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INHERITANCE TAX AND PARTLY EXEMPT RESIDUES: A TENTATIVE REJOINDER

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I am not wholly convinced by Robert Grierson's article, 'Lady Bountiful to the Inland Revenue?' (*The Charity Law & Practice Review*, Volume 3, 1995/96, Issue 1, page 11) in which he roundly dismisses the High Court's decision in *Re Benham's Will Trusts* [1995] STC 210 as incorrect.

If a wealthy testator executes a will containing only one substantive provision (example 1)

> "I give the whole of my estate to Oxfam and my nephew Fred in equal shares"

then of course section 41 of the Inheritance Tax Act 1984 applies and Oxfam takes a larger net amount than Fred.

But section 41 does not prevent a testator from dividing his estate in any way he chooses and if, in order to give Fred some rough and ready compensation for the inequality which the section would otherwise produce, our testator says (example 2)

> "I give the whole of my estate as to two thirds to my nephew Fred and as to one third to Oxfam"

he is of course entirely free to do so.

Suppose now that the testator wants to make a provision to this end which is precise rather than rough and ready, so he says (example 3)

> "I give the whole of my estate to Oxfam and my nephew Fred in such shares as after the deduction of any inheritance tax attributable to them respectively are of equal value".

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Here again, section 41 will not frustrate his purpose. The testator is not trying to push the burden of tax attributable to Fred's share on to Oxfam's share: he is simply (as in example 2) giving Fred a share which (before tax) is larger than Oxfam's. (The use of a formula of this kind was put forward first (so far as I know) by Professor (as he is now) Stephen Cretney in *The Solicitor's Journal* for 10th September 1976, and its validity has since then been confirmed by others).

So there is nothing, in section 41 or elsewhere, to prevent a testator from achieving net equality, as between an exempt beneficiary and a non-exempt beneficiary, if he shows a clear intention to do so. The only relevant question to ask in any given case is, has he shown such an intention?

Surely it can be strongly argued that the answer in *Benham* was yes. What the testatrix did was first to provide that inheritance tax should be paid (her reference to "testamentary expenses" being apt to include inheritance tax: cf Inheritance Tax Act 1984 section 211) and then to provide for an equal net division among exempt and non-exempt beneficiaries.

Is this formula not close enough to the formula adopted in example 3 above to justify the Court in reaching the decision it did? Robert Grierson thinks not. On the true construction of the will, he says, the testatrix thought that one could

> "(1) first, determine the amount of inheritance tax payable by ascertaining the chargeable amount of the testatrix's death transfer of value and applying to that chargeable amount the relevant rate of inheritance tax; and
>
> (2) then, having deducted the inheritance tax payable, divide the distributable residue in the stated proportions as between exempt and non-exempt beneficiaries",

and this, of course, is what section 41 says you cannot do. But if Robert Grierson had had an opportunity, just after the will was made, of asking the testatrix whether she really did think this, would she have confirmed it, or would she not more probably have stared at him in goggle-eyed incomprehension? If she had managed to say anything at all by way of reply, would it not have been something like, "I just want them all to take equally"?

I realise, of course, that whenever one seeks to ascertain the true intentions of any testator from the words of a professionally drawn will, one is entering the realms of fantasy and artificiality. This testatrix would probably not have understood, let alone confessed to holding, the view which Robert Grierson attributes to her in the quotation included in the preceding paragraph. Equally, of course, she would probably not have understood the reference to "testamentary expenses" to which I attributed some importance in the paragraph before that. All I am trying to say

is that, in my view, the court may well have got closer to giving her what she wanted than Robert Grierson's approach would have done.

The lesson for the future, of course, is that every partially exempt gift of residue must be so framed as to make the testator's intentions clear *one way or the other.* Perhaps I might mention shyly that this advice has been proffered for some years past in the Wills Division of Butterworths Wills Probate and Administration Service, where a form is offered: see paras [1057]-[1065] and Form 1A 22 1.