LETTERS TO THE EDITORS

From Richard Oerton
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(The publishers apologise for an error in a previous publication of this letter).

Dear Sirs,

PTPR - Volume 2 1992/93 Issue 3

Vested or Contingent Interest?

The article by Shân Warnock-Smith which appears under this title (Volume 2, Issue 3, page 165) seems open to question in several respects. She takes a case in which a testator leaves his residuary estate

> "upon trust for my sister A and my brother B in equal shares upon their respectively attaining the age of 40 years and if only one of them shall attain the age of 40 years then for that one absolutely"

with a gift over, if they should die before the testator or under 40, to their children contingently on reaching 18.

She takes the view that while A and B are under 40 their interests are to be classified, not as contingent, but rather as vested subject to divesting (or vested but defeasible) under the rule in *Phipps v Ackers* (1842) 9 Cl & Fin 583. There may be some slight doubt about this because the circumstances in which the primary gift does not become indefeasibly vested (which include the situation in which both A and B die before the testator or under 40 without leaving any child who attains a vested interest) are not exactly the same as the circumstances in which the gift over takes effect (which do not include that situation). But in *Re Mallinson Consolidated Trusts* [1974] 2 All ER 530 Templeman J (as he then was) said that,

although there must be correspondence between the two, the latter circumstances need not necessarily be the "identical counterparts" of the former.

At all events Shân Warnock-Smith devotes the rest of her article to considering the nature and incidence of vested but defeasible interests of this kind, doing so in paragraphs numbered 1 to 4, and it is the contents of these paragraphs which seem open to question.

In paragraph 1 she says that A's and B's interests would not (in the absence of some express testamentary provision) carry income until they reached 40, so that the income in the meantime would pass on intestacy. In support of this she quotes cases which concerned vested but defeasible interests in residue but in which those interests were preceded by prior trusts and were future (or deferred) ones. The interests of A and B, however, are not future interests but interests in possession and, as such, would certainly carry the intermediate income. It hardly seems necessary to quote cases in support of this proposition but reference may be made to *Re Nash* [1965] 1 All ER 51 which shows its correctness and in which Ungoed-Thomas J (at pp 53-4) quoted *Re Master's Settlement* [1911] 1 Ch 321 as showing that

> "if the gift to the residuary legatees is not of a future vested interest but of an interest vested in possession, then the ... income is payable ... to the residuary legatees ... despite the possibility of defeasance of their interests."

Re Kilpatrick's Policies Trusts [1966] 1 Ch 730 is a further illustration.

In her paragraph 2, Shân Warnock-Smith says that if the intermediate income did pass as on intestacy (as she thinks it would), and trusts for minors arose as a result, the provisions of Trustee Act 1925 s.31 would turn them into accumulation and maintenance trusts for income tax purposes, so that additional rate tax would be payable, but that it would "be otherwise if the persons entitled have a vested and indefeasible right to the income". Well, of course, that's right, but surely those with vested but defeasible interests in capital do not necessarily *have* vested and indefeasible rights to income? Under Trustee Act 1925 s.31(2), income may be accumulated during their minorities and they may never become entitled to the accumulations.

In paragraph 3 she returns to the factual situation in her original example and asks what would happen if A and B both died childless under 40. Had their interests been contingent, she says, the result would have been an intestacy; but since their interests are vested subject to divesting "the estates of both would probably take under the Will (subject to a possible argument in favour of the estate of the survivor only)". If this is right, then the very event upon which A and B are to be divested of their interests causes those interests to become indefeasibly vested. In the absence of clear authority, this result is hardly credible. Early statements

of the rule in *Phipps v Ackers* rest it upon the supposed intention of the testator that the first donee should take whatever interest the donee under the gift over is not entitled to, but they are not to be read as producing a result wholly inconsistent with the purpose of the condition.

For one reader at least, Shân Warnock-Smith's paragraph 4 is difficult to follow. It seems to hark back to her earlier view (with which disagreement has already been voiced) that the income of the residue passes as on intestacy whilst A and B are under 40, and it explores (among other things) the implications of the fact that "the settled property may or may not constitute relevant property" for inheritance tax purposes. But can one think of any circumstances in which it might be relevant property?

Richard Oerton

From Shân Warnock-Smith
10 Old Square
Lincoln's Inn

I am grateful to Mr Oerton for taking such a detailed interest in my article: scarcely can such an arcane subject have received such close analysis! May I be permitted to make the following points by way of reply?

1. Mr Oerton's reference to *Re Mallison* is a helpful one in establishing the applicability of the rule in *Phipps v Ackers* even though the gift over does not cover all the circumstances in which the primary gift might be defeated. I did not, however, express the view attributed to me by Mr Oerton that the rule does plainly apply to my example: the question I was addressing (and left unanswered) was whether as a matter of construction the rule had been ousted by express or implied direction;

2. so far as concerns the question whether income is undisposed of until the specified age is achieved, *Re Master's Settlement* to which Mr Oerton refers was a case in which the interests were vested in possession and were not future vested interests at all: the interests of the relevant beneficiaries were immediate and subject only to divesting in the event of the exercise of power of appointment. That is quite a different case from the hypothetical example: here A and B need to satisfy a condition before they can take, so that were not it for *Phipps v Ackers* their interests are

akin to contingent interests. They are, in my view, future or deferred gifts properly so called;

3. I suspect that Mr Oerton may have misunderstood my paragraph 2 though no doubt because of my own lack of felicity of expression. My reference to those with vested and indefeasible rights to income was intended to contrast the position of minors and those of adults who have an immediate right to income. That has nothing to do with the position under s.31(2) of the Trustee Act 1925;

4. Mr Oerton takes issue with my proposition that if both A and B die childless under the specified age the effect of *Phipps v Ackers* is probably that the estates of both take. He says: "If this is right, then the very event upon which A and B are to be divested of their interests cause those interests to become indefeasibly vested." But the events which would deprive them of their interests in my example are:

   (i) the death of one under 40, whether or not with children, leaving the other to attain that age, or

   (ii) the death of both under the age of 40 leaving children

   but no express provision is made for the death of both before the specified age. I do not read the result posited by me as one which produces a result wholly inconsistent with the purpose of the condition if the purpose and effect of the rule in *Phipps v Ackers* is to vest the gift rather than to leave it contingent: must one suppose that the testator would have preferred intestacy?

5. I agree with Mr Oerton's relevant property point and am grateful for it: on my hypothesis about intestacy the interests will either be in possession (if adult beneficiaries) or subject to the statutory trusts, including s.31, if minors. That being so, my ingenuity fails me when trying to think of an answer to his rhetorical question and I withdraw the proposition unreservedly!

Shân Warnock-Smith