

Commissioner's File: CIS/110/1989

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

IDENTIFIABLE DECISION  
NOT TO BE SENT OUT OF  
THE DEPARTMENT

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 5 December 1988 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to make further and fresh findings of fact and to give the appropriate decision in the light of them, I further decide that the claimant is not entitled to income support from 12 April 1988. This is because her capital exceeds the prescribed amount of £6,000.

2. This is an appeal by the claimant's Solicitor Mr F J H Tuohy of Messrs. Frederick J.H. Tuohy against the decision of the social security appeal tribunal of 5 December 1988, leave having been granted by the tribunal chairman. The claimant's former Solicitor was Mr D G Meager of Messrs. D. Graham Meager & Co. Mr Meager was also a consultant in Messrs. Frederick J.H. Tuohy. As the medical evidence showed that the claimant suffered from senile dementia the matter was referred to the Court of Protection. By an Order dated 9 May 1990 the Court of Protection appointed the Public Trustee as Receiver in this case. At the oral hearing of the appeal held before me, the claimant was represented by Mr J G M Edwards instructed by the claimant's Solicitor on behalf of the Public Trustee. The adjudication officer was represented by Mrs H Wheatley from the Solicitor's Office of the Departments of Health and Social Security.

3. The claimant, was born on 26 February 1908. She is a single woman. She lived alone in her own house. She was

admitted to hospital on 21 January 1988 following a minor accident in her home. As it was diagnosed that she was suffering from senile dementia she was transferred to a private nursing home on 16 February 1988 and has remained there ever since.

4. On 16 March 1988 the claimant's niece claimed supplementary benefit on her behalf. She stated that the claimant suffered from senile dementia and was unable to administer her own affairs. She declared that the claimant had savings of £4,000 in National Saving Income Bonds and her only income was her retirement pension and income from the Bonds.

5. On 23 March 1988 an officer of the Department visited the nursing home and interviewed the claimant in the presence of the matron. The record of the interview shows that although the claimant was very confused she believed that she still owned her house. However in reply to an enquiry, the claimant's niece stated that the claimant had transferred the house by "Deed of Gift" to her nephew, a solicitor, and to her sometime in 1987. On 30 March 1988 a copy of the Deed of Assignment ("the Deed") was received at the local office of the Department. This showed that the claimant had voluntarily assigned the unexpired residue of her leasehold interest of a term of 1,000 years from 22 March 1909 in her house to her nephew and niece. The Deed was dated 29 November 1988. In the light of the evidence the adjudication officer concluded that as the transfer was due to take effect on 29 November 1988, the claimant still owned the house at the date of claim. She rejected the claim for supplementary benefit because the claimant possessed capital which exceeded the prescribed amount of £6,000.

6. An income support claim form was requested on behalf of the claimant. This was issued on 12 April 1988. It was returned duly signed by her on 11 May 1988 together with a letter from her niece stating that the claimant had savings of £5,337, of which £2,340 was owed to her for nursing home fees paid on her behalf over the previous three months. This left the claimant with a balance of £2,997. A letter was enclosed from the nursing home confirming that the weekly fees were £190.

7. On 13 May 1988 the adjudication officer decided that the claimant was not entitled to income support from 12 April 1988. This was because she had deprived herself of capital for the purpose of securing entitlement to income support.

8. In a letter dated 23 May 1988 Mr Meager stated that the Deed was incorrectly dated 1988 and that it was in fact executed on 29 November 1987. That date is not now in dispute. As a result the adjudication officer reviewed her original decision but refused to revise it. Thereupon Mr Meager appealed against the decision.

9. In reply to further enquiries the claimant's niece stated in a letter dated 15 August 1988 that the claimant had been admitted to hospital direct from her home; it was her first visit in hospital in recent years; it had been intended that she should

return home; as a result of tests it was recommended that she was not fit to return home and in consequence she was admitted to a nursing home.

10. The adjudication officer again reviewed her original decision but decided that there were no grounds on which to revise it.

11. In her written observations on the claimant's appeal the adjudication officer submitted that the claimant had actual savings of £2,997. In addition it was not in dispute that she had formerly owned her house, which she had transferred to her niece and nephew on 29 November 1987. The adjudication officer took the view that the claimant had deprived herself of the house for the purpose of securing income support in terms of regulation 51(1) of the Income Support (General) Regulations 1987, so that it was a resource which fell to be treated as still possessed by the claimant. As a result the claimant had actual and "notional capital" resources in excess of £6,000, being the prescribed amount specified in regulation 45 of the Income Support (General) Regulations 1987 at the relevant time. The adjudication officer noted that the claimant retained no express life interest in the house and that there was no provision to safeguard her interests if she wished to continue to live in her house after 29 November 1987.

12. The claimant was represented by Mr Tuohy at the hearing of appeal before the tribunal on 5 December 1988. The tribunal received oral evidence from Mr Meager, the claimant's niece and Mr Twining, described as an administration executive with Messrs. Frederick J.H. Tuohy. In the event the tribunal dismissed the appeal. They recorded all relevant findings of fact, including that by 1987 the claimant suffered from "arthritis, a bad back, failing eyesight and was forgetful" and that "on 11.2.88 it was confirmed that she suffered from Senile Dementia". The reasons for decision read:-

"At the time of Assignment [the claimant] was 79, in indifferent health and living alone. We therefore found that a transfer to a nursing home in the foreseeable future was highly likely and must have been contemplated.

It was argued that the assignment was made only because of natural love and affection for the donees. We reject this argument. It was open to [the claimant] to show her love and affection for the donees by leaving the property to them in her Will.

There was, therefore, no obvious and compelling reason for the assignment to be made when it was other than for [the claimant] to divest herself of a capital resource. We were driven to the conclusion that she divested herself of this resource for the purpose of obtaining benefit."

13. Section 22(6) of the Social Security Act 1986 ("the Act") provides that no person shall be entitled to an income related

benefit if her capital or a prescribed part of it exceeds the prescribed amount. Regulation 45 of the Income Support (General) Regulations provides that for the purposes of section 22(6) the prescribed amount at the relevant time was £6,000. Regulation 49 provides for the valuation of a capital resource.

14. In his written submission the adjudication officer now concerned rightly analysed that the point at issue was whether or not the claimant's beneficial interest in her house had been transferred to her niece and nephew by the Deed. He submitted:-

"If the Deed of Gift is an imperfect one (in which case the transfer was ineffective) it is my submission that the claimant still possesses actual capital the value of which falls to be calculated in accordance with regulation 49 of the General Regulations. If, however, the transfer was effective, I submit that the question of deprivation needs to be addressed and that the first stage of the consideration required by regulation 51(1) of the General Regulations will have to be satisfied."

15. The tribunal found as fact that by 1987 the claimant was forgetful and that "on 11.2.88 it was confirmed [my underlining] that she was suffering from Senile Dementia". In the light of those findings it was incumbent on the tribunal to consider whether the claimant was capable of transferring the leasehold interest in her house at the date of the Deed. There is nothing in the record of the proceedings to indicate that they directed their minds to this issue. They proceeded on the assumption that the claimant had the required capacity to execute the Deed and had deprived herself of a capital resource for the purpose of securing entitlement to income support in terms of regulation 51 of the Income Support (General) Regulations 1987. In my view the tribunal's decision was inadequate and failed to comply with the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986. As a result it was erroneous in point of law.

16. Mr Edwards and Mrs Wheatley expressed extreme surprise that I required their submissions as to whether or not the claimant had the required capacity to execute the Deed at the material time. Mrs Wheatley assured me that she and Mr Edwards were in complete agreement that the Deed was effective. She stressed that this aspect of the case had never been in dispute and in her view the said adjudication officer's written submission referred to the issue by implication only. Mr Edwards supported this view. However he submitted a short list of questions he had issued to the parties concerned. In reply to the question "Is it to be contended that when she went into Cefn Coed Hospital on 21.1.88 there was one plan of action (temporary stay) which changed in the following 2-3 weeks in favour of permanent care? if so, please say so, quoting medical records if possible", the claimant's niece answered that her husband had sadly died at that time and she presumed "the Doctor had sent her [the claimant] to Cefn Coed for assessment on a temporary basis until such time as I was able to take over again. On the 11th February 1988 I went

to see a Doctor at Cefn Coed ... who told me that after tests it was found that my Aunt had Senile Dementia and it would be sensible to put her into permanent care preferably in a private home because of her demeanour ... I understand that Dr. O'Kane, the family doctor at the time had been written to by the Official Solicitor sometime this summer and I understand from the conversation that he had had with him that he replied saying that my Aunt was capable of making her own decisions at that time.". In reply to the questions put to Mr Meager, he stated "at the time [the claimant] appeared to be in sound mind and knew what she was doing". No medical evidence was submitted as to the claimant's medical condition at the date of the Deed nor, it seems, was any effort made to obtain any. It cannot be overstressed that this is an inquisitorial jurisdiction and I am required to consider all aspects of the case. It is not satisfactory to leave possible arguments unexplored. Prior to the oral hearing I had directed that counsel should appear on behalf of the adjudication officer, which should have been sufficient warning that matters of considerable difficulty were involved. Mr Edwards, appearing on behalf of the Public Trustee was under a duty to protect the claimant's interests. Mrs Wheatley appearing on behalf of the adjudication officer was under a duty to protect expenditure from Public Funds. In the circumstances, I adjourned the hearing in order to enable the parties to obtain further evidence. I issued directions specifying the additional information I required, which accounts for the delay in the promulgation of this decision. In the light of those replies, I did not consider it necessary to hold a further oral hearing of the appeal.

17. I directed the adjudication officer to obtain replies to the specific questions from the claimant's general practitioner at the material time and from the consultant who attended her during her stay in hospital.

18. In a letter dated 12 November 1990 the claimant's general practitioner at the time, Dr. D A O'Kane stated:-

"I am now able to confirm that [the claimant] was visited, at home, by a Consultant Psychogeriatrician on 23rd October, 1987, and I enclose a copy of his report.

As his report states she was beginning to show signs of memory impairment. However, I do remember that she knew her immediate family and I would think that, at that time, she was aware of the nature of the gift she was making ..

If you require any further details, you may find Dr. Donald Williams will have some records regarding her subsequent deterioration."

In a further letter dated 18 February 1991, he stated:-

"... as far as I can recall, I only ever saw this lady on three occasions, at home, and in the Autumn of 1987. This was at the request of her niece, or perhaps a neighbour. ..

I found her pleasant and living in clean surroundings and reasonably fed. I suspect the niece and the neighbour were keeping a close eye on her. Their concern was that she was happy to welcome complete strangers into her home, regardless of their intention. I think there may have then been only concern regarding her safety to be living alone. She was eventually visited at home by Dr. Donald Williams (Cefn Coed Hospital) who arranged for his nursing team to follow her up .."

19. In his report dated 18 December 1990, Dr. D Williams, the Consultant Psychiatrist at Cefn Coed Hospital, supplied the following information:-

" 1. I first attended the claimant personally on 22nd October 1987.

2. I am able to confirm that I diagnosed her that she was suffering from senile dementia at that time and it would be my opinion that she was not able to manage her affairs for 9 or 12 months prior to the date which I saw her.

3. As a result of the fire in her home on 20th January 1988. This had been started by [the claimant] igniting real logs and paper on an electric log fire.

The only injuries which she sustained was a scratch on her head while her hair which was normally white, was blackened with soot. In view of this she was considered a serious fire hazard and was admitted to Cefn Coed Hospital for further assessment."

20. I now have to consider the circumstances in which the claimant transferred her house and the advice she received from Mr Meager as to the effect of such transfer. In a letter dated 4 October 1990 the claimant's niece stated that the house was transferred in order to facilitate the general maintenance and administration. This, of course, could have been achieved by the claimant giving a Power of Attorney in favour of her niece and no doubt Mr Meager and the claimant's nephew, as solicitors, were aware of this alternative. The claimant's niece stated that it was the intention of all parties that the claimant would remain in the house for the rest of her life. The Deed made no provision for an express life interest in favour of the claimant and Mr Meager explained the position as follows:-

"Nothing was recorded regarding her right to stay at the home but she had been informed that a mechanical transfer of the property out of her name to those of her niece and nephew would not affect her right to stay there for so long as she wished."

21. In my Direction I asked Mr Meager for legal authority for the above proposition, when the evidence indicated that the claimant was no more than a bare licensee with no such

protection. I asked for replies to the following: Would the claimant have executed the Deed if she had appreciated that her residence could be terminated at any time; what was meant by "a mechanical transfer of the property"; the claimant was in failing health how did she propose to finance herself if she was unable to live in her house having disposed of her main asset; what advice was given to her on this matter; what were the "fiscal reasons" which made such a transfer necessary.

22. In reply Mr Meager stated that the claimant had not been separately advised and "owing to the closeness of the niece and nephew to [the claimant] and the fact that the niece had been in attendance on and off looking after [the claimant] for many years it was felt that there was no need for any further legal formalities other than the assignment to be made". He added that if the claimant "had need of the value of her home it would have been sold and the money held by the niece and nephew for her use and benefit [my underlining]. The fiscal reasons mentioned were that after seven years the value of the property would be excluded from her estate".

23. I now have to consider the validity of the Deed in the light of the above evidence. The claimant was not a patient of the Court of Protection at the date she executed the Deed. I must therefore consider the position as to whether she had the required mental capacity to understand the nature of the transaction. In Re Beaney, Decd. (Ch. B.) [1978] 1 W.L.R. 770 Deputy Judge Nourse (as he then was) explained the relevant law as follows:-

"The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a Will the degree required is always high. In the case of a contract, a Deed made for consideration or a gift Inter Vivos, whether by Deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and the value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his Will or on his intestacy, then the degree of understanding required is as high as that required for a Will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."

24. I have considered all the evidence with care, in particular Dr William's report, and I have come to the following conclusions. The claimant's senile dementia was in an advanced stage by 29 November 1987, when she executed the Deed. By that stage she did not have the high degree of understanding required by the law to dispose of her only asset of value though she was physically capable of signing her name, recognising her immediate family and maybe capable of understanding simple things. However

I am quite satisfied on the evidence, and I find as fact, that she was not capable of understanding, and did not understand, that she was making an absolute gift of her house to her nephew and niece. Furthermore Mr Meager's account of the advice he gave the claimant would make it very difficult, if not impossible, for me to find that the claimant had intended to make an outright gift of the house to her nephew and niece. That advice, assuming the claimant had understood its meaning, would have led her to believe only that the house was put into their names in order to facilitate general maintenance and running and that it was no more than "a mechanical transfer" which "would not affect her right to stay there for as long as she wished". She was advised that her nephew and niece were holding the house "for her use and benefit". This is something entirely different from an outright gift.

25. In the light of my findings of fact I am entitled to conclude that at the material time the claimant did not have the required capacity to execute the Deed. As a result the Deed was void and not effective and the leasehold interest in the claimant's house remained vested in her. It follows that the value of the claimant's house was an actual capital resource, which fell to be taken into account in calculating the claimant's capital under regulation 46(1) of the Income Support (General) Regulations. The claimant's house did not fall to be disregarded under the provisions of regulation 46(2) and paragraph 1 of Schedule 10, because it did not fall within the definition of "dwelling occupied at the home" in terms of regulation 2(1). It is not in dispute that the value of the house calculated in accordance with regulation 49(a)(i) exceeded the prescribed limit of £6,000. The claimant is not entitled to income support. I am informed that the house has not been sold to date, although it was placed on the market.

26. For the reasons stated above the tribunal's decision was erroneous in law as I consider it expedient to exercise the power conferred on me by section 101(5)(ii) of the Act to make fresh findings of fact and to give the appropriate decision in the light of them, I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs  
Commissioner

(Date) 19 June 1991