R(SB) 9/91

Mr. D. G. Rice **CSB/626/1989**
30.11.90

Notional capital - deprivation of capital – whether intention to obtain benefit is shown where that is not the predominant motive but is a significant operative purpose

The claimant had been receiving supplementary benefit as an owner occupier for some years. Following a stroke, she entered hospital on 6 November 1985 and her supplementary benefit ceased. On 4 April 1986, she transferred the beneficial interest in her property by deed of gift to her two daughters. Some three weeks later, the claimant entered a nursing home and supplementary benefit was reinstated. Her appointee notified the local office on 3 October 1986 that the claimant's former home was up for sale, and it sold on 21 January 1987 fetching £26,000 net. The adjudication officer then decided that supplementary benefit had not been properly payable while the claimant had been in the nursing home as she had deprived herself of her property to secure supplementary benefit. On appeal, the tribunal varied the adjudication officer's decision to the extent of disallowing supplementary benefit from the end of October 1986 and requiring a review in November 1988. The claimant, through the appointee, appealed to the Commissioner.

Held that:

1. the phrase " ... for the purpose of ..." in regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 requires the demonstration of a positive **intention** to secure benefit. It is not enough to assert that the natural **consequences** of deprivation was to secure an allowance (para. 8);

2. the intention to secure supplementary benefit need not to be the **predominant** motive underlying the relevant transaction (R(SB) 38/85 affirmed). In the present case, the predominant motive was doubtless to benefit the claimant's children, but a significant operative purpose was also to obtain supplementary benefit and the claimant was caught by regulation 4(1) (paras. 14 and 15);

3. the claimant had to be treated as still possessed of the property, but its value fell to be disregarded for as long as regulation 6(1)(a)(i) or (iii) of the Resources Regulations applied, in this case until the house was sold (para. 15). Thereafter, "the principle of diminishing capital" would apply as in R(SB) 40/85 (para. 16);

4. at the time the deed of gift was made, the claimant was *compos mentis*; her daughter, as appointee, acted only to carry out the mechanical operation of making a formal claim and receiving benefit (paras. 9 and 13).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons appearing below, the decision of the social security appeal tribunal given on 7 April 1988 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that, subject to the operation of "the principle of diminishing capital", the claimant is not entitled to supplementary benefit for any period from and including 21 January 1987.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 7 April 1988.

An oral hearing was directed, and at that hearing the claimant, who sadly died on 17 February 1989 and whose appeal was being continued by her daughter, Mrs. Julia Quinn as her executrix, was represented by Mrs. Vivienne Gay of Counsel, instructed by Messrs. Thelwell Fagan and Co., Solicitors, whilst the adjudication officer appeared by Mr. A. Prosser of Counsel, instructed by the Solicitor's Office of the Departments of Health and Social Security.

3. The facts of the case which are not in dispute can be conveniently summarised as follows. On 2 November 1985 the claimant (born on 29 November 1908), who had been in receipt of supplementary benefit for many years following the death of her husband, suffered a stroke whilst on holiday. On 6 November 1985 she was admitted to hospital in Buckinghamshire. Her daughter Mrs. Julia Quinn reported this to the local office, and on 9 December she applied to become the "appointee" of her mother on the basis that, in consequence of the stroke, she was unable to act for herself. That application was approved, and the appointment authorised, the same day. As the claimant had ceased to be entitled to supplementary benefit by virtue of her residence in hospital, her benefit was discontinued as from 12 November 1985. However, she continued to receive her retirement pension. On 8 January 1986 she was transferred to Clatterbridge Hospital, Wirral.

4. Prior to her admission to hospital, the claimant had lived at 6 Hillview Road, Irby, a property of which she was the owner-occupier. On 4 April 1986 that property was transferred by way of gift to the claimant's two daughters, the said Mrs. Julia Quinn and Mrs. J. Evans. On 25 April 1986 she entered Priory Mount Nursing Home and on that date supplementary benefit was re-instated. There is a note in the records of the local office that on 3 October 1986 Mrs. Quinn telephoned and stated that she understood that "profit from houses to be used by claimant to live on. House is up for sale at £29,000 with Whitegates Estate Agent." Seemingly at this stage, Mrs. Quinn did not expect the State to bear the cost of the claimant's maintenance. On 2 February 1987 Mrs. Quinn notified the local office that the sale of the property had been completed on 21 January 1987 and that the sum of £26,000 had been received. Also on 2 February 1987 the adjudication officer decided that the claimant was not entitled to supplementary benefit "from the prescribed pay day, Tuesday in pay week commencing 21 April 1986". However, I understand that the payment was in fact continued until 3 February 1987, and that, as far as these proceedings are concerned, the question of any possible recovery of benefit overpaid does not arise. As from 3 February 1987, only retirement pension was paid to the claimant.

5. In due course, the claimant appealed to the tribunal, who varied the adjudication officer's decision and decided that the claimant was not entitled to benefit "from prescribed pay day nearest to the end of October 1986 and that payment of an allowance should be reviewed in November 1988".

6. The tribunal went into the matter with a commendable thoroughness. They made detailed findings of facts and gave as the reasons for their decision the following:

> "The tribunal could not accept that the appellant's intention should be considered only in the light of a deliberately held limited knowledge of her situation and referred to paragraph 9 of R(SB) 40/85 that it is not normal to ascertain a person's purpose from direct evidence[;] it is a matter of inference

from primary facts found. The natural consequence of the gift would secure an allowance and the appellant was aware of conditions for an allowance.

The tribunal consider a reasonable period of disregard of the home is six months having regard to the period taken to sell after the house was eventually put on the market.

It is also considered reasonable to review the appellant's capital after a period of two years when regard should be had to the cost of her keep over the period."

7. It was not in dispute before the tribunal that the claimant's house was a capital resource, and that by transferring it by way of gift to her daughters on 4 April 1986, she had deprived herself of that resource. Further, it was not in dispute that, had she retained the property or the proceeds of sale thereof, she would have had resources in excess of the statutory maximum (then £3,000), and in consequence would not on any footing have been entitled to benefit. The real question at issue was whether, notwithstanding that she had deprived herself of the property, she was still to be treated as possessed of it. The critical regulation was regulation 4(1) of the Supplementary Benefit (Resources) Regulation 1981 (SI 1981 No. 1527], which, as far as is material to the appeal, reads as follows:

"4. (1) Any resource of which a member of the assessment unit has deprived himself for the purpose of securing supplementary benefit ... may be treated as if it were still possessed by him."

8. Manifestly, the tribunal took the view that the claimant had deprived herself of a capital resource "for the purpose of securing supplementary benefit", and that accordingly such resources should be treated as if it were still possessed by her, with the result that there was no entitlement to supplementary benefit. Mrs. Gay attacked that decision on a variety of grounds and was enthusiastically supported by Mr. Prosser who in substance adhered to the written submissions of the adjudication officer. It is unnecessary for me to consider their criticisms of the tribunal's decision, because I am in any event satisfied that the tribunal erred in point of law by reason of the somewhat cryptic terms in which the reasons for their decision were couched, and more particularly by their failure to grapple with the difficult problem of whether or not the deprivation was "**for the purpose of** [my emphasis] securing supplementary benefit". I do not think that it was enough for the tribunal merely to say that "the natural **consequence** [my emphasis] of the gift was to secure an allowance". A positive **intention** to secure benefit has to be shown. Accordingly, I must set aside the tribunal's decision as being erroneous in point of law. However, I do not consider it necessary for me to remit the matter to a new tribunal for rehearing. All the facts are before me, and I can conveniently substitute my own decision.

9. Mrs. Gay, in her very helpful and lucid submissions to me, first stressed that at all times, and particularly on the day of the transfer of property, the claimant was *compos mentis*. There had never been any suggestion in this case that she had been suffering from senile dementia, and although it was accepted that she had suffered a stroke, the disabling consequences of this were only physical, and not mental. She invited me to take judicial knowledge of the fact that the normal consequence of a stroke was physical rather than mental. Although the claimant's daughter Mrs. Quinn had been appointed in December 1985 her mother's appointee on the grounds that the

claimant was unable to act for herself, this, Mrs. Gay contended, had no adverse implication, as far as the claimant's mental capacity was concerned. Mrs. Quinn, in her application for an appointment, was merely using the statutory words, as suggested by an officer at the local office, and the only reason why she was appointed was because physically her mother could not conveniently deal with the mechanical process of claiming and receiving benefit. I accept that submission.

10. Mrs. Gay next contended that there was clear evidence to show that the claimant transferred the property to her two daughters with the sole intention of benefiting them and with no other object in mind. She drew my attention to an affidavit sworn by the claimant on 6 April 1988. Paragraphs 3 and 4 read as follows:

> "3. I know very little about any Supplementary Benefit Regulations or rules. When I decided to give my old home 6 Hillview Road, Irby to my two daughters the only thought in my mind was that the house was no longer any good to me and that since I intended to leave the house to my two daughters in my will I wished to give it to them in my lifetime. This was the only reason for the Deed of Gift being made in my lifetime.
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> 4. There is now produced to me and marked 'AMAO1' a copy of an attendance note which I understand was prepared by my solicitor Mr. Noel James Fagan ... at the time when I signed the Deed of Gift to my two daughters and I understand that the relevant portion of the attendance note reads as follows:
>
> > 'I asked [the claimant] if intention of gift to her daughters was the only intention she had and she said that was her only intention and rather than her two daughters getting the house on her death she wanted to give it to them now, since she no longer needed it.'
>
> I believe that the above attendance note accurately records what was said at the time when I executed the Deed of Gift and accurately represents my knowledge and intentions at and about the time of signing the Deed of Gift."

11. Unfortunately for Mrs. Gay's case, the affidavit is of limited value. It clearly shows that the claimant intended to make a **gift** of the property, and did not wish to retain any beneficial interest by way a resulting trust. Moreover, she did not mean to transfer the property by way of mortgage. But it does not show why she wanted the property to pass to her daughters **at that particular time**. To say that "the house was no longer any good to me" (she intended to go into a nursing home after she left hospital and in fact moved there within three weeks) does not resolve the far more important question, for the purposes of this appeal, why the **proceeds of sale** of the house were no longer of any use to her. If a person decides that he or she has no longer any need for his or her present home, the normal reaction is to sell it and take the proceeds of sale. In the present case, in giving away the house, the claimant also gave away its realisable value, and no explanation appears in the affidavit as to why the claimant adopted this course. To say that the property was left to the two daughters in the claimant's will is no explanation as to why she decided to donate it in her lifetime. This was not the case of a rich lady who could afford to give away her home and still have ample resources to live on.

12. Further, great stress is laid in the affidavit on the "intention of gift" being the "only intention". But I have to bear in mind that the question put to the claimant was

loaded, the questioner clearly having the terms of regulation 4(1) in mind. I note in this connection the finding of the tribunal:

> "It is admitted by the appellant's advisers that it was the appellant's intention to leave the house to her daughters by her will and it is conceded by her advisers that they were aware that the house or its value would be preserved for her daughters if it was given to them in her lifetime before she became liable for nursing home fees. They freely admit that they were aware that the appellant would not secure supplementary benefit if she retained the house."

Likewise, she would not obtain supplementary benefit if she was caught by the provisions of regulation 4(1). For if there was an intention to secure supplementary benefit, this would be fatal to the whole exercise. It is not surprising, then, to find the question put in the form in which it was, and it would appear to me highly doubtful, on the balance of probability, that the claimant appreciated its significance. I note a further finding on the part of the tribunal:

> "The appellant stated her intention in regard to the house in response to questions only as to her intention and although she was asked if she had any other intention no other intention was suggested and this was deliberately so having regard to the terms of the regulations."

What would have been exceedingly interesting to know is what would the claimant's answer have been to the full and frank question "if you give away your home to your daughters instead of selling it and receiving the money for it, what will you live on?". If this question had been put, it is difficult to avoid the conclusion that she would have in effect said either "I never thought of that, I had better not give the property away" or alternatively, "I will live on supplementary benefit, as I always have done since my husband died".

13. Mrs. Gay went on to submit that if the effect of the gift was to render the claimant entitled to supplementary benefit, this was simply the natural legal consequence of her action, but it did not follow from this that she made the gift "for the purpose of securing supplementary benefit". In other words, there had to be a deliberate intention to obtain benefit; it was not enough that it was the accidental consequence of the Deed of Gift. It must be remembered that the claimant was *compos mentis* at the time of the gift, that, by virtue of her having been in receipt of supplementary benefit for many years, she must be regarded as reasonably familiar with the supplementary benefit system, and that she would have realised that, had she been in possession of the house or the proceeds of sale of the house, she would not be eligible to receive benefit. To take any other view would, in my judgment, fly in the face of commonsense. Accordingly, she would have known that, if she wished to retain her right to supplementary benefit, she would have to divest herself of her former home (and the proceeds of sale thereof). She could not have both. What did she in fact decide to do? She decided to give away her home (and the proceeds of sale) **and** claim supplementary benefit. I am, of course, aware that her daughter Mrs. Quinn was actually doing the claiming as her appointee but, as stated above, the claimant was herself still mentally in control of operations, and Mrs. Quinn was only there to carry out the mechanical operations of making a formal claim and actually receiving the money. So, the factual position was simply that the claimant gave away her property (which was put up for sale a few months later) and claimed supplementary benefit. In the light of those facts, what intention should, on the

balance of probability, be attributed to the claimant at the time when she made her gift? I can reach no other conclusion, on the balance of probability, than that she divested herself of the property, at least partly, for the purpose of claiming supplementary benefit.

14. It must be borne in mind that securing supplementary benefit need not be the **predominant** motive underlying the relevant transaction. As was said in R(SB) 38/85 at paragraph 22:

> "Suppose a claimant on supplementary benefit inherits a large sum of money and proceeds to gamble with it and incur losses. Someone warns him that if he continues in this way he will be back on supplementary benefit and he replies 'if I lose, that is my idea'. His predominant purposes in gambling with the money would obviously be to win at gambling. But it would be open to the adjudicating authority to decide on these facts that another purpose was to obtain supplementary benefit."

In the present case, the predominant motive was doubtless to advance the claimant's children. But a significant operative purpose was also to obtain supplementary benefit in the same exercise. In other words, the claimant's intention was to kill two birds with one stone, to accelerate the daughters' inheritance and at the same time to claim supplementary benefit. There were two co-ordinate purposes.

15. Accordingly in the circumstances I consider that the claimant is caught by regulation 4(1), and that I must treat her as being, after the execution of the deed of gift, still possessed of the property in question. Of course, that property was originally a home and as such disregarded. Moreover, the disregarding will continue pursuant to regulation 6(1)(a)(iii) for such period as it might be reasonable to consider necessary to effect its sale. In the present case the property was not sold until 21 January 1987. There was no evidence that there was any delay involved in the selling, and accordingly I consider that it would be proper to disregard this particular capital resource until that date.

16. Thereafter "the principle of diminishing capital" should apply. (See R(SB) 40/85 para. 13). If and when the claimant's requirements, had they been met out of the proceeds of sale of the property, would have reduced the value of the notional resource below the relevant statutory maximum, from that moment of time the claimant should cease to be regarded as debarred from benefit by virtue of regulation 4(1).

17. With effect from 11 April 1988 supplementary benefit was abolished and income support took its place. Regulation 4(1) was in, substance replaced by regulation 51(1) of the Income Support (General) Regulations 1987 [SI 1987 No. 1967]. 1 have had no argument directed to me as to whether, having disposed of the property before the coming into effect of the income support legislation, the claimant might succeed in claiming income support for any part of the relevant period, and in any case this was not a matter ever adjudicated upon by the adjudication officer. Accordingly, I express no view whatsoever on this aspect of the case.

18. Before leaving this matter I consider that I should refer to the somewhat unsatisfactory way in which this appeal has been handled by the adjudication officer. The written and oral submissions made by or on behalf of the adjudication officer were directed solely to supporting the claimant's case. Of course, the adjudication

officer is not expected to argue the unarguable, and he should quite fearlessly support the appeal if he considers that no other course is properly open to him. However, if there is an arguable case pointing in the opposite direction, he should, for the assistance of the Commissioner, develop all relevant arguments, even if at the end of the day he submits that on balance they are not enough to defeat the claimant. In the present instance, I have received no assistance from the adjudication officer's oral or written submissions in exploring what I consider the fallacies underlying the claimant's case. I hasten to exonerate Mr. Prosser personally from this criticism, because I am sure he was merely carrying out instructions. However, at the end of the day, as this is an inquisitorial jurisdiction, I have to view all aspects of the case, and it is not satisfactory to leave possible arguments unexplored. The Commissioner who was originally going to hear this appeal asked that Counsel should appear on behalf of the adjudication officer, which should have been sufficient warning that matters of considerable difficulty were involved, and that the adjudication officer's written submissions were open to challenge.

19. My decision is as set out in paragraph 1.

Date: 30 November 1990

(signed) Mr. D. G. Rice
Commissioner