IN THE MATTER OF the last Will of REBECCA BARRETT.

1954

*June 3
*Dec. 9

NAOMI BEARD, BEATRICE G. PARKER, executrix of the last Will and Testament of Unia Gaunt Barrett, deceased and CAROLINE R. McCULLOCH ..... APPELLANTS;

AND

EDITH GEORGINA CONSTANCE BARRETT, trustee of the Estate of Rebecca Barrett, deceased, ROBERT JAMES GROWCOCK, executor of the last Will of Helena Augusta Mossom, deceased, HELENA ADELE SALE, IRENE ELAND CHRISTIE and ANNETTE GROWCOCK ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Annuities—Payable out of rents and profits of designated property—Continuing charge on income—Right of annuitant to Arrears—To accumulation of surplus income to meet actual or contemplated deficiencies.

A testatrix by her will gave to her husband a life interest in her whole estate and directed the payment of annuities out of the rents and profits of a certain property to her surviving daughters and a granddaughter. By a residuary gift the rest of her estate went to all her sons and daughters to be equally enjoyed by them during the terms of their natural lives, and after their deaths to their heirs and assigns forever. The testatrix died in 1893 and her husband in 1913. Following his death the annuities were paid out of the profits of the property charged with their payment and the surplus distributed under the residuary clause. Between 1932 and 1945 the revenue from the property fell below the amount required to meet the charges, and the advice of the court was sought, as to whether the deficiency arising in any year was payable out of the rents and profits of any other year or years. Judson J., to whom the application was made, held that it was, and his judgment was affirmed by the Court of Appeal for Ontario.

Held: By Rand, Estey, Locke and Fauteux JJ.—That any existing deficiency in a share of the gross annuity was in the first instance to be made up out of that portion of the rents and profits corresponding to that share, and so far might be paid in priority to the payment of the current annuity attributable to that portion, but this was not

*PRESENT: Kerwin C.J. and Rand, Estey, Locke and Fauteux JJ.

1954

In re BARRETT BEARD *et al* *v.* BARRETT *et al*

to affect the payment of the share of the gross annuity out of the appropriate portion of the rents and profits in relation to which there was no deficiency. In any year a deficiency prevented payment in full of the annuity recourse could be had to the rents and profits accrued during the lifetime of the annuitant in the first instance in the proportion set out above. Any deficiency existing at the death of the last person entitled to the annuity to cease to be payable out of the rents and profits earned after the death of such person.

The appeal was therefore allowed in part and the judgment amended accordingly.

Kerwin C.J. would have dismissed the appeal *in toto* as he agreed with the conclusions of the trial judge and the Court of Appeal.

Held: Further, that the costs in this court and in both of the courts below should be payable out of capital.

Judgment of the Court of Appeal for Ontario [1953] O.R. 897 affirmed, subject to a variation.

Appeal by three of the residuary beneficiaries of the estate of Rebecca Barrett, deceased, from an Order of the Court of Appeal for Ontario (1) dismissing an appeal from an Order of Judson J. (2), made on an application for the construction of Rebecca Barrett's will.

T. Sheard, Q.C. and *J. W. F. Goodchild* for the appellants.

J. L. Lewtas for all the respondents except E. C. G. Barrett.

J. S. Boeckh and *S. P. Webb* for E. G. C. Barrett.

The CHIEF JUSTICE:—The first point on behalf of the appellant was that the net rents and profits in each year should be distributed annually and that after the annuitants received payment of their annuities in any year the surplus income in that year should be distributed under the residuary clause and not applied to make up any deficiency in payment of annuities in past years. I agree with Chief Justice Pickup, speaking on behalf of the Court of Appeal for Ontario, that, on the proper construction of Mrs. Barrett's will, this contention cannot be upheld. Mr. Sheard sought to gain comfort from the reasons of Middleton J. on the earlier application to the Court for advice: *re Rebecca Barrett* (3) and (4). As a matter of fact all the Court was there concerned with was whether the gift to the daughters of the testatrix was of annuities charged upon the rents, or

(1) [1953] O.R. 897.
(2) [1953] O.W.N. 779.
(3) (1914) 5 O.W.N. 807.
(4) (1914) 6 O.W.N. 270.

whether they took the property in the income in fee-tail. However, it may be pointed out that Middleton J. had decided that the vesting in the residuary beneficiaries was "subject to these annuities"; and I think it is put quite accurately in Mr. Lewtas' factum—

> The fact that the residuary beneficiaries have a present vested interest in everything to which the annuitants are not entitled does not derogate from the rights conferred upon the annuitants by the gift of the annuity.

I agree that there was no laches or any acts on the part of the annuitants that would bar them. Something might be said about s. (1) of *The Accumulations Act,* R.S.O. 1950, c. 4, since, I understand, it was mentioned for the first time in this Court. By it, any accumulations for the purpose of meeting subsequent instalments were prohibited after August 2, 1914, being the expiry of twenty-one years after the death of the testatrix and, therefore, any standing by of the annuitants in the distribution of surplus income under the residuary clause during the period from the death of the husband of the testatrix on October 2, 1913, down to and including the year 1931, cannot be construed in any way as a waiver of their right to have arrears of annuity made up out of subsequent surplus income.

I also agree with Chief Justice Pickup that, as the property in the income vested within the period prescribed by the rule against perpetuities, the rule itself has no application. The decision of the Privy Council in *Belyea* v. *McBride* (1), was not referred to in the Courts below. That was an appeal from a decision of this Court and, while the amount of the arrears at the time of the death of the testatrix and the persons to receive them were determined, the gift was dependent upon a contingency that might not arise within the prescribed period (the contingency being that dividends should be declared by the directors of the company).

Judson J. decided that the charge continues until the arrears are paid, notwithstanding the death of the last annuitant, and the Court of Appeal agreed with him. In Williams on Wills, at pp. 187-188, it is stated that "Where a testator desires that an annuitant shall be paid out of income only, he will probably also desire that deficiencies

(1) [1942] 3 D.L.R. 785.

1954

In re BARRETT BEARD *et al* v. BARRETT *et al*

Kerwin C.J.

in any year shall be made up out of surpluses in other years, but he will probably intend that, on the death of the annuitant, all liability for the annuity shall cease and, in so far as it has not then been paid out of income, it shall to that extent fail and that unpaid arrears shall not be payable either out of future income or corpus". Whatever a testator intends or desires is, of course, to be gathered from a reading of the entire will and, in fact, in the notes to the sentence in Williams that follows the one quoted there appears a reference to several cases, including the one relied upon by the respondents, *In re Rose* (1), where, at p. 25, Sargant J. points out that "when once an annuity has been held to be cumulative at all, it would seem necessarily to follow that those who claim that it is cumulative to a limited extent only are bound to point out and establish the limits of its cumulativeness. And this appears to be the result of the authorities". He refers to the earlier cases in some of which, on the construction of the documents there under consideration, a different result was arrived at. The matter is discussed at length in Bowles' Testamentary Annuities at pp. 118 *et seq.* Upon consideration of the terms of the will before us, I am of opinion that the Judge of first instance and the Court of Appeal arrived at the correct conclusion.

The appeal should be dismissed, but subject only to a variation whereby the costs in both Courts below shall be payable out of capital. All parties are entitled to their costs in this Court out of capital, those of the trustee as between solicitor and client.

The judgment of Rand, Estey, Locke and Fauteux JJ. was delivered by:

RAND J.:—The question in this appeal is whether the bequest of an annuity for life payable out of the rents of a specific property is limited to rents accruing in each year severally or is continuing and as to arrears is charged upon those accruing during the life or indefinitely after the death of the annuitant.

(1) (1915) 85 L.J. Ch. 22.

After providing a life interest to her husband in all her real and personal estate the testatrix proceeded:

I give and bequeath out of the rents and profits payable from all and singular the Real Estate at present owned by me, under and by virtue of the demise in that behalf, contained in the Will of my late father, Lardner Bostwick, and consisting of fifty two feet of land on King Street, in the said City of Toronto, wherein are erected the Adelaide Buildings, the annual sum of six hundred and fifty four pounds. The six hundred pounds, to be equally divided between my daughters. The fifty four pounds to Edith Emily daughter of my son Frederick Albert Barrett for life, provided always that at the expiration of the present Lease and when a new Lease is granted that the rent should the same be increased Edith Emily's share shall be increased to 6 hundred dollars a year for life free from the control of any husband they or either of them my said daughters or Granddaughter may at any time marry for and during the term of their natural lives.

And after the death of my said daughters or any or either of them, then to their lawful issue, such issue to take the share or shares of their respective mothers.

And should any of my said daughters die without leaving lawful issue then the share of such daughter or daughters so dying without lawful issue, to go to the survivors of my said daughters equally, for and during the term of their natural lives, and after their or either of their deaths leaving lawful issue then such issue absolutely . . .

And that all my dear children may live in peace and love and as to the rest of my Real Estate and Personal, whether in possession or expectancy, I give the same to each and every of my dear children, sons and daughters, to be equally enjoyed by them during the term of their natural lives, and after their death, to their heirs and assigns forever . . . .

In matters of this nature there is a tendency to state pertinent considerations in the form of rules or canons of construction; but it must be kept in mind that we are interpreting an instrument, in this case a will, and that the paramount object is from the language the testator has used and the circumstances in which he used it to gather his intention. Apart, then, from definite constructions put on words or sets of words, considerations canvassed or applied in decided cases, in the light of which the questions raised are to be examined, while of much assistance, are, at most, aids to that ascertainment and they must yield to basic facts in each situation with which they clash: *Birch* v. *Sherratt* (1), Lord Cairns at p. 647.

When an annuity is, without more, to be paid out of a source or fund, obviously it is charged upon that fund. If, as here, the bequest is made directly out of the rents and

(1) (1867) L.R. 2 Ch. 644.

1954

In re BARRETT BEARD *et al* *v.* BARRETT *et al*

Rand J.

profits of a specified property, then that continuing source is the fund, subject to the determination of the time during which, as such fund, it is to continue. Had the bequest to the daughters and the granddaughter Edith been given *simpliciter* with the whole property passing as residue, even though not expressly made subject to the annuities, it would seem to be clear that, apart from any question of a charge on the corpus, the charge on the rents and profits and consequently the fund would, in point of time, be indefinite, and that arrears would be a continuing liability after the death of the annuitants: *In re Coller's Deed Trusts: Coller* v. *Coller* (1). The inquiry, then, is whether what would otherwise be a prima facie implication is, in the circumstances, rebutted.

The testatrix died in 1893 leaving four daughters: the husband died in 1913. The will was apparently drawn by her in her own handwriting and, as can be seen, is inartificial and presents aspects of difficulty. But we are relieved from several of them by a previous judgment of the Court of Appeal rendered in 1914. The gifts to the daughters were defined in these words:

> . . . that the said daughters of the said deceased are each entitled to receive one-fourth of the said sum of £600 or one-fourth of $2,400.00 during her lifetime; that on the death of each daughter her children are entitled to take for life the share of the deceased parent in equal shares and should any daughter die without leaving any child or children her surviving the share of the daughter so dying is to go for life to the surviving daughters equally (the child or children of a deceased daughter to take the share which the deceased parent would have taken if living).

The residue of the King Street property was declared to be vested in the children "subject to a charge thereon for the payment of the said annuities."

The "charge" in this context was not discussed on the argument before us, but from the questions put to the Court for determination I do not understand that the judgment in the use of this word is to be taken as declaring the annuities to be charged upon the corpus of the property; on that view the present application would seem to be to little or no purpose. The answer given to question No. 5, which introduces the circumstance of the payment of a mortgage on the property out of the rents "is the deficiency

(1) [1939] 1 Ch. 277.

payable . . . out of the corpus of the King Street property", in which the court, holding the future rents to be charged, stated that it was not necessary that the question should "at this time" be answered, to which no objection was taken before us, seems to be conclusive. But, in any event, the judgment does not determine the period of the rents and profits out of which the annuities are payable, and that, in the conclusion at which I have arrived, is sufficient for the purposes of the appeal.

The appeal has been brought by several of the residual beneficiaries who are concerned with the answer of the courts below that arrears in the annuity attributable to the daughters are an indefinite continuing first charge on the fund. Mr. Sheard's contention is that each year's annuity payment is to be made out of the annual rents and profits for that year only, from which it follows that there can be no arrears to be carried as a charge on the income of any other year. Assuming the ordinary rule that a simple annuity payable out of income is, prima facie, a charge on the income until paid in full, he submits that the direction to increase the amount payable annually to the grandchild Edith up to the sum of $600, to the extent that surplus income in any year permits it, is incompatible with such a charge and that all annual surplus must be distributed among the residuary beneficiaries: In *re Coller's Deed Trusts*: *Coller* v. *Coller* (*supra*). On this contention I agree with Pickup C.J.O., who, speaking for the Court of Appeal, viewed the increase as no more than a limited augmentation of the portion bequeathed to the grandchild: the surplus, in the sense of Coller's Trust, lies beyond that limit and the question of charge is unaffected.

He argues further that as the corpus of the property out of which the income arises has immediately vested in all the children in fee simple, as the King Street property is the most substantial item of the estate, and as the testatrix, assuming a continuing sufficiency of rents, contemplated an annual distribution of residual income, it would defeat her intention if the annual surplus could be retained for the security of the annuity or if the arrears remained charged on the income indefinitely. This depends on the language of the gift over. The word used in the general clause is

1954

In re BARRETT BEARD *et al* *v.* BARRETT *et al*

Rand J.

"rest" rather than "residue" but in substance these are equivalents, and I am unable to agree that the general words creating the annuity are cut down by this clause.

But it will be seen that a second series of annuities in remainder is provided to the children of the daughters who, in each case, upon the death of their mother, are to take her share. What is the nature and scope of this gift? There is no qualification in the language conferring it which I construe to mean that the share to a grandchild is of coordinate rank with, is as original and effective, and bears the same incidents, as that to a daughter; that it does not include the right to arrears due the mother at her death has, by all parties, been assumed.

That share becomes, in turn and to the same extent as that of the mother, a charge on the fund out of which it arises, which is the rents and profits accruing from the moment of the mother's death. The charge, related to that fraction of the total income corresponding to the share in the gross annuity must be taken to be as exclusive as the mother's; and the only manner in which that can be made so is to restrict it in each case to the income arising during the lifetime of each annuitant. When the annuitant dies, arrears die with her: Williams on Wills, 3rd Ed. Vol. 1, pp. 187-8 in which the following observation would seem to state accurately the mind of a testator in the ordinary case:

> Where a testator desires that an annuitant shall be paid out of income only, he will probably also desire that deficiencies in any year shall be made up out of surpluses in other years, but he will probably intend that, on the death of the annuitant, all liability for the annuity shall cease and, in so far as it has not then been paid out of income, it shall to that extent fail and that unpaid arrears shall not be payable either out of future income or corpus.

If, as held by the Court of Appeal, all arrears, including those of the deceased mother, remained prior in charge to the annuity in remainder, a grandchild might never personally receive any part of its share, a result in frustration of the clear intention of the testatrix. To attribute a concurrent charge either coordinate with, or senior or junior to that of the current annuity, involving as it must the current shares of the grandchildren and any living daughter, and the charges for arrears of both the grandchildren and living daughters and the estates of deceased daughters,

would necessarily contradict the express provision of the will. The controlling fact is the primary charge on the proportionate amount of the income in each case, for current annuity payments; that is exclusive in the case of the mother and must be taken to be equally so in that of her children.

A final consideration on the first question remains to be examined. It appears that, prior to 1932, the surplus income, with the consent of the daughters, had been distributed under the residuary clause and that the daughters, among the beneficiaries, had received a sum greater than the total arrears of the annuities. It was argued that it would be patently unjust to allow the surviving daughter and the representatives of her deceased sisters, now to assert a claim for the arrears against the descendants of the sons without taking into account the money so received. But I am unable to appreciate the force of this contention. If the surplus rents had been impounded and later used to make up the deficiencies in the rents, upon the arrears ceasing, the surplus now required for them would be available to the residual beneficiaries. That means simply that instead of receiving them prior to 1932 the same parties or persons standing in their shoes would receive them subsequently, say, to 1945. It is not to the point that children have died and are now represented by descendants because these latter take only what their parents would now be entitled to. Since the latter could not object to the payments out prior to 1932 neither can persons claiming through them.

The period of the continuing fund and the charge on it is, then, the life of each annuitant; upon death, interest in the income is at an end and the annuity, including arrears, drops. The arrears here which on this view still remain outstanding are those only of the surviving daughter, Edith Georgina. These continue a charge during her lifetime on that fraction of the annual income represented by her present share of the gross annuity. One daughter died on January 14, 1946, another on November 3, 1947 and a third on July 3, 1951. Adjustments in the distribution of arrears enuring to these daughters out of income accrued during their lives, are to be related to those dates.

1954

In re BARRETT BEARD *et al* *v.* BARRETT *et al*

Rand J.

We were asked to say whether costs in the Court of Appeal and on the application before Judson J., are to be paid out of the rents and profits or out of capital. Since the interest chiefly concerned in the question raised is that of the residuary estate to which surplus rents ultimately go, I should say that they ought to be paid out of the capital.

I would therefore allow the appeal to the extent of modifying certain of the answers as follows:

Q. 1. If the net rents and profits earned in any year from the King Street property referred to in the will are insufficient to enable payment in full of the annuity payable in respect of that year, is the deficiency payable out of the rents and profits of any other year or years?

A. Yes, but only out of the rents and profits accrued during the lifetime of the annuitant in the first instance in the proportion specified in the answer to question 3.

Q. 3. If the answer to question 1 is "yes", if in any year there is an existing deficiency, is it to be made up in priority to the payment of the annuity for that year?

A. An existing deficiency in a share of the gross annuity is in the first instance to be made up out of that portion of the rents and profits corresponding to that share, and so far may be paid in priority to the payment of the current annuity attributable to that portion, but this is not to affect the payment of the share of the gross annuity out of the appropriate portion of the rents and profits in relation to which there is no deficiency.

Q. 4. If the answer to question 1 is "yes", does any deficiency existing at the death of the last person entitled to the annuity cease to be payable out of the rents and profits earned after the death of such last person?

A. Yes.

The costs of all parties in all courts, those of the trustee as between solicitor and client, will be payable out of residual capital.

Appeal allowed to extent of modifying answers to certain questions.

Solicitors for the appellants Beard and Parker: *MacKenzie, Wood & Goodchild.*

Solicitor for the appellant McCulloch: *V. M. Howard.*

Solicitors for the respondent Barrett: *Mason, Foulds, Arnuk, Walter & Weir.*

Solicitors for the Respondents other than the trustee: *Arnoldi, Parry & Campbell.*