Capital limits – matrimonial asset – savings a/c in sole name of wife in which H had deposited bulk of money – held wife not sole owner & reg 52 applied. ★ 90/91

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SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Joan Hyde (Mrs)

Social Security Appeal Tribunal: Ashton

Case No: 6213573

[ORAL HEARING]

1. On 5 November 1991 I gave the following decision -

"1. My decision is that -

(a) the unanimous decision of the Ashton social security appeal tribunal given on 4 July 1990 is erroneous in point of law and is accordingly set aside;

(b) the claimant's entitlement to income support from 21 March 1990 is to be calculated on the basis that, as at the date of her claim, she possessed capital of £3,097.60.

2. I will give my reasons for my decision in due course."

I now give my reasons.

2. The claimant, Mrs Joan Hyde, appeals with leave of the chairman against the decision of the tribunal confirming the decision of the adjudication officer, issued on 27 March 1990, that (a) she was not entitled to income support from 8 March 1990 because her capital exceeded the prescribed limit and (b) for the purpose of calculating entitlement from 11 April 1990 she had capital of £3,195.20 in excess of £3,000.00, which was to be treated as an income of £13.00 a week.

3. At the material time Mrs Hyde had separated from her husband and had instituted divorce proceedings. She completed an employment training scheme on 28 February 1990 and, on 21 March 1990, she claimed income support on form B1 on which she declared that she had savings worth more than £2,500.00. Subsequently it was established that Mrs Hyde had a credit balance of £6,195.20 in a Halifax Building Society account in her

sole name. The only issue in this case is the manner in which those moneys should be treated.

4. I directed an oral hearing of this appeal, which took place at Liverpool on 5 November 1991. Mrs Hyde, who was unable to attend owing to ill health was represented by Mr S. Hynes, advice worker with Tameside Welfare Rights Unit. The adjudication officer was represented by Mr D. Jobbins of the Office of the Chief Adjudication Officer, and I am grateful both to him and to Mr Hynes for their assistance.

5. The adjudication officer decided on 27 March 1990 that the whole of the sum in the building society account was to be regarded as a capital resource belonging to Mrs Hyde and that none of it fell to be disregarded under Schedule 10 to the Income Support (General) Regulations 1987 [SI 1987 No. 1967]. Accordingly he applied regulation 53 of the General Regulations which, as at the date of claim, provided that -

> "52.(1) Where the claimant's capital .... exceeds £3,000 it shall be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £3,000 but not exceeding £6,000.
>
> (2) ... where any part of the excess is not a complete £250 that part shall be treated as equivalent to a weekly income of £1."

It followed that, as Mrs Hyde's capital was held to exceed £6,000.00, she had no entitlement to income support at the date of her claim. However, the capital limit in paragraph (1) of regulation 53 was increased from £6,000.00 to £8,000.00 with effect from 11 April 1990, and from that date she was considered to have a weekly income of £13.00 per week in respect of the excess of £3,195.20 over the £3,000.00 prescribed in paragraph (1). The effect of that was to reduce Mrs Hyde's entitlement to income support from £36.70 to £23.70 a week.

5. Although, somewhat surprisingly, it is not referred to in the adjudication officer's submission to the tribunal, Mrs Hyde stated in her letter of appeal dated 10 April 1990 that she had sent to the Department a letter dated 20 March 1990 from her solicitors, Messrs Rupert Wood & Son, of Ashton-under-Lyne, who confirmed that they were acting for Mrs Hyde in connection with her divorce proceedings and, with regard to the Halifax Building Society account, that -

> "Although this account is held in the sole name of Mrs Hyde, we have already advised her that it is part of the matrimonial assets and that at the end of the day the most she can hope to retain from this account is one half of its value."

In her letter of appeal, with which was enclosed a copy of her solicitors' letter, Mrs Hyde stated that her solicitors were -

" ... fully aware that this money is not mine at all as my husband deposited it."

And she continued -

> "This account was taken out by me several years ago as a single woman. When I married, for no reason really the account was not changed to a joint name one, of course, not anticipating the breakdown of the marriage. My husband deposited the bulk of the account over the past 3 or 4 years, always by cheque from his sole bank account from which he has his salary paid into."

6. On 4 July 1990 Mrs Hyde is recorded as giving evidence to the tribunal that her solicitor had advised her not to draw from the account, and the presenting officer is noted as referring to regulation 52 of the General Regulations, "which has not been dealt with in the submission". The tribunal found as facts that Mrs Hyde was separated from her husband, that she was involved in matrimonial proceedings, had been advised that the savings account was a matrimonial asset, that she should not withdraw from it and that "she would only be likely to retain one half of the balance", and that there had been no court order "freezing the account". The tribunal decided that the whole of the money in the account should be treated as Mrs Hyde's capital under regulation 46 of the General Regulations. They gave as their reasons -

> "The account was solely in her name and the fact that her solicitor had advised her not to withdraw from the account and that ultimately she might only be awarded one half of the amount in the account did not mean that one half of the capital could be disregarded since there was no provision for such a disregard in Schedule 10 to the General Regulations. The tribunal considered Reg 52 ... but decided that this could not assist the claimant since she was the only person beneficially entitled in possession to the savings account. The beneficial interest was not shared with her husband since the account was in her sole name and her husband had no power to dispose of or otherwise deal with the asset."

7. Regulation 52 of the General Regulations, as amended, is concerned with "Capital jointly held" and provides that -

> "52. Except where a claimant possesses capital which is disregarded under regulation 51(4) (notional capital), where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share and the foregoing provisions of this Chapter shall apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess."

So that where a claimant has the right, together with one or more other persons, to dispose of an asset then, whatever the claimant's interest may in fact be, he is treated as having an equal share with the other person or persons. As the learned editor of the 1991 edition of Mesher's Income Support remarks in the general note to that regulation, it is "nothing if not simple to apply". It is not appropriate for me to discuss in this decision that regulation's wider implications or the injustices to which it may give rise.

8. At the oral hearing on 5 November 1991 Mr Jobbins resiled from the submission dated 30 October 1990 by the adjudication officer now concerned with the case, which supported the tribunal's decision that Mrs Hyde was "the only person beneficially entitled in possession to the funds in the savings account". Mr Jobbins submitted that the tribunal had gone "down the wrong road".

9. Clearly he is right; as long ago as 1884 Cotton LJ, in Re Jones, 26 Ch D 736, made it plain that the phrase, "beneficially entitled in possession", did not mean merely deriving some benefit from possession, but beneficially entitled for one's own benefit and not, for example, as a trustee for others. The tribunal appear to have dealt with the matter on the basis that, while Mrs Hyde's former husband might have a claim against the funds in the savings account, as she was nevertheless the only person who could effect any withdrawals at that time, that was an end of the matter. I do not need to labour the point; in my judgment the tribunal's reasons disclose an error of law ex facie and their decision is accordingly set aside.

10. This clearly is a case in which I should exercise my discretion under section 101(5)(a)(i) of the Social Security Act 1975 to substitute my own decision, and I now do so. In that connection Mr Jobbins very properly raised for my consideration the question of whether Mrs Hyde's husband's payments into the account in her sole name should be treated as a gift to her by virtue of the doctrine of presumption of advancement.

11. The general rule is that where a person transfers his property into the name of a stranger then, in accordance with his unexpressed but presumed intention, a resulting trust arises in favour of the transferor. However, in the case of a transfer by a man to his wife or child, or to a person in relation to whom he stands in loco parentis, no such trust but instead a presumption of advancement arises. That is to say, a presumption that the transferor intends the property to vest absolutely in the transferee or, in other words, to make a gift of it. No such presumption arises where a wife puts property in her husband's name.

12. The presumption of advancement is, however, rebuttable by evidence of a contrary or different intention and, in present-day conditions, as between husband and wife, the presumption has become a weak one. That question, among others, was considered by the House of Lords in Pettit v Pettit [1970] AC 777, in which

Lord Reid said, at page 793E -

> "I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives' economic dependence on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished. I do not think that it would be proper to apply it to the circumstances of the present case."

Similar views were expressed by Lord Hodson at page 811G -

> "Reference has been made to 'presumption of advancement' in favour of a wife in receipt of a benefit from her husband. In old days when a wife's right to property was limited, the presumption, no doubt, had great importance and to-day, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide in a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect."

And by Lord Diplock at page 824 -

> " ... the most likely inference as to a person's intention in the transactions of his everyday life depends upon the social environment in which he lives and the common habits of thought of those who live in it. The consensus of judicial opinion which gave rise to the presumptions of 'advancement' and 'resulting trust' in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts were required to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of property-owning, particularly a real-property-mortgaged-to-a-building society-owning, democracy has compelled the courts to direct their attention to this during the last 20 years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples 'presumptions' which are based upon inferences of

fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

The current state of the law is conveniently summarised at pages 1132 and 1133 of Rayden and Jackson on Divorce (15th edition) -

> "**Presumption of advancement.** Although in the absence of evidence to the contrary there is a presumption where a husband purchases property or makes an investment in his wife's name that he is making a gift to her, it has been said that in the case of what has at times been termed a family asset intended as continuing provision for both of them that presumption is easily rebutted. It has been said that there is no longer any reasonable basis for the presumption and that the considerations which gave rise to it no longer apply so that the strength of the presumption has been much diminished. Moreover, as a general rule the proper presumption is that the beneficial interest belongs to them jointly : the property may be bought in the name of the husband alone or in the name of the wife alone, but, nevertheless, if it is bought with money saved by their joint efforts and it is impossible fairly to distinguish between the efforts of one and the other, the beneficial interest should be presumed to belong to them jointly. There are, however, cases where a joint account is opened only for administrative convenience, in which case the money put into it will belong to the person who provided it. The presumption of advancement, that is, presumption of gift to the wife, will apply where what is acquired in the wife's name is for the wife's personal use. Where the presumption of advancement to a wife prima facie operates, the husband is not permitted to rebut that presumption by setting up his own illegal transaction or his own design in fraud of creditors."

13. It may, of course, be that although moneys are paid into a savings account by one party only, that those savings have been made possible by the other party's efforts or indirect contributions. For example, there may be an express or implied agreement for the wife to the use all her earnings to pay household expenses and thus enable the husband to save as much as possible from his income, or vice versa. In such a case, while the account, in whoever's name (or names) it is, may have been opened for administrative convenience, the savings have clearly been accumulated through their joint efforts and, equally clearly, it would be unjust merely to look to see by whom the funds were provided. Each case must depend upon its own particular facts.

14. Applying the principles set out above to the instant case, it seems to me that the matters set out in paragraph 5 above, regarding both Mrs Hyde's perception of her entitlement to the moneys in the savings account and her solicitors very reasonable

and proper advice to her, constitute ample evidence that she was not solely beneficially entitled to the funds in that account. It follows that regulation 52 of the General Regulations applies and, "for the purposes of calculating the amount of capital the claimant is treated as possessing" she must be considered to have an equal share of the savings account. Mrs Hyde's claim for income support is dated 21 March 1990, which Mr Jobbins conceded is the relevant date of claim, and neither he nor I could see any justification for the date of 28 March 1990 (erroneously stated to be 8 March 1990 on the adjudication officer's decision on form AT2). On 20 March 1990 it is common ground that the Halifax Building Society account in question was £6,195.20 in credit; her interest for the purposes of regulation 52 was therefore £3,097.60. It is on that basis that in my judgment Mrs Hyde's entitlement to income support is to be calculated. Accordingly I substitute my own decision to that effect, as set out in paragraph 1(b) above, for that given by the tribunal. In view of the increase of the capital limit to £8,000.00 on 11 April 1990, Mrs Hyde's entitlement will be subject to the reduction provided by regulations 53(1) and (2) only for the period from 21 March to 10 April 1990. That will have to be assessed by the adjudication officer; I trust that will not give rise to any difficulty but, in the event of any dispute, the matter is to be referred back to me for determination.

15. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 2 December 1991