or capital."

"(7) A member of the assessment unit shall not be treated as possessing a resource pursuant to paragraph (6) if the trust funds are derived from a payment, whether in pursuance of a court order or otherwise, in consequence of a personal or criminal injury to him, except that if he is the claimant or the partner of the claimant this paragraph shall apply only for the period, not normally exceeding 12 months from the date on which the payment would, but for this paragraph, fall to be taken into account for the purposes of a claim for pension or allowance or a review of a determination pursuant to regulation 4 of the Determination of Questions Regulations, for which, having regard to the intentions of the trustees, it is reasonable that he shall not be treated as so possessing a resource."

"(8) A member of the assessment unit to whom paragraph (6) applies shall be treated as possessing a resource either in whole or in part having regard to -

(a) the number of beneficiaries under the trust: and

(b) the terms of the trust, either express or implied,

but no resource shall be treated as possessed by virtue of of these paragraphs for such period, not exceeding three months from the date on which it would otherwise have been so treated, as is necessary to enable the trustees to make arrangements for payments to be made to that person."

[Note: Regulation 4 is headed "Notional resources"]

(3) Regulations 6(2) and 7 provide:

"(2) Where the value of a claimant's capital resources (including those of a partner or dependant) as calculated in accordance with these regulations is £2,000 or less, those resources shall, except in so far as any provision of the Act or regulations made pursuant to it provides otherwise, be disregarded.

Maximum capital resources for entitlement to pension or allowance

7. Subject to regulation 8, where the value of a claimant's capital resources (including those of a partner or dependant) as calculated in accordance with these regulations exceeds £2,000, the claimant shall not be entitled to pension or allowance."

[Note: Regulation 6 is headed "Capital resources to be disregarded"]

(4) Regulation 11(4) provides

"(4) The following incomes resources shall be disregarded -
.....

(1) any current income from any capital resources which fall to be disregarded by virtue of regulation 6(1)
or (2)"

[Note: Regulation 11 is headed "Calculation of other income"]

The supplementary benefit officer's decision

12. By a decision issued on 25 May 1982 the supplementary benefit officer decided that the claimant was not entitled to supplementary benefit from the week commencing 21 June 1982 on the ground that she was the beneficiary of a £10,000 Trust Fund set up by the will of her late mother and since the trustees of the fund had the right at their absolute discretion to use any part of the capital as they might consider necessary for the benefit of the claimant, in accordance with the regulations the whole of the resources held under the trust should be treated as possessed by the claimant. Since the capital resources exceeded £2,000, the claimant was no longer entitled to supplementary allowance.

The SBAT's decision

13. On 28 October 1982 the SBAT unanimously affirmed the supplementary benefit officer's decision. They found the following facts:

"Findings of Tribunal on question of fact material to decision. This appeal was adjourned on 29.7.82 to obtain clarification of the will ([name of Testatrix]) which was not available to the Tribunal. At the adjourned hearing the Tribunal's written decision stated that the Tribunal appreciate a DHSS legal ruling - The Chairman confirmed that the Tribunal today would take their decision on the facts and not be restricted to the Department's interpretation.

[The appellant] is resident in Part III accommodation. Medical evidence has been submitted regarding her incapacity for work. The appellant is a beneficiary of a £10,000 Trust Fund set up under the will of her late mother. The terms of the Will allows all the income earned by the Trust to be paid to [the appellant] during her lifetime. The capital, if required, to be used first and foremost

for the benefit of [the appellant]. Mr
Legal Representative for the Trustees, maintained that it
was the income under the Trust and not the capital, therefore
[the appellant] is truly only entitled to the income.

The Trustees had a legal responsibility also
to the other beneficiaries. Mr maintained there were
4 interpretations of regulation 4(6) of the Resources Regulations
(attached) and he regarded No. 3 as the most pertinent of the
propositions."

The reasons recorded by the SBAT for their decision were:

"Under Resources Regulation 4(6) the claimant is to be treated
as possessing the income and capital as in accordance with the
terms of [the Testatrix's] will. Also in accord in [sic]
regulation 7 the capital resources have been correctly assessed
as over £2,000 and consequently [the appellant] is not
entitled to a Supplementary Allowance."

The arguments on appeal

14. Mr Rowland, on behalf of the claimant, submitted that here a sum
had been put into a fund to be held upon trust to pay the income to the
claimant during her life with a discretion to pay from capital and that
on the death of the claimant the remaining capital was to be divided between
the deceased's nieces. Regulation 3(2) of the Resources Regulations
(see as to these paragraph 11 above) divided resources into capital and
income resources. Income was a resource in the hands of the claimant when
paid: see regulations 9 and 11. The capital was a notional resource.
A problem only arose where capital resources were less than the limit
for disregarded capital: see regulation 6(2). Income from disregarded
capital resources was also to be disregarded: see regulation 11(4)(1).
As regards capital, one went to regulation 4(6). There was no provision
suggesting that one looks at the trust fund in any other way. In finding the
appropriate share by reference to regulation 4(6) one should look at the
intention of the Testatrix.

15. Looking at the Will, he submitted, did not give enough indication of
intention, therefore the case must go back to another tribunal. The SBAT
had known only of the terms of the Will and not the factual situation.
A plain life interest although of a market value, if sold, exceeding
the limit under regulation 7 did not exclude a claimant from benefit because
it was an income resource. Resources must be either income resources or
capital resources but they could not be both. An annuity would be
regarded as an income resource: see regulation 11(2). The implication was
that you looked once and once only at an interest and when it was an
interest producing income you did not consider any capital character.

16. (1) Mr Mummery, on behalf of the supplementary benefit officer,
stated that he was instructed to argue that:

- (i) you looked at income as an income resource;
- (ii) you did not regard a life interest as a capital resource
at all; and
- (iii) you looked at the discretion vested in the trustees
to pay capital as giving rise to a notional capital
resource.

Accordingly, there was no difference between the benefit officer
and the claimant.

- (2) He submitted that many of the facts were not at present ascertained, for example the date of the Testatrix's death. It was known that she had left a single daughter of 55 in Part III accommodation and the terms of the Will were known. But one did not know about the beneficiaries, or whether probate had been granted, or the ages of the reversioners. It was known £10,000 had been set aside and invested and that interest earned had been credited to a Post Office account. By the Will (clause 3), two funds were created, the income of the Daughter's fund to be paid to the Daughter with a discretion as regards applying capital of that fund for her maintenance or benefit. Clause 3(c) of the Will might be relevant to the intention of the Testatrix. The decision of the supplementary benefit officer could not be supported because he only considered regulation 4(6) of the Resources Regulations.
- (3) On the general law, Mr Mummery submitted that a simple life interest was an equitable interest which had a capital value. It could be assigned, surrendered or released. It was available to the trustee in bankruptcy for the benefit of creditors. There was no real problem about valuing, once one knew the age of the life tenant, her expectation of life, the amount of the income, the permitted range of investment and the terms of the trust. It was accepted that a protected life interest had no value - but the claimant's life interest was not a protected life interest. As regards the question whether clause 3(b) of the Will would drastically reduce the value of the life interest of the claimant, she could not assign her rights as an object of the discretion in relation to capital. But she could release them for value - see Re Gulbenkian [1970] Ch. 408 at page 418 per Plowman J. As the sole life tenant she was the sole object of the discretion. The onus would be on the supplementary benefit officer to find out the capital value of the life interest, if that was material. But it was submitted that it was not intended by the Resources Regulations to treat the life interest as a capital resource.
- (4) Turning to the Resources Regulations, there was in the scheme a clear distinction between capital and income resources. It was conceded by Mr Mummery that under the general law a life interest could be regarded as a capital resource and that because of the breadth of the language in regulation 5 of the Resources Regulations a life interest could as a matter of construction rank as a capital resource; and that there was nothing in regulation 6 to tell you to disregard a life interest. But he submitted that a life interest was an income resource and that the distinction between capital and income resources that was made in the regulations rendered them mutually exclusive, except in "deeming" cases.

Resources

(1) Co-existing capital and income resources

17. We are unanimous in rejecting as fallacious the argument advanced on behalf of both the claimant and the supplementary benefit officer that where a claimant has an asset or interest which produces income you do not consider any capital character of that asset or interest. Regulation 11(4)(1) of the 1981 Resources Regulations indicates clearly that items can be capital resources yielding income which are income resources. For that regulation (which so far as relevant is set out in paragraph 11(4) above) provides that where a capital resource is disregarded under one or other of a number of provisions including regulation 6(2) (which relates to capital resources below a prescribed figure - £2,000 at the date of the benefit officer's decision in the present case) then the income from that capital resource is also to be disregarded. It is clearly to be implied from this that if the capital resource is not disregarded, the income from that capital resource is not to be disregarded and constitutes an income resource. Common examples of assets or interests which have a co-existing capital element and income element and in this sense constitute capital and income resources are a Post Office Savings or a Building Society Savings account comprising capital and interest, other investments that are income-producing, and an absolute share or interest in a trust fund that is itself income producing. A life interest under a trust, if unrestricted, is another example and this is considered in the following paragraphs.

(2) Life interests under a trust

18. (a) Where income is given under a trust (whether by Will or lifetime settlement) to a claimant during his life, without restriction, that claimant has two resources. First, he has a right to the current income of the trust fund. This is an income resource. Secondly, he has a lifetime right to the future income of the trust fund. This is a saleable capital resource, capable of valuation and disposable through well recognised market channels. It produces no income. The income received, and future income, is derived from the trust fund. The trust fund itself is vested in trustees and is not an actual capital resource of the claimant at all. If the capital value of the life interest (added to other reckonable capital resources) is less than the limit prescribed by regulation 6(2), it falls to be disregarded as a capital resource. But the claimant's right to the current income of the trust fund does not fall to be disregarded, unless the trust fund or any part thereof is itself a resource of the claimant and its value or the value of the part (added to other reckonable capital resources) is less than the limit prescribed by regulation 6(2). It is only the current income of disregarded capital which falls to be disregarded under regulation 11(4)(1), and the capital which produces the current income is the trust fund, not the saleable life interest.

(b) Where income is given under a trust (whether by Will or lifetime settlement) to a claimant during his life on protective trusts, that protected life interest constitutes only an income resource. It is not a capital resource, because a protected life interest is unsaleable and worthless: see Commissioner's Decision CSB 330/83 (to be reported as R(SB) 2/84).

(3) Notional capital interests under a discretionary trust or power to apply capital

19. (a) Where an appropriate share in the capital of a trust fund is treated, by virtue of regulation 4(6), (7) and (8) of the 1981 Resources Regulations, as possessed by a claimant, that capital resource must be added to any other separate capital resources (actual or notional) of the claimant (including those of a partner or dependant) in order to determine whether the claimant is excluded from supplementary benefit under regulation 7. The position where one actual capital resource is a life interest in the same trust fund is considered in paragraphs 23 and 24 below.

(b) Where the capital value of such an appropriate share (when added to any other capital resources - actual or notional) is less than the limit prescribed in regulation 7, the capital falls to be disregarded under regulation 6(2). The income of that capital then falls to be disregarded under regulation 11(4) (1).

(4) Particular types of life interest

20. The four main heads are:

(a) a simple life interest i.e. a right to receive income from a trust fund during the beneficiary's life which is unprotected and is unaffected by any overriding power of appointment or advancement in respect of capital

(b) a protected life interest which is unaffected by any such power

(c) a simple life interest which is subject to an overriding power of appointment or advancement in respect of capital in favour of the claimant and/or others

(d) a protected life interest which is subject to a similar power.

(a) A simple life interest

21. The position here is as stated in paragraph 18(a) above. The life interest must be valued under regulation 5. If (when added to other capital assets) it exceeds the amount prescribed in regulation 7, supplementary benefit is not payable. If it does not, the income from the trust fund in which the interest subsists is an income resource which does not fall to be disregarded and which must be taken into account when calculating the claimant's income resources.

(b) A protected life interest not subject to any power

22. This interest has no capital value: see Commissioner's decision R(SB) 2/84. The income from the trust fund in which the protected life interest subsists is an income resource which does not fall to be disregarded and must be taken into account when calculating the claimant's income resources.

(c) A simple life interest subject to an overriding power of appointment

23. If the overriding power of appointment is exercisable in favour of beneficiaries other than the claimant, the life interest has no value because it can be overridden by an appointment in favour of a beneficiary other than the claimant. If the power of appointment is exercisable only in favour of the claimant it can be released by the claimant for valuable consideration - see Re Gulbenkian [1970] Ch 408 ("the Gulbenkian case") at page 418. In consequence it is within the power of the claimant to give the life interest a realisable capital value. It is therefore in this case the right of both the adjudication officer and the claimant to require the resources of the claimant to be valued:

- (A) on the basis that the power of appointment has been released, in which case the life interest has an actual capital value, because there is no subsisting power of appointment, but, there being no such subsisting power, the notional capital provisions of regulation 4(6), (7) and (8) cannot apply; and
- (B) on the alternative basis that the power of appointment has not been released, in which case the life interest has no capital value, because there is a subsisting power of appointment, but, there being such a subsisting power, the notional capital provisions of regulation 4(6), (7) and (8) do apply.

These are strictly alternatives, so that there is no way in which there can be a duplication of values (or "double counting") by according to the same interests both an actual value and a notional value.

Actual values (i.e. alternative (A)) should be taken first. For where the capital value of the life interest on this alternative, added to other capital resources that fall to be taken into account (which do not include any notional resources attributable to the power of appointment, because on alternative (A) it has been released) exceed the amount prescribed in regulation 7, supplementary benefit will not be payable and there is no need to look further. Where, however, the capital value of the life interest when added to those other capital resources does not exceed the amount prescribed in regulation 7, it is necessary to go on to consider alternative (B). This involves ascertaining (on the principles set out in Decision R(SB) 25/83) under regulation 4(6), (7) and (8) the claimant's notional share of the trust fund and then valuing such share in accordance with regulation 5. If the value of that notional share when added to other capital resources that fall to be taken into account (which will not include anything for the life interest because on alternative (B) it is valueless)

exceed the amount prescribed in regulation 7, the claimant will not be entitled to supplementary benefit. If, on the other hand, that value when added to those other capital resources does not exceed the prescribed amount, the claimant will not be disentitled on account of her capital resources from receiving supplementary benefit; and the amount of such benefit will fall to be calculated by reference to the amount by which her income resources fall short of her requirements. In calculating this, we consider that the trust income should to the extent that it is produced by that share of the trust fund to which a person is treated as notionally entitled under regulation 4(6), (7) and (8) be disregarded under regulation 11(4)(1) (read with regulation 6(2)) as being the income of disregarded capital; this places the life tenant in the same position as a protected life tenant where there is a similar power of appointment or advancement.

(d) A protected life interest subject to an overriding power of appointment

24. Here, the protected life interest has no capital value. The appropriate share of the claimant under regulation 4(6), (7) and (8) should be calculated in the manner indicated in Commissioner's decision R(SB) 25/83. If the value so ascertained (when added to any other capital resources that fall to be taken into account) exceeds the limit prescribed in regulation 7, the life tenant will not be entitled to supplementary benefit. If it is less, then the life tenant will not be disentitled to supplementary benefit by virtue of his capital resources. Trust income will fall to be dealt with as indicated in the last sentence of paragraph 23 above.

Was the SBAT decision erroneous in law?

25. The decision of the SBAT was clearly erroneous in point of law. There are no findings as to the number of beneficiaries. Regulation 4(8)(a) of the 1981 Resources Regulations specifically directs regard to be had to the number of beneficiaries under the trust, and this is clearly a material fact. It was also clearly material to find the date of the Testatrix's death so that the beneficiaries interested in the trust fund could be determined (see clause 4 of the Will) and it was essential to find whether any named beneficiary other than the claimant survived the Testatrix and to determine the state of the families of such beneficiaries. It is not at present even shown whether the Will has in fact been proved and if so by whom. No consideration has been given to the life interest as a capital resource.

Is it expedient to give the decision that the SBAT should have given?

26. No. The state of the family and the number of beneficiaries is unknown and the value of the claimant's life interest is also unknown. We have no jurisdiction to find further facts. The case must be referred to a social security appeal tribunal (which should be entirely differently constituted from the SBAT which heard the appeal in the first instance).

Directions to the social security appeal tribunal

27. (1) The fresh tribunal should find the material facts: see paragraphs 6 and 26 above.
- (2) They should obtain a proper valuation (pursuant to regulation 5 of the 1981 Resources Regulations) of the life interest, which should be made as at the week commencing 21 June 1982 and on the assumption that the claimant has released for valuable consideration the power of appointment in her favour. If the value of the life interest (added to any other actual capital resources of the claimant) exceeds £2,000, the tribunal must decide that the claimant is not entitled to supplementary benefit from the week commencing 21 June 1982. If it does not exceed this sum, they must ignore it and go on to fix the appropriate share of the trust fund to be notionally attributed to the claimant under regulation 4(6), (7) and (8) in the manner explained in decision R(SB) 25/83. That share should then be valued. If, when added to the other capital resources of the claimant - but excluding any capital value of the life interest, the sum so arrived at exceeds £2,000, the tribunal must decide that the claimant is not entitled to supplementary benefit from 21 June 1982.
- (3) The income of any appropriate share fixed under regulation 4(6), (7) and (8) should be disregarded when calculating the claimant's income resources: see regulation 11(4)(1) of the 1981 Resources Regulations.
- (4) In sub-paragraph (2) above, we have referred only to the question of entitlement from 21 June 1982. Where an actual award of benefit is made, it is usual for the award to be open-ended (i.e. to have no terminating date) though remaining subject to review. Where, as in the present case, there is a substantial back period, the tribunal should consider the amount (if any) payable over the period from time to time down to the date of their decision. We particularly have in mind that the amount prescribed in regulation 7 of the 1981 Resources Regulations has twice since that date been increased and that the value of the claimant's interest (actual and notional) may have changed.

Concluding observations

28. All the members of the present tribunal of Commissioners had prior to judicial appointment considerable experience as practising lawyers of dealing with matters concerning discretionary and other trusts and with valuation problems related to trusts. They have found this appeal to involve points of exceptional difficulty and complexity and it has proved possible to give practical guidance only in broad outline. For instance, we have covered only cases where the claimant is (as here) the only member of the assessment unit and have ignored the many complications that can arise where this is not so. The difficulties are mainly due to regulations 4(6), (7) and (8) of

the 1981 Resources Regulations, which require a mere spes or hope of benefit to be treated as a valuable asset when calculating a claimant's capital and income resources. Adjudication officers and members of social security appeal tribunals who lack practical experience of trust law and equity practice are likely to continue to find it virtually impossible to apply these provisions correctly to the facts of individual cases.

We are all of the view that some simplification of the law should now receive urgent consideration.

(Signed) J G Monroe
Commissioner

(Signed) V G Hallett
Commissioner

(Signed) I Edwards-Jones
Commissioner

(Date) 27 June 1984

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