[2016] UKFTT 523 (TC)

TC05272

Appeal number: TC/2015/05145

Inheritance tax – appeal against a notice of determination – permission given to appeal out of time – appeal heard immediately after out of time application – had Deceased reduced the value of her estate some years before she died – if so was there a gift with reservation – no reduction in value of estate – gift with reservation not considered – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIGEL SUSSMAN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JUDITH POWELL
MRS CAROL DEBELL

Sitting in public at the Royal Courts of Justice, The Strand London WC2A 2LL on 11 May 2016

The Appellant appeared in person

MR P. MCKENZIE, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the Appellant as personal representative and trustee of the estate of the late Mrs Myra Sussman ("the Deceased") against a notice of determination issued on 14 September 2012 ("the Notice"). The Respondents have not agreed to accept a late appeal against the Notice. The Tribunal heard the Appellant's application to appeal out of time as a preliminary matter. We set out briefly below our reasons for granting the application and then we shall deal with the substantive appeal which we heard immediately afterwards.

The Late Appeal

2. The Appellant gave notice of appeal on 12 October 2012 within the time period for making an appeal against the Notice. The Respondents rejected the appeal because the notice of appeal did not disagree the amount of tax and interest payable. Subsequently the Appellant changed the grounds of his appeal but the Respondents were not aware of the changed grounds until 11 June 2014 and said they were not asked to treat the matter as a notice of appeal made out of time until August 2015.

3. Some of the circumstances which were relevant to the late appeal application are relevant to the substantive appeal. As we heard the substantive appeal immediately after granting the late appeal application we did not ask the parties to repeat what they had already told us. For the same reasons we shall deal here with the application more briefly than we would have done if we had not heard the substantive appeal immediately afterwards.

4. The Deceased died in 2006 and the Appellant submitted an IHT 200 account of her estate in February 2007. One of the assets shown on the account was a residential property. It was subsequently sold. The sale of a this property meant that the related inheritance tax ("IHT") ceased to be payable by instalments but became due in full. This eventually led to discussions between the Appellant and the Respondents and to the Notice being issued. The Appellant did submit an appeal against the Notice in time but his appeal was rejected on the basis it did not challenge the amount of IHT or interest shown on the Notice. In the early stages the appeal and further discussions related to the Appellant's financial difficulties and the problems he had in making payment. In 2014 and whilst still unable to pay the IHT, the Appellant changed his view about the IHT position and in June 2014 submitted a new IHT 200 which was prepared on the basis that the residential property did not form part of the estate of the Deceased. If this was correct the IHT payable as a result of her death would have been reduced to zero. The Appellant seems to have regarded this new IHT 200 as a part of the process of an appeal against the Notice and the Respondents engaged in correspondence with his advisers about this new IHT 200 in October 2014 although it was not until August 2015 that they received the information and documents that they requested together with what the Respondents say was the first formal request to treat the matter as a notice of appeal out of time against the Notice on the basis that the residential property did not form part of the estate of the Deceased.

5. The Respondents referred the Tribunal to the decision of the Upper Tribunal in *Data Select v RCC [2012] UKUT 187 (TCC)* which concerned the Tribunal's discretion to allow late appeals. In that case Morgan J indicated at [34] the matters that the tribunal should consider:

"as a general rule, when a court or tribunal is asked to extend a relevant time limit the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.

6. The parties agreed that the purpose of the time limit is intended to bring efficiency to the conduct of appeal proceedings and to discourage stale appeals. There was a lengthy delay between October 2012 and the submission of the second IHT 200 in August 2014 and a still longer delay before the August 2015 correspondence which supplied information and documents and contained the formal application to bring the appeal out of time. The Appellant had various explanations for this including that his accountant did not have all the relevant documents when he prepared the February 2007 IHT 200 and then had health issues; the Respondents say the Appellant was in possession of the deed at the time he received the Notice in 2012 and could then have sought the advice he did subsequently receive and which led to the submission of the August 2014 IHT 200. There was then a lengthy delay before documents were sent to the Respondents. The Appellant says he did not realise the respondents did not have the documents. The consequences of an extension on the one hand and a refusal on the other hand are straightforward to answer in this case. An extension allows the Appellant the opportunity to advance his argument why IHT is not due in relation to the residential property on the death of the Deceased and a refusal will deny him that opportunity whereas the Respondents say that an extension would require them to spend time and resources defending the appeal which a refusal would save.

7. With the benefit of the points made to us by both parties we conducted the balancing exercise required of us in these circumstances. In the end we were persuaded to grant the Appellant's application for the following reasons. Although the various delays were considerable the technical arguments were not at all straightforward, the Appellant had not been aware of what advice had been given to the Deceased nor what she had done after receiving that advice and the documents she entered into were not easy to understand. We noted that the Respondents dealt with the August 2014 IHT 200 after it was submitted to them without informing the Appellant that it was too late for him to raise the question whether or not the residential property had formed part of the estate of the Deceased. Both parties attended the hearing prepared to present their case that day without asking for further time. The work involved in presenting the case was very small compared with the time that had already been spent by both parties in preparing to do so. We found that the balance was in favour of allowing the Appellant to present his case. We could see very little disadvantage for the Respondents by the time the application was made

to us and we granted the Appellant his application and moved on to consider the substantive appeal.

The Appeal

8. The Appellant says that the effect of a deed of trust dated 15 May 1998 ("the Deed") entered into by the Deceased was to remove a property at 7 The Drive Wembley Park ("the Property") from the estate of the Deceased for IHT purposes or, possibly, to reduce its value. The Deceased had been given an interest in possession in the Property as a result of the terms of the Will of her late husband and she was not the outright owner of the Property at any time. The Respondents put forward a number of reasons why this argument fails and say that the IHT shown in the Notice is correct – indeed they say it may be understated.

The Facts

9. Before we record what we found we should make one thing clear. We saw copies of various documents including the Deed itself. The Deed records the Deceased having taken advice to "assist with both Tax and Estate Planning". The Appellant was not able to elaborate upon what advice was given to the Deceased at the time. This means that we were unable to find any facts which might explain why the Deceased made the Deed.

10. The following facts are not disputed. The Deceased's spouse died on 12 January 1991 leaving a Will dated 23 April 1970. The Deceased was not named as an executor and there was no evidence she ever assumed any role as trustee of the estate. The Property was dealt with by her spouse in clause 3 of his Will from which it seems (and no one disputed) it must have been owned by him alone at the date of his death. Clause 3 of his Will provided that the Deceased should be allowed to live in the property which had constituted the matrimonial home when her spouse died (it was not disputed that the Property was the matrimonial property when he died) and have use of the furniture as long as she wished. The clause also provided that until the Deceased had in the opinion of the executor ceased to live in the Property permanently neither the house nor the furniture should be sold without her consent and she was to be responsible for all outgoings affecting the house including repairs. The Will contained further provisions allowing the executor to buy a replacement residence in which the Deceased could live on the same terms and the executor was empowered to use money from residue to augment the purchase price of a replacement residence; conversely any surplus from the sale of the Property not required to fund a replacement property was to be added to residue. The Will also provided that if the Deceased ceased to occupy the Property (or any replacement) then it should form a part of the residue. The executor of the spouse's estate was required to pay the income from the residue of that estate to the Deceased during her lifetime and after her death the residue vested in his children. The Deceased continued to live in the Property until she died. It was not disputed that the Will gave the Deceased an interest in possession for IHT purposes both in relation to the Property and also in relation to the residue. We consider the significance of this later.

11. Sometime later the Deceased entered into the Deed. She was the only party to it. Her signature was countersigned by a witness and the Deed was dated 15 May 1998. The purpose of the Deed was stated in the Deed itself to be "to assist with both Tax and Estate Planning". We saw no documents which explained the planning and the Appellant could not elaborate on this since he had not been involved at the time. The Deed stated the Deceased was Owner/Trustee and the Property was described as 7 The Drive Wembley Park. Although it was not correct that the Deceased was the owner of the Property the statement that the Deceased was "Owner/Trustee" seems to mean that she was the trustee of the trust declared in the Deed and this was not disputed by the parties. The Deed does state that the Appellant was the Beneficiary and clause 3 contains a declaration of trust in his favour. We shall return below to consider the terms of the trust in more detail. We did not see any evidence who was the registered owner of the Property at any relevant time after the Deceased's spouse died.

12. Nothing further seems to have been done in relation to the Property or the Deed until a few days before the Deceased died when she wrote a short letter which none of the parties dispute was signed by her. It was addressed "To whom it may concern" on notepaper headed "Myra Daphne Sussman, 7 The Drive, Wembley Park, Middlesex HA9 9EF". It bore the signature "Myra Sussman" and was witnessed by two persons and dated 15 August 2006. This letter was entitled "Life Interest in the estate of Howard Sussman (deceased)" and recorded "I wish to confirm that I no longer wish to have any interest in the estate both now and in the future and that all monies, properties etc. should be assigned and henceforth belong to my son Nigel James Sussman as of this date". We were not told why this letter was written. The Deceased died three days later on 18 August 2006.

13. When she died on 18 August 2006 the Deceased left a Will dated 26 March 1983 giving all her property to her husband (who of course had predeceased her) and if he predeceased her then to the Appellant who was her son. This Will was less than one page long and the Deceased did not appoint an executor. The Appellant signed the IHT200 although he did not record the capacity in which he did so. At the hearing he could not recall how he proved the Will but did not dispute that he did so.

14. On 11 September 2006 the Property was valued as at 18 August 2006 by Daniels estate agents and on 13 September 2006 by Grey and Co also as at 18 August 2006. The value was the same in each case ("in the region of £450,000") but a value of £430,000 was shown on the February 2007 IHT 200 and no one disputes this was the amount the property was sold for in March 2007.

15. The February IHT200 was submitted by Yugin and Partners although the Appellant explained that much of its preparation was done by a firm called "lesstax2pay" a fact confirmed by that firm in a letter to Yugin and Partners dated 11 June 2014 when lesstax2pay sent Yugin and Partners a revised IHT200 for them to submit to HMRC with the explanation that they were not in possession of all the relevant documents when they "originally produced the IHT200 form". The Property was shown as an asset of the estate of the Deceased in the original IHT200 and there

was no mention of the Deed or indeed of the terms of the trust established in the Will of the Deceased's spouse.

Events leading to the Notice and subsequent appeal

16. The IHT200 sent to HMRC in February 2007 showed that IHT of £76,282.69 was due of which £67,822.82 related to the value of the Property. As he was entitled to do, the Appellant elected to pay this IHT in ten equal annual instalments with interest running on the outstanding balance. By the time of the hearing the parties agreed that the right to pay by instalments came to an end if the Property was sold but the Appellant said he did not realise this until 2012. The Appellant paid IHT of £15,242.17 on 27 February 2007 (being the amount shown as payable on the February IHT 200) and he paid a further £8,574.72 on 14 May 2008.

17. In correspondence about the February IHT200 HMRC seem to have queried whether a trust in the Deceased's favour in the estate of her late spouse was in existence when she died. We did not see their letter but Yugin and Partners explained in correspondence with HMRC that there "was no Trust Fund created in respect of any residue and therefore nothing to complete in Schedule D5" (which is a form relating to a deceased person's interest in trusts). The residue to which Yugin and Partners must have been referring was the residue of the estate of the Deceased's spouse. They did not mention the clause 3 trust relating to the Property. Whether or not this argument by Yugin and Partners was technically correct (and the Respondents said at the hearing that it probably was not correct) HMRC did not pursue the point and they wrote to Yugin and Partners on 3 May 2007 accepting the value included for the Property in the February IHT200 and confirming they had no enquiries concerning that IHT200. They mentioned that the instalments remained to be paid annually and reminded Yugin and Partners that the personal representatives should inform HMRC if the Property was sold, if there were any changes in the value of the estate of the Deceased or if the account was found in any way to be incorrect. It seems that by the time this letter was written the Property had been sold but there is no evidence the sale was reported to HMRC at that time.

18. It is not clear to us when HMRC first became aware of the March 2007 sale of the Property but they were certainly aware it had been sold when they wrote to Yugin and Partners in January 2012. The Appellant had paid an instalment of IHT in 2008 as if the Property had not been sold but had paid nothing further by January 2012. The sale of the Property in 2007 meant the Appellant should in fact have paid the outstanding balance immediately but he seems not to have paid the instalments that would have been due even if it had not been sold.

19. On 19 April 2012 HMRC sent the Appellant a letter with an assessment for the unpaid amount of £61,316.50 which took into account accrued interest. They informed him that if payment was not made within the following 28 days they would issue a formal Notice of Determination which they did on 14 September 2012. The letter which accompanied the Notice referred to the possibility that he might appeal and advised him that in the absence of an appeal or of payment within the following

40 days proceedings would be commenced against him in the County Court to recover the sum assessed.

20. On 12 October 2012 the Appellant recorded in a written memorandum the contents of a telephone conversation he had with Mrs Bradshaw of HMRC Debt Management Inheritance Tax Unit and that he told her he had not received a withdrawal of the Notice following his conversation with Kate Else. He did not record the contents of that conversation but merely that he asked Mrs Bradshaw, in view of the time limits, to help him understand what grounds were acceptable in order to base an appeal. His note records that Mrs Bradshaw was unable to provide any helpful information because of a system failure and that she suggested he submit an appeal which could always be amended at a later stage. On the same day the Appellant faxed a letter to the Appeals team at HMRC IHT in which he set out the amount of IHT due and his failure to realise that a sale of the Property would trigger an immediate payment of the remaining balance. He explained that he had invested the sale proceeds of the Property in his business and he was reliant on the maturity of an endowment bond to pay the outstanding amount, that the bond was not due to mature until November 2013 and he was uncertain of the amount that would then be available because its maturity value depended on investment performance. He did not offer an explanation for his failure to pay the instalments that would have been due in 2009 and annually thereafter even if the Property sale had not triggered payment in full. He concluded the letter by asking for time to pay. HMRC replied to this letter on 15 October rejecting the purported appeal on the basis it did not question the accuracy of the IHT or interest shown as due and also rejecting his proposal to defer payment in full until October 2013 and instead asking for a proposal to pay monthly instalments until October 2013 followed by a balancing payment by 30 November 2013. On 30 October 2012 HMRC agreed a proposal to pay £250 per month from 1 November 2012 with a final balancing payment by 30 November 2013. The Appellant paid the monthly instalments up to and including one on 2 October 2013 but did not pay the balancing amount.

21. In mid-November 2013 HMRC wrote to the Appellant reminding him of the amount due by the end of the month and he replied to them in January 2014 explaining again that he had invested the sale proceeds of the Property in his business and that he did not have the funds required to make payment. He did not mention his endowment bond. He offered to pay £15,000 in full and final settlement saying he might be able to borrow this amount from family and friends, an offer which was formally rejected by HMRC on 24 February 2014. HMRC issued a claim form in the Northampton County Court which was served that day. The Appellant served a defence and counterclaim on 23 March 2014 saying that when his mother died all documents were passed to his accountants but "this excluded some documents relating to his mother's life interest. As a result the IHT200 Form was completed incorrectly and my solicitors submitted the wrong figures". He concluded by saying that he had asked his accountant to recalculate the figures but that as the accountant had been diagnosed with liver cancer it might take a few days to do this.

22. On 11 June 2014 the accountant sent an amended IHT200 to Yugin and Partners explaining he had not originally been in possession of all the relevant papers and that

the new IHT200 reflected these papers and reduced the tax liability to nil and gave rise to a repayment claim for the IHT already paid by the Appellant. The accountant did not explain to Yugin and Partners in that letter what the papers revealed nor why the tax was reduced to nil. The revised IHT200 did not include the Property and this meant the net chargeable estate of the Deceased was reduced to £52,756 on which no IHT was payable because the chargeable amount fell within the unused nil rate amount of the Deceased.

23. A check into the estate was commenced on 13 August 2014 by the Trusts and Estates section of HMRC. At some stage in this process they seem to have received an explanation that the Property was transferred to a discretionary trust. By October 2014 they focussed on this purported transfer and concluded that the gift to the trust was a gift with reservation of benefit so that IHT was due on the value of the Property when the Deceased died under the rules relating to gifts with reservation.

24. On 31 October 2014 Yugin and Partners responded to HMRC but, possibly because they had not been given a full explanation of why the Property was omitted from the revised IHT200, their explanation was difficult to follow. They stated that the Appellant had been "advised by his tax advisers that the Discretionary trust is in relation to the equity and not the property itself" They went on to say that the Deceased had survived seven years from the making of the trust and "the Property was not transferred to her son but remained in her name until her death". They accepted there "is still a tax liability in regard to the equity in the property from when it was transferred into the trust and from when it was sold". This tax liability was not subsequently explained and the point does not seem to have been pursued. Further correspondence did not take the matter forward.

25. The case was then reviewed by Mr McKenzie and on 7 January 2015 he wrote a letter which did clarify HMRC's position. He concluded that either the deceased continued until her death to occupy the Property under the terms of the Will of her late husband (in which she had an original interest in possession) in which case a charge arose on its full value when she died under the IHT rules applicable to interests in possession of this type or else the Property was transferred to a discretionary trust in May 1998 and the gift to the trust was a gift with reservation which continued until she died in which case a charge arose on its full value at the date of her death as a result of the gift with reservation rules. It seems that this letter was written before Mr McKenzie had seen the Deed and he may also not have fully appreciated she did not own the Property although her interest in it had been discussed in the context of the 2007 IHT200.

26. In March 2015 the Appellant instructed a new firm of accountants called Amica Services and they entered into correspondence with HMRC but they did not advance any new technical arguments and by 7 August 2015 the Appellant wrote to HMRC to explain he could no longer afford the cost of professional advice. He provided copies of the Wills of his late mother and father and of the Deed and advanced his own technical argument in support of his position that no IHT was due in respect of the Property when the Deceased died. As this technical argument was the same as the

one he advanced before the tribunal at the hearing we shall record it when we deal with the arguments we heard at the time.

The relevant law

27. It was not disputed that in the case of an interest in possession of the type the Deceased was given by her spouse when he died, section 49 of the Inheritance Tax Act 1984 ("IHTA") treats the person beneficially entitled to it as beneficially entitled to the property in which the interest subsists. Section 5 IHTA provides that for the purposes of IHTA a person's estate is the aggregate of all the property to which he is beneficially entitled apart from various exceptions not relevant here. Section 4 IHTA states that on the death of any person tax shall be charged as if, immediately before his death he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death. The combined effect of these provisions means that if the Deceased continued to enjoy the interest in possession in the Property which was conferred on her by her spouse's Will (or some other equivalent interest) until she died then she would have been treated as beneficially entitled to the Property when she died and it would have formed a part of her estate and a part of the transfer of value she was deemed to have made as a result of section 4 IHTA.

28. Sections 51 and 52 contain provisions that apply where an interest in possession of the type the Deceased was given by her spouse when he died is disposed of during the lifetime of the person entitled to it. In such a case section 51 (1) provides that "the disposal (a) is not a transfer of value, but (b) shall be treated for the purposes of this Chapter as the coming to an end of his interest and tax shall be charged accordingly under section 52 below". Section 52 (1) provides "where at any time during the life of a person beneficially entitled to an interest in possession in settled property his interest comes to an end tax shall be charged, subject to section 53 below as if at that time he had made a transfer of value and the value transferred had been equal to the value of the property in which his interest subsisted". Section 53 contains exemptions from charge not relevant here except for, possibly, section 53(2) which grants exemption where a person whose interest in property comes to an end becomes on the same occasion beneficially entitled to the property or to another interest in possession in the property.

29. In the context of a transfer of property which is not settled property, IHTA imposes a charge to IHT as follows. Where an individual makes a disposition as a result of which the value of his estate is less than it would be but for the disposition this is a transfer of value which is a chargeable transfer unless exempt. The amount by which his estate is less is the value transferred by the transfer. IHT is charged on the value transferred by a chargeable transfer (sections 3(1), 2(1) and 1 IHTA). Certain transfers of value are potentially exempt (section 3A) and a charge does not arise if the individual survives seven years after the transfer when the transfer becomes exempt.

30. Even where an individual makes a disposition of his property which reduces his estate that property does not necessarily fall outside the charge to IHT at that stage.

Section 102 Finance Act 1986 ("section 102") applies where an individual disposes of any property by way of gift after 18 March 1986 and either

"(a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of the relevant period; or (b) at any time in the relevant period the property is not enjoyed to the entire exclusion or virtually to the entire exclusion of the donor and of any benefit to him by contract of otherwise".

The relevant period for these purposes means a period ending on the date of the donor's death and beginning seven years before that date or, if it is later, on the date of the gift. In these circumstances the property is referred to a property subject to a reservation and section 102 (3) provides that

"where immediately before the death of the donor there is any property which in relation to the donor is property subject to a reservation then to the extent the property would not, apart from this section form part of the donor's estate immediately before his death that property shall be treated for the purposes of [IHTA] as property to which he was beneficially entitled immediately before his death".

The submissions

31. The Appellant represented himself. Understandably he found it difficult to explain why he thought that the Deed meant there was no IHT charge when the Deceased died. The Deed is not an easy document to understand and the Appellant was not familiar with the scheme of IHT as it applies to trusts. He had not been present when the Deceased took advice which led her to enter into the Deed and was not aware why she did it nor, we suspect, exactly what result was anticipated by the Deceased. He seems to have been rather vaguely aware that she had taken steps to reduce the IHT payable in respect of the Property without knowing any details.

32. The Appellant's main submission was not that the Deceased had transferred the Property to the trust created by the Deed but that she had transferred the equity. He explained what he meant by this; his first submission was that the Deceased had transferred her interest in the Property to the trust although by using this term he did not mean her right to occupy under the Will of her spouse because he also said that her interest in possession had not come to an end. He seems to have been suggesting that the transfer was only in relation to the post 1998 increases in value and there was no transfer of value in 1998 and any future growth took place outside her estate. He did not elaborate on how this could have been achieved whilst she only had a right to occupy the Property. If the Deceased had made a transfer of property to the trust declared in the Deed he says he was the only beneficiary of the Deed so that the Deceased had no further interest in what she had given away so that the gift with reservation rules did not apply.

33. The Respondents say that either the interest in possession created by the Will of the Deceased's spouse continued until she died or that she transferred that interest to the trust created by the Deed and continued to enjoy it until she died in which case it was property subject to a reservation and formed a part of her estate when she died for

that reason. They had initially argued that there might have been a charge under section 52 when she made the Deed in 1998 on the basis that her interest in possession ended at that stage. We deal below with that argument which raises difficult issues because of the nature of the interest in possession.

Our decision

34. This case raises difficult technical issues. We accept that the Appellant was unable to fully develop his submissions because he was not aware of the background to the Deed and because the IHT legislation surrounding trusts is not easy to understand.

35. We cannot reach a conclusion without deciding what, if any, asset was the subject of the declaration of trust by the Deceased when she entered into the Deed. Without reaching a decision about this we cannot consider the submissions made by the parties.

36. Before we consider the nature of the asset dealt with by the Deceased we shall describe some of the features of the Deed. It commences with what it describes as the "Particulars". These consist of thirty one clauses some of which have a number of sub clauses. These all seem to be sub clauses of Clause 1 although the numbering is far from clear. Clause 2 following the Particulars contains a recital that the "Owner Trustee is the owner of the Property". The term "Property" is not defined but "Property Address" is defined as 7 The Drive Wembley Park Middlesex HA9 9EF and so the Property is probably intended to be 7 The Drive. Clause 3 following the Particulars contains the declaration of trust as follows;

"The Owner declares that as from the date of this Deed that she will hold all Properties or Land (and if applicable subject of any mortgage) Endowments and Life Protection Policies with or without benefits both legally and beneficially on trust for the following beneficiary "

The Appellant was named as the beneficiary at the end of this clause. We can see that this caused him to believe that he was entitled to the trust assets.

37. The conclusion that the Appellant was entitled to the trust assets is incorrect. For example clause 1 of the particulars states

"The Owner and trustee Myra Daphne Sussman under the above particulars may exercise her discretion in the form of a power to appoint any income or capital that may become applicable to the prospective beneficiary nominated by her, any beneficiary will be at the complete discretion of the trustee and may form part of this trust document under an addendum or be given by way of a letter of wishes this power of appointment over income or capital enables the trustee to change the beneficial interests of the beneficiary in the light of future conditions."

38. Many other provisions make clear that the beneficiary is liable to be removed or to become one of a larger group of beneficiaries and so he is not entitled to the assets. This makes clear he was not the owner of the trust assets.

39. The Deed itself raises questions that simply cannot be answered without further evidence but we do not believe it is necessary for us to answer these questions to reach our decision. Amongst the questions we cannot answer is why the Deed described the Deceased as the owner of the Property. However she was not the owner. It may be that she was aware that the Property would form a part of her IHT estate but was not sure of the reason for this so that her advisers assumed she was the owner. She may have misunderstood the position and thought that she was the owner. It may be the advisers misunderstood the position having looked at it themselves. We certainly do not know the answer and neither did the parties. The Deed refers to other property but we were not told the Deceased included any other assets unrelated to the Property.

40. We have said that the important question we have to answer is what asset, if any, was the subject of the trust declared in the Deed. It seems to us that whilst the Deceased continued to occupy the Property she had nothing capable of being transferred to another person. Her interest under clause 3 of her spouse's Will was a right to occupy which came to an end if she ceased to do so permanently. We simply do not see how such an interest could be the subject of a trust of the type declared in the Deed. She continued to occupy the Property until she died. If the facts had been different and if, in 1998, the Property had been sold, or if she had ceased to live there permanently, the Property or its proceeds would have become subject to her further life interest in residue which was also an interest in possession for the purposes of section 49 IHTA. The termination of her first interest would have been exempt from IHT as a result of section 53 IHTA as long as she became entitled to a further interest in possession in the Property or in property representing it. If these had been the facts she might well have had an interest which she could have declared she held in trust for another because it was not an interest in possession the existence of which depended upon her personal occupation of the Property. But the fact was that she continued to occupy the Property and there is no evidence that her original interest in possession under the Will of her spouse had come to an end. We believe that the Respondents submissions concerning the reservation of benefit rules are not relevant here; she only had a limited interest in the Property and it was because she continued to enjoy the Property that she could not declare a trust over it of the type envisaged by the Deed. The interest enjoyed by her until she died was the occupation of the Property and we simply do not see how such an interest can be held upon trusts of the type declared. As that is our conclusion it is not necessary for us to consider these rules; she remained beneficially entitled to the Property for the purposes of section 49 IHTA and had not made a gift at all.

41. The Appellant found it difficult to explain more fully his submission that the Deceased neither transferred the Property to the Deed nor caused her interest in possession in the Property to end but merely transferred her equity in it to the trust. It may be that this was because he did not fully appreciate that she had never been the owner of the Property. She was treated for IHT purposes as if she had been the

owner but her only interest in the Property arose as a result of her spouse's Will and consisted of a right to live in the Property and a replacement property and to enjoy the income from the proceeds of sale if she ceased to live permanently in the Property or any replacement or if the Property and any replacement was sold without another property being purchased. It is not easy to see what she could have transferred to the trust declared in the Deed whilst the Property continued to be occupied by her and neither of the parties offered a satisfactory explanation about this.

42. We have concluded that the Deceased had no interest in the Property which could have been the subject of the trust declared in the Deed. The Appellant himself did not challenge the conclusion that her interest had continued until she died – his argument seems to have been that the events of 1998 somehow reduced the value of her interest. We do not see how she had achieved this.

43. If we had concluded that the Deceased was entitled to an asset over which she could have declared a trust of the type in the Deed there would have been further and difficult questions to answer. One of these questions is the exact nature of the Appellant's interest in the trust established by the Deed until he was removed or until further beneficiaries were added. It is possible he had an interest in possession but it is also possible that the trusts were entirely discretionary – we did not consider this in detail and it is not relevant to our decision since we have concluded the Deceased did not, whilst she occupied it, have any asset relating to the Property which was capable of being subject to the trusts declared in the Deed. Another unanswered question is whether the Deceased herself was a possible beneficiary of the trust. We regard this as irrelevant. If the Deceased had owned the Property personally the answer might have been relevant to whether she had reserved an interest in the trust property particularly if she had ceased to occupy it. As she did not own the Property and did continue to occupy it we do not need to consider her possible rights to become a beneficiary.

44. Neither the Appellant nor the Respondents referred to the terms of the Deed in any detail. We have already mentioned that the Appellant put forward his view that he was the only beneficiary and we want to deal quickly with this point about which he evidently felt strongly. He was certainly the only named beneficiary but this does not mean he was the absolute beneficial owner of the assets and in paragraph 43 we have given our reasons for concluding that he was not the absolute owner. His submission was made in support of his argument that the Deceased had not reserved an interest in the trust assets but the terms of those provisions are such that even if he had been the only beneficiary the reserved interest provisions might still have applied. They can apply in the context of an outright gift between individuals where the donor continues to enjoy the property given away.

45. We conclude with one final comment on the Appellant's submission that the Deceased had transferred her "equity" to the trust. He could not elaborate on this argument but we notice that Clause 5 of the Deed does refer to the equity in a property. However it does so in the context of trust property subject to a mortgage (Clause 4). Clauses 4 and 5 make clear that where such a property is sold by the trustees the mortgage is to be repaid so that only what is left (described as the equity)

is paid to the Beneficiary. In this case there was no property capable of being sold by the trustees and thus no mortgage to consider. It is certainly possible that in 1998 the Deceased intended to retain the then value of the Property and give away any increase in its value but it is difficult to see how the Deed would have had this result if she been the owner of the Property and impossible to find that this was the result whilst she merely had a right to occupy it.

Conclusion

46. Our conclusion is that the Deceased could not have given away her right to occupy the Property in 1998 and she had nothing else to give away while she continued to occupy it. Her right to occupy ***was*** her interest in the Property and continued until she died. On this basis her interest in possession continued until her death. We have not considered whether it ended the day she wrote the 2006 letter since we received no real submissions from the parties about the circumstances surrounding this letter and whether she had ceased to occupy it when she wrote the letter. As we have concluded that her interest continued until her death then she was treated as beneficially entitled to the Property when she died as a result of section 49 IHTA and it formed part of her estate when she died.

47. For the reasons stated above we dismiss the appeal.

48. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDITH POWELL
TRIBUNAL JUDGE

RELEASE DATE: 29 JULY 2016