Casebase Number: G0137

Thematic Note of SWAO Case Studies: Overpayment of Social Welfare – Estate of a Deceased

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Period of Analysis: 2009-2021

Theme: Overpayment of social welfare – Estate of a Deceased

Period of Analysis: SWAO Annual Reports 2009-2021

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Summary of the relevant law:

Overpayments of social welfare occur where a person gets a payment of an allowance, pension or any other benefit from the Department of Social Protection (the "Department") that they are not entitled to. The Social Welfare (Consolidation) Act 2005 sets out the circumstances where an overpayment may arise and the liability of a person to repay an overpayment.

An overpayment can arise where a person has been granted a payment but subsequently a revised decision is made by the Department under Section 302 or 325 of the Social Welfare (Consolidation) Act 2005 (the "**Act**") to reduce a person's entitlement to a social welfare payment retrospectively. In such circumstances, the Department will issue a letter informing the person of the revised decision.

A key question with overpayments is whether the Department allege fraud on the part of the recipient. Fraud occurs where the Department is told or led to believe something that the person receiving the payment knew was false or misleading or a key piece of information is withheld from the Department.

A revised decision that there has been an overpayment based on fraud is made under Section 302(a)/325(a)) of the Act.

If the overpayment arose as a result of fraud, the person may be criminally prosecuted even if the overpayment is repaid.

Where no fraud is alleged by the Department, they have some discretion to take into account the facts and circumstances that gave rise to the overpayment and this will be relevant in an appeal against such an overpayment. It is also possible to appeal the date when the overpayment is deemed to have arisen, which may result in the amount of the overpayment being reduced. A revised decision with no allegation of fraud is made under section 302(b).

It is therefore very important to know if fraud is alleged (ie, the decision was made based on section 302(a)) or no fraud is alleged (ie the decision is based on section 302(b).) A person can appeal the revised decision alleged fraud and if successful, the fact and circumstances that gave rise to the overpayment can also be considered in the appeal.

The other circumstances where an overpayment may arise are covered by sections 336, 336(a) and 336(b) of the Social Welfare Consolidation Act 2005 (as amended).

Examples of this category of overpayment are:

- double cashing, for example a person reports that she or he did not receive a payment due, a duplicate is issued and both payments are cashed by the person;
- impersonation, for example a person makes a claim assuming the identity of another person;
- cashing after death, for example a relative continues to cash a pension or allowance after the death of the person entitled to it.

Finally, the rules relating to the how the Department can recover an overpayment of social welfare are in Statutory Instrument No. 349/2005 Social Welfare (Recovery of Overpayments) Regulations, the Department's Operational Guidelines on Management of Customer Overpayments and Recovery of Customer Debt. and more information is available through Citizen's Information.

Observations on appeal outcomes in SWAO Case Studies:

Recovery of Overpayment from the Estate of a Deceased

Overpayments of social welfare can be recovered from the deceased's estate if not paid prior to their death. A debt may also arise during the settlement of a deceased customer's estate where it is determined that the customer had not adequately declared their means during the time they received an assistance payment (means tested payment) during their lifetime.

Overpayments discovered after the death of a person receiving social welfare payments can also be appealed. There are a number of appeals by the estate of a deceased in the case studies below. One example shows an appeal that was allowed because there no evidence of any other source of income to the deceased nor of him accessing the joint account which was in his name and his sister's name. She appealed on the basis that it was her money held in the account for the upkeep on the family home that the deceased had been living in. See G4 2015/24 State Pension Non-contributory. Another successful

appeal in seen in I9 2017/318/69 State Pension (Non-Contributory) where there was a failure by the Department to act on recommendations in Department reviews. The overpayment was reduced.

However in most instances, there are have very serious implications where means/assets are not communicated to the Department during one's life and come to light when assets being dealt with on death.

Relevant Case Studies of the SWAO Annual Reports 2009-2021

G4 2015/24 State Pension Non-contributory

Question at Issue: Claim against deceased pensioner's estate

Background: The deceased had been awarded pension in 1998 and had been in receipt of Disability Allowance prior to attaining pension age. At the time of the pension claim, he had declared a credit union account with a balance of some €1,900. His entitlement was reviewed in 2011 when he denied having any capital in the bank. Following his death, an investigation by a Social Welfare Inspector indicated undisclosed capital of €59,000 and his means were assessed retrospectively to take account of this. As a consequence of the revised means assessment, an overpayment of some €38,000 was calculated and a demand for payment was made against the estate. His sister, the executrix of the estate, made an appeal against the decision and solicitors acting on her behalf questioned the amount of the overpayment. It was submitted that the deceased never had capital in the [named] bank as his sister had provided this money for the upkeep of his residence.

Oral hearing: The sister of the deceased attended and was represented by her solicitor. The Deciding Officer attended at the request of the Appeals Officer, while the Social Welfare Inspector had moved to other duties and was unable to attend.

The solicitor in the case sought to provide some background, referring to the sister of the deceased, the fact that she had worked for some years in the United Kingdom before returning to the family home. He referred to the capital held at a [named] bank, and said that this had always belonged to his client and submitted that an affidavit from 1996 confirmed this. It was submitted that she had intended that the funds be used for the upkeep and renovation of the family home so that it would remain habitable until she returned to live there. It transpired that her brother had proved unable to maintain the house and evidence was produced showing that expenditure in the order of €230,000 had been incurred in the previous year for extensive renovations.

A copy of the grant of probate was submitted and it was pointed out that the net value of the estate came to just €20,000. It was submitted that the Department had misrepresented the ownership of the funds assessed and that the deceased had no interest in those funds. He had not been able to fulfil the purpose for which the capital had been set aside and he had never accessed the bank account at issue.

The Deciding Officer explained the assessment: the deceased had been assessed with capital held in his own name and a half share of the capital held in a joint account with his sister. She noted that there was evidence of transfers of funds between the accounts which suggested that they had been managed. In response, the deceased's sister pointed out that her brother had received no State payments until he was aged 49 years and she had enquired about his entitlements. At that stage, he had received a Disabled Person's Maintenance Allowance (subsequently Disability Allowance). She confirmed that she had managed the accounts and had moved the capital so that the best yield could be achieved. His sister described the deceased as having a learning disability and said that he had not been capable of managing things. They had another brother who died in 1995 and since then she had had to return home every 6 weeks. She recalled that the deceased had been duped by individuals purporting to do maintenance work and, on one occasion, had withdrawn €2,000 from his credit union account to pay them. She said that he had been vulnerable to such approaches and, after that, she had warned the bank and credit union to be aware of him seeking to withdraw funds.

The Deciding Officer conceded that the Department had not implemented its review policy over the years in question but said she believed that a reminder of the qualifying conditions had issued around the year 2000. It was accepted that there was no record of such a reminder on file. The Deciding Officer agreed there could be circumstances when a joint account was assessed in full against one of the named account holders. She went on to say, however, that she believed that the deceased could have accessed the account had he wished to. She noted that the Social Welfare Inspector had reported that there had been no evidence to indicate that the capital in the joint account was not the property of the deceased.

His sister insisted that the deceased did not have access to the [named] bank account and she said she objected to the Department seeking to recover what was, in effect, her savings. In conclusion, her solicitor reiterated the assertion that the deceased had no control over the funds at issue, the capital was the property of the deceased's sister and he had been a party of convenience only and had never sought to access the account. It was submitted that it was wrong therefore to attribute those funds to him.

Consideration: The Appeals Officer considered that there was no doubt as to the amount of capital held; the balances had been verified. What was in doubt, however, was whether one half of the money held in a joint account should have been assessed as capital held by the deceased and therefore a notifiable increase in his means which he had failed to declare.

He examined the question as to where the funds came from. The evidence indicated that the deceased had been awarded a Disabled Person's Maintenance Allowance sometime in the 1980s, consistent with his sister's account of him and her reference to his intellectual disability. The Appeals Officer noted that the Social Welfare Inspector made reference to the actual ownership of the funds but had dismissed his sister's assertion that the funds in the joint account were not the property of the deceased. The Appeals Officer considered that, in circumstances where the deceased had no income other than a social welfare payment, evidence was required to establish that he had access to the funds at issue and that he had accessed those funds. He noted that there was no evidence of income from any source apart from his pension and whatever his sister had provided him with. He noted also that there was no evidence that he had managed the account from the nursing home where he spent the last three years of his life, yet significant transactions had taken place during those years and his sister had confirmed that she managed the funds. In the circumstances, he concluded that it was appropriate to apply the discretion which is permitted in the legislation and to make the decision effective from a current date only with no retrospective effect.

Outcome: Appeal allowed

G5 2015/25 State Pension (Non-contributory)

Question in issue: Claim against deceased pensioner's estate

Background: The late pensioner made a claim for State Pension (Non-Contributory) in 1987. Her means were investigated and the capital declared, some £17,000, was assessed.

Pension was awarded. A review conducted in 1992 indicated capital of £16,000, with a similar amount noted at a further review in 1997. Following the pensioner's death in 2011, a schedule of assets was submitted to the Department, indicating that she held assets in the amount of €80,000 at the time of her death. A revised decision was made where the Deciding Officer concluded that pension was payable at a lower rate in the period from 2002 to 2011. As a result, an overpayment of some €45,000 was assessed against the estate. The executor sought to establish if the deceased would have had an entitlement to a contributory State Pension. Details of her social insurance record were examined and she was held to have an entitlement to a reduced Pre-1953 State Pension. The effect of this decision was to reduce the overpayment to €37,000, and a demand for payment was issued to the estate. An appeal was made by the executor.

Oral hearing: The personal representative of the deceased attended and was accompanied by a solicitor. The formal decision was presented and the evidence relied upon in making the decision was outlined. The question as to entitlement to a contributory State Pension was discussed and it was pointed out that the deceased had applied in 1981 but her claim was refused. The Appeals Officer

sought to clarify that a special Pre-1953 State Pension (Contributory) was introduced with effect from 5 May 2000, and applied to persons with social insurance contributions paid prior to 1953. This pension is payable at half the maximum standard rate. The Appeals Officer referred to evidence provided by the Department which indicated that, when the deceased's entitlement to a Pre-1953 State Pension (Contributory) had been established the overpayment had been recalculated and reduced from the amount originally assessed to the current level of €37,000.

In support of the appeal, it was submitted that the deceased would have been a saver and that she had lived frugally and had not spent much money down through the years. It was stated that her house was in very poor repair, that she only ever had one car and that she had never taken a holiday.

Consideration: In arriving at a decision in the case, the Appeals Officer examined all of the available evidence, including that adduced at the oral hearing. She noted that, at the time of application, the deceased's means were investigated and she had disclosed capital of

£17,000. No other means were disclosed at the time. The Appeals Officer referred to the reviews conducted in 1992 and 1997, when the deceased would have had an opportunity to disclose all her means and noted that capital of the order of £16,000 was declared. In contrast, she noted that the schedule of assets indicated capital of some €80,000 at date of death. She concluded that, under the terms of the relevant social welfare legislation, this capital was assessable as means. She determined that means had been assessed correctly in accordance with the relevant social welfare legislation and that the overpayment was recoverable from the assets of the deceased in accordance with the provisions of Section 335 (b) of the Social Welfare Consolidation Act, 2005.

Outcome: Appeal disallowed.

I4 2017/49 State Pension (Non-Contributory) Oral hearing

Question at issue: Claim against estate

Background: Following the pensioner's death, solicitors acting in the administration of the estate submitted a schedule of assets to the Department, in line with the requirements of the governing legislation. State Pension (Non-Contributory) had been awarded with effect from a date in 1988,and paid on the basis of a nil means assessment. The case was referred to a Social Welfare Inspector for a retrospective assessment of means.

The Inspector reported that the deceased held shares (17%) in a limited company, which was a holding company for some 20 acres of land, with company accounts having valued its assets at some €320,000. In addition, he obtained details as to the value of the lands held by the company. The Deciding Officer noted that the principal activity of the company was the letting of land, and he concluded that the land was an investment and fell to be assessed on a capital value basis. He made a decision revising entitlement throughout the period that pension had been paid and assessed an overpayment of some €50,000, with a claim for repayment being made against the estate.

In an appeal against the decision, made on behalf of the executors, it was asserted that the valuation used for the property owned by the company was unrealistic and not in line with commercial reality; that the shares had not been not valued, only the property was; that there was no recognition of loans to the company, and no account had been taken of the costs of realising the value in the company or the control exercisable by the shareholder; that the deceased had no power to force a sale of the property, and that she had no interest in the debts owed by the company.

Oral hearing: The evidence in the case was examined, including statements as to the value of the shares held and details outlined in the company accounts. Submissions were made on behalf of the Department and by the legal representatives appointed by the appellant (the executors), and by family representatives.

The appellant's legal representatives submitted that the figure of €320,000 referred to authorised share capital, that is, the value to which shares can be issued. It was submitted that a shareholder holds a share in the company and not in the land, reference being made to the fact that a company is a separate legal entity.

It was submitted further that, at 17%, as a minority shareholder, the deceased would have had no right to force a sale: in effect, she was locked into that as it could never have been realised unless with the agreement of all shareholders; the company would have had to wind itself up to distribute the cash. It was submitted that assets might make shares valuable, or not, but what was at issue was the value of the shares.

In addition, a copy of a case study published in the SWAO Annual Report 2016 was submitted; this referred to an overpayment of State Pension (Non-Contributory) assessed against an estate (2016/28). Attention was drawn to the Appeals Officer's statement that overpayments, arising from a revised decision under Section 302 (a) or 302 (b), must be individually justified and the larger the overpayment, the greater the burden of proof and justification required.

The family representatives submitted that the deceased had never derived any benefit from her shares and that the land held by the company had been in the family for many years and had been spread amongst a number of families at the time it was inherited; it had been put into a corporate environment because it made it easier to deal with on the basis of shares. It was submitted that the deceased had been totally dependent on her pension and that, at the time of her claim, she would not have regarded the shares at issue as an asset as they had never yielded anything.

Consideration: The legislation relied upon for the decision is outlined in the Social Welfare (Consolidation) Act 2005: Rule 1 of Schedule 3, Part 3, in relation to the assessment of means and Section 302 (b) in relation to the effect of revised decisions, providing for the implementation of a retrospective assessment.

The Appeals Officer was persuaded that the submission made on behalf of the appellant (the executors) was well founded, that is, that the deceased held a share in the company and not in the land, the company being a separate legal entity, and further that, as a minority shareholder, she could not have forced a sale of the land.

She noted that Schedule 3, Part 3, Rule 1, provides for the assessment of the value of property (not being property personally used or enjoyed) which is invested or is otherwise put to profitable use by the person or which, though capable of investment or profitable use, is not invested or put to profitable use. Having examined the evidence, including that adduced at oral hearing, the Appeals Officer concluded that it had not been established that there was a basis for an assessment of the capital value of the land held by the company at issue in the retrospective assessment of the deceased's means, having regard to the provisions of the governing legislation.

Outcome: Appeal allowed.

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