Resources—treatment of infant's legacy.

The claimant had three dependant daughters living with her. Two were under, and one was over, 18 at the material time Each daughter became absolutely entitled (but see note below) to £1,455.16 (or £1,455 17) by way of a legacy. The total sum of the legacies was over £3,000. The adjudication officer applied Regulation 8 of the Supplementary Benefit (Resources) Regulations and calculated the claimant's supplementary benefit entitlement by disregarding the youngest child's capital (thus reducing the total of the other two childrens' capital below the £3,000 cut-off provision in regulation 7) and taking into account a notional income resource. The Commissioner rejected the claimant's contention that as the two infant children did not have ready access to their capital the adjudication officer was wrong to apply regulation 8 and held that capital held in trust for an infant absolutely was an actual resource.

On 7 December 1988 the Court of Appeal (May, Croom-Johnson and Glidewell LJJ) allowed an appeal by the claimant and *held* that:

1. in calculating resources, actual assets which can be quantified without difficulty are to be taken into account pursuant to regulation 3 of the Resources Regulations Notional resources have to be taken into account pursuant to regulation 4. Both have to be valued in accordance with regulation 5 It is regulations 3 and 4 which deal with alternative situations, not regulations 4 and 5;

2 each daughter aged under 18 must be considered as possessing a resource comprising an equitable interest under the trust which could be advanced by up to one half of the capital until she was 18, when she was then entitled to the balance;

3. the value of that interest had to be valued under regulation 5 and could be more than 50%, but in view of the parties' agreement that value was adopted in this case.

Note: The case before the Court of Appeal was argued on the basis that a trust had been created to pay at age 18 and that sections 31 and 32 of the Trustee Act 1925 applied, but the respondent reserved the right in other cases to argue that on similar provisions there would be an outright gift, not a trust.

1. My decision is that the decision of the social security appeal tribunal dated 20 March 1986 was erroneous in point of law and it is set aside. The matter must be referred back to another tribunal.

2. The claimant is a divorced woman, who at the time in question had three dependant children living in her household, viz. Sharon born on 13 November 1965, Nichola born on 28 October 1967 and Gillian born on 6 March 1970. Each of these three children (along with other children of the claimant) was entitled to a legacy under the will of their grandmother (the claimant's mother) who died in the year 1980. She bequeathed such moneys as were standing to the credit of her account with a named bank at her death to such of her named grandchildren as should be living at her death if more than one in equal shares for their own use and benefit absolutely. The children above mentioned were three of such grandchildren and at 30 April 1984 the amount held for the children was £1,455.16 for each Sharon and Nichola and £1,455.17 for Gillian, a total of £4,365.49.

3. The adjudication officer gave a decision that the claimant's entitlement to a supplementary allowance from 14 May 1984 was £52.55 weekly. This figure was arrived at by attributing to Gillian a weekly income resource equal to her normal requirements there being no additional requirements attributable to her. The claimant appealed to the appeal tribunal against this, and her appeal was allowed. The adjudication officer now appeals to the Commissioner. He was represented at the oral hearing before me by Mr. P. Darby counsel instructed by the Solicitor to the Department of Health and

Social Security and the claimant was represented by Mr. S. Bewick a Welfare Rights Officer of the Rochdale Social Services.

4. The claimant's allowance was reduced as the result of attributing to the assessment unit a notional resource equal to Gillian's normal requirements under the provisions of regulation 8 of the Supplementary Benefit (Resources) Regulations 1981, read together with certain other provisions of those regulations. Regulation 2(1) of those regulations provides that references to a claimant's resources includes, where under the provisions of the Act the requirements and resources of any person fall to be aggregated and treated as those of the claimant, the resources of that person. The resources and requirements of the three children above mentioned were required for so long as they were under the age of 16 and thereafter so long as they continued in relevant education until they reached the age of 19 (or in certain cases 20) to be aggregated with those of their mother while they were members of their mother's household. I understand that in May 1984 Sharon was 18 and still in relevant education, Nichola was 16 and still in relevant education and Gillian was under 16. The adjudication officer accordingly decided that the resources of all three fell to be aggregated with the claimant's and that, as they added up in total to well over £4,000 they had to be taken into account in assessing the claimant's allowance. Regulation 7 (subject to regulation 8) debars a claimant with capital resources in excess of £3,000.00 from receiving an allowance. In fact the claimant personally had no capital resources, but those of her three dependant children brought the figure up above £3,000.00. Regulation 8 provides some mitigation of the rule where the figure goes above £3,000 by reason of the resources of a dependant. Its broad effect is to treat the dependant as having no capital resources but an income resources equal to the dependant's normal and (if there are any) additional requirements. If there is more than one dependant involved, one disregards the capital resources of as many dependants as is necessary to bring the figure below £3,000 and attributes to each of them an income resource equal to his or her normal and additional requirements. This has to be done in the manner most advantageous to the claimant. The adjudication officer in this case, recognising that the figure would be reduced below £3,000 if one child's money were ignored, considered it appropriate to ignore Gillian's money as her normal requirements (she had no additional requirements) were the smallest.

5. The claimant does not suggest that, if any adjustment fell to be made for the children's resources the adjudication officer acted wrongly. But she says that no adjustment fell to be made. The basis of this contention was that two of the children were infants who had not ready access to their money. The adjudication officer seems to have thought it right to treat the children as having notional resources under regulation 4(6) of the Resources Regulations rather than actual resources to which regulation 5 applied. The appeal tribunal accepted this as the proper basis for any adjustment. Applying regulation 4(8) they concluded that, as under section 32 of the Trustee Act 1925 the executors (and trustees) of the will of the claimant's mother had power to advance to the children one half of their vested or presumptive share, the proper amount to attribute to them under regulation 4(8) was one half of their respective moneys, which was enough to reduce the aggregate figure below £3,000. It will be noted they gave no consideration to whether the children had actual resources of any particular value, thereby ignoring the ruling of a Tribunal of Commissioners in decision R(SB) 45/83. Where money or property is held by one person as bare trustee for another person of full capacity that money is as much the resource of the person for whom it is held as if it were not held directly and not held through the bare trustee (see decision CSB 296/1985) relating to money held by a solicitor for

his client—a decision which on this point was expressly approved by the Court of Appeal in refusing the claimant leave to appeal (see R(SB)17/87). The present case differs in that two of the children were at the material time infants, and were thus not of full capacity, and the argument before me was on the question whether this made any and if so what difference to the position. I will turn now to this question, which was also the subject matter of the later Commissioner's decision R(SB) 26/86 now reported.

6. The executors of the grandmother's will (of whom the claimant was one) became trustees of the property specifically bequeathed to the several grandchildren by operation of law as soon as it became clear that the money so bequeathed was not required for administration (see *Re Cockburn* [1957] Ch. 438). Such of the grandchildren in question as were of full age could immediately claim their money under the so-called rule in *Saunsers v Vautier* (181) Cr and Ph 240. This rule applies only where the person concerned is absolutely and indefeasibly entitled, so that no future event and no exercise of any power can deprive the person of title; and it applies only where the person concerned is of full capacity. It is true that where the person is of unsound mind a receiver appointed by the Court of Protection can compel the handing over of the money or property to him, but that is no more than the substitution of one trustee for another. Mr. Darby submitted that an infant suing by his next friend could sue to recover the money from trustees. For myself I doubt this. The decision in *Re Somech* [1957] Ch 165, to which I was referred by Mr. Bewick, is very much against it. In that case property was held in trust for a person contingently on her attaining the age of 21 or marrying under that age. That person was an infant, had married and it was held that, notwithstanding that the trust document contained a direction that property should be handed over to any beneficiary who attained the age of 21 or married under that age, there should be an enquiry as to whether it was for the infant's benefit that this should be done.

7. The position is that a trustee cannot obtain a sure discharge from liability by handing over property to an infant who is absolutely entitled to it. A trustee owes some duty to an infant to protect him or her from the consequences of his immaturity. The trustee's resulting power to withhold property until the infant comes of age (which now happens at the age of 18) is a power coupled with a duty which exists purely for the benefit of the infant. It is quite different where the infant (or indeed the adult) has a defeasible or contingent interest in property so that there exist a possibility that he may never become absolutely entitled to it, where the trustee owes a duty to those who will succeed to the property if the infant does not become absolutely entitled.

8. A trustee for an infant has certain powers. Where he is an executor and the infant has become absolutely entitled he can pay the money or transfer the property to trustees appointed by him for the purpose under section 42 of the Administration of Estates Act 1925. He has power under section 32 of the Trustee Act to pay income to or for the benefit of the infant or to pay it to the parent *of the* income without being responsible for seeing to its application. And he has power under section 32 of the Trustee Act to apply up to one half of an infant's vested or presumptive share of capital for his benefit. The powers last mentioned are not confined to cases where the infant is absolutely entitled. But they do not detract from anything that can be done independently of these powers where the infant is absolutely entitled. If a trustee does apply capital for the benefit of or pay it to an infant who is absolutely entitled or who in the event becomes so entitled he will not necessarily be required to pay it all over again, his action may be upheld by the Courts even if it was not specially authorised by the tribunal if it was beneficial to the infant. And, as this is a somewhat risky thing for him to do a

trustee can apply in advance to the Court for directions. In view of the fact that the Court in *Re Somech* directed an inquiry into what was for the benefit of the infant I conceive that in an appropriate case the Court might overrule the trustees on an application made by or on behalf of an infant. I recognise that with capital assets of relatively small value, like those in the present case, the expense of Court proceedings would make an application to the Court unrealistic. But there is in fact in regulation 18 of the Supplementary Benefit (Urgent Cases) Regulations 1987 provision to cover the case of capital resources that are not readily realisable. (See further Halsbury's Laws of England (4th Edition) vol. 24 paragraph 472).

9. It was considerations such as the foregoing (which indicate that an asset to which an infant is absolutely entitled is a resource which, if not expended for the benefit of the infant is one that has to be husbanded exclusively for his or her benefit) that led the Commissioner in decision R(SB) 26/86 to hold that a resource held in trust for an infant absolutely was as much the infant's resource as it would be if he were an adult; and that accordingly there was no question of considering it as a notional resource. I agree with that decision. Incidentally, if it were considered as a notional resource it would be appropriate to place on it a value in excess of the one half attributed to it by the tribunal in this, a case by reference only to section 32 of the Trustee Act 1925.

10. I hold therefore that the tribunal erred in law. I do not think it appropriate that I should myself give the decision. The question is one of an on-going award, which requires to be considered week by week. I was informed at the hearing that money had been expended on maintaining the family out of Sharon's share, she being of full age. This means that the capital resource would be steadily depleted at Sharon's expense. It is possible that the aggregate figure as a result in due course fell below £3,000. In any case I understand that Sharon ceased to be in relevant education before her nineteenth birthday. When that happened she ceased to be a dependant and her resources ceased to be aggregated with those of the claimant. And any supplementary benefit appropriate to her would have had to be claimed by her. From that time on I imagine that the resources of the other two children would not together have exceeded £3,000. I note also that Nichola was at all material times over 16 so that she too remained a dependant only if she was in relevant education. It may be necessary for enquiries to be made into that if she ceased to be in relevant education before Sharon.

11. The adjudication officer's appeal is allowed.

Commissioner's File No: CSB 629/88.

(Signed) J. G. Monroe
Commissioner

A **VALERIE PETERS** Appellant
(Appellant)

and

THE CHIEF ADJUDICATION OFFICER Respondent
(Respondent)

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Limited,
B Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2).

MR. MARK ROWLAND (instructed by Messrs. Sinclair Taylor and Martin, London Agents for Messrs. Isherwood and Hose, Heywood) appeared on behalf of the Appellant/Appellant.

MR. DUNCAN OUSELEY (instructed by the Solicitor to the Department of Health and Social Security) appeared on behalf of the Respondent/Respondent.

C JUDGMENT

(Revised)

LORD JUSTICE MAY: This is an appeal with leave from a decision of Mr. J.G. Monroe, a Social Security Commissioner, of 2nd June 1987 pursuant to section 14 of the Social Security Act 1980.

The case is concerned, in the supplementary benefit context, of the proper
D treatment of a resource which is held in trust for an infant and into which I shall go in more detail in a moment.

In so far as the statutory background to this case is concerned, one starts with section 1 of the Supplementary Benefits Act 1976 as amended and in force in May 1984 when the relevant events occurred. That provides—

> "1(1) Subject to the provisions of this Act, every person in Great
> E Britain of or over the age of 16 whose resources are insufficient to meet his requirements shall be entitled to benefit as follows:
>
> (a) a supplementary pension if he is one of a married or unmarried couple of whom one is or both are over the age of 65 or if he is not one of such a couple and has attained pensionable age; and
>
> (b) a supplementary allowance in any other case."

A Section 2(2) of the Act provides:

> "Entitlement to, and the amount of, any supplementary benefit shall be determined in accordance with the provisions of this Part of this Act and Schedule 1 to this Act."

One therefore moves to the first Schedule to the Act and by paragraph (1) it is provided—

B "(1) The amount of any supplementary benefit to which a person is entitled shall, subject to the following provisions of this Schedule, be the amount by which his resources fall short of his requirements.

(2) For the purposes of ascertaining that amount—

(a) a person's requirements shall be determined in accordance with
C paragraph 2 of this Schedule; and

(b) a person's resources shall be calculated in the prescribed manner;

and without prejudice to the generality of paragraph (b) of this sub-paragraph, regulations in pursuance of that paragraph may provide for a person to be treated as possessing resources which he does not possess and for disregarding resources which a person does possess.

D (3) Regulations may provide that a person whose resources as ascertained in pursuance of paragraph (b) of the preceding sub-paragraph or a prescribed part of them exceed or exceeds a prescribed amount shall not be entitled to a supplementary pension or allowance."

One can then turn to paragraph 3(2) of the Schedule, which provides that—

E "(2) Where a person is responsible for, and is a member of the same household as, another person and they are not a married or unmarried couple, then—

(a) if the other person is a child or is excluded from entitlement to supplementary benefit by section 6(2) of this Act; or

(b) if the circumstances are such as are prescribed, their requirements
F and resources shall be aggregated and treated as those of the first-mentioned person."

Pausing there, I ought to go back to section 6(2) of the Act merely to mention that that provides that—

> "A person who has not attained the age of 19 and is receiving relevant education shall not be entitled to supplementary benefit except in
G prescribed circumstances."

Consequently the combined operation of the paragraph in the Schedule and the section in the Act is that if a person is a child up to the age of 16 or a child up to the age of 19 receiving full-time education, that child's requirements and resources are to be aggregated and treated as those of the first mentioned person, that is to say the claimant.

Regulations have been made under paragraphs (1) and (2) of the first Schedule and for present purposes they are the Supplementary Benefit (Resources) Regulations 1981, (S.I. 1981 No. 1527). I start with the definition regulation 2, which amongst numerous other definitions, provides that an " 'assessment unit' means the claimant, and any partner and dependant of the claimant", and there one has an echo of the provisions in paragraph 3(2) of the First Schedule and in section 6(2) of the Act to which I have just referred; and "'claimant' means a claimant for supplementary benefit and references to a claimant's resources include, where under the provisions of the Act the requirements and resources of any person fall to be aggregated with and treated as those of the claimant, the resources of that person."

One can then move on to regulation 3. Sub-regulation (1) of it provides that—

> "(1) For the purposes of Schedule 1 resources for any period shall be calculated in the manner set out in these regulations."

Sub-regulation 2 lists a number of different cases and provides that some shall be treated as capital resources and others as income resources.

I turn to the regulation which has caused more trouble in this case than the others and that is regulation 4. It is contained in the body of regulations under the rubric "Notional resources". I need not read it all. 4(2)(a) provides:

> "(2) Any resource which either—
>
> (a) would become available to a member of the assessment unit upon application duly being made, but which has not been acquired by him;...
>
> may, if, in the opinion of the benefit officer it is reasonable in the circumstances to do so, be treated as if it were possessed by him."

Regulation 4(6) provides:

> "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

A express or implied discretion to pay him, or apply for his benefit, any income or capital."

Sub-regulation (8) is another material part of regulation 4. I need not read it in full. It lays down how the appropriate share of a trust resource, referred to in sub-regulation (6), is indeed to be calculated.

I now move on to regulation 5, noticing that on the way I pass a heading B "Part II", a headline "Capital Resources" and a rubric "Calculation of Capital Resources". Then, in so far as is material, regulation 5 provides:

"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—

C (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;"

The only part of regulation 6 which needs reference is sub-regulation (2):

"Where the value of a claimant's capital resources (including those of a D partner or dependant) is calculated in accordance with these regulations is [£3,000] 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."

The other side of that particular coin appears in regulation 7 to this effect: "Subject to regulation 8, where the value of the claimant's capital E resources (including those of a partner or dependant) as calculated in accordance with these regulations exceeds [£3,000], the claimant shall not be entitled to pension or allowance."

Finally one should refer to regulation 8:

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

F (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 G 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."

The facts of this case, and the adjudication officer's decision, are conveniently set out on pages 16 and 17 of the bundle before us.

The claimant, Mrs. Peters, was at the material time divorced and she lived with her three dependent daughters, Sharon, Nichola and Gillian. Sharon was born on 13th November 1965 and therefore became 18 on 13th November 1983. Nichola was born on 28th October 1967, becoming 18 on 28th October 1985. The youngest of the three daughters, Gillian, was born on 6th March 1970 and thus became 18 on 6th March 1988.

On 18th April 1984 the Social Security Authorities received a letter from the claimant's solicitors telling them that the three girls had each received the sum of £1,455.16 under the will of their grandmother. Consequently the claimant's supplementary allowance was reduced with effect from 14th May 1984 as that capital was treated as being available to the children. But on 17th May another letter was received, saying that the money had been left in trust until the children were 18 years of age, Mrs. Peters, the claimant herself, and a Mr. Zawadzki being the trustees.

Various inquiries were then made. After referring to the relevant regulations, the Adjudication Officer's decision on page 17, paragraph 17 was that "In Mrs. Peter's case the adjudication officer decided that, as Gillian's normal requirements were the lowest of her 3 dependants, being £13.70 per week, her capital resources should be disregarded (thus bringing the assessment unit's capital resources below the £3,000 stipulated in regulation 7), but that it should be treated as producing a weekly income resource of £13.70. This produced the result most favourable to Mrs. Peters in the determination of her supplementary allowance."

On 19th November 1984 the claimant appealed against that decision of the Adjudication Officer and on 20th March 1986, in a decision published on 8th April that year, the Rochdale Social Security Appeal Tribunal allowed her appeal. It is unnecessary to go into the details of the Appeal Tribunal's decision, because the matter then went by leave to the Commissioner, who allowed the appeal on 2nd June 1987. The essential part of his decision appears on page 14 of the bundle. He concluded that he was required by an earlier decision of the Commissioners to hold "that a resource held in trust for an infant absolutely was as much the infant's resource as it would be if he

were an adult". It is against that finding that the claimant now appeals to this court. It will therefore be seen, as I said at the start of this judgment, that the whole issue in this case is how, for the purposes of the supplementary benefit or allowance legislation one has to treat moneys held in trust for an infant, part of an assessment unit in respect of which the claimant is making a claim to supplementary benefit or allowance.

I should say that by the terms of the grandmother's will, which is on pages 20 and 21 of the bundle, it would seem that the relevant moneys were given outright to the three girls, although subsequently a trust was constituted in respect of the sums. I mention that because counsel for the respondents was prepared to accept for the purposes of this appeal that a trust was validly brought into existence in relation to the three daughters' entitlements under their grandmother's will, but that was without prejudice to his right in any other case to argue that on similar provisions there would not be a trust, but an outright gift by the will, to the relevant children. I suspect that various concessions and agreements have been made in this particular appeal in order that a decision may be obtained from this court on the principal issue, namely how one is to treat an infant's equitable interest under a trust for the purposes of the supplementary benefit legislation. Indeed the full concession by counsel for the respondents for the purposes of the present appeal was that the moneys left to the three girls by their grandmother were at the material time held by trustees on trust to pay the sums over to the girls on attaining the age of 18 and that this was a trust to which sections 31 and 32 of the Trustee Act 1925 applied, thus the trustees had the power in 1984 (which is the period with which we are concerned) to advance up to 50 per cent of the moneys held by them for each girl whilst the trust still subsisted, for their benefit, education and maintenance. It is on that basis that this appeal has been argued.

It has been argued on behalf of the appellant in this way. It is accepted that at the material time the eldest girl, Sharon, had reached 18 and therefore had a resource amounting to the whole of her trust fund by virtue of regulation 4(2)(a) to which I have referred.

In so far as the other children were concerned, the trustees were entitled, as I have said is the concession, to advance to each up to one half of their moneys and therefore, although the children perhaps strictly did not have the right to call for one half from the trustees, it was argued that it would be proper to consider one half of each trust fund as a resource which each child did and should bring into the assessment unit for present purposes.

A On behalf of the Department it was argued that in the first place these were not discretionary trusts properly so called. Mr. Ouseley drew attention to the fact that, as with an adult entitled to a bare trust, these trusts in favour of these children were certain as to the beneficiary, were certain as to amount, were certain as to whether or not they were going to be paid in the ultimate event, there was no doubt about the entitlement of the child at the age of 18 B and there was an obligation on the trustee either to hold and invest the trust moneys, or to spend at least half on the child during the minority. He submitted that in those circumstances it was proper to treat each child's entitlement under her trust as being a resource under the legislation of the full value of the capital sum held in trust. If, however, that submission was not accepted, counsel was prepared in the present case—and in the present C case only—to agree with the appellant's contention that the proper assessment of the resource of each child, other than Sharon, was one half.

The result, subject to more particular arithmetic which will have to be carried out hereafter, of such a view of the children's fund is that there would be £1,450 as a resource from Sharon's entitlement, there would be half of that, some £725, as a resource in respect of each of the other two girls, the D total would be just under £3,000 and accordingly the resources should not be taken into account in assessing the supplementary benefit under that part of the regulation to which I have already referred.

For my part, however, I respectfully disagree with the contentions put forward on behalf of both the appellant and the respondent and also with the decision of the learned Commissioner. I think it is essential to look at the E general scheme set up by the statute and Regulations. The Act requires one to look at resources on the one hand and requirements on the other. The present appeal is concerned with resources and I do not propose to refer further to requirements. The nature and value of many resources of claimants for supplementary allowances will admit of no doubt or argument; for instance, savings in a bank, National saving certificates, deposits in a building society; F they are clearly resources of an obvious and clear value.

There seems in the past history of this type of litigation to have grown up a distinction between actual assets on the one hand, to which it has been said that regulation 5 applies, and notional assets on the other, to which regulation 4 applies. That, in my view, is an erroneous approach to this statutory scheme. The actual assets, which one can quantify without G difficulty, I have already referred to—the bank deposits, for instance. They come into the equation pursuant to the provisions of regulation 3. Regula-

A tion 4 is concerned with those potential assets of any member of an assessment unit which are at least arguably not a resource but which the Act and the regulations provide shall be brought into account as a resource. That is why they are called a notional resource. They have, as do any resources, to be valued according to regulation 5. Regulations 4 and 5 do not, as I think, deal with alternative situations. The alternative situation is between the B actual resource under 3 and the notional resource under 4. Each has to be valued "in so far as is applicable" (the words in regulation 5) by virtue of that regulation 5. Consequently, in the instant case, so far as the girls' equitable interests in the trusts were concerned, the provisions of regulation 6(8), which I did not quote in full, nevertheless show that the respective girls' interests were in the whole of the capital sums the subject of their respective C trusts and under the terms of the trusts by the concessions which have been made, the trustees had a discretion to advance at least one-half of the capital of each trust pending the majority of the children.

In my judgment, therefore, each girl, for the purposes of the supplementary benefit legislation, must be considered as having possessed a resource comprising an equitable interest under the trust, which could be advanced up D to one half until she attained the age of 18 and then she was entitled to the whole of the balance not advanced at the age of 18. That was the resource. That fell to be valued under regulation 5, because its value did not clearly appear from regulation 6 or the facts.

The appellant contends, as I have said, for 50 percent of the capital sum as its value. The respondents are prepared to agree for present purposes. E However, I am not satisfied that the value of that resource, valued pursuant to regulation 5, could not be more than 50 percent. In an appropriate market a discretionary entitlement of up to 50 percent now and at least 50 percent in, say, six months in a given case, or three to four years in another, could well be said to have a value greater than 50 percent of the capital value of the trust. It may be, of course, that in many cases a valuation of 50 percent of the F capital in the trust will be as accurate an estimate as one can make. But that is not necessarily so. However, it is an estimate on which, if the learned Commissioner is held to have been wrong, as I think he was, the parties are ad idem for the purposes of this appeal.

I would therefore allow the appeal, direct that at the material time Sharon had a resource of the full capital sum and the others of one half. In those G circumstances the matter must then go back to the relevant Appeal Tribunal to make an appropriate arithmetic decision on the ruling that this court gives.

LORD JUSTICE CROOM-JOHNSON: I agree.

LORD JUSTICE GLIDEWELL: I also agree. In particular I would like to emphasise what my Lord has already said that, in so far as there has in some of the decisions been an impression that there is a distinction to be drawn between actual resources and notional resources and that notional resources fall to be dealt with under regulation 4 whereas actual resources fall to be dealt with and valued under regulation 5, that impression is erroneous. I entirely agree with my Lord that if a claimant, or any member of an assessment unit, has a capital resource, one has to decide first whether that is a resource of an obvious kind, such as those to which my Lord has referred, or is a notional resource under regulation 4. If it is established that there is a resource then subject, if it is notional, to some of the particular sub-regulations in regulation 4, it falls to be valued under regulation 5.

I wholly agree with my Lord and with the result he proposes.

Appeal allowed with costs. Legal aid taxation of the appellant's costs.

MR. ROWLAND: My Lord, two matters. First, as far as the relief is concerned, your Lordship indicated the matter should go back to the Tribunal for the arithmetic to be done, but as I understand your Lordship's decision that decision is that the capital resources are less than £3,000 and therefore there is no arithmetic to be done.

LORD JUSTICE MAY: I understood Mr. Ouseley to suggest that if one went into the arithmetic, it might not be precisely £1,400 and precisely £700 and one might be over the £3,000.

MR. OUSELEY: That was a concern that I had, yes. The evidence as to the figures is fairly scant, but the reference to an amount one sees at page 11, paragraph 2—a reference to an amount held as at 30th April 1984. But that I think derives from the earlier letter from Mrs. Peters' solicitors relating to an earlier date showing what they have got from the will.

LORD JUSTICE MAY: I am concerned to bear in mind that perhaps the trustees may have invested the sum. If the figures are £1,400 and £700 then you can agree it, but in any event until the matter is finally determined I think it should go back to the tribunal.

MR. ROWLAND: The other question is the matter of costs. The appellant is legally aided. I would ask for an order for costs and for an order for legal aid taxation.

A **LORD JUSTICE MAY:** You cannot argue with that, can you?

MR. OUSELEY: In the light of your Lordship's comment I won't press the point.

LORD JUSTICE MAY: The appeal will be allowed with costs. There will be legal aid taxation of the appellant's costs.
