IN THE HIGH COURT OF AUSTRALIA.

Hackett

v.

West Australian Trustee Executor and Agency Coy. Ltd and ors.

REASONS FOR JUDGMENT.

Judgt 11/10/1940

Judgment delivered at Melbourne

on Friday, 11th October, 1940.

C.11235 H. J. Green, Govt. Print., Melb.

HACKETT

v.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED AND ANOTHER

JUDGMENT

RICH J.
DIXON J.
McTIERNAN J.

HACKETT

v.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED AND ANOTHER

Order :

Appeal allowed. So much of the order of the Supreme Court of Western Australia discharged as declares that clause 8 of the Will of the said deceased does not neither does any other clause of the said Will authorise the plaintiffs as trustees of the Will and estate of the said deceased to make advances out of capital to each or any of the daughters of the said deceased. In lieu thereof declare, in answer to the first question in the summons, that, in the exercise of the power conferred upon the trustees by clause 8 of the Will of the said deceased to raise any part or parts not exceeding together one moiety of the vested or expectant share of any child or grandchild of his under the trusts of the Will of the said deceased and apply the same for his or her advancement preferment or benefit as such trustees shall think fit, the trustees may resort to the corpus of the shares settled on daughters by clause 7(f) of the Will. Costs of the appeal to be paid out of the estate, those of the trustees as between solicitor and client.

HACKETT

v.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED AND ANOTHER

The question raised by this appeal relates to a power conferred upon trustees to raise any part or parts of the vested or expectant share of any child or grand-child of the testator under the trusts of the will and apply the same for his or her advancement preferment or benefit. The question is whether the power extends to settled shares of daughters in such a way as to enable the trustees, should they think fit to do so, to apply portion of the corpus for the benefit of a daughter, being a tenant for life only.

A presumption of some strength exists against a construction which would allow to trustees a discretion to take from

corpus belonging to remaindermen what they thought desirable in the interests of a tenant for life who otherwise would have no title to it and to appropriate it for the benefit of the tenant for life. But the presumption may be overcome by any sufficient indication of intention and not a few instances may be found where the Court has discovered in the terms of the trust instrument a purpose on the part of the settlor or testator, while settling the share allocated to a child or grandchild upon him or her for life and upon his or her children in remainder or among such of them as he or she may appoint, of reserving a discretionary power to the trustees nevertheless to apply part of the corpus of the share for the

advancement or Benefit of the child or grandchild to whom it is allocated. See for instance re Britttlebank 1881 30 W.R. 99, Lowther v. Bentinck 1874 L.R. 19 Eq. 166, re Aldridge 1886 55 L.T. 554, re Sparkes 1911 56 Sol. Jo. 90.

In the present case the testator made two main provisions out of residue for his children. By the first he directed his trustees to set aside and invest £20,000 and to pay the income to his widow during her life and after her death to stand possessed of such sum for all his children who being sons should attain the age of twentyone or being daughters attain that age or marry in equal shares. Then by a proviso he went on to declare that his trustees should

retain the "share" of each of his daughters upon trusts which he then set out. Those trusts were, briefly, for the daughter for life and after her death to such of her children as she should appoint and in default of appointment in equal shares, contingently on their attaining full age or if females marrying, and in default of such children then over to the other children of the testator. The second of the main provisions for children to which I have referred falls into two parts one of which is confined to daughters, the other to sons. The testator directs his trustees to set aside for each of his daughters living at his death a sum of £10,000 upon trust to invest the same until she attains full age or marries and to apply the income in the discretion of the trustees

for her education and maintenance, paying her after she becomes sixteen not more than £100 for pocket money and travelling expenses. He then goes on to direct an accumulation of the balance of the income not required for the foregoing puposes, viz maintenance, education, pocket money and travelling expenses, by investing the same and the resultant income to the intent that the accumulations might be added to the principal and follow the destination thereof. Upon such daughter attaining twentyone or marrying the testator directs that the full income should be paid over to her and that upon her death the sum of £10,000 should be "held upon the same trusts for daughters'

children as are declared of and concerning daughters' shares after their death as provided in" the clause governing the lagacy of £20,000 already set out, "with the like powers for each such daughter as to appointment ..... and on failure of children or in default of appointment ... the same shall sink into and be deemed part of the residuary estate." Then the testator makes a parallel provision for sons by which the trustees are to set aside £10,000 for each son until he attains twentyone with a similar direction as to applying the intermediate income in maintenance and education and as to accumulating surplus income and upon his attaining twentyone to pay over to him

the full income until he is twentyfive and then the principal.

In 1929 the Supreme Court of Western Australia was called upon to interpret the direction as to the accumulation of the daughters' shares and declared that all accumulations of the balance of the said income made prior to the date when a daughter attains the age of twentyone years or marries before that age should be added to and treated as forming part of the principal sum of £10,000 and be capitalized and follow the destination thereof accordingly and that the income to which a daughter is under the said sub-clause entitled upon attaining the age

of twentyone years or marrying earlier is the income on the capital sum of £10,000 as increased by all such accumulations to that date.

After the provisions in favour of children, ~~x~~ daughters and sons, there follows the "advancement" clause upon which turns the question for determination in this appeal. It is in the following words :- "I declare that "in addition to the statutory power of applying income for "the maintenance and education which power shall be applicable "to the expectant shares of daughters as well as of sons and "grandchildren under this my will my trustees shall have "power to raise any part or parts not exceeding together "one moiety of the vested or expectant share of any child "or grandchild of mine under the trusts of this my will and "apply the same for his or her advancement preferment or

"benefit as my trustees shall think fit."

The question is whether "the vested or expectant share of any child or grandchild of mine under the trusts of this my will" includes the capital sums settled upon daughters and their children so that out of such capital the trustees may, if they think fit, apply money for the daughters' advancement preferment or benefit.

The statutory power to which the clause refers is sec. 26 of the English Trustees Mortgagees &c. Act 1860 23 & 24 Vic. c. 145, which we are informed forms part of the law of Western Australia by virtue of the Ordinance 31 Vict. c. 8 (W.A.). Its provisions do not, in our

opinion, enable the Court or the trustees to apply the capitalized accumulations to the maintenance of the daughter at all, let alone after she has ceased to be an infant: see re Bowlby 1904 2 Ch. 686, re Humphrys 1893 3 Ch. 1 and re Breeds' Will 1875 1 Ch. D. 226.

It is not quite clear why the draftsman of the will thought it necessary or desirable to say expressly that the statutory power should apply to the expectant shares of daughters as well as of sons. The shares are "expectant" because a daughter is not entitled even to the income until she attains twentyone. Probably the draftsman feared that the statutory power, owing to the manner in

which it is expressed, might be construed as covering only the income of corpus to which the infant is entitled whether contingently or absolutely under the will or settlement. At all events the difference between the shares of sons and daughters is that the former are entitled to the corpus and the latter are not. There is therefore strong reason for regarding the words "expectant shares of daughters" as meaning the shares allocated to daughters and settled upon them and their children. That seems to be the meaning in which the word "share" is used in the will wherever it refers to the "shares" of children or daughters.

It is clearly the meaning of "share" in the trust of the £20,000 and where, in the trusts of the sums of £10,000, the reference back to the trusts of £20,000 occur for the purpose of incorporation it clearly refers to the share of corpus which is settled on daughters and their children. Indeed where shares are clearly allotted among children and settled upon daughters but not on sons the word "share" would naturally mean the share of corpus, settled or unsettled, in the expression "childrens' share" and "daughters' share" alike. In other words "share" naturally includes settled share. This meaning of the word share is borne out by the language of a clause

forfeiting a daughter's interest in any share under the will including income if she should marry without consent and directing that the share bequeathed to her and all income thereafter arising thereform should sink into residue.

In the clause now in question the word "raise" clearly points to an application of capital and appears to us incongruous as a reference to a use of income. The limitation to a "moiety" of the share also looks in the same direction.

These considerations, as well as the general tenor of the clause, all appear to us to point to the conclusion that the clause was meant as a power to the

trustees to utilize the capital of the shares of children (and grandchildren), up to one half, for their advancement and benefit, whether the shares were settled or not, and we think this construction should be placed upon the provision.

We think the appeal should be allowed and so much of the order of the Supreme Court discharged as declared that clause eight of the will of the said deceased does not, and neither does any other clause of the said will authorize the plaintiffs as trustees of the will and estate of the said deceased to make advances out of capital to each or any of the daughters of the said deceased. In

lieu thereof a declaration should be made declaring, in answer to the first question in the summons, that, in the exercise of the power conferred upon the trustees by clause 8 of the testator's will to raise any part or parts not exceeding together one moiety of the vested or expectant share of any child or grandchild of his under the trusts of the testator's will and apply the same for his or her advancement preferment or benefit as such trustees shall think fit, the trustees may resort to the corpus of the shares settled on daughters by clause 7(f) of the will.

The costs of the appeal should be paid out of the estate, those of the trustees as between solicitor and client.

HACKETT V THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED AND ANOTHER.

JUDGMENT. STARKE J.

An Originating Summons was issued out of the Supreme Court of Western Australia for the determination of the question whether Clause 8 of the will of Sir John Winthrop Hackett or any other clause of the will authorised the trustees of the will to make advances out of capital to each or any of the daughters of the deceased. Clause 8 was as follows:- "I declare that in addition to the statutory power of applying income for the maintenance and education which power shall be applicable to the expectant shares of daughters as well as of sons and grandchildren under this my will my trustees shall have power to raise any part of parts not exceeding together one moiety of the vested or expectant share of any child or grandchild of mine under the trusts of this my will and apply the same for his or her advancement preferment or benefit as my trustees shall think fit". The testator directed his trustees to set aside and invest out of the residue of his estate a sum of £20,000 for the benefit of his widow and children including his daughters and also sums of £10,000 for each of his daughters. A daughter, a defendant to the Summons and the appellant here, did not seek advancement out of the fund of £20,000. The widow of the testator has a life interest in this fund and it was recognised, I suppose, that her life interest precluded any advancement from it. At any rate, the widow's interest in the fund could not be prejudiced or affected.

But the appellant claims that the trustees are authorised to make advancements to the daughters out of the sums of £10,000 which the testator directed to be set aside for them. The trusts declared by the testator as to these sums were in substance: To set aside for each of his daughters living at his decease or born in due time afterwards the sum of £10,000 upon trust

to invest the same and until each daughter should attain the age of 21 or marry to apply the income for the education and maintenance of each such daughter in the discretion of his trustees and after each daughter attained the age of sixteen to allow her pocket money and travelling expenses not exceeding £100 per annum at the discretion of the trustees and to accumulate the balance of the income to the intent that the accumulation should be added to the ~~income~~ principal and follow its destination. And upon further trust upon each daughter attaining the age of 21 years or marrying to pay over to her the whole of the income of the said sum of £10,000 during her life and upon her death to hold the said sum and the investments representing the same upon the same trusts for daughters' children as were declared of and concerning ~~the~~ daughters' shares after their death as provided for the sum of £20,000 with like powers of appointment and on failure of children or in default of appointment the testator directed that the same should sink into and be deemed part of his residuary estate. The trusts of the sum of £20,000 which the testator directed to be set aside and invested were for his widow for life and upon her death for all his children who being sons should attain the age of 21 years or being daughters should attain that age or marry under that age to be divided between them in equal shares. But the daughters' shares were settled; that is to say, the testator directed his trustees to retain the share of each daughter in the sum of £20,000 and pay the income to her during her life for her separate use but restrained from anticipation and from the decease of such daughter in trust for their children in such shares as she should by deed or will appoint.

The question is whether the advancement clause contained in the will authorises his trustees to raise and apply the whole or any part of the capital sums of £10,000 set aside for each of his daughters for their advancement preferment or

benefit. The testator directs that the sum of £10,000 be set aside for each of his daughters living at his decease, and provides out of the income for her education maintenance pocket money and travelling expenses during minority. But upon each daughter attaining the age of 21 years or marrying, the testator in effect settles her share; that is to say, he directs that the income thereof shall be paid to her during her life and that upon her death his trustees should hold the sum of £10,000 for such daughter's children and their issue as she should appoint. Apart from the discretionary trusts for education maintenance pocket money and travelling expenses the life interests of the daughters in these sums of £10,000 are conditional upon attaining the age of 21 years or marrying. Such interests are expectant upon one or other of these events. And these sums are set aside for each of his daughters and settled upon them and their children.

The words of the testator indicate and, it may be said, expressly recognise that these sums represent shares of his daughters in his estate expectant upon one or other of the events mentioned. The advancement clause is wide in its terms and the daughters may properly be said to have expectant shares in the sum of £10,000 under the trusts of the testator's will. The fact that the daughters have life interests in the sums mentioned does not necessarily preclude the application of the advancement clause. That is a question which depends ~~mainly~~ wholly upon the construction of the will of the testator. See Craven's Estate 1937 1 Ch. at pp.432-3; 434-5. But I desire to make it plain that the decision of this Court does not mean that the trustees should raise the sum desired by the appellant but only that it is within the discretion of the trustees so to do. It may well be that the trustees will regard the raising of such a sum as £1000 for the appellant - she is now 28 years of

age - and placing it at her disposal as unwise as it might prove harmful. But they will no doubt consider the provisions made by the will for the benefit of the daughters and act in the case of each daughter as a prudent parent would in circumstances existing from time to time.

The reference to the statutory power of applying income for maintenance (Cranworth's Act 23 & 24 Vic. c.145 Sec.26) in Clause 8 of the will has no bearing upon this case. Re Bowlby 1904 2 Ch. 685; re Mellor 1922 1 Ch. 312.

The appeal should be allowed.