

BETWEEN:

1964
May 25, 26
May 26

THE MINISTER OF NATIONAL
REVENUE

APPELLANT;

AND

CANADA TRUST COMPANY
(ESTATE OF MARY VIOLA
MAINE)

RESPONDENT.

Revenue—Estate tax—Estate Tax Act, S. of C. 1958, c. 29, ss. 3(1), (2) and 58(1)—Aggregate net value of property passing on death—Trusts—Whether word “authorize” imposes a duty to act.

Under the will of the late Jonathan Francis Maine who predeceased his wife, Mary Viola Maine, a trust was established under the terms of which the income from the bulk of the estate was to be paid to the testator’s wife, and the trustees were authorized to pay to her such additional amounts as she might desire or request. On the decease of the wife, the appellant included in his computation of the aggregate net value of the property passing on her death the value of the property held by the trustees pursuant to her late husband’s will on the ground that prior to her decease, she had the power under the terms of the trust to dispose of that property.

Held: That the terms of the trust include a mere authorization to the trustees to make certain payments to Mrs. Maine but do not confer upon her a right to require that such payments be made.

- 2. That whereas the use by the testator of the words “direct” and “instruct” in his will clearly impose a defined duty on the trustees, the word “authorize” implies an authority to act rather than a duty to act in the manner desired or requested by Mrs. Maine.
- 3. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at London.

F. J. Dubrule and *M. L. Ainsley* for appellant.

R. S. Macnab for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

JACKETT P. now (May 26, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue under the *Estate Tax Act* from a judgment of the Income

1964
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 CANADA
 TRUST CO.
 (MAINE
 ESTATE)
 Jackett P.

Tax Appeal Board allowing an appeal by the respondent as executor of the estate of Mary Viola Maine from the assessment of the respondent by the Minister in respect of that estate.

The sole question raised by this appeal is whether the Minister of National Revenue was correct in including, in his computation of the aggregate net value of the property passing on the death of Mary Viola Maine, the value of the property held by trustees pursuant to the will of her husband, Jonathan Francis Maine, who had predeceased her.

The expression "aggregate net value" is an expression used in the *Estate Tax Act* to describe the result of the first of three main stages in the computation of estate tax. I refer to subsection (2) of section 2 and subsection (1) of section 8 of that Act.

Mrs. Maine died in 1962 and it is common ground that tax is payable under the *Estate Tax Act* in respect of her death.

The provisions of the *Estate Tax Act* that require to be considered are paragraph (a) of subsection (1) of section 3, subsection (2) of section 3, and paragraph (i) of subsection (1) of section 58. Section 3(1), in so far as relevant, reads as follows:

3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(a) all property of which the deceased was, immediately prior to his death, competent to dispose;

....

The particular words in paragraph (a) that are of significance in this appeal are the words

property of which the deceased was . . . competent to dispose.

Subsection (2) of section 3, in so far as applicable, reads as follows:

3. (2) For the purposes of this section,

(a) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were *sui juris*, have enabled him to dispose of that property;

....

Paragraph (i) of subsection (1) of section 58 is a definition of the expression "general power" and reads, in part, as follows:

"general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument *inter vivos* or by will, or both, . . .

1964
MINISTER OF
NATIONAL
REVENUE
v.
CANADA
TRUST Co.
(MAINE
ESTATE)
Jackett P.

The effect for present purposes of the provisions that I have read is that, even though certain property did not in fact pass on the death of Mrs. Maine, its value must be included in the aggregate net value of the property passing on her death if, immediately prior to her death, she had such an estate or interest therein as would have enabled her to dispose of such property or if, immediately prior to her death, she had any power or authority enabling her to appropriate or dispose of such property as she saw fit.

Counsel for the Minister has reduced the matter to a somewhat simpler formula, which is sufficiently accurate and comprehensive for the determination of the present appeal. He puts the question: could Mrs. Maine on the day after her husband's death have said, "I want all of that property"? As I understand counsel for the Minister, if the Court would have enforced such a demand, the appeal should succeed, and, if the Court would not have enforced such a demand, the appeal must fail.

The answer to the question raised by the appeal must therefore depend upon the meaning of the will of Jonathan Francis Maine, Mrs. Maine's husband, who as I have already said had predeceased her. That will is Exhibit R-1.

By that will the husband appointed one of his sons and the respondent trust company as the executors and trustees of his will and he left to them, as his executors and trustees, his entire estate upon certain trusts. Those trusts are set out in four paragraphs lettered from A to D inclusive.

Before considering in detail the particular paragraph that I have to interpret it is relevant to examine in a general way the trust provisions as a whole.

Paragraph A is a paragraph that falls into two parts. The first part is a trust to pay out of the capital of the estate all the testator's just debts, et cetera. The second part is a provision with reference to succession duty which reads in part: "I do hereby direct that all gifts . . . in this my will

1964

MINISTER OF
NATIONAL
REVENUE
v.
CANADA
TRUST CO.
(MAINE
ESTATE)
Jackett P.

... shall be free of Succession Duty". I emphasize that the testator here used the word "direct".

Paragraph B also falls into two parts. The first part is a trust "to permit" the testator's wife the use of a certain residence and the second part is an instruction with reference to payment of certain expenses in connection with that residence. The second part reads in part:

I do instruct my executors and trustees to pay all expenses in connection with the carrying on and maintenance of such residence out of the capital of my estate.

I emphasize that the testator here used the word "instruct".

Paragraph C is the paragraph upon which the Minister relies as creating a power or authority that falls within section 3(1)(a) and I therefore quote it in full:

To pay unto my said wife, Mary Viola Maine, the income out of the capital of my estate, or, if in her absolute discretion, the income be not sufficient to adequately maintain my said wife in the manner in which she is accustomed or if she shall desire any additional amounts from time to time then I do hereby authorise my said executors and trustees to pay such amounts to her as she may request or desire.

I will, of course, return to an examination of this paragraph when I complete my general outline of the will.

Paragraph D provides for the conversion of all the assets of the testator's estate remaining at the death of his wife, for the payment of certain charitable bequests and for the division of the residue among two sons and a daughter.

I have reviewed the terms of this brief will to make it clear that I am considering the effect of paragraph C in the context of the whole will. I shall now examine that paragraph in more detail.

Looking at paragraph C of the enumeration of trusts, it appears that it also falls into two parts. The first part of paragraph C is a trust "to pay unto my said wife . . . the income out of the capital of my estate". That part of the will is a clear creation of a trust enforceable by Mrs. Maine by appropriate legal action if the trustees had failed, at any time, to pay such income to her. The second part of paragraph C is, in terms at least, a mere authority to make certain payments to Mrs. Maine. The operative words are "I do hereby authorize my said executors and trustees to pay such amounts to her as she may request or desire". Now, what are the amounts that Mrs. Maine may request

or may desire? Those words refer back to the earlier words in paragraph C, reading as follows:

if in her absolute discretion, the income be not sufficient to adequately maintain my said wife in the manner in which she is accustomed or if she shall desire any additional amounts from time to time . . .

Those are the words which describe the circumstances in which additional payments may be desired or requested.

The question I have to decide is whether paragraph C enabled Mrs. Maine to dispose of the capital of the trust set up by her husband's estate.

If paragraph C enabled Mrs. Maine to require the trustees to pay to her the whole of the capital of the trust, it, in effect, enabled her to dispose of it within the meaning of the statute. See *The Montreal Trust Company v. The Minister of National Revenue*¹.

I cannot, however, construe paragraph C, the operative words of which are a mere authorization to the trustees to make certain payments to Mrs. Maine, as conferring on her a right to require that such payments be made. I am conscious of the fact that the words "in her absolute discretion" in paragraph C carry a strong implication that the testator intended that her views in relation to the possible additional payments were to prevail. I cannot, however, read those words, where they appear in the description of the circumstances that may give rise to additional payments, as overriding the clear meaning of the word "authorize" in the operative words of the provision.

My conclusion is strengthened by the use by the testator of the word "direct" in the corresponding part of paragraph A and by the use of the word "instruct" in the corresponding part of paragraph B. Those words clearly impose a defined duty on the trustees. In contrast, the word "authorize" implies an authority to act rather than a duty to act in the manner desired or requested by Mrs. Maine. I am also strengthened in my conclusion by a contrast between the first part of paragraph C and the second part. The first part of paragraph C is a trust to pay the income out of capital to Mrs. Maine. Had it been intended that the second part was to create a right in Mrs. Maine to appropriate the capital as she saw fit, then, in my view, words would have been used similar to the words used in

1964

MINISTER OF
NATIONAL
REVENUE
v.
CANADA
TRUST Co.
(MAINE
ESTATE)

Jackett P.

¹ [1956] S.C.R. 702.

1964
 MINISTER OF
 NATIONAL
 REVENUE
 v.
 CANADA
 TRUST Co.
 (MAINE
 ESTATE)
 ———
 Jackett P.
 ———

the will which was before the Supreme Court of Canada in *The Montreal Trust Company v. The Minister of National Revenue, supra*, and I refer particularly to the judgment of the then Chief Justice of Canada at page 704 where he states that

There was a further trust "to pay to my wife . . . the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire".

In paragraph C we find, on the contrary, that while the first part is a trust expressed in the language used in the will that was before the Court in the *Montreal Trust* case, the second part is couched in language that mererly authorizes the trustees to make a payment.

I have in mind that there is a doctrine in connection with the interpretation of statutes that authorizing words may in certain circumstances carry with them an implied duty to exercise the authority when the conditions precedent to its exercise have arisen. I refer to the authorities of which the leading case is *Julius v. Lord Bishop of Oxford*¹. These authorities were not discussed during the course of argument and I doubt that they apply to the interpretation of a will. In any event, as I recall these authorities, they would not, even if applicable here, have required the trustees to make the payments requested or desired by Mrs. Maine but would merely have required the trustees to exercise the jurisdiction conferred on them of deciding whether or not the payments desired or requested should be made. In that connection, I should say that I have not overlooked the argument of counsel for the Minister that there is a dominating desire by the testator, appearing in his will, that his wife should not suffer from want. In my view, however, my interpretation of paragraph C is consistent with that view of the will. The reservation of a final decision to the trustees with reference to any desire or request of Mrs. Maine to pay out all or some substantial part of the capital can be explained by the testator's possible apprehension that Mrs. Maine, as she became older, might have been constrained to request or desire money for some benevolent purpose in such a substantial amount that, in the view of the trustees, the capital of the trust would have been so impaired as to have left her without adequate means for her own needs

¹ (1880) 5 A.C. 214.

for the balance of her life. It is not unreasonable to assume that the trustees were being given an ultimate authority to protect her against any such eventuality.

In what I have said I have adopted an interpretation of paragraph C that is as favourable as possible to the contention of the Minister. In doing so, I must not be taken to have formed an opinion with reference to the arguments put forward by counsel for the respondent for a more restrictive interpretation of paragraph C.

The appeal is dismissed with costs.

Judgment accordingly.

1964

MINISTER OF
NATIONAL
REVENUE

v.

CANADA
TRUST Co.
(MAINE
ESTATE)

Jackett P.