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CASE NO: 131/91

H HOLT WILL TRUST ..... APPELLANT

AND

COMMISSIONER FOR INLAND REVENUE ..... RESPONDENT

HARMS, AJA:

Case No 131/91
J vd M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

H HOLT WILL TRUST — Appellant

and

COMMISSIONER FOR INLAND REVENUE — Respondent

CORAM: CORBETT, CJ, HEFER, VIVIER, VAN DEN HEEVER, JJA et HARMS, AJA

HEARD: 21 AUGUST 1992

DELIVERED: 10 SEPTEMBER 1992

J U D G M E N T

HARMS, AJA :

The appellants are the trustees of the Hilda Holt Will Trust. The respondent, the Commissioner for

Inland Revenue ("the Commissioner") assessed the trust to normal tax for the 1983 and 1984 years of assessment. The appellants ("the trustees") duly objected to the assessments; their objection was disallowed and they then lodged an appeal to the Income Tax Special Court. The appeal was successful and the assessments were set aside. The Commissioner's subsequent appeal to the Cape Provincial Division was upheld. Hence the present appeal by the trustees.

The testatrix, the late Miss Hilda Holt, executed her testament on 8 October 1980. She died shortly thereafter namely on 31 December 1981. The assessments relate to the first two full tax years that followed upon her death. It appears from the will that she had a friend, Miss Florence Walker, who, we were informed, died recently and who was, when the will was executed, in her mid seventies. It can safely be assumed that the testatrix was of a similar age.

Miss Walker was at all relevant times an invalid confined to a wheelchair. She required assistance for the performance of all bodily functions. The testatrix had the well-being and care of Miss Walker at heart and made special provision for her in the will. She received a legacy of R40 000. Movables such as jewellery, furniture, as well as medical chairs and similar goods were also bequeathed to her. As an additional legacy she was entitled to travelling costs for her and a companion or nurse if she wished to move to England.

After having provided for these and other special bequests, the testatrix instructed her executors to realise the balance of her estate and to hold the assets in trust. The relevant portion of the will provides as follows:

"9.

The rest, residue and remainder of my Estate shall be held upon trust by my Executors and invested by

them in terms of the powers of investment hereinbefore granted to them for the following purposes:-

(a) To pay to the said FLORENCE WALKER (out of the nett income, but if such income is insufficient, then to such extent as may be necessary out of the capital) during her lifetime, an annuity which shall be paid to her in monthly instalments. ... The monthly instalments hereinbefore referred to shall be such sum as shall, on the last day of the month during which my death occurs, have the same purchasing power as ONE THOUSAND RAND (R1 000,00) has at the date of execution of this my Will." [which figure had to be adjusted annually in order to retain that purchasing power] ... "I further direct that in addition to the aforesaid monthly instalments, my Executors shall pay any income taxes levied by any Government or other competent authority on the said FLORENCE WALKER and attributable to the inclusion of the annuity in her income, the intention being that the said FLORENCE WALKER shall receive her annuity free of tax. ...

(b) In addition to the annuity payments and tax payments payable from the Trust, to pay from the Trust income generally such amounts for the said FLORENCE WALKER'S personal benefit as she may from time to time indicate to my Executors in writing as being necessary for her personal requirements.

(c) Any surplus income shall be accumulated as part of the capital and invested by my Executors.

(d) Upon the death of the said FLORENCE WALKER:-

(i) SEVENTY FIVE PER CENTUM (75%) of the capital or the balance thereof then still held in trust (including any accumulated income) shall devolve upon and be paid to the following Institutions in the proportions set out against the name of each Institution, namely:-

THE CAPE JEWISH AGED HOME	40%
CAPE JEWISH BOARD OF GUARDIANS	20%
THE HERZLIA SCHOOL, CAPE TOWN	15%
THE CAPE JEWISH ORPHANAGE (ORANJIA)	5%
THE CAPE JEWISH SICK RELIEF SOCIETY	10%
JEWISH SHELTERED EMPLOYMENT CENTRE, CAPE TOWN	10%

and

(ii) The other TWENTY FIVE PER CENTUM (25%) of the capital or the balance thereof then still held in trust (including any accumulated income) shall devolve upon and be paid to the following Institutions, in the proportions set out against the name of each Institution, namely:-

THE CAPE FLATS DISTRESS ASSOCIATION (CAFDA)	10%
THE SOUTH AFRICAN NATIONAL COUNCIL FOR THE BLIND	10%
THE SOUTH AFRICAN NATIONAL COUNCIL FOR THE DEAF	10%

THE COMMUNITY CHEST OF THE WESTERN CAPE	20%
THE PRINCESS ALICE ORTHOPAEDIC HOSPITAL (the funds to be used for the welfare and amenities of needy patients)	10%
THE CAPE CRIPPLE CARE ASSOCIATION	10%
THE CAPE PENINSULA SCHOOL FEEDING ASSOCIATION	10%
THE STUDENTS HEALTH AND WELFARE CENTRES ORGANISATION (SHAWCO)	10%
THE SERVICE DINING ROOMS, 82 Canterbury Street, Cape Town	10%

The ultimate beneficiaries upon whom the balance of the capital was to "devolve" on the death of Miss Walker were all charitable institutions of a public character which, by virtue of the provisions of s 10(1)(f) of the Income Tax Act 58 of 1962, were exempted from tax on income accruing to them.

The trustees expended during the two tax years R22 165,53 (1983) and R32 770,73 (1984) on the annuity, the income tax contribution and the other requirements in terms of clause 9(b) of the will. The net trust

income was, for these two years, R172 131,04 (1983) and R186 423,33 (1984) and tax was assessed on so-called taxable income in the hands of the trustees of R141 174 (1983) and R145 981 (1984). The crisp issue for decision is whether this income had, during the relevant tax years, accrued to or in favour of the ultimate beneficiaries or not (see s 5 of the Act), i e whether they had acquired a vested right in that income during the tax years in question: Commissioner for Inland Revenue v Polonsky 1942 TPD 249. If the answer is in the affirmative the trustees, as representative taxpayers, would be entitled to the exemption created by s 10(1)(f) since any exemption which could be claimed by the person represented by a representative taxpayer, must be allowed in the assessment made upon the representative taxpayer in his capacity as such. See s 95(2). Counsel chose not to argue the overriding question as to whether a testamentary trust was during

these tax years liable at all for tax in respect of the undistributed income accruing to it. It was held in Friedman & Others NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue 1991 (2) SA 340 (T) that it was not. Judgment on appeal in that case is presently pending in this Court. The reason for counsel's attitude was that the interpretation of the will on the question of the vesting of the undistributed income may be relevant in respect of the subsequent years of assessment. The fact of the matter is that the Act was amended retrospectively to 1 March 1986 so as to make special provision for the taxation of trusts: see Income Tax Act 129 of 1991, s 2(1)(b), 2(2)(a) and 27. The underlying assumption of this judgment that a trust could have been so taxed should therefore not be seen as an expression of approval or disapproval of the judgment in Friedman's case, supra.

The will required the trustees to capitalise, at the end of each tax year, the surplus income. It had to be invested as part of the trust capital. The surplus income, therefore, vested in the person in whom the trust capital had vested.

The answer to the question of where the right to the surplus income vested can thus conveniently be sought by establishing whether the ultimate beneficiaries had obtained a vested right in the trust assets upon the death of the testatrix. That, in its turn, depends on the question whether the grant to the charities was conditional or contingent and not certain. See Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 175-6. It must be determined with reference to the language of the will, properly interpreted in the light of the admissible surrounding circumstances known to the testatrix, and with the assistance of the relevant rules of construction (ibid). The fact that a

bequest takes the form of a fideicommissum does not necessarily mean that no right vests in the ultimate beneficiaries.

In determining whether the so-called surplus trust income had accrued to or in favour of the charities concerned, it is convenient to consider the nature of Miss Walker's interest. The president of the Income Tax Special Court (TEBBUTT J) held that it was of a usufructuary nature whereas the court a quo (per NEL J) was of the view that it was the interest of a fiduciary in a fideicommissum residui. Miss Walker's entitlement was to an annuity, a tax contribution and a payment of her personal needs. Those payments had, as a matter of principle, to be made out of trust income. If the trust income were in any tax year insufficient to pay the annuity, trust capital could be utilised for that purpose only. Any shortfall in the tax contribution or money needed for personal necessities

could not be provided for in like manner. But, according to the court a quo, the fact that she had some entitlement to the capital indicated that the only purpose of the trust was to provide for her needs, that the whole of the trust capital was earmarked for her use and that, therefore, the overriding intention of the testatrix was to postpone the vesting of the trust assets in the charities until her death.

The testatrix was a very wealthy woman who seemingly lived a life of relative opulence. There is no reason to believe that she was not fully aware of the value of her assets. In the short span of time between the execution of the will and her death, she thrice amended her will by the addition of codicils, the last dated some two weeks before her death. Capital assets to the value of approximately R1,5 m were handed to the trustees for their administration. From the income of this capital she willed that only R12 000 per annum

should be used as a basic annuity, and, as indicated, Miss Walker's total entitlement amounted to a mere R22 165,53 during the first full tax year following the testatrix's death. If regard is further had to the wording of the will, it is obvious to me that the testatrix was clearly of the view that, at the date of distribution (i e the date of Miss Walker's death) there would not merely be left a substantial residue of the initial capital but that it, together with accumulated surplus income, would be paid to the charities. It is so that she made provision for the eventuality where the trust income in a given year would not suffice to pay the annuity. In such event capital was to be utilised but only, as pointed out, to pay the annuity. It is true that, as envisaged by the testatrix, inflation was likely to cause a steady increase in the amount of the annuity, but, as pointed out by appellant's counsel, the same inflation would tend to

increase the capital value of the trust assets and the income derived therefrom. In all the circumstances it seems clear that the testatrix regarded the use of capital to supplement the annuity as a remote possibility and that Miss Walker's entitlement to the trust capital was inserted ex abundanti cautela. In my view it follows that the overriding intention of the testatrix could not have been to give Miss Walker a vested interest in the capital of the trust. That disposes, in part, of the finding that she had a fiduciary interest. Since she had no power at all to alienate any trust property, her rights could, also, not be equated with those of a fiduciary in a fideicommissum residui.

Counsel for the Commissioner, in support of the submission that the charities had no vested interest in the capital of the trust, relied almost exclusively on the fact of Miss Walker's interest

therein. In Estate Raath & Another v Estate Bell & Others 1922 NPD 323 the same argument was considered and rejected. MATTHEWS AJ held (at p 328) that the direction of the testator to draw upon the capital fund to supply any shortfall in income "by itself would not create a necessary inference that the testator intended to postpone the vesting of the interests of the other beneficiaries until after the deaths of his wife and sister; for it is not the property which is on the testator's death to vest in the eight beneficiaries but the right to a division thereof ..." The argument raised its head once again in Commissioner for Inland Revenue v Estate Bews 1943 NPD 327. The full bench there stated that the widow in that case was a usufructuary in spite of the fact that, in the event of a shortfall, her income had to be made up out of capital. The court then approved of MATTHEWS AJ's dictum and added another consideration why the

submission under investigation had to fail, namely:

> "The cases, in which the question of vesting arises, almost invariably depend upon a condition of survivorship. ... The possibility of the bequest being reduced from time to time because capital is used to make up the income payable to the usufructuary to a fixed sum is not a condition of this kind, and, in a case like the present, is quite irrelevant in relation to the question of vesting." (at p 331 in fine - p 332)

Reliance was placed on this judgment in Ex Parte Administrators Estate Hellmuth 1951 (1) SA 298 (0) 303 D-E for the proposition that " 'n vestiging van regte plaas kan vind alhoewel die corpus nog nie bepaal is nie". These principles were accepted as virtually axiomatic in Ex parte Estate Phillpott 1952 (3) SA 233 (N) and the point was made that (as I have found the case to be in the present instance) where a will clearly contemplates that there will be a residue for distribution to the ultimate beneficiaries, the intention to postpone vesting is not present. And, added the learned judge (DE WET J) at p 237 E, (I

paraphrase) it is possible for an uncertain but ascertainable amount in futuro to vest immediately. Marwick v Marwick & Others 1953 (2) SA 827 (N) is another instance where it was held that vesting took place in the ultimate beneficiaries in spite of the fact that the annuitant had an entitlement to income which could be supplemented by a draw on capital. So, too, Estate Mader v Estate Mader & Others 1962 (1) SA 22 (T) and Ex Parte Estate Heurtley 1963 (4) SA 218 (SR). To sum up, this line of cases has held that the fact that the annuitant is entitled to have the annuity supplemented from capital, does not make him a fiduciary but he remains essentially a usufructuary and, if that is the case, the presumption that vesting takes place in the ultimate beneficiaries on death, arises. See especially the Estate Mader case supra at p 25 A-B. Secondly, "the mere fact that the usufructuary might receive capital from the estate, thus causing the

residue to be diminished, did not in itself postpone the vesting of the residue in the ultimate beneficiary in a case where the will clearly contemplated that there would be a residue at the date of distribution. In such an instance an uncertain but ascertainable amount in futuro would vest in the ultimate beneficiary a morte testatoris". (CORBETT et al, The Law of Succession in South Africa p 158). It was not suggested that we should not follow these cases nor can I conceive of any reason not to do so.

It follows that although the extent of the ultimate bequest to the charities was not fixed, that did not, in itself make the bequest conditional. The bequest was, as at the death of the testatrix certain: each ultimate beneficiary was already entitled to a fixed percentage of the ultimate trust assets. The fact that the assets would not remain static, did not affect the entitlement. It is a well known fact that

trust assets grow or diminish, in specie or in value, but that per se, as set out above, has never been held to render a bequest conditional or to create an uncertainty as to the right in contradistinction to the value of the right.

The usual condition of survivorship which is to be found in a true fideicommissary bequest was also not present. As was stated by WATERMEYER JA in Jewish Colonial Trust Ltd v Estate Nathan supra at p 177, where the fideicommissary is a charity with an apparently indefinite future existence and the object of the bequest is to benefit the charity at a definite future date, the rights given to the ultimate beneficiary are unconditional and vest on the death of the testator since no condition of survivorship can be implied. That is especially true in the present case where fixed percentages of the trust assets were allocated to each charity and no provision was made for the eventuality of

one or more of them going out of existence prior to the death of Miss Walker. As was so pithily stated in Commissioner for Inland Revenue v Estate Bews supra at p 331, death, issue and parentage are all foreign to the nature of juristic persons. Clause 9 (d) of the will provided that the trust assets would "devolve upon and be paid" to the ultimate beneficiaries at the death of miss Walker. The phrase "devolve upon" usually bears the connotation of a vesting. I am, however, satisfied that, having regard to the aforegoing considerations and the terms of the will as a whole, in this context it was used tautologically and synonymously with "to be paid".

To conclude: I am of the view that the interpretation attached to the will by the President of the Income Tax Special Court was correct and that, consequently, his order should be reinstated.

The appeal is accordingly upheld with costs, including the costs consequent upon the employment of

two counsel. The order of the court a quo is amended to read "Appeal dismissed with costs, including the costs of two counsel".

L T C HARMS
ACTING JUDGE OF APPEAL

CORBETT, CJ)
HEFER, JA) CONCUR
VIVIER, JA)
VAN DEN HEEVER, JA)