

SUPPLEMENTARY BENEFIT

Resources—how a claimant is to be treated as notionally entitled to resources held under a discretionary trust—how any share of such resources is to be ascertained and valued.

The claimant, who was in receipt of supplementary allowance, was one of three daughters and became a beneficiary under her late mother's Will. The assets consisted of the freehold property in which the claimant lived and investments valued at some £4,700. The Will provided, inter alia, that no sale should be made of the house in which the claimant lived during her lifetime without her consent. The Trustee was directed to invest the residue and pay the income from it to the claimant; after her death to hold upon the same trusts in equal shares for such of the children of the claimant's sisters as should be living at the claimant's death. The supplementary benefit officer decided that the claimant was not entitled to supplementary allowance on the grounds that, being the only beneficiary, her capital resources calculated in accordance with regulation 4(8) of the Supplementary Benefit (Resources) Regulations 1981 exceeded £2,000 (the claimant being notionally entitled to the capital resources valued at £4,700). On appeal, the tribunal considered that, having regard to the terms of the Trust and the duty of the Trustee to balance the interests of the tenant for life and the remaindermen, the claimant should not be treated as possessing any part of the Trust fund under regulation 4(8)(b) of the Resources Regulations. The supplementary benefit officer appealed to a Social Security Commissioner.

Held that:

1. the expression "a trust" and "the trust" in paragraphs (6) and (8) of regulation 4 of the Resources Regulations have the same meaning and are a reference to the "trust" under which the resources are held (paragraph 15);

2. "beneficiaries" in regulation 4(8) does not have a technical meaning. It is used in a general sense, not as a term of art. It includes all persons who may receive benefits from the resources in question under any trust or power in the trust instruments (paragraph 16);
3. in deciding the appropriate share the purpose as well as the terms of the trust, whether expressed or implied, should be considered. The words in regulation 4(8) "having regard to" are not exhaustive and regard may be had to other matters (paragraph 17);
4. a claimant can be treated as possessed of the whole share when she is the only beneficiary and is entitled under the rule in *Saunders v Vautier* (1841) Cr. and Ph240 to call for the entire trust fund. A claimant may also be properly treated as entitled to the whole share although there are other beneficiaries, e.g. a spendthrift trust where there is only one true beneficiary and the inclusion of others is to prevent the real beneficiary from calling for the trust fund (paragraph 18);
5. where there are other beneficiaries who are clearly intended to take capital, the discretion to apply capital for the claimant only being intended for emergencies, it would be wholly inappropriate to treat the claimant as entitled to the entire resources of the trust (paragraph 18);
6. even though the life tenant has only a fixed income interest and the power to pay over capital is limited to emergencies, the capital trusts being for children or other persons, it would be inappropriate to treat the life tenant as entitled to a nil share of capital (paragraph 19);
7. to determine the "appropriate share", all the circumstances relating to the trust including any letter of intent should be taken into account. A statement by the trustee that it is not intended to exercise a discretion to pay capital or income is not material. The fixing of the appropriate share is not intended to be made on the basis of the actuarial or market value of the "interests". The method to be adopted is after consideration of the number of beneficiaries, the terms expressed or implied of the trust and the other circumstances, having regard to the real probabilities under the trust (paragraph 20);
8. in the case of a common inter vivos discretionary settlement, regard should be had to any "letter of intent" and other information, whether in the settlement or not, indicating who the intended beneficiaries in fact are (paragraph 20);
9. once the appropriate share has been fixed it should be valued on the principles set out in regulation 5 of the Resources Regulations (paragraph 21).

The appeal was allowed.

1. Our decision is that the decision of the supplementary benefit appeal tribunal dated 5 April 1982 is erroneous in point of law. We set it aside and refer the case to another tribunal for determination in accordance with our directions (Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 1605] as amended by the Supplementary Benefit and Family Income Supplements (Appeals) Amendment Rules 1982 [S.I. 1982 No 40], rule 10(8)(a)(ii)).

Representation: arrangement of paragraphs

2. (a) Leave to appeal to the Commissioner on a point of law against the decision of the supplementary benefit appeal tribunal was granted to the supplementary benefit officer by the Commissioner. The Chief Commissioner directed that the appeal should be heard by a Tribunal of Commissioners. An oral hearing of this appeal was held. The claimant did not appear and was not represented. The corporate trustee of the trust considered in this decision was also unrepresented. The supplementary benefit officer was represented by Mr R. A. Birch of the Solicitor's Office of the Department of Health and Social Security. Mr John Mummery of Counsel, instructed by Mr A. Roberts, of the Solicitor's Office, appeared in the role of amicus curiae.

(b) *Arrangement of paragraphs in this decision:*

Our decision is arranged as follows:

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Nature of the appeal

3. This appeal is concerned with the proper method of determination of the capital resources of a claimant for supplementary benefit who is the object of discretion under a trust to pay or apply capital for his benefit.

4. Where the value of a claimant's capital resources (including that of his dependants) is more than £2,500 (£2,000 prior to 22 November 1982) the claimant is not entitled to any supplementary pension or allowance. Certain *notional* capital resources are specifically included for this purpose. The present statutory provisions, which are contained in regulations framed since the enactment of the Social Security Act 1980, provide for the mandatory treatment of the object of a discretion under a trust to apply capital (or income) for the benefit of a claimant (or any other member of the assessment unit of which the claimant forms part) as possessed of the whole or an appropriate part of the resources in question. They replace a short provision, in paragraph 29 of Schedule 1 to the Supplementary Benefits Act 1976, as originally enacted, under which any sum which was held on a "discretionary trust" [sic] for the benefit of a person might be treated as included in his resources.

The law

5. The relevant law is set out in the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No 1527] which came into operation on 23 November 1981. The figure of £2,500 was inserted (in substitution for £2,000) by regulation 4 of the Supplementary Benefit (Up-rating) Regulations 1982 [S.I. 1982 No 1127] which came into operation on 22 November 1982.

"Calculation of resources

3.—(1) ...

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

Notional resources

4.—(1) ...

(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) ...

(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 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.

.....
Calculation of capital resources

5. Except in so far as regulation 6 provides that certain resources shall be disregarded, the amount of a claimant's capital resources to be taken into account shall be the whole of his capital resources assessed where applicable—

- (a) at their current market or surrender value less—
 - (i) in the case of land, 10 per cent, and in any other case, any sum which would be attributable to expenses of sale, and
 - (ii) any outstanding debt or mortgage secured on them;
- (b) in the case of a National Savings Certificate—

.....
Capital resources to be disregarded

6.—(1) In calculating a claimant's capital resources the following shall be disregarded:—

- (a) the value of—
 - (i) the home,
 -
 - (vi) any reversionary interest,

except

(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 £2,500 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 £2,500, the claimant shall not be entitled to pension or allowance."

[Regulation 8 relates to the effect of capital resources of dependants and is not relevant in the present appeal].

Note

“assessment unit” is defined in regulation 1. It is not in dispute that the claimant is the sole member of the assessment unit in the present case.

The facts

6. The trust with which this appeal is concerned is contained in a Will dated 6 July 1970 which was made by the claimant’s mother. This appoints a corporate trustee (a well-known bank) to be executor and trustee, incorporating a common form bank charging clause. After a personal bequest to her daughter Margaret (who is the claimant) the Will gives (by clause 5) the residue of her estate upon the usual trust for sale with power to postpone and, after declaring (by clause 6) that no sale shall be made of the house in which she was residing during the lifetime of her daughter Margaret without that daughter’s consent and that she should be permitted to occupy it, the trustee was directed to invest the residue and to pay the income from it to her daughter and after her death hold the same upon trust in equal shares for such of the children of her daughters Dora and Barbara as should be living at the death of Margaret.

7. Clause 8 of the Will is in these terms:

“I HEREBY DECLARE that notwithstanding the trusts hereinbefore declared in favour of my grandchildren the Company [i.e. the corporate trustee] may upon the request of my said daughter Margaret at any time or times raise any sum or sums out of the capital of my residuary estate and pay such sum or sums to my daughter Margaret for her absolute benefit in addition to the income of my residuary estate hereinbefore given to her but in any such case the Company shall have absolute discretion whether or not they will raise such sum notwithstanding the request of my said daughter.”

Clause 10 declares:

“MY SAID DAUGHTERS Dora and Barbara are already well provided for and for this reason and because of the state of health of my said daughter Margaret I make no provision for them in this my Will.”

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

8. The date of the testatrix’s death and of probate of her Will and the state of the families of Dora and Barbara are not stated anywhere in the case papers before us. There are no findings by the supplementary benefit appeal tribunal on these material points. We were given to understand at the hearing before us that the claimant might have two nephews or nieces (presumably children of Dora or Barbara) now living.

9. The value of the trust fund was stated by the trustee, on 24 February 1982, to be stocks and shares, say £4,700 and freehold property (i.e. the house) say £18,300. The claimant was said to be 56 years of age and to have an expectation of life of 25 years. According to the trustee, the claimant was slightly mentally retarded and found it difficult to become involved in detail. The trustee regarded the main beneficiaries as persons other than the claimant and considered clause 8 to be a common clause found in Wills in order to make cash available in cases of emergency or some financial crisis. Before exercising the discretion, the trustee would ensure that such payments were for the claimant’s benefit. In the event of any capital payments by the trustee resulting in a mere reduction of the claimant’s supplementary benefit, the trustee felt that no advantage would be gained by the claimant and as such it was unlikely that it would exercise its discretion in this way. As trustee, it had to bear in mind not only the interests of the claimant but those of the ultimate beneficiaries.

10. According to the supplementary benefit officer, until 28 December 1981, the claimant had been in receipt of supplementary allowance because her total resources did not exceed her total requirements. She lived by herself "in her owner-occupied property" (presumably the house mentioned in the Will). She had declared a Post Office account containing £162 and income from the trust fund. This fund consisted of the freehold property in which she lived and holdings of £3,700 6% Funding Loan 1993 and £3,300 12% Treasury Stock 1995, which holdings had been valued by the trustee on 16 November 1981 at approximately £4,700.

The supplementary benefit officer's decision

11. The supplementary benefit officer in his decision issued on 1 December 1981, decided that the claimant was not entitled to a supplementary allowance after 21 December 1981 on the ground that her capital resources calculated in accordance with regulation 4(8) of the Supplementary Benefit (Resources) Regulations 1981 exceeded £2,000. The date chosen was selected in order to enable the trustee to make the necessary arrangements for any capital payment from the trust fund. It would appear that the supplementary benefit officer treated the claimant as notionally entitled to capital resources valued at £4,700.

The supplementary benefit appeal tribunal's decision

12. The supplementary benefit appeal tribunal reversed the benefit officer's decision and decided that the claimant was not notionally entitled to anything. The facts found, decision and reasons for their decision are set out on form LT 235.

They found the following facts:

"The Appellant has a life interest in the estate of her late mother, which upon her death will be divided between her nieces and nephews. The will creating the trust gives the Trustee at the request of the Appellant, power to raise any sum or sums out of the capital of the estate and pay such sums to the Appellant, but the Trustee has absolute discretion whether or not he will raise such sums."

Their decision was:

"The Appellant is entitled to Supplementary Allowance from 28/12/81."

The reasons for their decision were:

"Having regard to the terms of the Trust and the duty of the Trustee to balance the interests of the tenant for life and the remaindermen the Appellant shall not be treated as possessing any part of the Trust Fund. Regulation 4(8)(b) of the Resources Regulations refer."

It is against this decision that the benefit officer now appeals.

The arguments on the appeal

13. Mr Birch, on behalf of the benefit officer, argued that there was only one beneficiary under the trust. Regulation 4(8) which directed regard to be had to the number of beneficiaries under the trust must be read in the context of regulation 4(6), the effect of which was to make the objects of a discretion beneficiaries. The claimant was the sole object of the discretion to pay capital under clause 8 of the Will. The whole fund could be used for the claimant and she should be treated as entitled to the entire fund.

14. (1) Mr Mummery, as amicus curiae, pointed out that the claimant was the sole beneficiary of the trust of income under the Will. As regards capital, the sole beneficiaries were nephews and nieces of hers, who had interests contingent on being alive at her death. She had no interest under the trusts of capital. But there was a power in clause 8 to advance her capital

on request. However this was an absolute discretion except that it seemed that there was no power to pay her unless she did so request. The statutory power of advancement of half the capital (with consent of the claimant) applied in respect of the nephews and nieces. The right to occupy the testatrix's house conferred on the claimant fell to be disregarded. The power conferred by clause 8 was a mere power and was purely discretionary. Its object had no interest in property and had a mere spes (or hope of benefit) without value. The power was entrusted to trustees who could, he submitted, release it with her consent but not without her consent. As a bare power it was to be contrasted with a trust power, which imposed on trustees a greater duty than a mere power since in the case of a mere power the trustees were under no duty to exercise it whereas in the case of a trust power the trustees *must* exercise the power and in default the court would. The objects of a bare power could not demand payment but all the beneficiaries (being of full age and sui juris) of a trust power could demand and compel payment, unless the fund were income and there were power to accumulate: see *Re Gulbenkian's Settlement* [1970] A. C. 508 at pages 524–525.

(2) It was well established that an object under a discretionary trust did not have an interest which could be taxed: see *Gartside v IRC* [1968] A. C. 553. With “notional” provisions it would be difficult to say that the object of a power had any valuable share.

(3) Regulation 4(6) and 4(8) should be read together in the context of the whole legislation. There were three possible results in this case:

- (i) the claimant was to be treated as possessed of the entire capital of the residuary estate other than the house (i.e. of £4,700). This was the benefit officer's decision;
- (ii) the claimant was to be treated as possessed of nothing (supplementary benefit appeal tribunal decision);
- (iii) the claimant was to be treated as possessed of a part or share which has to be valued.

(4) Regulation 4(8) was a guide as to what that share was, not as to its value as to which see regulation 5. “Beneficiaries” in this regulation meant all the persons capable of benefiting under any trust or power in the trust instrument or instruments and did not have a technical meaning. The term included all who might receive benefits, i.e. the claimant and such of the children (including adopted and illegitimate children) as might be living at her death and must include children born to Dora and Barbara at any time prior to the death of the claimant. Regulation 4(8) was *exhaustive*. One had regard only to (a) and (b) of that regulation and did not regard its purpose. When a regulation was directed to “purpose” it said so: see regulation 4(5)(b).

(5) In Mr Mummery's submission a necessary consequence of saying that regulation 4(6) and 4(8) was exhaustive was that the claimant was not entitled to anything. She had nothing of any value.

Construction of the regulations

“The trust”

15. In our judgment, the expressions “a trust” and “the trust” in paragraphs (6) and (8) of regulation 4 of the Resources Regulations have the same meaning and are a reference to the “trust” under which the resources in question (in which case investments worth £4,700) are held: see the wording of paragraph 4(6) which is set out in paragraph 5 above. We reject the submission of Mr Birch, on behalf of the benefit officer, that the “trust” consists simply in the discretion to pay capital. The discretion

referred to in paragraph (6) of regulation 4 is clearly only one of the provisions of the "trust" and is not the "trust" itself.

"Beneficiaries"

16. "Beneficiaries" in regulation 4(8) does not have a technical meaning. Like the expression "trust", it is used in a lay and general sense and not as a term of art. We agree with Mr Mummery that the word includes all persons who may receive benefits from the resources in question under any trust or power in the trust instruments. If the expression were given more restricted meaning, so as to be confined to persons with a definable interest in the trust fund, which was capable of valuation, the purpose of regulation 4, which is clearly to include the resources of claimants who are simply the objects of a discretion to pay income or capital in the computation of their resources for supplementary benefit purposes, would be frustrated and the provisions contained in the regulation to achieve this clear purpose would be entirely ineffective. In our view, discretionary objects are clearly beneficiaries: cf *Leedale (Inspector of Taxes) v Lewis* [1982] 1 W.L.R. 1319 at page 1329 paragraph G per Lord Wilberforce.

17. *Regulation 4(8) is not exhaustive.* Regulation 4(8) states that a member of the assessment unit (in this case the claimant) 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.

Mr Mummery submitted that this provision is exhaustive and that it was a necessary consequence of this construction that the claimant was not to be treated as entitled to anything because she had nothing of any value. If this is a necessary consequence, it is a powerful argument against adopting such a construction; because its effect is that regulation 4(6) is inapplicable to any object of a discretion which is incapable of valuation and has, indeed, no value. Such a construction renders the provisions of regulation 4(6) nugatory. In our judgment, in deciding whether a claimant should be treated as possessed of the whole of an appropriate share of any resource the purpose of the trust under which the resources are held should be considered, as well as the terms, whether express or implied of the trust. The words "having regard to" are not exhaustive. The provisions of regulation 4(8) do not require regard to be had to *no* other matters in working out what is the "appropriate" share under regulation 4(6). Thus if there is a "letter of intent" of the kind discussed by Lord Fraser of Tullybelton and Lord Scarman in their opinions in *Leedale (Inspector of Taxes) v Lewis* (supra) [1982] 1 W.L.R. 1319, this should be taken into consideration in deciding what is the appropriate share of a beneficiary.

18. *When can a discretionary object be treated under regulation 4(6) and (8) as possessed of the whole share of capital resources?*

(1) This can clearly happen when the object of the discretion is, in the events which have happened, the only beneficiary and is entitled under the rule in *Saunders v Vautier* (1841) Cr. and Ph. 240 to call for the entire trust fund. But in such a case the claimant is not notionally possessed of the capital resources in question because he is the sole object of a discretion but by virtue of his absolute interest.

(2) But there are cases where a claimant may properly be treated as entitled to the whole of the resources held under a trust even though that trust has other beneficiaries. An example is that of a spendthrift trust under which a settlor settles property on a beneficiary (e.g. himself) for that beneficiary's own protection. Under such a trust, it is common to create an overriding general power of appointment by the beneficiary with the

consent of separate trustees and subject thereto to settle the property on the beneficiary on protective trusts for his benefit during his life and subject thereto for his children and remoter issue as he shall by deed or Will appoint and in default of appointment in trust for his children at a specified age (21 or 18) or earlier marriage in equal shares with the usual provision for hotchpot and a power to appoint a life interest to a surviving wife by Will. The usual ultimate trust consists in a general power of appointment by Will or Codicil and in default of appointment for those persons who would take the trust fund on intestacy if the beneficiary were to die domiciled in England in the same shares manner and events as they would have taken in such case under the law in operation at the death of the beneficiary. Under the above trusts, there is only one true beneficiary and the inclusion of other beneficiaries is to prevent the real beneficiary from calling for the trust fund and thus to protect him against imprudence. In such a case, although regard is, under regulation 4(8)(a) to be had to the number of beneficiaries, those other beneficiaries who are objects of the general powers of appointment can, in our judgment, for practical purposes be discounted altogether.

(3) Where, however, there are beneficiaries other than the discretionary object and those beneficiaries are clearly intended to take capital, the discretion to apply capital for the claimant only being intended for emergencies, it would be wholly inappropriate to treat the discretionary beneficiary as entitled to the entire resources subject to the trust. For example, where there is a residuary gift of the income of a trust fund to a testator's wife for life and from and after her death the children of the marriage are to take capital, the existence of the common, and indeed usual, power to pay capital to the wife would not justify treating her as entitled to the whole of the capital. Such treatment would be in flagrant disregard of the express provisions of regulation 4(8)(a) which directs regard to be had to the number of beneficiaries.

19. *When can a discretionary object be treated under regulation 4(6) and (8) as possessed of a nil share of capital resources?*

(1) In our judgment, those beneficiaries other than the spendthrift who have been inserted in the settlement so as to prevent the spendthrift's calling for capital might properly be treated as entitled to a nil share.

(2) A beneficiary who is the object of a discretion to pay capital and who also has a fixed interest in income for life (e.g. the wife referred to in paragraph 18(3) above) is not a nominal beneficiary. Even though that life tenant only has a fixed income interest and the power to pay over capital is limited to emergencies, the capital trusts being for children or other persons, it would, in our judgment, be inappropriate to treat the discretionary object as entitled to a nil share of capital. Some appropriate share of capital ought to be attributed to such a life tenant.

20. *Determining the "appropriate" share under regulation 4(6) and (8)*

(1) Apart from the exceptional case in which a claimant can properly be treated, notwithstanding that there are other beneficiaries, as entitled to the whole of the trust's resources, or to none of them, it is necessary to determine what is the "appropriate" share. In so doing, the benefit officer, or the appeal tribunal, must have regard to the number of beneficiaries and to the terms, express and implied, of the trust, as required by regulation 4(8). But regulation 4(8) is not exhaustive. The overriding requirement is contained in regulation 4(6) which calls for a member of the assessment unit to be treated "as possessing the whole or any appropriate share".

(2) All the circumstances relating to the trust, including any letter of intent, should, as already indicated in paragraph 17, be taken into account. A statement by the trustee that it is not intended to exercise a discretion to

pay capital (or income) in favour of a claimant if that would reduce the amount of supplementary benefit payable to the claimant is, however, not material. If this were a factor that could be taken into account, regulation 4(6) would be virtually ineffective. The fact that the object of a discretion has in general nothing with any market value is not a relevant factor.

(3) Whether a claimant has a life interest in the income of a trust and why that capital has been left elsewhere are material facts.

(4) In the case of the common inter vivos (i.e. lifetime) discretionary settlement, regard should be had to any "letter of intent" and other information (whether contained in the settlement itself or not) indicating who the intended beneficiaries in fact are. None of the persons intended to take may have any fixed interest and we consider that distinction must be made between those persons truly intended to be benefited and other objects of the discretion who had been inserted for other purposes (e.g. in connection with the reduction or avoidance of taxation).

(5) The fixing of the appropriate share is not, in our judgment, intended to be made on the basis of the actuarial or market value of the "interests". This would be impossible in the case of a discretionary interest (whether under a discretionary settlement or as the object of a power of appointment in a fixed interest trust). The method by which the appropriate share is fixed must be much looser than this and should, in our view, after consideration of the number of beneficiaries, the terms express and implied of the trust and the other circumstances, have regard to the real probabilities under the trust. A similar conclusion was reached in *Leedale's* case (supra): see in particular the speech of Lord Fraser of Tullybelton at page 1326 paragraphs G – H. The conclusion in that case was reached on different wording from that before us, but the House of Lords was there faced with a similar problem, namely the requirement to apportion a share to a discretionary beneficiary whose interest had no actual value at all.

21. *Valuation of the "appropriate" share under regulation 5*

Once the appropriate share has been fixed, on the principles set out above that share, as so fixed, should be valued on the principles set out in regulation 5. Regulation 5, in our judgment, only comes into play when the share has already been fixed. If, for example, a claimant were treated, under regulation 4(6), read with regulation 4(8), as entitled to a half share of the capital resources, then the amount of the claimant's capital resources is that half share, which falls to be valued under regulation 5. The whole trust fund should be valued and the claimant's capital resources will be one half of this.

22. *Was the decision of the supplementary benefit appeal tribunal erroneous in point of law?*

(1) The decision of the supplementary benefit appeal tribunal was clearly erroneous in point of law.

(2) Rule 7(2) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 requires the tribunal to include in the record of their decision "a statement...of their findings on material questions of fact". Regulation 4(8)(a) of the Resources Regulations specifically directs regard to be had to the number of beneficiaries under the trust. There are no findings as to that number. Nor is there any evidence anywhere in the correspondence or other material before the tribunal as to what that number is. That number is clearly a material fact, since it affects the calculation of any capital resources which the claimant is to be deemed to be entitled to as a result of the discretion in clause 8 of her mother's Will. It was also clearly material to find the date of the testatrix's death, which is relevant when considering whether any adopted children are comprised in

the class of beneficiaries. Children adopted by Dora or Barbara while the adopter is under the age of 55 years, even if adopted after the testatrix's death, are included in the class of their children in the Will, provided that the date of such death is later than that of the coming into force of Schedule 1 of the Children Act 1975. That Schedule came into force on 1 January 1976: see section 198(4). The Will is not an "existing instrument", notwithstanding that it was made before 1 January 1976: see paragraphs 1(5) and (6) of the Schedule. Accordingly paragraph 5 of Schedule 1 applies to the Will. If the testatrix died before 1 January 1976 the law in force prior to the Children Act 1975, which is different, will be applicable.

(3) The ages of Dora and Barbara should also have been found and whether they are capable or likely to have further children. They can only adopt children who can take under the Will if such children are adopted while the adopter is under the age of 55, where the Children Act 1975 applies: see Schedule 1 paragraph 6(5). Until it is established that they can have no further children, and can adopt no relevant further children, the class of beneficiaries interested in capital under the Will of the claimant's mother is not closed.

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

23. Since the material facts have not been found, the answer to this question is clearly No, since we have no jurisdiction to conduct a complete re-hearing, finding further facts.

Directions to the supplementary benefit appeal tribunal

24. (1) The tribunal should determine how many children of Dora and Barbara are now in existence. Adopted children will be included, whenever adopted (while the adopter is aged under 55), if the testatrix died on or after 1 January 1976. Illegitimate children are included since the Will is dated after the Family Law Reform Act 1969 came into force: see section 15(1) and (8) of the Family Law Reform Act 1969. It came into force on 1 January 1970 [see S.I. 1969 No 1140].

(2) The tribunal should determine whether the class of children (as above defined) is closed or whether there can be further children.

(3) The date of the death of the testatrix and the fact and date of probate should be found as facts.

(4) It is not open to the tribunal to decide either that the claimant is to be treated as entitled to no capital resources by virtue of the discretion to apply capital in her favour. No reasonable tribunal, in the light of the law as explained in paragraph 19 above, could come to such a conclusion. Nor is it open to the tribunal to decide that the claimant is to be treated as entitled to all the capital resources (i.e. all the investments valued at £4,700); see paragraph 18 above.

(5) The tribunal should treat the claimant as entitled to an "appropriate" share, having regard to the number of beneficiaries under the trust now in existence and hereafter likely to come into existence and to all other facts and circumstances that may be relevant. The fact that the object of a discretion has nothing capable of valuation is not relevant; for valuation is made after the share has been fixed. The fact that the trustee may not intend to pay capital to the claimant if that will reduce her entitlement to supplementary benefit is not relevant. The share should not be fixed on actuarial principles but after considering the number of beneficiaries and the express and implied terms of the trust, on real probabilities. In this connection, it is relevant to take into account that the claimant is regarded as slightly mentally retarded, which may be an indication that otherwise she might have taken capital; but on the other hand that the testatrix intended that

some capital at least should go to the children of Dora and Barbara: see clause 10 of the Will. When the appropriate share has been fixed, it should be valued in the manner indicated in paragraph 21 above.

(6) "The trust", in terms of paragraphs (6) and (8) of regulation 4 of the Resources Regulations should be taken to be the trusts, powers and provisions of the Will of the claimant's mother on which the assets comprised in her residuary estate (other than the house which is exempt under regulation 6(1)(a)) are held, including the discretion to pay capital to the claimant under clause 8 of the Will and the statutory power of advancement which applies to the trusts of residue.

(7) The power under clause 8 of the Will to pay capital to the claimant at her request should be treated as a bare power vested in the trustee by virtue of its office. In so far as it is desired to consider the duties of the trustees, the general analysis of the nature of this clause by Mr Mummery (see paragraph 14 above) should be accepted but should be read in the light of the speech of Lord Wilberforce in *Re Baden's Deed Trusts* [1971] A.C. 424 at page 447.

(8) In the event of any purported release by the trustee of its power to apply capital for the benefit of the claimant, it should not be accepted that, as the law stands, such a release can be effected, even at the direction of the claimant, since the power is vested in the trustee by virtue of its office. (Releases of this character have been accepted by the Revenue for tax purposes: see 56 Law Society's Gazette page 93 but special considerations apply to this class of case).

(9) The tribunal should ask for and hear argument on the question whether the life interest of the claimant in the investments held on the residuary trusts of the Will should be treated as a capital resource under the Resources Regulations and, if so, should ask for evidence as to what its capital value is. The trustee considered that the claimant had an expectation of life of 25 years. The market value of this life interest should, it may well be argued, be treated as a capital resource of the claimant which should be added to the value of the capital resources to which she is treated as notionally entitled as an object of the discretion to pay her capital.

Conclusion

25. Our decision is set out in paragraph 1. Before parting with this case, we draw the attention of the claimant and her advisers to regulation 18(3) of the Supplementary Benefit (Urgent Cases) Regulations 1981 [S.I. 1981 No 1529] under which the benefit officer has power to pay an additional pension to the claimant, for a reasonable period and then for an extended period in a case where the claimant is taking reasonable steps to realise a notional capital resource as an object of a discretionary trust.

(Signed) I. O. Griffiths
Chief Commissioner

(Signed) V. G. H. Hallett
Commissioner

(Signed) D. G. Rice
Commissioner