Administrative Appeals Tribunal decisions

Assets test: disposal of property

TOKOLYI and SECRETARY TO DSS

(No. 7650)

Decided: 10 January 1992 by R. A. Balmford.

Mrs Tokolyi asked the AAT to review a DSS decision, affirmed by the SSAT, rejecting her claim for age pension on the grounds that her assets precluded payment of pension. Included in the assets were amounts of money Mrs Tokolyi had paid to her 2 sons.

Background

Mr and Mrs Tokolyi came to Australia from Hungary in 1957. They had 2 sons, Gabor and Leslie. They established a business which was sold in 1972 and they then purchased as joint tenants 2 farming properties, on the outskirts of Melbourne. (They also owned their matrimonial home as joint tenants.)

In 1977, Mr Tokolyi was granted invalid pension and Mrs Tokolyi received a wife's pension. In the same year, Mr Tokolyi executed a will naming his wife as executrix. Aside from a legacy of $5000 to his son of a previous marriage who had remained in Hungary, all his property was to be left on trust with the income to his wife for life and thereafter to be divided between the 2 sons, Gabor and Leslie, in equal shares.

In 1982 Mr Tokolyi was found to have cancer and he died in September 1983.

In February 1984, Mrs Tokolyi's solicitors applied for her to be registered as surviving proprietor of the 2 farming properties and the matrimonial home, and the sum of $5000 was sent to Mr Tokolyi's son in Hungary.

Mrs Tokolyi had commenced to receive an age pension in December 1983 but, after completing a Statement of Assets in March 1986, her pension was cancelled. In the meantime, with some help from her sons, she had done some work clearing and developing the farming properties and these were both sold in 1987 for a total of $420 000. In 1988, she sold her home for $245 000 and purchased another for $167 947.

In 1987 and 1988, Mrs Tokolyi paid to her sons amounts totalling $227 772, of which $85 000 went to Gabor and the remainder to Leslie. She also invested $60 000 in the Pyramid Building Society and a further $80 000 in Custom Credit. The latter amount was withdrawn in September 1989 and paid to Leslie.

On 23 November 1989, Mrs Tokolyi re-applied for age pension but her claim was rejected due to assets. A further unsuccessful claim lodged on 24 August 1990 was the subject of this appeal. The SSAT affirmed the rejection of her claim by taking into account as part of her assets the amounts paid to her sons in 1987 and 1988 and the amount of $80 000 paid to Leslie in 1989, as well as her investment in Pyramid.

Mrs Tokolyi disputed the decision to include the amounts paid to her sons as she submitted that the $227 772 was paid pursuant to an oral agreement between her husband, herself and her sons under which the proceeds of the sale of the properties were to be divided (leaving aside the $5000 legacy) in 4 equal shares, or 3 if the sale took place after Mr Tokolyi's death. She said that, under this agreement, the amounts to the sons were to be adjusted to take account of the fact that Gabor had previously received more from his father than had his brother Leslie. Mrs Tokolyi also claimed that the $80 000 paid to Leslie in 1989 was loan, which he had little prospect of repaying; and that the Pyramid investment had lost most of its value following the freezing of its accounts in June 1990.

The legislation

The claim under review was lodged in 1990. As the date of effect of the AAT decision would be prior to 1 July 1991, the AAT applied the Social Security Act 1947 in dealing with this appeal.

At the relevant time, s.6(2) provided that where an amount of property had been disposed of, any amount exceeding $10 000 was to be included as part of the person's assets.

By s.6(3), if the disposition occurred prior to 1 March 1991, the amount was to be reduced by 10% for each of the next 5 years, after which it ceased to be taken into account.

Section 6(10) provided that a person was to be taken to have disposed of property where the person disposed of or diminished the value of property where the person received no or inadequate consideration in money or money's worth: s.6(10)(a); or the disposition was made for the purpose of obtaining a pension, or receiving pension at a higher rate: s.6(10)(b).

Section 4(11) provided that any unpaid amount of money loaned after 27 October 1986 (though not the interest) was to be included in the value of the property of the person.

Finally, section 7 allowed the Secretary to consider applications for payment of pension where the application of the assets test would lead a person to suffer severe financial hardship, where section 6 did not apply or the Secretary decided that its application should be disregarded. But the Secretary could only exercise this power where the person had applied in writing under the section.

The arguments

Counsel for the DSS submitted that some of the asset values upon which the original decision and the SSAT decision were based had now been shown to be incorrect; that the payments to the 2 sons of $227 772 were dispositions of property within ss.6(2) and 6(10) and should be included in Mrs Tokolyi's assets; that the amount remaining unpaid of the loan of $80 000 to the son Leslie should be included as an asset; that the Pyramid investment should be valued after 24 June 1990 at the discounted value of Victorian Government Security Bonds held by Mrs Tokolyi; and, finally, that the hardship provisions (s.7) were not available to the applicant as no written application had been made.

Counsel for Mrs Tokolyi submitted that she had taken title to the farming properties pursuant to the oral agreement made by the family, which had the effect of severing the joint tenancy, so that she did not take title as the survivor. It was argued that there was a release by all parties of their rights under the will and that this release, on the part of the sons, amounted to consideration.

Counsel also argued that the payments made to Mrs Tokolyi's sons were in consideration of the work the sons had done on the 2 properties and that the events which occurred constituted part performance, such that a court would order specific performance of the agreement. In effect, her counsel

argued that she had not disposed of property: she had merely carried out the terms of the agreement or of a constructive trust consistent with the terms of the agreement or of an obligation enforceable by virtue of the doctrine of promissory estoppel.

Each of these arguments was disputed by counsel for the DSS.

The AAT's reasoning

The AAT found that each of Mrs Tokolyi's 2 sons had an expectation of receiving roughly one third each of the proceeds of the sale of the 2 properties. The Tribunal also found that the legal scenario presented on behalf of Mrs Tokolyi was unnecessary since, even if the discussions took place as submitted, no agreement was needed to carry into effect the parties' wishes. As a result of Mr Tokolyi's death, his widow became sole owner by right of survivorship of all 3 properties and she was then free to deal with them as she chose, including in accordance with what she and her family had agreed.

Turning to the will, the AAT found that no-one had released or surrendered any rights under the will, which was administered by solicitors. Nor did the Tribunal accept that any consideration had passed from the sons since the will conferred no rights upon them which could be surrendered. The evidence of their participation in the work of the properties was not significant and there was no evidence of any other consideration.

After considering the recent decision of the High Court in *Corin v Patton* (1990) 64 ALJR 256, the AAT held that the joint tenancy had not been severed so as to prevent Mrs Tokolyi taking the properties as surviving tenant. There was no evidence of any intention to do so; nor was it necessary to do so in order to carry out the family's intentions. As to the argument that the sons' conduct constituted part performance such that a court would order specific performance of the remainder of the agreement, the AAT noted that the only conduct referable to any agreement were statements made by the sons when seeking business finance that each son's assets included a share of a family trust to the value of approximately $150 000.

The AAT noted that s.53(1) of the *Property Law Act* 1958 (Vic.) provides that no interest in land can be created or disposed of except in writing, and a declaration of trust respecting any land must be manifested in writing. However, resulting, implied or constructive trusts are exempted by s.53(2). Accordingly, the Tribunal considered whether there was a constructive trust.

After considering the High Court decisions in *Baumgartner v Baumgartner* (1987) 164 CLR 137 and *Muschinski v Dodds* (1985) 160 CLR 583, the AAT held that there was no action on the part of Mrs Tokolyi's sons which would have rendered it unconscionable for her not to sell the 2 farm properties or not to dispose of the proceeds as had been discussed. Although the AAT found that the sons had an expectation of receiving a share of the proceeds of the sale, there was no evidence that either acted to his detriment in reliance on that expectation.

The tribunal also rejected the argument based on promissory estoppel, again finding that there was no evidence of any detrimental reliance on the part of the sons (see *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 and *Kintominas v Secretary to DSS* (1991) 63 *SSR* 891; 103 ALR 82).

The AAT concluded, after referring to further evidence from Mrs Tokolyi that she considered the agreement made binding on her, that –

> 'Had the family members intended to enter into a legally binding agreement, they could have sought legal advice to ensure that this was achieved.'
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> (Reasons, para. 42).

A further argument made on behalf of Mrs Tokolyi and rejected by the AAT was that the purpose of s.6(10)(a) was only to catch sham agreements entered into for the purpose of avoiding the assets test. It was held that purpose, while relevant to paragraph (b), was irrelevant to paragraph (a). On this basis, the AAT held that the amounts of $227 772 paid to the 2 sons were property disposed of by Mrs Tokolyi for no consideration and accordingly should be included in the value of her assets.

On the issue of the $80 000 amount paid to Leslie, the AAT found that it was intended as a loan, not a gift and accordingly, it also formed part of the property within s.4(11) of the 1947 Act.

Finally, the AAT considered the investment in Pyramid Building Society and decided that prior to 24 June 1990, its face value should be taken into account and after that date, it should be assessed at the discounted value of the Victorian Government Security Bonds.

As to the hardship provisions, the AAT held that this issue was not before the Tribunal as no application had been made under s.7 and the matter had not been considered by either the primary decision maker or the SSAT.

Formal decision

Although the AAT agreed in substance with the decision under review, because there were variations in detail between the findings of the SSAT and of the AAT, the AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the reasons for decision.

[R.G.]

Assets test: resulting trust, problems of proof

ARONOVITCH and SECRETARY TO DSS

(No. 7557)

Decided: 6 December 1991 by J.R. Dwyer, P.J. Burns and L.S. Rodopoulos.

Aronovitch was the sole registered proprietor of a Bentleigh property, which was not her principal home. The value of that property, if included in her assets, would preclude payment of sickness benefits to her under the benefits assets test.

Aronovitch said that the property was owned beneficially by her mother, Mrs Rubel, who lived in Israel. She said that the property had been bought by her and her husband on behalf of her mother with $17 000 funds provided by Rubel and brought into Australia by a friend, Mr Rothstein, who was no longer alive. Under a 1979 Family Court approved agreement between Aronovitch and her husband, the property was transferred from their joint names to Aronovitch as sole proprietor.

On various occasions, including in the Family Court agreement, Aronovitch had referred to the Bentleigh property as hers without indicating that she held it on trust for her mother. Her evidence concerning how the money was brought into Australia by Mr Rothstein, and on other details,