

“FIDUCIARY PRACTICE IN A COMPLEX WORLD”

RIGHTS OF TRUST BENEFICIARIES: CASE STUDY

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Abel is married to Betty. They have two sons, Charles and Evan.

A discretionary *inter vivos* ownership trust was created by Abel that held immovable property, cash and shares during his life. The trustees of the trust were:

- Abel, Charles and Donald (an attorney and appointed as the independent trustee).

The trust deed stipulated that the aim of the trust was to provide for Abel and Betty for their retirement. Upon their death, the trustees at that time can choose, in their absolute discretion, if and when to distribute the benefits to the remaining beneficiaries in any proportion they deem fit.

The beneficiaries were listed as:

- Abel, Betty
- Charles, Evan
- Any Descendants of Charles and Evan or a PBO chosen by the trustees.

Abel and Betty have since received monthly payments from the trust.

The trustees of the trust, while Able was still alive, decided on a restructuring of the trust assets and sold one of the immovable properties in the trust for a fair market value to another trust. Charles was coincidentally also a beneficiary of said trust. Evan is a tenant of one of the other properties of the Trust.

Evan is dissatisfied with the decision of the trustees and accused the trust of unequal treatment of the beneficiaries and that the trust did not take the interest of all the beneficiaries into account.





Discretionary TRUST

Abel

Charles

Donald

Provide for retirement
THEN AFTER DEATH
Trustees can select
to offer benefits to
any beneficiary

Abel

Betty

has received benefits

Charles & co

beneficiary on another trust

Evan & co



tenant

PBO

RIGHTS....



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NAME THE BENEFICIARIES WITH A VESTED RIGHT



- Abel and Betty.
 - received monthly payments that they accepted



VESTED RIGHTS



“A vested right indicates that its beneficiary is the holder of a **complete real or personal right**. A complete right is one that has **all the parts necessary to allow for its full operation and for all consequences flowing from it**. A right will not be complete when it is subject to a suspensive condition. However, ownership of the benefit, and the transmissibility and immediate enjoyment of the right are not requirements for its vesting.”

Van der Merwe ‘The meaning and relevance of the phrase ‘vested right’ in income tax law. (2000) 12 SA Merc LJ 319.

“A vested right was something substantial; something which could be measured in money; something which had a present value and could be attached.” ITC 76 (1927) 3 SATC 68 at 70.

“Surely a right has accrued on the ensuing acceptance to the third party ... and it would be unfair for it to be taken from him without [his] consent.” Voet 39.5.43.

EXPLAIN IF THE RESTRUCTURING REDUCED THE MONTHLY PAYMENT OF BETTY, WHAT THE LEGAL POSITION IS



- Recurring benefits are already vested in Betty, her consent will be needed if changes are made.
- Griessel v De Kock 2019 (SCA) - rotational visits to game farm taken away.
 - vested right = consent needed



NAME THE BENEFICIARIES WITH A CONTINGENT RIGHT



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CONTINGENT RIGHTS



Contingent right is “something which may ripen into a vested right on the happening of an event, but it must be such that the happening of the event, without more gives the vested interest.” *Stern and Ruskin v Appleson* 1951 (3) SA 800 (W) at 805.

A contingent right is only still a chance to get a right in the future- this automatically flows as consequence from the agreement. He does not need to accept this right and the benefit is not anything substantial yet.

“A condition is a term that qualifies a contractual obligation in such a manner as to make its operation and consequences dependent on whether an uncertain future event will happen or will not happen.” *Van Huyssteen, Lubbe & Reinecke Contract: General Principles* (2016) at 279.



NAME THE BENEFICIARIES WITH A CONTINGENT RIGHT



Upon the death of Abel and Betty, the trustees may decide to distribute to Charles or Evan or descendants or PBO.

None of them has a contingent right.



A SPES/ HOPE/ EXPECTATION



“A person cannot be said to have a contingent interest in something which another may or may not choose to give him in the future.”

Stern and Ruskin v Appleson 1951 (3) SA 800 (W) at 805.

“By a future right is meant the expectation or *spes* that a claim may materialise in future. It is to be distinguished from a contingent or conditional right, where the right exists but its continued existence and eligibility is made subject to a condition, resolute or suspensive.” Petrus Nienaber & George Gretton ‘Assignment/Cession’ in Reinhard Zimmermann, Daniel Visser & Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 803.



NAME THE BENEFICIARIES WITH A SPES/HOPE



Strictly speaking: Charles or Evan or descendants or PBO.

If it is in the trustees' discretion to decide if, when and how much to offer to a beneficiary, the beneficiary will only have a hope that they will decide in his favour.

- Although in case law, beneficiaries with only a *spes* are sometimes referred to as “contingent beneficiaries” (Potgieter 2011 (SCA))
 - Griessel 2019 (SCA): to select beneficiaries from a list of potential beneficiaries- their rights were “contingent” and this warranted legal protection
 - The beneficiary actually had vested rights



DEED: “AFTER THE DEATH OF ABEL AND BETTY, THE BENEFITS MUST BE DISTRIBUTED TO CHARLES, EVAN, DESCENDANTS.”



EXPLAIN IF **DEATH** IS THE CONDITION THAT HAS TO BE FULFILLED FOR THE CHILDREN'S CONTINGENT RIGHTS TO BECOME VESTED RIGHTS.

- Death is not a condition- it is a time clause.
- A condition must be an uncertain future event. Death is certain. It is only extended. Vesting is postponed until the death of both Abel and Betty.
- Kuttel 2022 (SCA): “On the death of the last-dying of them ... the trust’s capital is to be distributed in equal shares to Peter, Francois and Adrian.”
 - Can be argued that they had a vested right to the capital postponed until the death of both parents. Yet, seen as contingent in the case.
- Nktobe 2015 (EC)[9]: “A contingent beneficiary is a beneficiary whose rights to the enjoyment of the benefits of the trust property are conditional upon the occurrence of an event such as the death of another (as in the Hofer case), the passage of a particular period of time (as in the Doyle case), or where the trustee has a discretion, not merely regarding the mode of applying the terms of the trust, but whether or not to distribute to a particular beneficiary. (As in Braun v Blann and Botha NNO and Another 1984 (2) SA 850 (A).”
- See Honoré 2018 §321 for the postponed vesting issue.

IDENTIFY THE ACTUAL/IMMEDIATE BENEFICIARIES OF THE TRUST.



- Abel and Betty.
- Actual does not necessarily mean vested?
- Are Charles and Evan actual beneficiaries because they are mentioned by name in the trust deed?
 - They may be actual beneficiaries, but it won't give them vested rights



IDENTIFY THE FUTURE BENEFICIARIES OF THE TRUST



- Future (Honoré) , remoter (Meyerowitz) beneficiaries
- Charles, Evan, descendants, PBO



IDENTIFY THE POTENTIAL BENEFICIARIES OF THE TRUST



- Potential beneficiaries could be further away, not named, part of a group, or should still apply to be a beneficiary (Nktobe), unborn etc.
- Du Toit, Smith, Van der Linde 2023: Beneficiaries with a mere hope (in a discretionary trust) should be referred to as “potential beneficiaries”
- Case law: no distinction between “contingent” and “potential” beneficiaries.
- If the trustees exercise their discretion in their favour, Charles, Evan, their descendants or the PBO could potentially be beneficiaries.





TO WHICH PARTIES DO THE TRUSTEES OWE THEIR FIDUCIARY DUTY?

- Hofer v Kevitt 1998 (SCA) & Doyle v Board of Executors 1999 (O): The trustee owes the interest of good faith towards all, whether actual **or potential**.
- Gross 1996 (A): While the rights of beneficiaries may be only contingent, they have **vested interests in the proper administration of the trust and entitled to prevent the maladministration of the trust.** (Ferreira 2019 (EC))
 - could argue that it also extends to potential beneficiaries (De Waal, Claassen)
 - different/separate from their right to benefits
 - at creation by operation of law

WHEN AN INTEREST IN THE TRUST IS NEEDED



- Sec 16 TPCA: Master may call upon the trustee to account for his administration and disposal of trust property.
- Sec 19 TPCA: If any trustee fails to comply ... or perform any duty imposed upon him by the trust instrument or by law, the Master **or any person having an interest in the trust property** may apply to the court for an order directing the trustee to comply with such request or perform such a duty.
- Sec 20 TPCA : A trustee may, on the application of the Master or **any person having an interest in the trust property**, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests and its beneficiaries.

INTEREST IN TRUST CASE LAW



- *Nktobe v Bengu* 2015 (EC): potential beneficiaries do not have a sufficient legal interest in the trust property to clothe them with locus standi in proceedings for the removal of the trustees.
- *Ras v Van der Meulen* 2010 (SCA): Obiter- conducting part-time farming operations and paying expenses are consistent with her having accepted the benefits of the trust. (she would then be a capital beneficiary who would have had an interest in the trust)
- *N v Maluleke* 2022 (GP): beneficiaries named, but in discretion of trustees, not any vested or contingent rights, not recognised as beneficiaries of the trust (regardless that some were tenants), hence no interest in the affairs of the trust.
- See *Maja* 2022 (LMP): “named beneficiary” found to have interest in the trust

CAN EVAN CLAIM TO BE MISTREATED?



- *Hofer v Kevitt* 1998 (SCA): 385E-F. The right of the trustees to vary the trust was not unfettered and if the proposed variations were not in the interest of both the donor and the potential beneficiaries, it was the duty of the trustees not to agree thereto.
 - *Du Toit* 2007:118: "A trustee of a trust *inter vivos* can ... agree with the trust's founder to the amendment of the provisions of the trust or to the termination of the trust, even if the amendment is prejudicial to beneficiaries who have not yet signified their acceptance of trust benefits, without fear that he will breach his fiduciary duty ... A beneficiary's right to proper trust administration does not render a trust *inter vivos* irrevocable *ab initio*."
1. Ask the question: what rights do the beneficiaries have?
 2. Note: the difference between rights to the property and right to proper administration (fiduciary duty).

CASE LAW ON THE MATTER



- Kuttel (Evan in case study):
 - question: right of beneficiary? No, contingent (/spes).
 - fiduciary duty was justified (fair market value, powers)
 - could not claim to be informed of transactions or being treated unfairly
- Griessel (Betty in case study):
 - question: right of beneficiary? Yes, vested.
 - fiduciary duty was not justified (strife)
 - trustees should treat all the beneficiaries (with same rights) even-handedly (not the same as equally)
- If beneficiary had vested right & justified fiduciary duty?

THANK YOU

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