

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Barbara Jane Boord (Mrs.)

Social Security Appeal Tribunal: Truro

Case No: 10/02

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 5 June 1984 and I set that decision aside as being erroneous in law. I give the decision which the tribunal should have given, namely that in the ascertainment of the claimant's entitlement to supplementary benefit as from 19 March 1984 the sums paid by the claimant's former husband under an order of the Divorce Court dated 11 January 1984 should be treated as follows:

- (i) The capital sum of £1,733.88 paid to the claimant by her former husband is not to be regarded as a capital resource of the claimant: Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No. 1527], regulation 13(2)(b);
- (ii) The sum of £1,000.00 paid by the claimant's former husband in respect of the child V.G. is to be regarded as a resource of the said child only as to £500.00 thereof, which is to be treated as income in accordance with the provisions of regulation 13 of the above-cited Resources Regulations;
- (iii) The sum of £1,000.00 payable by the claimant's former husband in respect of the child P.Y. is to be treated as a resource of the said child only as to £500.00 thereof, which is to be treated as income in accordance with regulation 13 of the above-cited Resources Regulations;
- (iv) The sum of £1,000.00 payable in respect of the child Z.K. is not to be regarded as a resource of the child until 13 May 1986 (when Z.K. attains 7 years) at which rate £500.00 thereof must be treated as an income resource in accordance with regulation 13 of the above-cited Resources Regulations.
- (v) The sum of £5.00 annually payable by the claimant's

former husband in respect of the three children V.G., P.Y. and Z.K. is to be treated as an income resource of the children under regulation 13 of the above-cited Resources Regulations.

2. This is an appeal to the Commissioner by the claimant, a divorced woman living with her three children, V.G. born on 20 March 1975, P.Y. born on 22 August 1976 and Z.K. born on 13 May 1979, against the decision of the social security appeal tribunal dated 5 June 1984 upholding the local adjudication officer's decision to the effect that supplementary benefit was not payable to the claimant for the inclusive period from 19 March 1984 to 1 April 1984 because of the resources attributed to the children and to the claimant (the details of which are set out in paragraph 1 above). At the claimant's request the appeal was the subject of an oral hearing before me on 2 April 1985 at which the claimant was represented by Mr. M. Rowland of counsel and the adjudication officer was represented by Mr. C. D'Eca of the Solicitor's Office of the Department of Health and Social Security. I am indebted to Mr. Rowland and to Mr. D'Eca for their assistance to me at the hearing.

3. The appeal concerns the proper treatment of the resources derived from the claimant's ex-husband under an order of the Divorce Court dated 11 January 1984 a copy of which is part of the appeal papers in this case. The details of those resources are set out in paragraph 1 above. Both Mr. Rowland and Mr. D'Eca concurred in submitting that the decision of the original tribunal in this case was erroneous in law (i) in that adequate findings of fact and reasons for decision were not given and (ii) that in law the tribunal had erred in attributing the whole of the £1,000.00 provided for each of the three children as a resource of those children. I accept those submissions as being correct though I note that the original tribunal in this case made a conscientious attempt to deal with the very difficult issues arising in this type of case.

4. So far as concerns the sum of £1,733.88 received on 24 February 1984 by the claimant from her former husband (the court order in fact provided for a payment of £1,733.73) it was common ground between Mr. Rowland and Mr. D'Eca that this sum should not be treated as a capital resource of the claimant since it had already been properly spent on the payment of outstanding debts. Therefore no part of it need to be taken into account as part of the resources of the assessment unit (see the above-cited Resources Regulations, regulation 13(2)(b)). I accept those submissions as undoubtedly being correct in the present case.

5. The principal contention was as to the proper treatment of three sums of £1,000.00 each payable in respect of the three children of the claimant and her former husband under the following terms of the divorce court's order,

"The petitioner [the claimant] and the respondent [the claimant's former husband] having agreed that the lump sum orders in favour of the children of the family hereinafter made be dealt with as follows:-

That each lump sum in favour of each child of the family shall be paid into separate Post Office Savings Accounts...opened in the name of the petitioner. Such sum shall be held in trust for the benefit of the child of the family and the income therefrom shall be applied for the maintenance of the child of the family until such time as he or she shall attain the age of 18 (or shall cease his or her full-time education whichever is the later date) and thereupon such sums shall vest absolutely in the child of the family.

That on or before the lapse of six weeks from the date hereof the respondent do pay the sum of £1,000.00 to V.G.B. a child of the family born on the 20th day of March 1975.

That on or before the lapse of six weeks from the date hereof the respondent do pay the sum of £1,000.00 to P.Y.B. a child of the family born on the 22nd day of August 1976.

That on or before the lapse of six weeks from the date thereof the respondent do pay the sum of £1,000.00 to Z.K.B. a child of the family born on the 13th day of May 1979".

6. Those sums were duly paid in pursuance of the order of the Court before the period in issue in the present case and were invested by the claimant in accordance with the court's order in "informal trust accounts" of the National Savings Bank, the terms of which are (see letter from the National Savings Bank dated 15 March 1984 part of the appeal papers) that "the beneficiary's signature is ... required jointly with that of the trustees for all withdrawals. In common with other types of national savings bank accounts, no withdrawals are allowed until the beneficiary reaches the age of seven". It also appears that one month's notice of a withdrawal has to be given but I do not regard that as being a practical obstacle in the way of regarding the £1,000.00 as a resource of or any part of it as a resource of the children since no doubt immediate withdrawal could be made on loss of interest. The restriction to withdrawals until the beneficiary reaches the age of 7 is however material (see below).

7. The original tribunal treated the whole of £1,000.00 for each of the three children as a lump sum paid to them and coming therefore within what may be described as the "spreading-out as income" provisions of regulation 13 of the above-cited Resources Regulations. It was for that reason that it was held that there was no entitlement to supplementary benefit. However, both Mr. Rowland and Mr. D'Eca agreed that that approach was erroneous in view of the fact that under the terms of the court order the whole of the capital could not be released to the children. However, the court order does not exclude the provisions of section 32 of the Trustee Act 1925 which provides as follows:-

"32. Power of advancement

- (1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ... whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event ...

Provided that -

- (a) the money so paid or applied for the advancement or benefit of any person shall not exceed together in amount one half of the presumptive or invested share or interest of that person in the trust property."

8. Under that power, therefore, up to one half of the capital of the trust fund could be advanced by the trustees for the advancement or benefit of each of the children. Therefore, the £500.00 that could be freed in favour of the children should in my view be regarded in the case of the two children who are over the age of 7 as being a lump sum payment to them and therefore to be spread

out as an income resource of theirs under the provisions of regulation 13(3) of the Resources Regulations. Mr. Rowland argued that not necessarily the whole £500.00 should be taken into account since he contended that, as a trust was involved, regulation 4(8)(b) of the above-cited Resources Regulations would require regard to be had to the "terms of the trust either express or implied" and that would involve considering whether the real intention was to keep the capital intact until the children had reached majority at 18 years. I do not accept that contention since in my view regulation 4 dealing with "notional resources" is ousted in the present case by the provisions of regulation 3(2)(b) of the Resources Regulations which provides that "any payment, including any instalment of a capital payment which falls to be paid by instalments, made, whether in pursuance of a court order or otherwise, by or derived from a liable relative, shall be treated in accordance with the provisions of regulation 13". Undoubtedly the payments in this case were payments made "in pursuance of a court order" and were made "by or derived from a liable relative". I do not on reflection consider that there applies here the exception to the definition of "payment made by or derived from a liable relative" in regulation 2(1) of the Resources Regulations of "a payment resulting from a disposition of property, whether voluntary or by order of the court as the case may be, made in or in connection with an agreement to separate or proceedings for a decree of divorce ...". These were outright payments by the claimant's ex-husband out of his own resources and were not "resulting from a disposition of [matrimonial] property". Moreover, each was a "payment" within regulation 3(2)(b), even though subject to a trust.

9. Consequently, regulation 3(2)(b) makes a direct reference to regulation 13 and there is no scope for the notional resources provisions of regulation 4. As a second limb of his argument, Mr. Rowland argued that there was a discretion to take into account under regulation 13 less than the full amount of the £500.00 presumptive share of capital because of the provision of regulation 13(2)(b) that there shall be taken into account in such a case only "such part of the amount as may at that time reasonably be considered to form part of the resources of the assessment unit". However, in the case of the two children who are over the age of 7, I consider that that does not give the adjudicating authorities some kind of general discretion but merely requires them to look at the actual legal entitlement to the resource in question. There is no obstacle to a release of £500.00 out of the £1,000.00 as capital for the benefit of the children and in my view that is therefore the sum that should "reasonably be considered" to form part of the resources of the two children over the age of 7. I do not consider it relevant under regulation 13(2)(b) to consider such questions as whether or not in fact the intention of the parties was that the capital should be kept intact and the income be used to finance the children's journeys to Scotland to see their father. However, so far as the youngest child is concerned, under the terms of the informal trust account at the National Savings Bank into which the claimant quite properly paid the £1,000.00 for this child, no withdrawal can be made before the age of 7 years. Whether or not that was precisely in accordance with terms of the court order does not derogate from the fact that until the child attains the age of 7 years no part of that £1,000.00 can "reasonably be considered to form part of the resources of the [child]" (regulation 13(2)(b)). I have therefore so declared in paragraph 1 of my decision.

10. This case has been outstanding a considerable length of time, with financial hardship to the claimant. I would therefore ask the local adjudication officer as soon as possible to 'do the arithmetic' pursuant on my declarations of principle in paragraph 1 above and calculate the entitlement of the claimant to supplementary benefit as from 19 March 1984 onwards. Any difficulty in connection with the terms of this decision can of course be referred to me.

(Signed) M.J. Goodman
Commissioner

Date: 9 May 1985