

[2015] NZSSAA 091

Reference No. SSA 071/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Auckland against a decision of a
Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace	-	Chairperson
Mr K Williams	-	Member
Lady Tureiti Moxon	-	Member

HEARING at AUCKLAND on 13 October 2015

APPEARANCES

Mr S Broadbent for the appellant
Ms T Donnelly for Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee that she should be required to make a contribution of \$1,217.28 a fortnight to the cost of her rest home, care on the basis of income.

Background

[2] The appellant is aged 77 years. She suffers from Alzheimer's Disease. She began living in a residential care facility on 1 October 2014.

[3] An application for Residential Care Subsidy was made on her behalf on 24 November 2014.

[4] The Chief Executive concluded that the appellant had deprived herself of estimated income of \$45,395.89 and found that she should pay \$1,217.28 per fortnight towards her residential care.

[5] The appellant sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to this Authority.

[6] The information available about the appellant's financial circumstances is that on 5 July 1989 the appellant and her husband (now deceased) became the trustees and, together with their children, discretionary beneficiaries of a Trust known as the A W & G I XXXX Family Trust (the Family Trust). The settlor of the Family Trust was the appellant's brother-in-law but there is no suggestion that he contributed any capital to the Family Trust.

[7] On the same day as the Family Trust was settled, the appellant and her husband sold their holiday home at Whitianga to it.

[8] In later years the appellant and her husband transferred their family home to the Family Trust, together with other property including Mr XXXX's share in XXXX Ltd. In addition, the Family Trust acquired shares in two investment property-owning companies, XXXX Properties Ltd and XXXX Rentals Ltd. We understand that a gifting programme was carried out.

[9] When the appellant's husband died he left all of his estate to his wife. This included the amount received from the sale of his legal practice. On 9 July 1998 a second Trust was settled by the appellant's brother-in-law. The appellant was the sole trustee of this Trust. The beneficiaries were the appellant's children. This Trust was called the A W & G I XXXX Children's Trust (the Children's Trust). The assets left to the appellant by her husband were transferred to the Children's Trust. We understand the amount involved was approximately \$282,000.

[10] In carrying out the financial means assessment, the Chief Executive accepted that the appellant's assets were below the limit specified in the provisions relating to long-term residential care in Part 4 of the Social Security Act 1964. He then proceeded to consider the appellant's eligibility for a subsidy based on income. The available income was assessed in two ways. The first method was to consider the actual trust income based on the Family Trust's accounts for the year ending 31 March 2014 and assess notional income on certain assets in the Family Trust. Income was assessed as follows:

XXXX Rentals Ltd	\$26,189	
XXXX Properties Ltd	\$9,830	
XXXX Ltd	<u>\$ 8,227</u>	
Total net income	\$44,246	(Total A)

[11] Notional income from the other Family Trust assets, excluding the house at Whitianga and the family home, was calculated as follows:

Investments	\$33,290
Westpac term deposit accounts	\$195,056
Loan to Pene XXXX	<u>\$ 87,099</u>
Total assets included	\$315,445

[12] At the Reserve Bank rate of 4.19%, the Ministry estimated that income of \$13,217.15 (Total B) could be earned from these assets. Total income was then calculated as follows:

Total A \$44,246 plus Total B \$13,217.15 =	\$57,463.15
Less 21% allowance for tax =	<u>\$12,067.26</u>
Assessed annual income	\$45,395.89

[13] The Chief Executive considered that this income was a reasonable assessment of the income that would have been available to the appellant had she and her late husband not deprived themselves of assets and income.

[14] An alternative method of assessing income was also considered. The total value of all assets was assessed to be approximately \$1,935,000. Applying the current Reserve Bank interest rate of 4.19% would result in notional annual income of \$81,093.50.

[15] Mr Spencer, giving evidence on behalf of the Chief Executive, noted a third option available would have been to calculate the total of all assets, deduct the value of the house and the beach house on the basis that the appellant or her representative should be given time to arrange for the sale of that property or otherwise arrange to earn an income from that property, and calculate notional entitlement on the balance.

[16] A decision was made that the first option based on the combination of actual and notional annual income of \$45,395.88 was a fairer approach at this stage. The appellant's income contribution to her residential care costs was assessed as being \$1,217.28 per fortnight.

[17] The appellant, represented by her son Mr XXXX, objects to the assessment. He submits:

1. The appellant and her husband never gifted more than the amount permitted of \$27,000 per annum. As the gifting of assets was permitted under the Regulations, it follows that the income associated with those assets must also have been gifted and such gifting permitted.
2. The appellant has not deprived herself of income. Before the appellant's mental incapacity the Family Trust distributed a fair return on the money the appellant lent to the Family Trust. Following her incapacity the trustees have continued to distribute a similar fair amount as beneficiary income. Further, if the current trustees decide not to distribute income, the appellant cannot be said to have deprived herself of income. The appellant does not have the mental capacity to deprive herself of anything.
3. To transfer the family home and the beach properties to the Family Trust does not constitute deprivation of income because there was never any intention to derive income from the properties and there never was any income.
4. The Family Trust has benefitted from the capital profits on its investment properties. The appellant did not contribute to the purchase of the properties or to maintaining or managing them. Mr XXXX has done much of the work involved for no reward.

Legislation Relevant to this Appeal

[18] A person who has been assessed as needing long-term residential care, who wishes to seek funding from the Government for that care, may apply under the provisions of Part 4 of the Social Security Act 1964 for a financial means assessment. Eligibility for government funding is dependent on the result of the means assessment. A financial means assessment may be conducted as to either assets or income. Section 146 provides for a means assessment as to assets. In this case, it has been accepted that the appellant's assets fall within the applicable asset threshold and that although gifting has taken place, that gifting was permitted gifting and the deprivation provisions of the Act do not apply to the appellant's assets.

[19] If an applicant's assets fall within the applicable asset threshold, the Chief Executive is then required to conduct a means assessment as to income. Section 147 applies to the means assessment as to income, which is conducted under Part 3 of Schedule 27. The assessment of income must assess the annual income of the person at the date of the means assessment, and must determine a weekly contribution up to the maximum contribution that the person must pay from income towards the cost of contracted care services provided.

[20] Clause 5 of Schedule 27 defines "income" for the purpose of the means assessment as to income and provides that a person's annual income is his or her estimated income for the 52-week period commencing on the date of the means assessment.

[21] Section 147A of the Act provides as follows:

147A Deprivation of assets and income

- (1) If the chief executive is satisfied that a person who has applied for a means assessment, or the spouse or partner of that person, has directly or indirectly deprived himself or herself of any income or property (other than an exempt asset), the chief executive may in his or her discretion conduct the means assessment as if the deprivation had not occurred.
- (2) If the chief executive is satisfied that a person who has been means assessed, or the spouse or partner of that person, has directly or indirectly deprived himself or herself of any income or property (other than an exempt asset), the chief executive may in his or her discretion include that income or property in a review of the person's means assessment under section 150 as at the date of means assessment as if the deprivation had not occurred.

[22] Regulations known as the Social Security (Long Term Residential Care) Regulations 2005 specify actions which are considered to amount to deprivation, but deprivation is not limited to the examples given. Examples relevant to deprivation of income include:

9B Deprivation of property and income

- (d) a failure at any time to exercise any right or entitlement to demand a payment:

Example

The spouse of the person being means assessed makes a loan to another person with interest on the loan being payable on demand. The spouse of the person being means assessed never makes a demand for the interest.

The spouse of the person being means assessed may be treated as having deprived himself or herself of interest to the extent of the amount of interest that is payable on demand.

- (e) a waiver of a right at any time to receive any entitlement or payment:

Example

The person being means assessed and that person's partner jointly own a rental property. The tenants of that property fail to pay the rent payable under the tenancy agreement.

The person being means assessed and that person's partner take no action to recover the unpaid rent.

The person being means assessed and his or her partner may be treated as having deprived themselves of income to the extent of the unpaid rent.

- (f) an investment at any time in non-income-earning assets:

Example

The person being means assessed deposits savings in a non-interest-bearing bank account.

The person being means assessed may be treated as having deprived himself or herself of income to the extent of income that could have been earned on the savings if the savings had been invested in an interest-bearing bank account.

Decision*Calculation of income*

[23] Mr XXXX did not make any criticism of the Option 1 calculation of income other than to state that the interest rate used was not the current interest rate. The interest rate applicable is the interest rate applying at the date of assessment, not the current interest rate at the date of the hearing, whether it be lower or higher. The date of assessment in this case is 24 November 2014

[24] In addition, if the return on capital assessment method was used, he suggests that the value of one of the properties was lower than the value provided in the Chief Executive's assessment of the total capital value of the assets of both Trusts. As that method was not used to make the final determination in this case, it is not necessary for us to consider that matter further at this time.

[25] In effect, the Chief Executive has concluded that the appellant and her husband have deprived themselves of income, and has assessed the appellant's income as though that deprivation had not occurred.

[26] It is important to understand in the first instance that deprivation of income need not be with the intention of obtaining a benefit. All that is required is a deliberate act on the part of the individual.¹

¹ *Blackledge v Social Security Commission* High Court, Auckland CP81-87, 17 February 1992 and *Keenan v Director-General of Social Welfare*, High Court, Auckland AP24-SWO0, 19 June 2000.

[27] It is also relevant to note, that bearing in mind the context and purpose of the financial means assessment provisions, the phrase “*spouse or partner of that person*” in s 147A(1) includes the deceased or former spouse of the partner or partners.²

[28] In this case the appellant and her late husband at various times have deprived themselves of assets and the associated income by:

- (a) transferring their assets and any income associated with those assets to the Family Trust;
- (b) making decisions to place assets acquired after the establishment of the Family Trust in the ownership of the Trust rather than in their personal ownership;
- (c) in the case of the appellant, transferring the funds and assets she inherited from her husband to the Children’s Trust;
- (d) failing to ensure that interest was paid on the loan made to the Family Trust by the Children’s Trust;
- (e) failing to ensure that loans made to other beneficiaries of the Family Trust generated an income; and
- (f) failing to ensure all of the Family Trust would be paid to the appellant.

Does the permitted gifting of assets under Regulation 9B of the Social Security (Long Term Residential Care) Regulations 2005 impact on the assessment of income?

[29] The submission made on behalf of the appellant is that because gifting is permitted under the provisions relating to assets and the amount gifted by the appellant and her husband did not exceed the permitted amount of \$27,000 per annum, it follows that the income associated with those assets must also have been gifted and that this gifting was permitted gifting.

[30] The provisions relating to allowable gifting are contained in reg 9 of the Social Security (Long Term Residential Care) Regulations 2005. Regulation 9(1) specifically provides that:

“For the purpose of paragraph (b) of the definition of assets in Clause 4 of Part 2 of Schedule 27 of the Act, allowable gifts are gifts of real or personal property (for example, money) gifted during the gifting period ...”

² See [2013] NZSSAA 70.

[31] The significance is that allowable gifting is specifically stated to be in relation to the definition of assets. There is no reference to allowable gifting being relevant to the definition of 'income' in Schedule 27 of the Act.

[32] The provisions for the means assessment as to assets and the means assessment as to income are contained in separate provisions in the Act. There is no suggestion that one is dependent on the other.

[33] Regulation 11 of the Regulations makes specific provision for income exempt from the means assessment. There is no express provision that income associated with gifted assets should be exempt.

[34] Section 147A gives the Chief Executive a discretion to conduct a means assessment as to income as if the deprivation had not occurred if he is satisfied that the person being means assessed or their spouse or partner has directly or indirectly deprived themselves of income.

[35] We are satisfied that in the absence of any express provision in the Act or Regulations, the discretion in s 147A applies, regardless of allowable gifting of assets permitted in relation to the asset assessment.

Timing of Deprivation

[36] Mr XXXX submitted that the appellant has not in the past, nor is she currently, capable of making a decision to deprive herself of income.

[37] The primary events of deprivation took place when the appellant and her husband decided to place their assets in the Family Trust at the time the Trust was settled. Further deprivation of income occurred when assets subsequently acquired were placed in the Family Trust, resulting in any income capable of being earned by those assets to belong to the Trust. Whether or not in terms of trust law the distributions that have been made are fair, or whether or not the current trustees decide not to distribute income, is not entirely relevant. The point is that the various assets and the income associated with those assets could have been held in the personal names of the appellant and her husband. Alternatively, even if the assets were held by the Family Trust, the appellant and her husband could have ensured that all available income from the Family Trust was available for their support rather than making provision for other family members.

[38] Moreover, while Mr XXXX submits that there was never any intention to earn an income from the beach house and the family home, the point is that had they not been transferred to the Trust, and rather held in the personal names of the appellant

and her husband, now that she no longer has a need for those properties, they are assets which could be realised to provide an income to meet the cost of the appellant's care.

Contribution of the appellant to the Trust property

[39] Mr XXXX submits that the appellant did not contribute anything towards purchasing the investment properties or maintaining and managing them. She was never entitled to the returns and therefore never deprived herself of those returns. Mr XXXX referred to the work that he, in particular, and his brother-in-law have done for the Family Trust. He recalled that his father was a wise man whose role he had tried to replace in preserving the assets of the Family Trust for the beneficiaries. He regrets that in relation to the property he shares ownership with the Family Trust and did not purchase it in his sole name.

[40] As previously outlined, we consider that the legislation allows for deprivation by the appellant's late husband to be taken into account, as well as deliberate decisions made by the appellant. In fact, as trustee of the Family Trust she must have agreed to decisions about the purchase of assets. Mr XXXX's submission overlooks the fact that the capital the appellant and her husband placed in the Family Trust would have enabled the subsequent purchase of investment properties. It seems to particularly ignore the fact that the appellant placed all the assets left to her by her husband in the Children's Trust, which then lent that money to the Family Trust.

[41] Mr XXXX considers that much of the growth in the asset values of the Family Trust are solely through the decisions he has made and the unpaid labour that he contributed to the Family Trust. We infer Mr XXXX's efforts in relation to the Family Trust are on the basis that, as a beneficiary of the Family Trust, he stands to reap the benefit of his efforts eventually. We infer that there were benefits for Mr XXXX in the Family Trust purchasing half of the property in which he shares ownership. Without his parent's capital at the outset there would be no Trust.

[42] The assets of both trusts are significant. They are well able to provide the income the appellant needs to meet her Residential Care costs at this stage of her life and provide a substantial inheritance for Mr XXXX and his siblings when she has passed on.

Funding of illness compared with funding in old age

[43] Mr XXXX says it is unfair that persons not in residential care with a health condition receive government funding for their care but his mother, who also has a

health condition, does not. Ms Donnelly pointed out that the contribution the appellant is required to make does not cover the full cost of her care.

[44] This argument relates to government funding priorities. What is funded by a government is a matter of rationing and policy choices made by government. The Ministry of Social Development simply carries out that policy in accordance with the rules that have been put in place by Parliament and by the Government to give effect to the relevant policy and funding decisions.

Lack of information from Work and Income

[45] Finally, Mr XXXX suggests that Work and Income have changed the rules relating to deprivation in the last three years and they have failed to provide adequate information about these changes. He points to examples on the Ministry's website as being inadequate. He believes that the legislation has not changed in the past 10 years but the Ministry's application has changed significantly. He points to what he sees as the many potential inconsistencies in the application of the deprivation provisions. The Chief Executive is required to apply the legislation enacted by Parliament relating to the assessment of Residential Care Subsidy. The deprivation provisions in s 147A are part of that legislation.

Exercise of discretion

[46] Having determined that deprivation has occurred, the Chief Executive has a discretion as to whether or not income should be assessed as though the deprivation had not occurred.

[47] The Authority has previously found that:

The social security system is a safety net to provide support when there is genuine need. It is not appropriate for individuals to make provision for their adult children and grandchildren from the resources available to them and then call on the State to provide them with assistance for their own support.³

[48] The work Mr XXXX has done for the Family Trust is a matter to be taken into account in exercising the discretion. It was not altogether clear that he has done more than any other loving son or daughter would do for an elderly parent to manage their property, but in any event we note that he and his siblings will ultimately benefit from that work.

[49] The appellant and her late husband put their financial resources and their time and energy into building up the resources of the Family Trust rather than their

³ [2010] NZSSAA 74 at [31].

personal estates. The appellant must therefore now look to the Family Trust for her support while she is in residential care. It is difficult to believe that the assets and income owned by the Family Trust cannot now be used to meet the cost of the appellant's care while she is alive, without any significant impact on the capital available for distribution to her adult children in the future.

[50] We are satisfied that the Chief Executive was correct to exercise his discretion to conduct the means assessment as to income as if deprivation had not occurred. We accept that it was appropriate to base the assessment for the first year on income of \$45,395.89. The Chief Executive may, however, elect to take a different approach in future, (for example the Reserve Bank rate on total assets in later years), particularly in view of the various difficulties Mr XXXX referred to at the hearing regarding the Trust earning income.

[51] The appeal is dismissed.

DATED at WELLINGTON this 27th day of November 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member