IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PETER CARL KOHLBERG ..... Appellant

and

HAROLD MOULSDALE BURNETT, NO ..... 1st Respondent

JOHN DAVID ENRAGHT-MOONY..... 2nd Respondent

JOAN HILDEGARDE ENRAGHT-MOONY ..... 3rd Respondent

LORIMER ERIC LEACH in his capacity as curator-ad-litem ..... 4th Respondent

ALICE MARY KOHLBERG ..... 5th Respondent

SANDRA JOAN SHILLINGTON ..... 6th Respondent

JOHN PETER ENRAGHT-MOONY ..... 7th Respondent

PATRICIA ANNE ENRAGHT-MOONY ..... 8th Respondent

Coram: RABIE, CJ, BOTHA, VAN HEERDEN, JACOBS, JJA et GALGUT, AJA.

Heard: Delivered:

27 February 1986 26 March 1986

J U D G M E N T

RABIE, CJ:

This appeal is concerned with the question of the validity of that part of clause 3 of the will of the late Herbert Kohlberg in which he bequeathed the residue of his estate to two trusts which he had created about a year before his death. The Eastern Cape Division (per Kannemeyer, J., with whose judgment Mullins, J., agreed) held, in an application brought by one of the executors of the will (the first respondent in the

appeal/.....

appeal) that the relevant part of the clause (to which I shall refer as "the clause", or "clause 3") was valid. The Court dismissed the counter-application by the present appellant (who is also an executor of the will) in which he sought an order declaring that the clause was invalid and that the residue of the estate fell to be dealt with according to the laws of intestate succession. The judgment of the Court a quo has been reported: see Burnett N O v. Kohlberg and Others, 1984(2) S.A. 137.

The aforesaid Herbert Kohlberg (hereinafter referred to as "the deceased") died on 25 August 1979. He was a widower. He left two children, viz. the appellant and Joan Hildegarde Enraght-Moony, the third respondent in the appeal. In his will the deceased, after making

certain bequests, went on to provide as follows in clause 3 thereof with regard to the residue of his estate:

> "... I leave and bequeath the rest, residue and remainder of my Estate and Effects whether movable or immovable and of whatsoever nature and kind and wheresoever situate whether in possession, reversion, remainder or expectance, nothing excepted:
>
> (a) As to THIRTY-FIVE per centum (35%) to THE KOHLBERG KOHLBERG TRUST to be administrated, dealt with and distributed as part of the capital and according to the conditions of that Trust; and
>
> (b) As to SIXTY-FIVE per centum (65%) to THE KOHLBERG MOONY TRUST to be administrated, dealt with and distributed as part of the capital and according to the conditions of that Trust.

Three executors were appointed in the will, viz. the first respondent, John David Enraght-Moony (the second respondent) and the appellant. The second respondent is

the/.....

the husband of the third respondent.

The two trusts mentioned in clause 3 of the will are family trusts which the deceased created by means of notarial deeds of donation and trust on 3 August 1978, i.e., on the same day on which he executed his will, but shortly before he signed the will.

In clause 1 of the deed by which the Kohlberg Kohlberg Trust was established it is recorded that the deceased donated to the trustees of the trust the sum of R3 500-00, to be held by them as the trust fund for the purposes of the trust, and that this trust fund was to be deemed to include such other assets as the deceased might thereafter transfer to the trustees. A similar

statement appears in clause 1 of the deed relating to the Kohlberg Moony Trust, save that the amount of the donation is said to have been R6 500-00.

Clause 15 of the Kohlberg Kohlberg Trust deed provides how the trustees are to deal with the capital of the trust fund after the deceased's death. The clause is quoted at p. 138 E- p. 139B of the report of the judgment of the Court a quo and need not be repeated. It is sufficient to say that it appears therefrom that the main intention of the deceased in creating the trust was to benefit, after his death, his son (the appellant) and the members of the latter's family. Clause 15 of the Kohlberg Moony Trust contains provisions similar to

those of clause 15 of the Kohlberg Kohlberg Trust, save that they relate to the Kohlberg Moony Trust and the beneficiaries thereunder, being the deceased's aforesaid daughter (the third respondent) and the members of her family.

In his counter-application in the Court a quo the appellant said the following with regard to his contention that clause 3 of the will was invalid:

"(i) The purported bequests to the Trusts purport to incorporate the terms and conditions of the Trust into the Will of the deceased;

(ii) The Deeds of Donation and Trust .... are not part of the deceased's Will and, moreover, have not been duly executed by the deceased in accordance with the provisions of the Wills Act, 1953;

(iii) Both the Trusts were established inter vivos.

The bequests to the Trusts have the effect of incorporating by reference the terms and conditions of the Trust Deeds into the Will which, in law, is neither permissible nor valid;

(iv) It is submitted that a bequest to a Trust is valid only if the Will itself contains the terms and conditions of the said Trust but not otherwise. As the terms and conditions of the Trusts are not so reflected in the Will of the deceased, the purported dispositions to the Trust are invalid, of no force and effect and have no legal efficacy."

And also:

"It is not my contention ... that every bequest to a Trust or Trustee has no legal efficacy. I do, however, submit that where the Testator intends that the Trustees are not to take beneficially themselves, the terms and conditions of the Trust have to be set out in the Will or, if incorporated by reference, be executed in the manner required by the Wills Act, No. 7 of 1953. Failing this, the bequest to the Trust is of no legal force."

It/.....

It appears that it was argued on behalf of the appellant in the Court below that a trust, not being a legal *persona*, cannot receive benefits under a will, and that clause 3 of the deceased's will should, for that reason, be held to be invalid. The Court, after discussing the argument at some length, rejected it and held (at p. 142 E-F of the report) that "although a trust as such cannot strictly be a beneficiary under a will, a bequest can be made to the trustee *qua* trustee for the benefit of an existing trust ....". The aforesaid argument was not advanced on appellant's behalf in this Court, and it is accordingly not necessary to deal with it. I would merely say that in my opinion counsel was correct in not pursuing it.

The argument that was presented to us may be summed up as follows: (a) the bequest in clause 3 of the deceased's will is a bequest to the beneficiaries under the two trusts mentioned in the clause; (b) the identity of those beneficiaries appears from clause 15 of each of the two trust deeds; (c) the terms of the trust deeds do not, however, form part of the will, since a testator cannot incorporate the terms of a document in his will merely by referring to that document in the will (Moses v. Abinader, 1951(4) S.A. 537(A)); (d) the will consequently fails to identify the beneficiaries of the bequest; and (e) the residue of the estate therefore falls to be dealt with as on intestacy. I should perhaps add at this point that counsel did not contend - rightly so, in my view -

that the words which follow upon the names of the trusts in paragraphs (a) and (b) of clause 3 of the will are indicative of an intention to incorporate in the will the terms of clause 15 of each of the two trust deeds.

The validity of the aforesaid argument depends on the validity of the submission made in (a). Counsel for the appellant referred to this submission as the crux of the appeal. The short but crucial question is, therefore, whether counsel is correct in contending that the bequest of the residue of the estate was a bequest to the beneficiaries under the two trusts, and not to the trusts, or to the trustees, as representing the trusts. If this contention is correct, it would follow that the

deceased failed to indicate in his will to whom he intended to bequeath the residue of his estate and that he should, therefore, be held to have died intestate in so far as the residue of his estate is concerned.

If a trust can receive benefits under a will, I have difficulty in understanding the contention that the deceased did not in clause 3 of his will declare who were to be/the beneficiaries in respect of the residue of his estate. It is clear from the language used in the clause that the deceased bequeathed the remainder of his estate to the two trusts mentioned therein. It is true, of course, that a trust, not being a legal persona, cannot, as a trust, acquire or hold property, but this fact does

not bring about that the two trusts were not properly appointed as beneficiaries in clause 3 of the will. The trustees of the two trusts are in law entitled to act on behalf of the trusts and to hold, in their capacities as trustees, property for the purposes of the trusts. "It is trite law", it was said by Steyn, C.J. in Commissioner for Inland Revenue v. MacNeillies Estate, 1961(3) S.A. 833 at p. 840 G-H, "that the assets and liabilities in a trust vest in the trustee." In these circumstances it cannot, in my opinion, be said that the deceased failed to appoint beneficiaries in respect of the remainder of his estate in clause 3 of his will. Counsel submitted, however, that the "actual beneficiaries" are not the trusts, or the trustees of the trusts qua trustees, but the

beneficiaries under the trust deeds, and that, since their identity is not revealed in the will but has to be sought in the trust deeds, it must be held that clause 3 of the will does not contain a valid disposition of the residue of the deceased's estate. It is true that the beneficiaries under the trusts are the only persons who actually benefit by the bequest, since the trustees hold the trust funds only in their representative capacities and not for their own benefit. This does not mean, however, that the beneficiaries under the two trusts are to be regarded as the beneficiaries whom the deceased sought to appoint as his beneficiaries in clause 3 of his will, but whose identity he left to be determined by reference to the trust deeds. The deceased did not appoint them as beneficiaries in his

will. Their rights to receive benefits are not derived from the deceased's will, but from the terms of the trust deeds.

In the light of the aforegoing I consider that counsel's argument cannot succeed and that the appeal should be dismissed.

There remains the question of costs. In the Court a quo the Court ordered that the appellant's costs in respect of both the application and the counter-application were to be paid out of the deceased's estate as between attorney and estate, such costs to include the costs of two counsel. Counsel for the appellant submitted that, in the

event of the appeal being dismissed, the Court should order that the appellant's costs of appeal should be paid out of the deceased's estate. Such an order, it was submitted, would be justified on the following grounds: "(a) Although the appellant has a personal interest in the outcome of the appeal, the relief sought by him also relates to his position as an executor in the estate of the deceased; (b) the litigation was brought about by the deceased; (c) notwithstanding the finding of the Court a quo, the matter is res nova; (d) the appellant had acted on the advice of senior counsel." (Quotation from counsel's heads of argument.) I find myself quite unable to agree with counsel's submission. One may accept that the appellant was, by reason of his position as executor

justified in seeking the decision of the Court on the question whether clause 3 of the deceased's estate was valid or whether the residue of the estate was to devolve as on intestacy. A full Court of the Eastern Cape Division gave its decision on that question, and it would have been reasonable for the appellant, as executor, to have accepted that decision. He was the only one of all the parties to the application proceedings who did not accept the Court's judgment, and in the circumstances it can hardly be said that his decision to go on appeal was taken in the interests of the estate or of anyone (except himself) who had an interest in the estate. His real reason for deciding to go on appeal admits of little doubt. He has a personal interest in the matter. He and the third

respondent (who was prepared to accept the validity of clause 3 of the will) are the deceased's only children, and an order that the residue of the deceased's estate should be dealt with as on intestacy would be to his financial advantage. Now that he has lost his appeal, it would be inequitable to order, as we were asked to do, that his costs of appeal should come out of the estate of the deceased. Fairness demands, in my opinion, that he should be ordered to pay the costs of the appeal.

It is ordered as follows;

(1) The appeal is dismissed with costs, including the costs of the curator ad litem and the costs

of the application for leave to appeal. Only such costs as cannot be recovered from the appellant may be paid out of the estate of the late Herbert Kohlberg.

(2) Should the appellant fail to sign the first and final liquidation and distribution account in the aforesaid estate as drawn by the first respondent within 21 days of the date of this judgment, the deputy sheriff of Port Elizabeth is authorised to sign it on his behalf.

P J RABIE
CHIEF JUSTICE.

BOTHA, JA.
VAN HEERDEN, JA.
JACOBS, JA. Concur.
GALGUT. AJA.