Assets test: disposal of property

MAZZELLA and SECRETARY TO DSS

(No. 4931)

Decided: 21 February 1989 by H.E. Hallowes.

Elena Mazzella applied for an invalid pension in 1985. Although qualified, she was not paid any pension because of the assets test, as she owned a block of four flats purchased in 1983 and estimated to be worth $150 000.

Mazzella again applied for invalid pension on 13 April 1987. By that time she had transferred ownership of two-thirds of the block of flats to her two daughters. Once again the claim was rejected due to the assets test.

In rejecting the claim the DSS included as Mazzella's property the full value of the flats less an allowance of $21 000 for moneys borrowed from her daughters between 1975 and 1983 to meet expenses not connected with the flats. Mazzella asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.6AC(1) [now s.6(1)] of the *Social Security Act* provided that the value of property in excess of $2000 disposed of by an unmarried person in any 'pension year' should be included in the person's assets.

Section 6AC(10) provided that a person disposed of property where the person diminished the value of her property for 'no consideration or inadequate consideration, in money or money's worth'; or the Secretary was satisfied that the person's 'dominant purpose' was to obtain a pension or payment of a pension at a higher rate.

The term 'pension year' was defined in s.6AC(13) (only para (c) of which was relevant to this review) 'in relation to a person who is receiving a prescribed pension' to be each succeeding and preceding 12 months from 'the pension pay-day on which [the] pension ... first became payable'.

The evidence

Mazzella's daughters had been given money by relatives which, by the end of 1975, totalled $21 000. In October 1975 Mazzella was injured in a motor vehicle accident making her incapacitated for work. Between 1975 and 1983 she used her daughters' money for their schooling, and for family expenses.

in 1983 Mazzella received $135 000 in settlement of a personal injuries claim arising out of the motor vehicle accident. The whole amount was invested in a block of four flats which was purchased in her own name. At the time of the purchase she considered including her daughters in the contract but, on legal advice, decided the property should remain in her name until her daughters reached the age of 21.

A trust deed was signed by Mazzella on 15 October 1986 in which it was stated that the block of flats had been purchased with funds that belonged partly to her and partly to her daughters. It recounted the reason for registering the flats in her name and acknowledged that the property was held by her as trustee for herself as to one-third share and for her daughters as to two-thirds share. The daughters' share was to be transferred to them when they had both reached the age of 21 years.

In February 1987, about one month after her younger daughter turned 21, a two-thirds interest in the block of flats was transferred to her daughters.

Mazzella contended that the consideration for transferring this interest to her daughters was the use she made of their money between 1975 and 1983 and home help her daughters provided to her since the motor vehicle accident.

Pension year

The AAT decided that the s.6AC(13) definition of 'pensioner year' did not cover Mazzella's situation because she was not a person 'who is receiving a pension' as she had never been paid a pension. However the AAT decided to use the period of 12 months from the pay-day on which pension would have first been paid to Mazzella had any pension been payable, 16 April 1987.

Purpose to obtain pension?

The AAT accepted Mazzella's evidence and was satisfied that she did not transfer two-thirds of her interest in the block of flats to her daughters in order to obtain a pension. The transfer was effected out of moral obligation to her daughters.

Inadequate consideration

Applying the Federal Court decision in *Frendo* (1987) 41 *SSR* 527, the AAT decided that at the date of transfer

> 'there was no act, forbearance or promise by the daughters such that Ms Mazzella received adequate consideration in moneys worth when she transferred her interest'.

(Reasons, para. 24)

Allowing for the daughters' interest

Finally, the AAT decided whether Mazzella held two-thirds or some lesser part of the flats in trust for her daughters at the date of transfer. The recent Federal Court decision in *Dineen* (see this issue of the *Reporter*) was cited for the proposition that the AAT is entitled to disregard a self-serving trust document created after the event and find that no express trust was created.

The AAT accepted Mazzella's evidence that the source of the purchase price for the flats was her settlement money. This was contrary to the trust deed which recited that the funds used to purchase the flats belonged partly to Mazzella and partly to her daughters. The trust deed was self-serving and could not be relied on to establish the desired trust over the property.

However, the AAT was prepared to find a constructive trust, limited to $21 000, in favour of the daughters, applying the principles in the High Court decision in *Baumgartner v Baumgartner* (1987) 62 ALJR 29.

It came to the conclusion that justice would be satisfied to affirm the decision under review. There was no provision in the Act permitting an allowance for inflation on top of the $21 000 obtained from her daughters' bank accounts. This outcome was 'practical' and preferable to 'the Tribunal pursuing complicated factual inquiries as to deposits and withdrawals from the daughters' accounts over the relevant period': Reasons, para. 27.

Formal decision

The AAT affirmed the decision under review.

[D.M.]