

## SUPPLEMENTARY BENEFIT

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### Resources—treatment of dependant's interest in a trust fund

The claimant was a widow who lived with her two sons aged 9 and 4. Her husband died on 27.9.79 and his will was contested. A Court Order was made on 25.5.82 which created a Trust Fund and directed that the balance of the estate after legal costs and a sum awarded to the claimant should be held on trust absolutely for the 2 children in equal shares until they reached 21 years. A solicitor was made co-trustee of the funds together with the claimant. It was established from the trust's solicitor that income from the fund had been paid to the children and that during the period in issue each child had in excess of £3,000 held on trust.

The supplementary benefit officer decided that the trust income should be taken into account as a resource and a recoverable overpayment of £444.60 had occurred for the period 18.8.82–13.3.83 because the claimant had failed to disclose that money had been paid out of the trust fund. On appeal the tribunal confirmed the decision adding that the children should be treated as possessing their capital under the trust fund by virtue of regulation 4(6) of the Resources Regulations.

The claimant appealed to the Commissioner

#### *Held that:*

1. the tribunal erred in law by finding that the children had notional resources. In the circumstances of the case each child had an actual resource consisting of one half of the trust fund which but for their infancy, they could call for now; they were absolutely entitled but lacked legal capacity (paragraph 13);
2. despite the fact they had not reached the age of majority (18 years) the Court had powers to make advances out of the children's absolute interest (paragraph 13).
3. Resources Regulation 8(1) applied to both dependants. Thus the capital resources of both children must be disregarded under this regulation—the resource of each child to be treated as producing a weekly income equal to that child's requirements (paragraph 15);
4. as regulation 8(1) applied to the children's capital resources the failure to disclose payments of income out of the trust fund could not have caused an overpayment. The tribunal therefore erred by finding that the claimant had been overpaid supplementary benefit. Failure to disclose income paid out of the trust fund was, in the circumstances of this case, irrelevant when calculating the amount of supplementary benefit payable (paragraph 15).

The appeal was allowed.

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### Decision

1. Both appeals succeed. My decisions are:
  - (1) both the decisions of the social security appeal tribunal dated 26 June 1984 are erroneous in point of law and I set them aside
  - (2) it is expedient that I should give the decisions that the tribunal should have given
  - (3) my decisions are that:
    - (a) trust income from the estate of the late K. . . . C. . . . is not to be taken into account as a resource of the claimant in respect of the period 29 November 1982 to 13 March 1983 and
    - (b) any overpayment made in respect of that period is not recoverable under section 20 of the Supplementary Benefits Act 1976.

## Representation

2. I held an oral hearing of both appeals. The claimant appeared and was represented by Mr. A. Merriman, Graduated Managing Clerk with Pictons, Solicitors, of Luton. The adjudication officer was represented by Mr. C. A. M. E. d'Eca of the Solicitor's Office, Department of Health and Social Security.

## Procedural

3. An extension of time for applying for leave to appeal and leave to appeal were granted by another Commissioner. It is not entirely clear whether leave was sought, or given, against both decisions. The claimant, through her representatives, apparently did not originally contest the overpayment but now does so. I grant an extension of time for applying for leave to appeal and I grant leave to appeal, so far as this has not been effectively granted already, against both decisions.

## Nature of the appeals

4. These appeals illustrate two points. First, that the absolute and indefeasible share of a person in a trust fund is an actual resource, notwithstanding that that person is an infant and has not attained full age (18). Paragraphs (6), (7) and (8) of regulation 4 of the Resources Regulations, which relate to notional resources are accordingly irrelevant when considering the capital resources of the infant concerned, for supplementary benefit purposes. Secondly, when the capital resources of a dependant fall within regulation 8(1) of the Resources Regulations, that dependant's capital is disregarded and he is *deemed* to have an income equal to his requirements whether those resources in fact produce such an income or not. Any excess income is disregarded. In effect, the dependant is taken out of the assessment unit and nothing is paid for his normal and additional requirements.

## The supplementary benefit officer's decision

5. By a decision issued on 23 May 1983 a supplementary benefit officer decided:

- "1) Trust income from the estate of the late K. . . . C. . . . taken into account as a resource and
- 2) a recoverable overpayment of £444.60 has occurred [sic] for the period 18.8.1982 to 13.3.1983."

6. The claimant appealed against that decision. In his written submission on the appeal the supplementary benefit officer stated that the claimant was a widow living with her two sons aged 9 and 7. Her husband died on 27 September 1979 and in his Will bequeathed his estate to his brother with the proviso that he provide from the estate at his discretion for the maintenance and benefit of the two children. The claimant contested the Will and a Court Order was made on 25 May 1982 which awarded the claimant the sum of £2,250 to be paid out of the estate together with her costs and directed that the rest of the estate be held on trust absolutely for the two children in equal shares until they reached 21 years. A solicitor was made co-trustee of the funds together with the claimant.

7. The Department of Health and Social Security were aware of the Court Order by 21 June 1982, when the claimant was visited. The trust's solicitors stated in a letter received on 9 March 1983 that £400 had been paid out of the trust on 28 September 1982 and a further sum of £200 on 3 December 1982. Both sums were paid for the children. In a telephone call on 18 March 1983 the solicitors stated the estimated amount of the trust was

£10,000 and on 17 April 1984 a letter was received from them that there was a little over £6,000 capital in the trust. During the period in issue it is not in dispute it exceeded £6,000.

8. The supplementary benefit officer decided that the moneys held on trust should be treated as a resource under paragraphs (6) and (8) of regulation 4 of the Resources Regulations when calculating the claimant's supplementary allowance and that an overpayment of £444.60 had occurred for the period 18 August 1982 to 13 March 1983, which was later revised to £446.94 of which £218.40 was recoverable. The claimant made a new claim for supplementary benefit on 3 January 1984 and had been in receipt of supplementary benefit since 9 January 1984. She stated that each child had £3,000 held on trust which was confirmed by the solicitors' letter of 17 April 1984.

9. The reasons for the supplementary benefit officer's decision were stated to be that the claimant had failed to disclose the material fact that income had been received from the trust. Had it been known at the proper time supplementary benefit would have been reduced. The amount of benefit paid as a consequence of the claimant's failure to disclose the material fact of the receipt of this income was recoverable under section 20 of the Supplementary Benefits Act.

#### The decision of the appeal tribunal

10. On 26 June 1984 the tribunal gave two decisions in each of which they confirmed the benefit officer's decision. In the first decision, their reasons were that the children should be treated as possessing their capital under the trust by virtue of regulation 4(6) of the Resources Regulations as under the court order the trustees had expressed or implied discretion to pay or apply for children's benefit any income or capital. Under the Resources Regulations 8(1) the capital resources of the children shall be disregarded as a capital resource but should be treated as producing a weekly income of £8.75 for each child which was the payment equal to the weekly requirements applicable to each child under Parts II and III of the Regulations. In the second decision, their reasons were that the claimant had failed to disclose that moneys were being paid out of the trust for the benefit of the children. Had these payments been disclosed at the correct time the payment of supplementary benefit to the claimant would have been smaller. The schedule of overpayment was correct but only the payments from 29 November 1982 to 6 March 1983 were recoverable under paragraphs 1 and 2 of section 20 of the Supplementary Benefits Act [Note: The reason for this is that the children were staying with their grandparents for the rest of the period, as their mother was in hospital].

#### The relevant statutory provisions

11. These are set out in the Appendix to this decision.

#### The errors of law

12. Both decisions were erroneous in law and I set them aside.

13. The first decision was erroneous in law because it treated the children as having notional resources. Each child had an actual resource consisting of his absolute one half share of the trust fund. The tribunal was misled by the fact that the trustees of the fund had a discretion to apply income for the maintenance or benefit of the children. That discretion, which is conferred by section 31 of the Trustee Act 1925 (the Court Order contains no express power), enables the trustees to accumulate income not applied for child's maintenance or benefit. But each child is absolutely entitled to any accumulations so made on his behalf. The wording of the trust is quite

clear. Each child is awarded, by the order, an absolute half share of residue after payments of £2,250 and costs to the claimant it being directed that:

“the executor do pay or cause to be paid to the Plaintiff [the claimant] and Martin Oldham (a Solicitor of the Supreme Ct) as Trustee for the infant dependants the residue then remaining of the said deceased’s Estate in equal shares on trust for the said children on their respectively attaining the age of 21 years absolutely”.

This is clearly, as Mr. Merriman and Mr. d’Eca agreed, an absolute, not a contingent gift. Each child is entitled to his share *whether or not* he attains the age of 21 years. At the age of 18 (the age of majority: Family Law Reform Act 1969 Section 1) each child can insist on its transfer to him (together with the accumulations) notwithstanding the direction that it is to be held on trust for him until he attains the age of 21 years: see *Wharton v Masterman* [1895] A.C. 186. This is the principle of *Saunders v Vautier* (1841) (Cr. and Ph. 240). The position is similar to that considered in decision R(SB) 45/83, which is that of a Tribunal of Commissioners, where a mentally disabled person was absolutely entitled to a trust fund of £10,000 set up under a Trust Deed relating to vaccine damage payments and it was held that regulation 4(6), (7) and 8 of the Resources Regulations did not apply. But for his mental disability he could have put an end to the trust: see paragraph 14(4). But for his infancy, each child could, in the present case, call for his share now. Both are already absolutely entitled but lack legal capacity. For completeness, it should be added that the fact that there is a statutory power to advance an infant for his benefit up to one half of his share under section 32 of the Trustee Act 1925 does not detract from the fact that the whole share is his absolutely. As to the Court’s power to make advances out of an infant’s absolute interest see Halsbury’s Laws of England, 4th Edition, volume 24 paragraph 472.

14. The second decision was erroneous in law because any failure to disclose that income (or capital) had been paid out of the trust fund during the period in issue (29 November 1982 to 13 March 1983) was wholly irrelevant when calculating the amount of supplementary benefit payable to the claimant. Any overpayment was accordingly not made *in consequence* of such failure. An essential condition for the application of section 20 of the Supplementary Benefits Act 1976 is not satisfied. The reason for this turns on regulation 8 of the Resources Regulations, and regulations 11(2)(o) and 12(1)(b), which I now consider.

15. The facts are not in dispute. The Department knew of the Court Order by 21 June 1982. The claimant was entitled under the Court Order to the sum of £2,250. (It is not suggested that she had any other assets). That sum is less than the maximum resources for entitlement to pension or allowance prescribed in regulation 7, which was £2,500 from 22 November 1982 to 20 November 1983. Each child was, throughout the period in issue (29 November 1982 to 13 March 1983, it not being disputed that there was no recoverable overpayment for the period 18 August 1982 to 28 November 1982) entitled to a one half absolute indefeasible share in a trust fund worth more than £6,000. Thus the claimant’s capital resources (including those of any partner or dependant) amounted to more than the prescribed amount (£2,500) only if one or other of her dependant’s resources were taken into account and would not amount to less than the prescribed amount, even if her £2,250 were disregarded altogether, unless *both* the children’s capital resources were disregarded. Regulation 8(1) accordingly applied to both dependants. It follows that the capital resources of both children must be disregarded under regulation 8(1), the resources of each child are to be treated as producing a weekly income equal to that child’s requirements—

*whether or not they in fact produce any income*—(regulation 8(1)) that such income is to be taken into account in full (regulation 11(2)(o)) and that any excess of actual income of the child is to be disregarded (regulation 12(1)(b)). (Regulation 13 referred to in regulation 12(1)(a) clearly cannot apply). It should be added that since the capital resources of both children are to be disregarded under regulation 8(1) the value of the claimant's capital resources during the period in issue cannot have exceeded £2,500. The income from her own capital resources accordingly also falls to be disregarded: see regulation 11(4)(1). The failure to disclose payments of income (or capital) out of the trust fund (as to which see paragraphs 7 to 10 above) could not have caused any overpayment.

Conclusion

16. At the hearing before me, it was not disputed that it was expedient that I should give the decisions that the tribunal should have given and this I now do. My decisions are set out in paragraph 1 above.

(Signed) V. G. H. Hallett  
Commissioner

**APPENDIX**

Regulation 6(2), 7, 8, 11(2)(o) and 11(4)(1) of the Supplementary Benefit (Resources) Regulations 1981, as amended, as in force during the relevant period (29 November 1982 to 13 March 1983):

6. (1) .....

(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.

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.

8.—(1) Where a claimant's capital resources as calculated in accordance with these regulations—

- (a) exceed the sum specified in regulation 7; but
- (b) would be reduced to or below that sum if the capital resources of a dependant were disregarded,

the capital resources of that dependant shall be disregarded as a capital resource, but shall be treated as producing a weekly income resource equal to the weekly requirements which would be applicable to that dependant under Parts II and III of the Requirements Regulations (normal and additional requirements).

(2) Where a claimant has more than one dependant who has capital resources, paragraph (1) shall apply to that dependant or those dependants to whom the application of that paragraph in the determination of the claimant's title to pension or allowance would produce the result most favourable to the claimant.

11.—(1) .....

(2) There shall be treated as income and take into account in full—

[(a) to (n)] .....

(o) any income falling to be taken into account by virtue of—

- (i) regulation 8;
- (ii) regulation 13;

(3) .....

(4) The following income resources shall be disregarded:—

(a)

- (1) any current income from any capital resources which fall to be disregarded by virtue of regulation 6(1)(b), (d), (e), (g) or (i) or (2);

12.—(1) Where

- (a) any income resource to which regulation 11 applies but to which regulation 13 does not apply is payable to a dependant; and
- (b) after the application of regulation 11(4) and (5) that resource, or if more than one is payable the aggregate of those income resources, exceeds the aggregate of the weekly requirements

applicable to that dependant under Parts II and III of the Requirements Regulations (normal and additional requirements), the amount of the excess mentioned in sub-paragraph (b) shall be disregarded.