

**TESTAMENTARY GIFTS OF
OCCUPATION
& IHT LITIGATION**

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**RIGHTS OF OCCUPATION UNDER A
WILL TRUST:**

a recent IHT conundrum

Hall v HMRC

[2023] UKFTT 32 (TC)



Radcliffe
Chambers

51 Fortis Green



The innocuous gift to Mr B

The clause 3 gift (a mere right to occupy 51 Fortis Green):

“I GIVE AND DEVISE unto my trustee my freehold house at 51 Fortis Green aforesaid UPON TRUST to sell the same with full power in his absolute discretion to postpone such sale for so long as he shall think fit without being liable for loss and to hold the net proceeds of such sale and the net rents and profits thereof until sale UPON TRUST in equal shares for my five nephews and nieces [....] and my friend RITA SILVA of 57 Fortis Green East Finchley aforesaid or the survivor or survivors of them living at the date of my death and if more than one in equal shares absolutely and beneficially PROVIDED ALWAYS as hereinafter declared in the proviso to clause 4 in respect of my residuary estate where any beneficiary has predeceased me and PROVIDED FURTHER AND I DIRECT my trustee shall not sell or dispose of the said freehold house during the lifetime of Lazzaro Boggia without his consent in writing to the intent that the same shall be retained as his home for so long as he shall desire without charge BUT he being responsible for the full cost of insuring the same against the usual householders comprehensive risks in it full reinstatement value from time to time as well as paying all outgoings relating thereto and the expense of proper and adequate maintenance and repairs as well as decorations”

What caused the headache?

Mr Boggia was named as a beneficiary in Mrs Raboni's will. He was given a right of occupation in her property, **but nothing more extensive than this**. Subject to that, the property and the residuary estate went to Mrs Raboni's nieces and nephews in equal shares.

When Mrs Raboni died a few years later in 2004, her estate consisted of little more than her property. Her only debts and liabilities were her funeral expenses and an IHT bill of c. £15,000. **The residuary estate, however, was not sufficiently large to bear the IHT liability.**

The executors advised that the property would have to be sold to pay the IHT; further (**and incorrectly**) that if it was sold its value would not be an open market value, but would be subject to Mr Boggia's right to occupy.

The beneficiaries therefore decided to pay the IHT themselves, thinking this would be a better investment. Mr Boggia occupied the property for the rest of his life. He died in 2017.

Was IHT due on Mr Boggia's death, by reason of his occupation of the property? The will trustees thought so and paid HMRC £190,000

But did Mr Boggia have an interest in possession (IIP) in the property at his death?

Did Mr B have an IIP? 5 questions

What is an interest in possession?

What is the nature of a beneficiary's interest in an unadministered estate?

What are the relevant rules governing the administration of estates (and the duties of PRs)?

What was the nature and scope of the clause 3 gift to Mr Boggia?

Did the actions of the executors and beneficiaries somehow confer an interest in possession on Mr Boggia?

1. What is an interest in possession?

The term “interest in possession” is not defined in the taxing statutes. Instead its meaning must be ascertained from an HMRC press release, issued in 1976, and the speeches of the House of Lords in *Pearson-v-IRC* [1981] AC 753 which endorsed the statements in that press release.

The House of Lords defined an interest in possession as “a present right to present enjoyment” of settled property. (In *Pearson* the beneficiaries did not have such a right because the trustees had an overriding discretion to accumulate the income).

HMRC’s IHT Manual (IHTM16062) endorses the definition in *Pearson* and goes on to state “a person has an interest in possession when they have ‘a present right of present enjoyment’ or an immediate right to the income or enjoyment of property (irrespective of whether the property produces income)”.

A right of residence conferred by a trust instrument will, if it confers a present right of present enjoyment, be an interest in possession (*IRC-v-Lloyds Private Banking* [1998] STC 559).

What is an interest in possession? (contd.)

IHTA 1984

Section 43 – meaning of settlement

Section 49 – treatment of interest in possession

Section 49A Immediate post-death interest (post 22 March 2006)

- (1) Where a person (“L”) is beneficially entitled to an interest in possession in settled property, for the purposes of this Chapter that interest is an “immediate post-death interest” only if the following conditions are satisfied.
- (2) Condition 1 is that the settlement was effected by will or under the law relating to intestacy.
- (3) Condition 2 is that L became beneficially entitled to the interest in possession on the death of the testator or intestate.
- (4) Condition 3 is that–
 - (a) section 71A below does not apply to the property in which the interest subsists, and
 - (b) the interest is not a disabled person's interest.
- (5) Condition 4 is that Condition 3 has been satisfied at all times since L became beneficially entitled to the interest in possession.

2. What are beneficiary's rights in an unadministered estate?

A beneficiary of an unadministered estate does not have beneficial or legal ownership of estate assets at the moment of death.

Rather they have inchoate rights (eg the right to compel due administration) which might in due course mature into an interest under the will trust, subject to the rules governing administration of estates (*Commissioner of Stamp Duties v Livingstone* [1965] AC 694 at 707-8, 717 and *Re Leigh's Will Trusts* [1970] Ch 277 at 281-2).

Commissioner of Stamp Duties-v-Livingstone [1965] AC 694

Lord Radcliffe at 707-8 and 715:

*“When Mrs. Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. ... It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed “duties in respect of the assets” as trusts. **What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration.** Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund.*”

Commissioner of Stamp Duties-v-Livingstone (contd.)

An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. ... At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate."

"It is idle to use such phrases as ... that she had an 'interest' in this estate. If the present appeal is tried by this test, which they accept as the correct one, their Lordships regard it as clearly established that Mrs. Coulson was not entitled to any beneficial interest in any property in Queensland at the date of her death. What she was entitled to in respect of her rights under her deceased husband's will was a chose in action, capable of being invoked for any purpose connected with the proper administration of his estate ..."

Re Leigh's Will Trusts [1970] Ch 277

Buckley J at 281-2:

“[The Livingstone case] establishes the following propositions: (1) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased’s legal personal representatives for the purposes of administration without any differentiation between the legal and equitable interests; (2) no residuary legatee or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (3) each such legatee or person so entitled is entitled to a chose in action, viz. a right to require the deceased’s estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in due course of the administration of the deceased’s estate; (4) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered.”

3. Duties of personal representatives

Personal representatives are under statutory duty to “collect and get in the real and personal estate of the deceased and **administer it according to law**” (s. 25, AEA 1925). This includes selling specifically devised property to pay the debts and liabilities where the residuary estate is insufficient for that purpose.

In the case of a solvent estate, s. 34 & Sched. 1, Part II of the AEA 1925 sets out the order in which, subject to any contrary provisions in the will, the real and personal estate of a deceased must be applied towards the discharge of liabilities.

In the estate of Mrs Raboni, the duty of the executors was to sell the property to pay the tax.

4. What was the nature of the gift to Mr B?

The clause 3 gift in the will was a mere right to occupy 51 Fortis Green and not a substitute property.

On the facts of this case, Mr Boggia's inchoate rights never matured into a right to occupy the property under a will trust sought to be imposed by clause 3; the estate was insufficiently liquid for the IHT to be borne by the residue.

Given the assets in the estate and the very limited nature of the rights granted to Mr Boggia under the will he was in no position to insist that the property not be sold.

The residuary beneficiaries (and any one of them individually) were entitled to insist (i.e. to compel due administration of the estate) that the property be sold to pay the IHT and then for the executors to pay out the net proceeds of sale to them in equal shares.

As it happened, the beneficiaries were under the illusion that the value of the property was adversely affected by a right of occupation.

5. Did the beneficiaries' decision not to sell create an IIP?

Neither the mistaken belief nor the indulgence of the executors and beneficiaries could create rights that never came into existence under the will at the end of the period of administration. (See *Walden v HMRC* [2005] STC 683; the wording of the will did not give rise to an IIP; it was immaterial that the beneficiary was treated by the executors and trustees as if she did have an IIP).

Mr Boggia was permitted to occupy but the legal status of his occupation was as a gratuitous licensee. (Note: the Tribunal did not make a specific finding to this effect) His occupation continued as a consequence of the beneficiaries deciding that they did not want the property to be sold and that they would pay the IHT liability themselves.

Could an IIP have arisen in similar circumstances?

A lease for life is treated as settled property by IHTA 1984 – s. 43(3):

“A lease of property which is for life or lives, or for a period ascertainable only by reference to a death, or which is terminable on, or at a date ascertainable only by reference to, a death, shall be treated as a settlement and the property as settled property, unless the lease was granted for full consideration in money or money's worth”. Such a lessee would have an IIP in settled property (s. 49(1) IHTA).

But Mr B was not granted a lease for life, even though he occupied the property for the rest of his life.

Other points to consider:

- What if the shortfall is only £1?
- What if the occupant has the money to pay the shortfall and wishes to do so?
- What if the residuary beneficiaries are children who (but for the IIP) would “closely inherit”?

**A fine is a tax for doing wrong.
A tax is a fine for doing well.**

The pi-rate of tax



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