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Re McCreath

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the suspect of the dangerous consequences of remaining silent. The right to remain silent at the time of arrest must be a hollow one if adverse inferences can later be drawn from it. The decision in *Graham* also tells us one more thing. It will be remembered that Graham said he might make a statement if he could first get in touch with his lawyer. Although he later changed his mind, it was by that time too late — the "*res gestae* period" had expired. So although a suspect may insist on being allowed to seek advice from a lawyer before being subjected to a breathalizer test,[127] no such generosity is shown to a suspect waiting to make his exculpatory statement!

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[127] *R.* v. *Brownridge* (1972), 28 D.L.R. (3d) 1 (S.C. of Can.).

Re McCreath

SUCCESSION DUTY — TRUST *Inter Vivos* — INTEREST RESERVED BY SETTLOR — EXEMPT

The Province of Ontario has not found it a simple matter to levy death duties. Throughout the first forty-seven years of its operation the *Succession Duty Act* was open to attack on constitutional grounds. Despite numerous amendments in the years between 1892 and 1937 it was not until the latter year that the charging section assumed an appearance which remotely resembled the present provisions of section 6.[1] Further but less substantial amendments were required in 1939 and 1940. Since 1940, although other parts of the statute have been affected by a long series of amendments, the basic structure of the *Succession Duty Act* has not changed. Duty is imposed upon property which is situate in Ontario if that property passes on the death of a person.[2] In addition, persons resident or domiciled in Ontario are subjected to duty if foreign personalty passed to them on the death of a person domiciled in Ontario.[3] The duty is also imposed upon residents who, under dispositions made in Ontario, have received either property situate within the Province or foreign personalty.[4] Finally, persons resident in Ontario at the date of the death of a person domiciled in Ontario, are subject to duty if they have

[1] S.O. 1937, c. 3, s. 7.

[2] R.S.O. 1970, c. 449, s. 6(a).

[3] *Id.*, s. 6(b).

[4] *Id.*, s. 6(c).

received foreign personalty under dispositions made outside of Ontario and if they were resident and the deceased was domiciled in Ontario at the date of the particular disposition.[5]

That the statute has grown into such a complex and convoluted piece of legislation seems to have been due in part to the difficulty which was experienced in simultaneously retaining provisions which were over-enthusiastically borrowed from the Estate Tax legislation in force in the United Kingdom, retaining a wide tax base and remaining within the limits allowed by the British North America Act, 1867. In view of this difficulty and the effect it had produced upon the legislation by 1940, it is, perhaps, not surprising that the tendency since that year has been merely to add rather than to integrate subsequent amendments into the statute.

The appointment of the Langford Committee[6] in 1972 has raised hopes that reform, if not repeal, of the legislation may be in the offing. Persons who hold such sentiments will be encouraged by the recent decision of Fraser J. in *Re McCreath*.[7]

The Decision in Re McCreath

Almost 20 years before her death the deceased had transferred shares in a company to a trustee upon the following trusts:

> (a) During the lifetime of the settlor to pay or apply the whole net income of the trust fund in each year to or for the benefit of the settlor and her issue from time to time alive or some one or more of the settlor and her said issue as the trustee may from time to time in its absolute discretion determine and if paid or applied to or for the benefit of more than one of them to pay or apply the same in such proportions as the trustee may from time to time in its absolute discretion determine.
>
> (b) On the death of the settlor, if she shall die leaving issue her surviving, to hold the trust fund in trust for the issue of the settlor or such one or more of them and in such proportions and subject to such terms and conditions as the settlor may by will direct and in default of such direction or insofar as the same may be void or shall not extend or take effect to pay or transfer the trust fund to the issue of the settlor who shall be living at her death and if more than one in equal shares per stirpes.

After the deceased died in 1968 without having exercised her testamentary power of appointment, the Minister of Revenue for Ontario included the value of the corpus of the trust within the aggregate value for the purposes of succession duty. The deceased's children who were donees in default of appointment and other beneficiaries under the deceased's will appealed to the Supreme Court of Ontario.

The appellants argued first that the corpus of the trust was not property passing on death within the terms of the general definition in the statute and

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[5] *Id.*, s. 6(d).

[6] *The Advisory Committee on Succession Duties* was established in June 1972 under the Chairmanship of Mr. J. Alex Langford Q.C. The Committee's terms of reference include the making of a comprehensive review and thorough examination of the *Succession Duty Act* and the presentation of advice with respect to a revision of the Act.

[7] [1973] 1 O.R. 771.

that it did not fall within any of the special categories of property which is deemed to pass on death. The second ground of appeal was that the trust fell within the exemption conferred by section 5(1)(g) of the Act.

Fraser J. rejected the first of these arguments and held that the corpus was deemed to pass on death under section 1(r)(x) as

> property passing under any past or future settlement, including any trust, . . . made by deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, ...[8]

In giving his reasons for this part of the decision, the learned Judge considered at some length whether the deceased could be regarded as having reserved an interest within the meaning of the provision. Two decisions on the meaning of an almost identical provision in revenue legislation of the United Kingdom supported an affirmative conclusion.[9] In a more recent decision, *Gartside and Another* v. *I.R.C.*,[10] the House of Lords had held that the objects of a discretionary trust which contained a power to accumulate income did not have any "interest" within the meaning of a statutory provision which deemed property to pass on death if, *inter alia,* "an interest limited to cease on a death has been disposed of or has determined, . . . after becoming an interest in possession, . . .".[11] The House of Lords refused to over-rule the earlier decisions and distinguished them mainly on the ground that the mischief at which the provisions analogous to section 1(r)(x) of the Ontario Act were directed required the application of a broader conception of an interest.

In *Re McCreath,* Fraser J. placed some weight also on *dicta* which emphasized the fact that the trust in *Gartside* was "non-exhaustive": that the trustees were, in other words, entitled to accumulate income and could not be compelled to make a distribution.

> In the case at Bar the donees of the income are entitled collectively to the payment of the whole thereof. The settlor is one of those donees. In the provisions of [section 1(r)(x)] the word "interest" is not qualified by "in possession" or words of a like import. I am of opinion that in principle and applying the reasoning in the cases to which I have referred, that the settlor did have an interest in the income from the 1948 trust and it therefore falls within the definition of property passing on death found in [section 1(r)(x)].[12]

The learned Judge then turned to the second ground of appeal and the argument that the trust constituted a disposition which was exempt under section 5(1)(g) of the *Succession Duty Act.* That provision reads as follows:

> No duty shall be levied on any of the following property nor on any person to whom there are any transmissions of any of the following property, with respect

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[8] The remaining part of the provision deals with powers to revoke the settlement or to resettle property in the settlement.

[9] *A.-G.* v. *Heywood* (1887), 19 Q.B.D. 326; *A.-G.* v. *Farrell,* [1931] 1 K.B. 81.

[10] [1968] A.C. 553 (H.L.).

[11] *Finance Act,* 1940, s. 43(1).

[12] *Supra,* note 7, at 785. *per* Fraser, J. In subsequent English decisions this distinction has been rejected, see text, *infra* at p. 324.

> to such transmissions, or on any person to whom any of the following dispositions are made, with respect to such dispositions, and such property and dispositions shall not be included in the aggregate value nor included for the purpose of determining any rate of duty, . . . (g) any disposition where actual and bona fide enjoyment and possession of the property in respect of which the disposition is made, was assumed more than five years before the date of death of the deceased by the person to whom the disposition is made, or by a trustee for such person, and thenceforth retained to the entire exclusion of the deceased or of any benefit to him whether voluntary or by contract or otherwise;

As in the opinion of the learned Judge the trust fell within the terms of the statutory definition of a disposition and as it was created more than five years before the date of the settlor's death, the crucial question was whether, within the five year period, *bona fide* possession and enjoyment of the property was retained to the entire exclusion of the deceased or of any benefit to him. The answer to the question was held to depend upon the correct identification of the property which was the subject matter of the disposition. To assist in this identification the learned Judge referred to decisions of English and Irish Courts, the Privy Council and the Supreme Court of Canada.

The English and Irish decisions[13] turned on the interpretation of the provision of the *Finance Act*, 1894 on which the draftsman of section 5(1)(g) had obviously relied. The Privy Council decisions[14] turned on provisions in Australian legislation which were, in all relevant respects, identical to those considered in the English and Irish cases. In the Canadian case, *M.N.R.* v. *National Trust Company Limited (Wood Estate)*,[15] the Supreme Court of Canada, on the basis of a provision virtually identical to section 5(1)(g), upheld an appeal against an assessment under the *Dominion Succession Duty Act*.

The reasoning in these prior decisions suggests that, for the purposes of provisions of the kind contained in section 5(1)(g), the subject matter of a disposition consists of the beneficial property rights which the disposition confers upon its recipients. Beneficial property interests which are retained by the maker of the disposition are not part of the subject matter.

In *Re McCreath* this reasoning was followed. The subject matter of the disposition was identified as the equitable remainder in the corpus of the trust and, as the deceased had been excluded from this equitable remainder interest, the trust was held to be exempt. The fact that she might under the terms of the trust, and did in fact, share in the income was of no significance as the gift of the corpus was "clearly severable from the gift of the income".[16]

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[13] *Re Cochrane*, [1905] 2 I.R. 626; aff'd., [1906] 2 I.R. 200 (C.A.); *St. Aubyn* v. *A.-G.*, [1952] A.C. 15 (H.L.).

[14] *Commissioner of Stamp Duties of New South Wales* v. *Perpetual Trustee Co. Ltd.*, [1943] A.C. 425 (P.C.); *Oakes* v. *Commissioner of Stamp Duties of New South Wales*, [1954] A.C. 57 (P.C.); *Chick* v. *Commissioner of Stamp Duties of New South Wales*, [1958] A.C. 435 (P.C.).

[15] [1949] S.C.R. 127.

[16] *Supra*, note 7, at 795.

Critique

The implications of the decision are remarkable. No attempt to impose death taxes could possibly be effective if it was directed solely at the testamentary estate. The draftsmen of statutes which impose such taxes invariably seek to bring within the statutory net a variety of *inter vivos* dispositions which might otherwise be used to avoid the tax. The prime example of such a disposition is surely the trust with a life interest reserved to the settlor. If the reasoning in *Re McCreath* is correct the corpus of such a trust is exempt from duty under the legislation in force in Ontario. This conclusion is so startling that the reasoning of the learned Judge deserves careful scrutiny.

On reading the opinion there is at first an appearance of inevitability in that reasoning. The terms of section 5(1)(g) are indeed similar to those of the provisions which were considered in the earlier cases in other jurisdictions. There is, however, one highly significant difference between the provisions construed in the English, Irish and Australian cases and those on which the decisions in *Wood Estate* and *Re McCreath* were based. The latter were exempting provisions; the former were provisions which recaptured gifts if the donor was not excluded from the property or from any benefit within the statutory period. Whereas the approach in the English, Irish and Privy Council decisions may be perfectly appropriate for the purposes of the *Finance Act* and the Australian legislation, it is singularly inappropriate when the construction of the *Succession Duty Act* is in question.

It was recognized in the Supreme Court of Canada in *Gorkin (Adilman Estate)* v. *M.N.R.*[17] that when Parliament inserts a recapturing section in a Succession Duty Act:

> It must be assumed that it was placed there so as to include, as a succession, a certain type of transaction which would not otherwise have been included under any of the other paragraphs. . . .[18]

It has been seen that section 1(r)(x) deems settlements with reserved life interests to be property passing on death. That part of the provision would be almost totally ineffective if the decision in *Re McCreath* were correct. Where such a settlement was created more than five years before the settlor's death, the corpus would normally be exempt under section 5(1)(g). Where such a settlement was created within five years of the death it would be recaptured under one of the provisions relating to dispositions unless the requirements of those provisions with respect to the place of the disposition and of the domicile or residence of the settlor and the recipient were not satisfied. It is hardly a reasonable assumption that the sole purpose of section 1(r)(x) is to fill the lacunae in the other provisions which recapture dispositions made within five years of death.

In two other respects the reasoning in *Adilman Estate* is of some relevance to the problem in *Re McCreath*. In the former case the Minister had, in the Exchequer Court, relied successfully on a decision on the interpretation of a provision of the *Finance Act* of the United Kingdom. That provision

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17 [1962] S.C.R. 363.

18 *Id.*, at 368, *per* Martland J.

created an exception to the obligation to pay tax. This factor was given some emphasis in the Supreme Court's reasons for refusing to apply the decision to a recapturing provision in the Dominion Succession Duty Act.[19]

The second point which is worthy of note is that the Court in *Adilman Estate* adopted[20] the following statement of Lord Blanesburgh in *Attorney General for Ontario* v. *Perry:*

> First then, is the Ontario Sub-section, unlike the corresponding British Enactment, an "original" section? In their Lordships' judgment it undoubtedly is, and must be so construed. It contains on its face no reference to any origin. It comes into Ontario legislation full-grown and without ancestry. It would, in their Lordships' judgment, be contrary to all principle, for the purpose of construing it, to look at the evolution even of the same enactment under some other system of law.[21]

The same point had been made at greater length by Judson J. delivering the judgment of the Supreme Court of Canada in *Toronto General Trusts Corporation (Hilder Estate)* v. *M.N.R.*

> The Finance Act, 1894 imposed an estate duty not a succession duty. I have already stated that the Canadian Act taxes a successor who becomes beneficially entitled to property consequent upon a death. The English Act imposes a tax on property passing on death or property deemed to pass on death . . . There is no possible analogy between a duty imposed upon a successor when there is a change of beneficial ownership and an estate duty imposed on property passing or deemed to pass on death. The two Acts differ so widely in structure and incidence of taxation that cases decided on one Act are of little assistance to the interpretation of the other and it is of no help that sections of one Act may have been copied from the other. The Dominion Succession Duty Act must be construed independently and the caution expressed in *Attorney General for Ontario* v. *Perry*, . . . against a consideration of statutory origins and evolution as an aid to interpretation is particularly appropriate here where the two Acts differ so fundamentally.[22]

The provision to which Lord Blanesburgh referred was, in fact a provision almost identical to those construed in English and Australian cases which were followed in *Re McCreath.* That provision has now been removed from the *Succession Duty Act* of Ontario although as has been seen a virtually identical provision now confers an exemption in section 5(1)(g) of the statute. It would be very curious if the deletion of the recapturing provision and its replacement with an exempting provision has had the effect of making applicable decisions which might formerly have been held to be inapplicable.

If, however, a case can be made for treating the decisions under recapturing provisions as supplying no guidance for the interpretation of section 5(1)(g), there remains the formidable obstacle raised by the reasoning and decision of the Supreme Court in *Wood Estate.*[23] The assessment under appeal in that case had been made with respect to a trust created some ten years prior to the settlor's death. Under the terms of the trust the settlor's daughter was entitled to the annual income and was to receive the corpus on the death of the settlor. It was also provided that in the event of her death in

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[19] *Id.*, at 368, *per* Martland J.

[20] *Id.*, at 369, *per* Martland J.

[21] [1934] A.C. 477 at 487 (P.C.).

[22] [1958] S.C.R. 499 at 505, *per* Judson J.

[23] [1949] S.C.R. 127.

the settlor's lifetime the corpus would revert to him. On the authority of the Privy Council cases decided under the Australian legislation it was held in both the Exchequer Court[24] and the Supreme Court of Canada that the trust fell within exempting provisions very similar in terms to those in section 5(1)(g) of the *Succession Duty Act* of Ontario. Moreover, as Fraser J. emphasized in *Re McCreath,* the members of the Supreme Court of Canada were unanimous in holding that the particular provision conferred an overriding exemption which had to be applied irrespective of the fact that the trust fell within any one or more recapturing provisions of the *Dominion Succession Duty Act.*

In the light of this reasoning and the attitude of the Supreme Court towards the Privy Council decisions it cannot be said that the result in *Re McCreath* is unsupported by persuasive authority. That is not to say that the learned Judge was compelled to adopt an interpretation of section 5(1)(g) which, to put it bluntly, makes nonsense of the recapturing provisions of the statute. There are, it is submitted, grounds on which the decision of the Supreme Court might well have been distinguished. At the relevant time the *Dominion Succession Duty Act* contained both a recapturing and an exempting provision with terms similar to those in section 5(1)(g). Despite the dicta delivered in *Adilman Estate* and *Hilder Estate* it was obviously much easier to regard the Privy Council decisions on similar recapturing provisions as applicable in these circumstances. When the draftsman of the statute included a provision almost identical in its terms and substantially similar in its purpose to provisions in other jurisdictions it is not illegitmate at least to start from the assumpton that the decisions from other jurisdictions have some persuasive authority. It is not a long or unreasonable step to allow that assumption to affect the interpretation of an exempting provision which is in virtually the same terms.

The position under the *Succession Duty Act* of Ontario is quite different. There, section 5(1)(g) has no converse in the recapturing or charging provisions. Its purpose is quite different from that of the provisions considered by the Privy Council. It would seem that in such circumstances it would have been quite proper for Fraser J. to consider the structure of the Act and the consequences of alternative interpretation, to treat the decision of the Supreme Court as distinguishable and to heed the warnings given in the later cases of *Adilman Estate* and *Hilder Estate.*

Alternative Constructions

The above comments are not uncritical. They would, however, be quite empty if it were not possible to give section 5(1)(g) a more limited and more reasonable construction. In this context a short reference to the history of the statute may be helpful. The original enactment of 1892 contained no provisions closely analogous to sections 1(r)(x) and 5(1)(g). In 1896, however, with the wholesale incorporation[25] of provisions modelled on those of the *Finance Act,* 1894 of the United Kingdom, the concept of property passing

[24] [1946] Ex. C.R. 650.

[25] S.O. 1896, c. 5.

on death was introduced into the statute. Included among the categories of property deemed to pass on death was property passing under a settlement which reserved an interest to the deceased during his lifetime and a provision similar to section 5(1)(g) but in the positive or recapturing form. The first of these provisions has remained in the statute throughout its history and now appears as section 1(r)(x). The second remained in the Statute until 1937.

In 1919 an exempting provision in terms somewhat similar to section 5(1)(g) was inserted into the Act[26] This exemption was however limited to gifts in favour of specified relatives. Thus from 1919 until 1937 the Act contained a provision in substance identical to section 1(r)(x), a recapturing provision similar to those considered in the English and Privy Council cases and a very limited exempting provision which required the assumption of possession by the donee to the exclusion of the donor or of any benefit to him.

In 1937 the basic structure of the charging provision of the Act was changed and for the first time the duty was imposed upon "dispositions".[27] At the same time the elaborate definition of a disposition was enacted, the recapturing provision which spoke of assumption of possession by the donee and the exclusion of the donor was removed and replaced with a provision which recaptured dispositions of property situate in Ontario in certain circumstances and the exempting provision was changed so that it now referred to "dispositions" rather than "gifts". The scope of the exemption was extended so that it applied to any members of the deceased's family and not simply to the relatives formerly specified.

In 1939 an exemption in similar terms was conferred upon dispositions made to other persons more than thirty years prior to the deceased's death.[28] When, in 1946, the period was reduced to five years the provision which exempted dispositions in favour of relatives became redundant and was repealed.[29]

As the application of the exemption to "dispositions" was effected in 1937 as one part of a package of amendments which introduced the concept of a disposition into both the charging section and the categories of property which is deemed to pass on death, it would not be unreasonable to allow this fact to affect the construction of 5(1)(g). On this basis and in the light of the considerations mentioned earlier in this paper the provision might well be interpreted as confined to dispositions which can only attract tax as such.

Such an interpretation would prevent the emergence of a substantial gap in the recapturing sections of the Act by allowing section 1(r)(x) to have the effect it was obviously intended to have. At the same time such an interpretation would in no way unduly restrict the operation of section 5(1)(g). The scheme of most death tax statutes in common law jurisdictions is that the subject matter of *inter vivos* dispositions is recaptured if life interests are reserved by the settlor or if, although nothing is reserved in the disposition,

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[26] S.O. 1919, c. 9.

[27] S.O. 1937, c. 3, s. 7.

[28] S.O. 1939 (2nd Sess.), c. 1.

[29] S.O. 1946, c. 90.

the settlor subsequently obtains some benefit from the subject matter. It is submitted that despite the wide terms of the definition of the term "disposition"[30] a similar construction of the *Succession Duty Act* is not precluded.

The general thrust of the above comments is that the history and structure of the legislation in force in Ontario requires a much more limited interpretation of section 5(1)(g) than that adopted in *Re McCreath.* If, however, those comments are misconceived there would still appear to be tenable arguments which, if accepted, would have led to the dismissal of the appeal.

It has been seen that the learned Judge drew a crucial distinction between the income and capital interests in the trust.[31] Once the deceased was held to have been excluded from the latter, it was immaterial that she had received some benefit from the former. This conclusion depends entirely on the proposition that the deceased's "interest" as a member of the class of income beneficiaries was to be characterized as a beneficial proprietary interest for the purposes of section 5(1)(g). If that proposition were rejected then on the authority of Privy Council decisions it is clear that, by her receipt of income, the deceased would have obtained a benefit from property of which she had disposed.[32]

It is submitted that for the purposes of section 5(1)(g) the interest of a beneficiary under exhaustive or non-exhaustive discretionary trusts of income should not be characterized as a beneficial interest in the property and that the distinction drawn in *Gartside* between the concept of an interest for the purposes of different provisions in legislation of the United Kingdom is equally applicable to the *Succession Duty Act.* In that case the House of Lords recognized that the mischief at which provisions analogous to section 1(r)(x) were directed required an extension of the concept beyond a "narrow or technical meaning".[33] There would seem to be no reason of authority, principle or policy for adopting this extended concept of an interest for the interpretation of section 5(1)(g). It is true that in the first part of his reasons for judgment Fraser J. distinguished the decision of the House of Lords in *Gartside* on the ground that the trustees in that case were under no obligation to distribute any income to the beneficiaries whereas the trustee in *Re McCreath,* on the other hand, had no power to accumulate income. That distinction has been rejected in English cases to which the learned Judge did not refer and it has been held that the reasoning in *Gartside* is as applicable to an exhaustive discretionary trust as it is to a trust under which the trustees are entitled to accumulate income.[34]

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[30] The definition in s. 1 specifically includes dispositions made by the creation of a trust: s. 1(g) (x).

[31] See text, *supra,* at p. 319.

[32] See *Commissioner of Stamp Duties of New South Wales* v. *The Permanent Trustee Co. Ltd.,* [1956] A.C. 512 (P.C.); *Oakes* v. *Commissioner of Stamp Duties of New South Wales, supra,* note 14.

[33] *Gartside and Another* v. *I.R.C., supra,* note 10 at 612. See also *In re Coleman* (1888), 39 Ch.D. 443 at 452 (C.A.); *In re Munro's Settlement Trusts,* [1963] 1 W.L.R. 145 at 148-49. (Ch.D.).

[34] See *Re Weir's Settlement Trusts,* [1971] Ch. 145 (C.A.); *Sainsbury* v. *I.R.C.,* [1970] Ch. 712.

The first limb of the statutory definition of the term "disposition" is as follows:

> "disposition" means,
> (i) any means whereby any property passes or is agreed to be passed, directly or indirectly, from the deceased during his lifetime to any person, . . .[35]

At the time of the creation of the trust in *Re McCreath* the entire control of the property passed from the settlor to the trustee. The former retained no right to demand any part of the capital or income. Any income she received came to her exclusively as a result of the decision of the trustee. In these circumstances it can be argued that there are sufficient grounds to justify a conclusion that, for the purposes of a taxing Act, the entire property in both the capital and income of the trust passed from the settlor to the trustee.

If the above argument is also misconceived one might still wonder why, in *Re McCreath,* no significance was given to the deceased's retention of a testamentary power of appointment over the corpus of the trust. At the creation of the trust, contingent interests in remainder passed to the deceased's issue. Those interests were, as the learned Judge recognized, property of which the deceased had disposed. Thereafter, although she received no benefit from those interests, she retained the power to divest the interests of some members of the class and to alter the proportions in which particular members would ultimately share in the corpus. Such a power of appointment is not normally regarded as a beneficial interest in property.[36] In these circumstances can it be said that, from the creation of the trust, the deceased was excluded from the property interests which had passed to her issue? On the previous cases it is clear that the provision contains two limbs and that exclusion from benefit and exclusion from the property are two distinct requirements.[37] It seems reasonable to assume that the purpose of the provision is to exempt dispositions of property which passes completely out of the control of the settlor.[38] On this basis the deceased was clearly not excluded.[38a]

This submission is supported by a recent decision of Wilson C.J.S.C. in the Supreme Court of British Columbia. In *Burns* v. *The Queen*[39] one question was whether trust property, over which the settlor had retained a power of appointment similar to that retained in *Re McCreath,* was

> property taken under any grant or gift, whenever made, of which property bona fide possession and enjoyment has not been assumed by the donee immediately upon the grant or gift, and thenceforward retained to the entire exclusion of the donor. . . .[40]

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35 Section 1(g) (i).

36 *Commissioner of Stamp Duties of New South Wales* v. *Stephen,* [1904] A.C. 137 (P.C.); *O'Grady* v. *Wilmot,* [1916] 2 A.C. 231 (H.L.) at 370-73, *per* Lord Summer.

37 See, in particular, *Chick* v. *Commissioner of Stamp Duties of New South Wales, supra,* note 14.

38 Unless, possibly, the settlor's control is exercized in a fiduciary capacity: see *Oakes* v. *Commissioner of Stamp Duties, supra,* note 14 and contrast *A.-G. for Alberta* v. *Cowan,* [1926] 1 D.L.R. 29 (S.C.C.).

38a See the remarks of Lord Blanesburgh in *A.-G.* v. *Adamson,* [1932] All E.R. 159, at 165 (H.L.).

39 [1972] 4 W.W.R. 328 (B.C.S.C.).

40 *Succession Duty Act,* R.S.B.C. 1960, c. 372, s. 2(2) (c).