



1951
Mar. 20
Apr. 27

BETWEEN :

PHYLLIS BOUCK APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Money directed by testator to be paid into an account to be under “the sole control” of appellant or to be used as a guardian “in her sole discretion” may determine is income—Appeal dismissed.

A testator directed his trustee to pay into an income account certain money annually until all of his children attained the age of twenty-five years and provided “the moneys to the credit of the account shall be

under the sole control of my wife” and in the event of the death of his wife before the children shall have attained the age of twenty-five years the guardian of the children to have the control of such moneys “as the said guardian in her sole discretion may from time to time determine”.

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Appellant is the widow of the testator and in 1944 received a certain sum of money from the estate of her late husband. Respondent assessed appellant for income tax on the whole of the said sum so received. From such assessment an appeal was taken to this Court.

Held: That the control over the moneys received by appellant was sufficiently absolute in its nature to constitute income and the appeal must be dismissed.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Graham, Deputy Judge of the Court, at Edmonton.

R. A. MacKimmie and *C. Johnston* for appellant.

H. W. Riley K.C. and *F. J. Cross* for respondent.

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

GRAHAM D.J. now (April 27, 1951) delivered the following judgment:

This is an appeal by (Mrs.) Phyllis Bouck from her assessment for income tax for the year 1944.

The facts are not in dispute. The appellant is the widow of the late Charles Bouck of Calgary, in the Province of Alberta, who died on the 19th of July, 1944.

Clause 5 of the last will and testament of the said Charles Bouck reads as follows:

5. To pay to the credit of an “income Account” all the net revenue of the trust hereby created (after payment of the cost of administration and the said income taxes) in every year until all of my children shall have attained the age of twenty-five (25) years. The moneys to the credit of the said account shall be under the sole control of my wife to be used by her to maintain a home for herself and my children, for the maintenance of my wife and my children for the proper education of my children and otherwise for the benefit of my wife and my children as my wife in her sole discretion may from time to time determine. In every such year in which the said net revenue is less than the sum of Ten Thousand (\$10,000) Dollars, my Trustee shall pay to the credit of the said income account out of the capital of the trust an additional sum which with the revenue for such year will equal the said sum. If through any unforeseen cause the sum above mentioned

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should in any such year or years prove insufficient for the said purposes, then my Trustee may in its discretion pay in to the said income account such additional moneys out of the capital of the trust as may be reasonably required for the said purposes. Any moneys from time to time to the credit of the said income account and not required by my wife for the purposes aforesaid, may be taken by my Trustee and shall become part of the capital of the trust hereby created.

Provided that in the event of my wife remarrying before both of my children shall have attained the age of twenty-five (25) years, then my Trustee shall pay to my wife in each such year thereafter, in monthly instalments without power of anticipation, one-third of the net income in each such year of the trust hereby created, for her own use, and the amount so paid shall be deducted from the amount payable in each year to the credit of the said income account, and the moneys to the credit of the said income account shall thereafter be used exclusively for the maintenance, education and benefit of my children.

Provided further that in the event of my wife dying before all of my children shall have attained the age of twenty-five (25) years the above mentioned guardian of my children shall have the control of the moneys from time to time to the credit of the said income account to the extent required to provide for the maintenance, education and benefit of my children as the said guardian in her sole discretion may from time to time determine, in the same manner as my wife if living. Provided that the said guardian shall in each year first obtain the approval of my Trustee of the amount to be expended in such year for the said purpose.

It is admitted that under this provision the appellant received in the year 1944 the sum of \$3,797.26 from the estate of her late husband.

The said Charles Bouck left surviving him two infant children, both of whom resided with their mother and were during the year in question supported by her.

In assessing the appellant for income tax the Minister of National Revenue ruled that the whole of the sum of \$3,797.26 was income in the hands of the appellant and therefore subject to tax.

The appellant submits that under the terms of the will and particularly under the terms of clause 5 of the will the moneys so paid to the appellant are paid to her on behalf of herself and her two children and that as a result a portion only of the amount should be considered income accruing to her as defined by The Income War Tax Act.

This appeal involves an interpretation of the testator's intention as expressed in the above referred to clause 5 of his will.

A number of authorities on this point were submitted during the course of argument and it is by no means an easy task to reconcile them. Some hold that under clauses

of a somewhat similar nature the widow is a trustee for herself and the children. Others, notably *Lambe v. Eames* (1) and *Singer v. Singer* (2), reject this view and hold that the income belongs to the widow absolutely subject only to an obligation to provide, in her discretion, for the support and maintenance of the children. I have no doubt that in part the conflict of opinion is caused by the subject matter of the dispute before each Court and the actual words used by the testator. Here I have to decide only the question as to whether the amount received by the appellant is income in her hands under the provisions of the Income War Tax Act.

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Having this in mind and the use of the words "the sole control" and "in her sole discretion" in clause 5 of the will, I have adopted the conclusion reached by Middleton J., in *Singer v. Singer, supra*, that the testator Charles Bouck had unbounded confidence in his wife and that his dominant intention was until the children attained the age of 25 years and so long as she remained his widow she should occupy substantially the same position towards the children as he had himself occupied.

This being so, the control over the moneys received by the appellant was sufficiently absolute in its nature to constitute income, as defined by Section 3 of The Income War Tax Act, received by her in the 1944 taxation year.

I might point out that the Act recognizes the position of a taxpayer who is supporting dependent children by increasing the basic exemption over that of a single person and by allowing a deduction for the support of each child. It recognizes therefore the obligation of the parent to provide support and maintenance for the dependent children. The appellant in this regard is in exactly the same position as was her late husband. The appellant may find some comfort in the fact that if she succeeded in her appeal she would be taxed under the provisions of the Act as a single person.

The appeal is therefore dismissed with costs.

Judgment accordingly.

(1) (1871) L.R. 6 Ch. App. 597.

(2) (1915) 52 S.C.R. 447.