



**TC03183**

**Appeal numbers: TC/2012/01821 & TC/2012/01824**

*CAPITAL GAINS TAX – Flat originally owned by taxpayers’  
mother/mother-in-law – Flat sold to taxpayers subject to agreement  
permitting mother/mother-in-law to remain in occupation for her life or  
until remarriage – Flat later sold after mother/mother-in-law ceased to  
occupy and more suitable property provided – whether private residence  
relief available – whether taxpayers trustees and flat “settled property” –  
appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VERONICA WAGSTAFF  
STEPHEN WAGSTAFF**

**Appellants**

**- and -**

**COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC  
MRS CAROL DEBELL**

**Sitting in public at Bedford Square, London WC1 on 9 January 2013**

**Keith Buckland, Accountant, for the Appellants**

**Aidan Boal, Appeals and Review Unit, for the Respondents**

## DECISION

### The Issue

- 5 1. This is an appeal by Mr and Mrs Wagstaff (“the Appellants”) against closure notices of 22 December 2011 and consequential amendments to their returns for the year 2006/07. The amendments increased the amount of capital gains returned for the year by £8,545 each.
- 10 2. The capital gain arose on the disposal of a property in Southborough, Kent (“the Flat”). In their original returns the Appellants had declared net chargeable gains of £6,716 being their half shares of the gains on the disposal of the Flat. It was agreed that taper relief of 35 per cent was due in respect of the disposal and that losses of £20,993 from earlier years were available to each Appellant.
- 15 3. Following the opening of HMRC’s enquiry into the circumstances of the disposal and the amount of the capital gain realised, the Appellants submitted a claim under section 225 of the Taxation of Chargeable Gains Act 1992 to the effect that their ownership of the Flat was subject to a trust and that the Flat was settled property qualifying for relief under that section.
- 20 4. On closing their enquiry HMRC refused the Appellants’ claim for relief and determined the amount of the capital gains as £15,261, giving rise to additional capital gains tax of £3,418 each.

### The evidence available to the Tribunal

- 25 5. In addition to the papers produced by the parties, Mr Stephen Wagstaff gave evidence and was cross-examined by Mr Boal for HMRC. On the basis of those documents and Mr Wagstaff’s evidence, which we accept, we find the facts set out below.

### The facts

- 30 6. The Flat was purchased by Mr Wagstaff’s mother (“Mrs Barbara Wagstaff”), in 1990. On 6 February 1996 she sold and transferred the Flat to the Appellants for £45,000. The price was based on a valuation report of 14 October 1994. The report was not before us and we heard no evidence regarding the valuation either at the time that it was given or in respect of the sale which took place some 15 months later. HMRC had nevertheless accepted the price as an arm’s length price.
- 35 7. The sale was subject to the terms of an agreement of 6 February 1996 (“the Agreement”) between the parties under which Mrs Barbara Wagstaff was entitled to continue living at the flat at no cost for the remainder of her life or until her remarriage, subject to payment of £5,000.
- 40 8. Mrs Barbara Wagstaff continued to occupy the property until 2005. In August 2005 she had knee replacement surgery, following which she returned to the Flat. Within a week, however, she fell down stairs, seriously injuring the replacement joint,

and had to be returned to hospital. She was not released from hospital until November 2005 when she went to live with the Appellants pending the arrangement of more suitable long term accommodation. The Flat remained available for her use with her furniture and belongings in situ until she moved into a new single storey, stair-free home in June 2006. Thereafter the Flat remained empty until it was sold (by  
5 stair-free home in June 2006. Thereafter the Flat remained empty until it was sold (by way of an arm's length third party sale) with her agreement on 16 March 2007.

9. The Agreement, which is signed by the parties as a deed, records Mrs Barbara Wagstaff's sale of the Flat to the Appellants, that the Agreement is intended to be legally binding and that it is entered into to regulate the occupation of the Flat by Mrs  
10 Barbara Wagstaff. The Agreement comprises four short clauses, which we reproduce in full below. The Appellants are the "Owners" and Mrs Barbara Wagstaff is the "Occupier":

15 "1. In consideration of the sum of £5,000, the Owners allow the Occupier to reside at the property at no cost for the remainder of the Occupier's life or on remarriage of the Occupier whichever shall happen first.

2. The Occupier shall pay all common household expenditure including council tax water rates gas electricity telephone television licence and/or rental agreement contents insurance food.

20 3. The Owner will pay for the cost of the building insurance ground rent and service charge and for decorating and repairing the inside and outside of the property

4. All items of personal use and the contents of the property belong solely to the Occupier."

25 10. Mr Wagstaff explained that prior to their purchase of the Flat its value had declined and his mother had become concerned that her income would be insufficient to support her as she got older. The Appellants had therefore agreed to acquire the Flat to forestall his mother's concern and to release equity that she would then be able to use to generate income. The Appellants and his mother recognised, however, that family arrangements can go wrong. It was important, for example, that their  
30 arrangement with his mother should not be called into question if the worst should occur, for example if the Appellants separated or divorced or if they fell out with his mother.

35 11. The purpose of the Agreement was therefore to give security to her continued occupation and to ensure that she could use and enjoy the Flat without interference or interruption from the Appellants. He had noted in correspondence that in signing the Agreement the Appellants forfeited the right to let or to dispose of the Flat. As a result the Flat had only been sold once she was no longer able to occupy it and with her agreement. Mr Wagstaff confirmed in cross-examination that the arrangement was designed to survive his or his wife's death and that they had made no particular  
40 provision in their wills to deal with that eventuality. Mr Wagstaff also told us that the Appellants had bought the new single storey, stair-free home for his mother and she occupied it on the same terms as the Agreement (although we did not understand that she had paid a further £5,000 for that privilege).

## The Legislation

12. Section 223 Taxation of Chargeable Gains Act 1992 (“the Act”) provides that no part of a gain attributable to the disposal of a dwelling house and certain associated land which a person has occupied as their principal private residence shall be a chargeable gain. Under section 225 this relief is extended to settled property as follows:

“[Principal private residence relief] shall also apply in relation to a gain accruing to trustees of a settlement on a disposal of settled property being [a dwelling house and associated land] where, during the period of ownership of the trustees, the dwelling house or part of the dwelling house ... has been the only or main residence of a person entitled to occupy it under the terms of the settlement ...”

13. The definition of “settled property” is supplied by section 68 of the Act:

“In this Act, unless the context otherwise requires, “settled property” means any property held in trust other than property to which section 60 applies (and references, however expressed, to property comprised in a settlement are references to settled property)”

14. Section 60 of the Act deals with property that is held by a person as nominee for another or as trustee for another absolutely entitled to the property as against the trustee. It provides as follows—

“(1) In relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee, or for any person who would be so entitled but for being an infant or other person under disability (or for 2 or more persons who are or would be jointly so entitled), this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).

(2) It is hereby declared that references in this Act to any asset held by a person as trustee for another person absolutely entitled as against the trustee are references to a case where that other person has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustees to resort to the asset for payment of duty, taxes, costs or other outgoings, to direct how that asset shall be dealt with.”

(With effect from 6 April 2006 the word “property” was substituted for the word “assets” or “asset”.)

15. Section 226 of the Act applies to any gain accruing to an individual so far attributable to a disposal of a dwelling house occupied as the sole residence of a dependent relative, provided rent free and without any other consideration. This relief, however, ceased to apply on 6 April 1988.

## **The parties' submissions in outline**

16. HMRC submitted that the Appellants acquired full legal and beneficial ownership of the Flat on 6 February 1996 and immediately granted to Mrs Barbara Wagstaff a "Lease for Life" under the Agreement. The Agreement did not fetter the Appellants' right to dispose of the Flat, although they could not sell it with the benefit of vacant possession given Mrs Barbara Wagstaff's rights under the Agreement. The Appellants were therefore absolutely entitled to the Flat subject only to those rights. The Agreement did not give rise to any trust. The Appellants were accordingly not trustees and the Flat was not settled property for the purposes of section 225 of the Act.

17. The Appellants noted that this might be an appropriate conclusion where a lease for life was granted at full market value. In the present case, however, the consideration specified under the Agreement was nominal only and significantly below a reasonable market rent at the time. The Appellants therefore contended that in purchasing the Flat from Mrs Barbara Wagstaff and immediately granting her for nominal consideration the right to occupy the Flat for her life or until remarriage, the Appellants had subjected their interest in the Flat to a trust, in respect of which the Flat was the settled property.

18. The Appellants noted in particular that section 68 of the Act did not elaborate on the meaning of "property held in trust". They drew attention to the definition of "settlement" in section 620 Income Tax (Trading and Other income Act) 2005 and to that in section 43 Inheritance Tax Act 1984. Section 43(3) of the 1984 Act provides that "A lease of property which is for life or lives or for a period ascertainable only by reference to death ... shall be treated as a settlement and the property is settled property, unless the lease was granted for full consideration in money or money's worth". For their part HMRC relied on section 43(3) of the 1984 Act as indicating that a lease for life is not ordinarily settled property.

## **Our decision**

19. We can dispose at the outset of four points that had arisen in correspondence or at the hearing:

(1) We accept that the Appellants entered into the Agreement for less than full consideration. There was, therefore, an element of 'bounty' involved in the Agreement, although the concept of 'bounty' has principally been relevant to the broad definition of "settlement" under section 620 of the 2005 Act (to distinguish in particular commercial arrangements that are not treated as settlements for those purposes from those arrangements that are). HMRC did not contend that the Agreement had been entered into for full consideration and appeared in correspondence to have accepted that it was not (while contending that the absence of full consideration did not alter the nature of the parties' relationship).

(2) The Agreement was drawn up by the Appellants' solicitor when the Flat was transferred from Mrs Barbara Wagstaff to the Appellants. It was not a 'home made agreement' in the sense of something drawn up and

5 entered into between the parties without professional assistance. HMRC  
relied on this to suggest that the solicitor responsible for drafting the  
Agreement would have expressed the parties' relationship as one of trustee  
and life tenant if that had been the parties' intention. Nevertheless, the  
10 Agreement's brevity suggests that it does little more than record the  
Appellants' instructions to the solicitor to draft a document that would  
provide a legal basis for Mrs Barbara Wagstaff's continued occupation of  
the Flat (and who would bear particular expenses) without necessarily  
specifying what form of legal relations it should create between the parties.  
15 The solicitor concerned described it as being "in a very basic form" and  
asked whether it should be more detailed or amended in some way. The  
Agreement must be construed and given effect to according to its terms  
(such as they are) but we do not regard it as solely determinative of the  
matter, i.e. the question remains, having regard to all the evidence, whether  
for the purposes of the Act the relationship between the parties was such  
that the Appellants were trustees and the Flat "settled property" as defined.

20 (3) The definition in section 68 of the Act is expressed to apply "unless the  
context otherwise requires". Some of the Appellants' submissions might  
be thought to be suggesting that the context of section 225 did "otherwise  
require". We do not think that the Appellants went that far but in any  
event, there is nothing that we can detect in the context of section 225 to  
indicate that the section is referring to some other concept of settled  
property beyond property recognised as such under section 68. Different  
25 Acts provide different definitions to meet the particular circumstances of  
the taxes they impose. Thus, while we note those other definitions of  
"settlement" and "settled property", the question remains whether the Flat  
was "property held in trust other than property to which section 60  
applies".

30 (4) The Appellants relied on what they said were assurances given to  
Parliament in 1988 when 'dependent relative relief' under section 226 was  
withdrawn, to the effect that arrangements within section 226 would  
ordinarily fall within section 225. Even if such an unequivocal and clear  
assurance had been given to Parliament such that we should take note of it,  
we do not think that it could affect our construction of section 225.  
35 Assuming that the Inland Revenue (as it then was) had advised Ministers  
and Ministers had advised Parliament that most arrangements within  
section 226 had been found to fall within section 225, we would still need  
to be satisfied that section 225 covers the Appellants' arrangement with  
Mrs Barbara Wagstaff. Furthermore, it does not appear that the  
40 Appellants' arrangement would have fallen within section 266. That  
section required that the dwelling house was "provided rent free and  
without any other consideration". The Agreement has express  
consideration, albeit not full consideration.

45 20. Briefly stated HMRC's case is straightforward: the Appellants became absolutely  
entitled to the Flat on 6 February 1996 subject only to the occupational rights granted  
to Mrs Barbara Wagstaff under the Agreement. This deceptively simple approach,  
however, raises the question of the nature of Mrs Barbara Wagstaff's rights under her  
arrangement with the Appellants and how those rights 'impacted' on the Appellants'

interest in the Flat; in other words, whether they were indeed ‘absolutely entitled’ to their interest in the Flat in the sense of having the exclusive right to direct how the Flat should be dealt with and, if not, whether the restrictions to which they were subject were a matter of trust or solely contractual in nature.

5 21. Mr Boal for HMRC referred us to four cases in the course of argument: *Knight v Knight* (1840) 3 Beav 148; *Ashburn Anstalt v W J Arnold and W J Arnold & Co Ltd* [1988] EWCA Civ 14; *The Cape Brandy Syndicate v IRC* (1030) 12 TC 358 and *Re Ali* [2-12] EWHC 2302 (Admin). We have not found that these cases of great  
10 assistance on the issue that we have to decide, each being fairly far removed from the Appellants’ arrangements.

22. Mr Boal relied on *Knight v Knight* to the effect that the Appellants’ arrangements did not satisfy the basic requirements of a trust: certainty of intention to create a relationship of trust, certainty of subject matter and certainty of objects, i.e. who is to benefit from the trust and the extent of their interest. In fact, the only uncertainty in  
15 this respect relates to the parties intention to create a trust relationship. The subject matter of the trust (if there was one) is clear – the Flat – as also the object of the trust (if there was one) – Mrs Barbara Wagstaff.

23. *Knight v Knight* itself concerned an expression of wishes and whether it affects a gift or bequest of property that is otherwise absolutely given or bequeathed to another.  
20 Such arrangements are sometimes referred to as ‘precatory trusts’ although the appropriateness of that terminology has been doubted. Lord Langdale in *Knight v Knight* put the issue in these terms:

“As a general rule, it has been laid down, that when property is given  
25 absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust, first, if the words are so used, that upon the whole, they ought to be construed as imperative; secondly, if the subject  
30 of recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives 1000l. to A. B., desiring, wishing, recommending or hoping that A. B. will, at his death, give the same sum  
35 or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator upon the sum or subject intended to be given, or upon the person or object of the wish.”

24. The relevant authorities on ‘precatory’ trusts, including *Knight v Knight*, were considered by Rigby LJ in *Re Williams* [1897] 2 Ch 12, who concluded that:

40 “...in every case the conclusion that the words relied upon did not create an imperative trust was based, as I think, upon some uncertainty either as to the subject or as to the objects of the supposed trust.”

25. As this suggests, it is not necessary to be able to point to some specific trust language. What should be clear from all the circumstances is an intention to create ‘trust obligations’ and this will generally be easier to do when the subject matter and objects of the supposed trust are clear. Thus—

5                    “No particular form of expression is necessary for the creation of a trust if,  
on the whole, it can be gathered that a trust was intended. It is unnecessary  
for the settlor to use the word “trust”: the court construes the substance  
and effect of the words used, against the background of any relevant  
10                    surrounding circumstances. Indeed, the settlor need not even understand  
that his words or conduct have created a trust if they have this effect on  
their proper legal construction. Conversely, it is not enough that the settlor  
describes the transaction as a trust if on its proper construction the  
transaction was not intended to operate as a trust.

15                    The settlor’s intention must be clear on two main questions: (1) that he  
intended the trustee to owe legally enforceable duties rather than duties of  
a merely social or moral nature; (2) that if he intended to create a legal  
relationship, it was to involve trust duties as distinct from some kind of  
legal relationship, such as a simple relationship of debtor and creditor.”

(Snell’s Equity, 32<sup>nd</sup> Edition, paragraph 22-013, omitting footnotes)

20                    26. As we have noted, the Agreement is a brief document. Although the Respondents  
have described it as a “Lease for Life” it does not use the formal language associated  
with the grant of a lease nor incorporate any of the usual terms that might be expected  
under a lease. The Agreement merely “allows the Occupier to reside at the property”  
for the remainder of her life or until remarriage. There is no explicit guarantee of the  
25                    exclusive occupation and, unless that is to be implied, Mrs Barbara Wagstaff would at  
best occupy the Flat by virtue of a contractual licence.

30                    27. What is clear from the Agreement and from Mr Wagstaff’s evidence is that the  
parties intended that the arrangements into which they were entering should give rise  
to legal rights and obligations that would regulate their relationship during Mrs  
Barbara Wagstaff’s lifetime. That was the only basis on which she was prepared to  
part with absolute ownership of her Flat.

35                    28. No expression was strictly needed of an intention to create binding legal relations  
when the Agreement formed part of an arrangement under which the Appellants had  
agreed to pay £45,000 for the house offset by an allowance for works to the Flat and  
the payment for occupation, leaving a completion sum due for the Flat of £35,000.  
Nevertheless the understanding that the arrangement was legally binding on the  
parties was fundamental. In parting with ownership of her Flat, Mrs Barbara  
Wagstaff was to an extent placing herself in the hands of her son and daughter-in-law  
but only on the basis that they accepted particular legal obligations towards her.

40                    29. In this respect, HMRC took the view that the Appellants were entitled as absolute  
owners of the Flat to dispose of it as they chose subject only to the terms of the  
Agreement. This does not, however, accord with Mr Wagstaff’s evidence or with the

way in which the Appellants dealt with the property and the eventuality of Mrs Barbara Wagstaff's accident.

5 30. Mr Wagstaff's evidence was to the effect that the Appellants had always accepted that they were not free to dispose of the Flat as they chose and could only act in relation to it with Mrs Barbara Wagstaff's agreement. Having regard to the brevity of the terms of the Agreement it does not seem likely that when it was entered into the parties envisaged that Mrs Barbara Wagstaff should ever be put in the position of having to rely on the Agreement as against a third party purchaser of the Flat from the Appellants. Her position vis-à-vis the Flat was to be secure against any eventuality, something that would not necessarily be guaranteed by a purely contractual relationship in the form of the Agreement but which would be better protected if the Appellants in entering into the arrangement were accepting the obligations ordinarily associated with a trust and the role of trustee. Had it become necessary for Mrs Barbara Wagstaff to seek relief against the Appellants we think that she would have been able to establish that this was the nature of the intended legal relationship in providing that the arrangement was legally binding on the Appellants.

20 31. The practical expression of the relationship accepted by all concerned can be seen following Mrs Barbara Wagstaff's accident and the recognition that the Flat was no longer suitable accommodation. With her agreement the Appellants acquired new accommodation for her to occupy on the terms of the Agreement and sold the Flat.

25 32. It therefore seems to us, and we so decide, that in acquiring the Flat on terms that included the Agreement the Appellants were assuming the role of trustees as they have contended so that they did not become at that time absolutely entitled to the Flat, with the exclusive right to direct how the Flat should be dealt with. Their interest in the Flat was therefore "settled property", i.e. property held in trust other than property to which section 60 of the Act applies.

33. In all other respects HMRC did not dispute that the requirements of section 225 of the Act were satisfied and that relief was therefore available to the Appellants on the disposal.

30 34. Consequently, the Appellants' appeals are allowed.

35 35. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

40 **MALCOLM GAMMIE CBE QC**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 7 January 2014**