Administrative Appeals Tribunal Decisions

Age pension: farm assets and trusts

AGNEW and SECRETARY TO THE DSS (No. 13072)

Decided: 8 July 1998 by B.H. Burns.

Mr and Mrs Agnew lodged applications for age pension in May 1996. Their applications were rejected by the DSS on the ground that their assets were above the limit for receipt of pension. This decision was affirmed by the SSAT. Mr and Mrs Agnew argued that $396,546, being the value of farm property which they had disposed of, should not have been included in their assets.

The facts

Until 19 September 1995 Mr Agnew was the registered proprietor of a farm property 'Rosedene'. From the late 1970s Mr and Mrs Agnew and their 3 sons carried on a farming business at Rosedene in partnership.

As at 30 June 1995 the partnership was indebted to Austrust Ltd in the sum of $371,105.60. The debt was secured in part by a registered mortgage over Rosedene; it was also secured in part by personal guarantees given by Mr and Mrs Agnew.

The partnership was dissolved on 1 July 1995, and on 7 March 1996 a deed expressing the terms of the dissolution of the partnership was entered into by Mr and Mrs Agnew and their sons. Mr and Mrs Agnew were no longer members of the partnership, which was carried on by their 3 sons. The 3 sons assumed responsibility for all the debts and liabilities of the partnership, and indemnified Mr and Mrs Agnew in respect of liability for any of the outstanding debts. The land Rosedene was not a partnership asset.

On 19 September 1995 Mr Agnew sold Rosedene to Rosedene Nominees Pty Ltd, the trustee of the Rosedene Family Trust. The Trust was created on 19 September 1995. The beneficiaries of the Trust were the 3 sons, their spouses and children. The sale price was $450,000. Austrust Ltd agreed to discharge the mortgage of approximately $350,000, and take a new mortgage over the land. The purchaser, that is the Nominee company, was liable to pay the mortgage out. Mr Agnew then gifted the balance of the purchase price to the Nominee company.

It was agreed that the market value of Rosedene at the relevant time was $450,000.

The legislation

The relevant sections of the *Social Security Act 1991* are s.1121A, which sets out how to work out the value of a person's assets if the person is a primary producer and has liabilities that are 'related to the carrying on of primary production' and ss.1123 and 1124 on disposal of assets. In effect, these sections state that a person disposes of assets if they do not get any, or adequate, value for those assets. The value of the assets disposed of are included as part of the assets of the person for the calculation of the asset test in determining eligibility for receiving social security payments.

Section 1125A in effect states that if a disposition of assets occurs in a pre-pension year, then there must be taken into account, for a period of 5 years, as part of the assets of the person, 50% of the value of the disposition which exceeds $10,000.

The DSS decided that the full value of Rosedene was an asset which had been disposed of by the Agnews, and therefore its full value should be taken into account when assessing their eligibility for pensions. The DSS also contended that at the time of the disposal of Rosedene Mr Agnew personally had no liabilities related to primary production which would reduce the value of the asset (pursuant to s.1121A) as any liability he owed to the partnership had been erased, prior to the transfer, when he was given a complete indemnity by his sons.

Mr and Mrs Agnew's main contention was that at the time of the disposal, Rosedene was held by them on trust for their sons, and hence their beneficial interest in the asset was significantly diminished. In the alternative they argued that at the time Rosedene was transferred to the trustee it was subject to a liability in the form of the mortgage to Austrust Ltd, in the sum of $371,106 and this sum ought to be subtracted from its value in accordance with s.1121A. That is, the value of the asset gifted was $78,894.

The trust

For the Agnews it was argued that each of the 3 sons had left their occupations in Adelaide, and gone onto the land, in the 1970s. The land was farmed by the partnership until 1995. In 1980 the Agnews went to live in Perth, where Mr Agnew had been offered a job, leaving his sons to carry on farming. Mr Agnew stated that in 1980 he considered transferring the land to the sons' names, but for the cost of stamp duty. From that time, management decisions were made without his input, the sons purchased additional property, upgraded plant and equipment and improved the land. During this time, the mortgage rose to about $370,000.

Mr Agnew retired in 1995, and the Agnews both returned from Perth to South Australia. It was then that the property was transferred to the trustee company. Mr Agnew said the property was transferred to the trustee company rather than to his sons directly because the size of the property made it impractical to divide it equally between them. Mr Agnew agreed that when he went to Perth he had not been sure how the property was to be divided between his sons.

Peter Agnew, the eldest son, stated that from the time the parents went to Perth, he and his brothers had considered the land theirs to manage as they thought fit. He stated that had they not thought of the land as theirs, they would not have increased the mortgage to the extent that they did, and would have behaved more conservatively in the management of the property. In 1988, when the financing of the farming operation was shifted from the ANZ bank they again considered whether Rosedene should be transferred into their names, but decided against this course of action partly due to the cost of stamp duty, but also because Mr Agnew's independent income on the partnership books was viewed positively by the mortgagees.

Peter stated that he and his brothers farmed 4500 acres, 2500 of which they own, of which 1120 is Rosedene. He agreed that all the improvements had been for the year to year profitability of the farming business, and that the loan and mortgage over Rosedene serviced the whole of the farming operation, not just Rosedene. He also agreed that Mr Agnew had not derived any benefit from these improvements, as he had never drawn any profit from the farm or partnership while he was in Perth. He and his brothers all wanted to go on the land, they were not doing their parents a favour by remaining on the land. Indeed, it was the parents, by moving to Perth, and allowing them to live on the property rent free, who had done the sons a favour.

The Agnews argued that there was a constructive trust, in that Mr Agnew, when he went to Perth, made a representation to his sons that the land was theirs, and that based on this the sons incurred a large debt which they would not otherwise have been a party to.

The AAT stated that for there to be an express trust, there are 3 essential ingredients: first, there needs to be certainty of intention to create a trust; second, there needs to be certainty of the subject matter, that is the property being held on trust; and third, there must be certainty of object, that is of the persons who are intended to benefit from the trust, and the extent of the benefit.

The AAT found that Mr Agnew had not, by words such as 'its yours now' divested himself of all rights as beneficial and legal owner. Rather, there were specific reasons for maintaining the legal title in Mr Agnew's name – stamp duty would be avoided, Mr Agnew would derive a tax advantage and the sons would derive an advantage when applying for loans. Moreover, the AAT found that had the sons decided to do something which jeopardised the continuing ownership of Rosedene, Mr Agnew would have intervened. That finding is enough to negative an express trust.

The AAT accepted the comments in *Fallone and Secretary to the DSS* (1987) 11 ALD 477,

> 'Administration of the assets test legislation is an extraordinarily complex and difficult task. It is important for all who might be subject to its application, that the assets test be administered fairly. It can only be administered fairly by the respondent where clear evidence is submitted, by those who would seek to avoid or reduce its application, that property or money which has all the appearance of being in their hands has in fact legitimately passed to someone else.
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> It is possible, in the context of family life, to elevate all kinds of understandings and expectations between family members into agreements which might be claimed legitimately to have divested pension recipients of whole or part of their assets. If, through the Tribunal's interpretation of the assets test legislation, it were made possible to allow such expectations and understandings to be so elevated, the respondent would be in an impossible position in its attempts to dispute the legitimacy of dispositions of assets, as part of its duty to ensure fair and equal application of the assets test formula to all who might fall within it.'

The AAT then looked at whether there was a constructive trust. There are 3 necessary elements of a such a trust — first, a common intention as to the ownership of the beneficial interest; second, the party claiming a beneficial interest must be able to show that he or she has acted to his or her detriment; and third, that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property [*Hohol v Hohol* [1981] VR 221]. The AAT accepted that the second and third points are two sides of the same coin.

The AAT found that there was no constructive trust over Rosedene at the time of its disposal. First, it had already found that there was not a common intention that the beneficial ownership should pass to the sons. The AAT also found that the sons had not acted to their detriment, in that they all wanted to live and work on the land. The improvements made to the land were for the benefit of the profitability of the farming operation. Further, they enjoyed 15 years use of the land at no cost and were able to use Rosedene as security for loans taken out to service both Rosedene and their other farming interests, three-quarters of which had nothing to do with Rosedene. No unconscionable act would have been committed by Mr Agnew should he have asserted an unfettered right over the land on his return from Perth.

Liabilities over the land at the time of transfer

Section 1121A allows for the value of primary production assets to be reduced where a person has primary production liabilities which relate to the primary production. The relevant time is that at which the asset is disposed of. The AAT held that at the time the property was transferred, Mr Agnew had no liabilities with respect to the partnership debt, as he had been given a full indemnity by his sons. Therefore, s.1121A could not apply to reduce the value of the asset.

The AAT also found, although it was not necessary for the decision, that the debt existing over Rosedene did not relate to 'the carrying on of *the* primary production' as required by s.1121A(1)(c). Where a liability in the form of a mortgage is registered over one property but relates to primary production carried out on several properties, some of which are owned by another, the whole of that liability cannot be deducted from the value of that one property, but must be shared proportionally between them.

The AAT decided that the value of Rosedene disposed of for no consideration was $450,000, and this sum less the disposal limit of $10,000 was to be included in the calculation of Mr and Mrs Agnew's assets when assessing their eligibility for age pensions.

Formal decision

The AAT affirmed the decision under review.

[A.B.]

Disability support pension: residing overseas, 'severely disabled'

BLUNDELL and SECRETARY TO THE DSS (No. 12972)

Decided: 12 June 1998 by B.A. Barbour and J.D. Campbell.

The SSAT decided on 15 April 1997 to affirm an earlier DSS decision that Blundell did not qualify for disability support pension (DSP). Blundell sought review in the AAT. The issue was whether he continued to be eligible for DSP 12 months after leaving Australia. His entitlement would only continue if Blundell established he was severely disabled when he left Australia on 15 November 1995.

The facts

Blundell had received DSP since 26 March 1992. The DSS assessed him as having a 35% impairment from back pain, right leg sciatica and bilateral knee pain. In August 1993, Blundell consulted Dr Pell, a neurosurgeon. He underwent an arthroscopy and partial menisectomy on his left knee on 14 September 1994. In August 1995, Pell recommended spinal surgery. On 4 September that year, Pell performed nerve root decompressive surgery at St Vincent's Hospital. Blundell was discharged from hospital 6 days later and Pell's clinical notes indicated he made a good recovery from a successful operation.

On 15 October 1995, Blundell applied to have his DSP paid whilst overseas, indicating he intended to depart for England on 15 November 1995. Twelve months after his departure from Australia, the DSS reviewed his entitlement, deciding he no longer qualified for DSP.

The legislation

Sections 1213A(2) and (3) of the *Social Security Act 1991* provides that a person does not continue to be entitled to DSP 12 months after leaving Australia, unless they were severely disabled as at the date of departure. Eligibility for DSP also lapses if a person who was severely disabled on departure does not continue to be so disabled.

Section 23(4B) provides that a person is 'severely disabled' if they have a physical, psychiatric or intellectual impairment that renders that person totally unable to work for the next 2 years, and they are unable to benefit from a rehabili-