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Abstract
The correct allocation of tax liability under a trust is determined by reference to the beneficiary's 'present entitlement' to the income of the trust. It is apparent that the equitable nature of the parties' interests, under a trust, has made the determination of tax liability difficult. In order to clarify the position, this article will outline the equitable principles referred to in case law.

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tax liability, income tax

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AN ANALYSIS OF THE CONCEPTS OF 'PRESENT ENTITLEMENT'

By Anna Everett[*]

The correct allocation of tax liability under a trust is determined by reference to the beneficiary's 'present entitlement' to the income of the trust. It is apparent that the equitable nature of the parties' interests, under a trust, has made the determination of tax liability difficult. In order to clarify the position, this article will outline the equitable principles referred to in case law.

[1]

Introduction

The law of trusts is a creature of equity. Within equity, there are doctrines that deal with the duality of interests that arise in relation to property. That one person can hold the legal title over an asset for the benefit of another, yet only deal with the asset pursuant to the rights of the latter can be a difficult concept. The interest that a beneficiary has in the property and income of a trust has particular interest for the tax lawyer.

The concept of 'present entitlement' under the *Income Tax Assessment Act 1936* (ITAA36) refers to the beneficiary's interest in the property of a trust. The determination of the beneficiary's entitlement is important because income derived from the trust property will only be assessed in the hands of the beneficiary if he or she is,[2] or is deemed to be,[3] presently entitled to the income under the trust. Otherwise the income is assessed in the hands of the trustee.[4]

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1 S Barkoczy, 'The Nature of "Present Entitlement" in the Taxation of Trusts' (1994) (4) *Revenue Law Journal*, 3, 65, for an overview of the concept of 'Present Entitlement'.

2 For example, s 97 ITAA36, (which deals with the situation where a beneficiary is presently entitled to a share of the income of the trust estate and is not under a legal disability and is an Australian resident.)

3 For example, s 95A(2) ITAA36, (which deals with the situation where the beneficiary has a vested and indefeasible interest in the income of the trust estate but is not presently

Ever since the 1930's, when income tax was referred to the Commonwealth by the States, the determination of a beneficiary's tax liability under a trust has been problematic. There have been continuing difficulties over the years in determining the nature of a beneficiary's interest under a trust. The difficulties in determining one's tax liability as a beneficiary under a trust will continue, unless there is a change in the legislation that deals with this issue.

In one of the earliest High Court decisions *FCT v Whiting,*[5] the Court held that the beneficiary's present entitlement should be construed in the light of the laws of trusts and estates.[6] Kitto J affirmed this in *Taylor v FCT (Taylor),*[7] where the term, 'present entitlement' used in Part III of Division 6 ITAA36, was determined by an application of equitable principles.[8] The question is: what are the indicia of present entitlement?

The beneficiary will be presently entitled to the income of the trust if:[9]

1. the beneficiary's interest is both vested in interest and vested in possession (in accordance with the 'laws of estates'),[10] and
2. the beneficiary has a present right to demand payment of the income of the trust (in accordance with the 'laws of trusts').[11]

So, when is the interest of the beneficiary vested in interest or in possession?
'Vested in interest' refers to the beneficiary's present fixed right to the income of the trust. This may be a present right to the future enjoyment of the income.[12] As such, a remainderman would have a vested interest. For example, if property was transferred to A on trust for B for life and thereafter to C, both B and C's interests would be vested in interest.

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entitled to that income. The provision in these circumstances deems the beneficiary to be presently entitled for the purposes of the Act.)

4 For example, *s* 99 ITAA36, (which deals with the situation where no beneficiary is presently entitled to the income of a trust estate.)

5 (1943) 68 CLR 199.

6 Ibid 216.

7 (1970) 199 CLR 444.

8 Ibid 448.

9 See *FCT v Whiting* (1943) 68 CLR 199; [1943] ALR 186, and *Taylor v FCT* (1970) 119 CLR 444.

10 Above n 5.

11 Ibid.

12 *Walsh Bay Developments v FCT (1995)* 31 ATR 15; 130 ALR 415.

'Vested in possession' means the beneficiary has an immediate right to take possession of the property. The beneficiary's vested interest has crystallised into a proprietary interest. The beneficiary may, at this time, demand a distribution of her or his share of the income[13] and, even if income is not actually paid to the beneficiary, the taxation liability attaches.

In the example above, only B's interest would be vested in both interest and in possession.

Judicial analysis of the concept of present entitlement

To determine a beneficiary's liability to tax under Division 6 of Part III ITAA36, one must determine whether the beneficiary is 'presently entitled' to distributions under the trust. The phrase 'present entitlement' does not occur in trust law. The case law has, however, provided some direction. In particular, the courts require that the meaning of 'present entitlement' be determined in accordance with the rules of equity,[14] including those rules which determine at what point in time the beneficiary has a sufficient interest in the underlying property to call on the property of the trust.

Vested in interest or vested in possession: In Whiting's case in 1943 the High Court considered the meaning of 'presently entitled' as it occurs in Division 6 of Part III ITAA36[15].

The issue was whether the Commissioner was correct in assessing the trustees of the estate under s 99 ITAA36, or whether he should have assessed the beneficiaries under s 97 ITAA36. Latham CJ and Williams J proposed that the answer to this question lay in a determination of the nature of the beneficiaries' entitlement.[16]

- Section 99 ITAA36 states that the trustee will be taxed on the income of the trust where no part of that income is assessable in the hands of the beneficiary under s 97 ITAA36.
- Section 97 ITAA36 states that where a beneficiary is not under any legal disability and is presently entitled to a share of the income, the beneficiary will be taxed on that share of the net income of the trust estate.

13 Above n 5.
14 Ibid 216.
15 Ibid 199.
16 Ibid; see also Starke J at 219 for similar reasoning.

- Section 98 ITAA36 states that where a beneficiary is under a legal disability, though is presently entitled to a share of the income of the trust estate, the income will be taxed in the hands of the trustee.

Their Honours held firstly, that the provisions of s 98 ITAA36 referred to the beneficiary having a right to immediate payment of a share of the trust income. Even though the beneficiary had a vested interest in the income, as he was under a legal disability, he did not have a right to immediate payment because he was unable to give an effective discharge to the trustee. He was accordingly not presently entitled to the income.

Secondly, their Honours held that the words 'presently entitled' referred to an immediate right to possession, rather than, as in the case before them, merely a vested interest in the income of the trust. On the facts, the interest of the beneficiary was an interest in the income of an unadministered will, the effect of which was that the beneficiary was 'entitled' to the income. But he was not 'presently entitled', as the precise quantum of the estate could not be determined until the estate was fully administered.[17] Until that time, the income of the estate would remain with the executors. Their Honours then held that the correct way to construe the relevant provisions within the Act was 'in the light of the general principles of law applicable to the administration of estates by executors and trustees at law and in *equity*'.[18]

The result was that the beneficiary could not be 'presently entitled' to the income of the estate, under the provisions of the ITAA36, until the estate was fully administered and the debts of the estate were paid, allowing for the ascertainment of the share of the estate that was owing to the beneficiary. At this time, the beneficiary would be presently entitled to the income of the estate, because he would then have an interest in ascertainable, specific property. Until the estate was fully administered and the debts of the estate are paid, all the beneficiary has is an 'interest' in respect of the income of the estate.

One approach to analyzing this scenario is that the beneficiary has an interest in a 'mere expectancy'; that the interest that he has is in property that is not quantifiable and therefore, he has no real interest. The better approach is that the interest that the beneficiary holds is, in itself, a type of property, namely a chose in action. However, the issue for taxation administrators is whether, if there is income generated from the 'property', the beneficiary is presently entitled to that income.

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17 *Robertson v Deputy Federal Commissioner of Land Tax* (1941) 65 CLR 338.

18 Above n 5, 216 emphasis added.

The nature of a beneficiary's entitlement under an unadministered will was addressed in *Commissioner of Stamp Duties (Qld) v Livingston*[19] (*Livingston*) and *Official Receiver in Bankruptcy v Schultz*[20] (*Schultz*). In both cases, the beneficiary was a specific legatee, unlike the situation in *Whiting*, where the beneficiary was a residuary beneficiary.

The combined effect of these cases is that in the case of an unadministered will, the beneficiary does not have a beneficial interest in any of the assets of that estate. What he or she has is an equitable proprietary interest in non-specific property. This interest may be asserted against the trustees in order that they administer the estate properly, but does not mean that the legatee has an interest in respect of the particular assets of the estate.[21]

Conditional Settlements

In 1970 the High Court was again required to consider the meaning of 'present entitlement'. *Taylor's* case[22] followed and affirmed *Whiting.* However, in *Taylor* the 'property' generating the income was the interest of infant beneficiaries of a contingent trust.

The trust had been established for the benefit of three infant sons of the testator. The question was whether the Commissioner of Taxation was correct in assessing the trustees under s 99A ITAA36, rather than a beneficiary under s 98 ITAA36. Kitto J noted that the trust was contingent in that it was to take effect in the alternate events of the sons reaching the age of 21, or dying before this age. The Court held that the effect of the declaration was that the beneficiary would take a postponed but indefeasibly vested interest.[23] Accordingly, at the time of settlement, the son became absolutely entitled to the income of the trust, although personal enjoyment of the income was postponed[24] until the age of 21. However, the taxpayer was still an infant and because of his legal disability was not able to demand payment of the income of the trust during the relevant income year.[25] The effect of this legal disability was considered.

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19 [1965] AC 694.
20 (1990) 170 CLR 306.
21 D Ong, *Trusts Law in Australia* (2nd ed, 2003), 48.
22 Above n 6, 444.
23 Ibid 448.
24 Ibid.
25 Ibid.

Kitto J set out the requirements for a beneficiary in this situation to be 'presently entitled':

(1) if he either;
    a. has a right to demand immediate payment (s 97); or
    b. would be entitled to do so were it not for his legal disability (s 98); and

(2) the legal disability was the only obstacle to his asserting his right to immediate payment.[26]

It was held that the contingency was certain enough to vest the beneficiary with interest in the subject of the trust. So he was 'presently entitled' to the income from his 'contingent' interest. Either way (ie, reaching the age of 21 or dying) he, or his estate, was from the date of the settlement, entitled to the income.
It may appear incongruous that a beneficiary could be held to be 'presently entitled' to the income of a trust notwithstanding a legal disability.[27] However, the effect of s 98(1) ITAA36 is that the income of the trust is assessed in the hands of the trustee, not in the hands of the beneficiary.

Mere expectancy and uncertainty

What would happen to the liability for income tax if the subject of the trust were held to be uncertain? If the subject of the trust were unascertainable the trust would be invalid. This is illustrated in the case of *Williams v Commissioner of Inland Revenue,*[28] where a purported assignment of an amount of money out of a specific trust fund was held not to be a declaration of a trust.[29] As the amount of money available under

26 Ibid 449.
27 Examples of persons under a legal disability are those who are minors, those who are bankrupts and those with limited mental capacity. The doctrine of legal disability refers to the lack of capacity of the individual to give good discharge to the trustee upon the disbursement of trust income. *Legal Disability*, Australian Tax Practice: Commentary 95, 0260.
28 [1965] NZLR 395.
29 One of the maxims that of equity is the 'equity will not perfect the imperfect gift', that is, as the assignment was invalid, equity would not step in and declare that a valid trust had been created instead, per LJ Turner *Melroy v Lord* (1862) 4 DeGF & J264; 45 ER 1185 at 1189, from Ong above n 21, 158.

the trust was unascertainable at the time of the purported assignment, the money was held to be a 'mere expectancy' and therefore not property that could be assigned.

The case was an appeal from the judgment of Hardie Boys J. The judge at first instance upheld the assessment of the Commissioner and decided that the purported assignment by Mr Williams, of four annual sums of £500 out of the income to which he was entitled under a trust, did not effectively divest him of the sums before he was entitled to them.[30] He therefore remained liable for them as assessable income in his hands.

Turner J held that the interest that Mr Williams held in the trust was an existing interest[31], and so was capable of being effectively assigned. His Honour held that if Mr Williams had purported to assign the whole of his interest in the trust, the assignment would have been valid in equity. However, as the appellant had purported to assign a specific amount out of the income of the trust, the assignment was ineffective. The reason for this was that equity will not recognize an assignment of an interest that does not exist at the time of the assignment but will arise sometime in the future.[32]

What the appellant purported to assign was not a percentage of his share in the income to be received, but a quantified sum of money that he hoped he would receive. As the income from the trust was not ascertainable at the time of the purported assignment, the sum of money that the appellant purported to assign was not in existence and the appellant could not own it. As he did not own the quantified sum, he could not assign it.[33]

Two scenarios would have validated the purported assignment. If the appellant had assigned a percentage of the income of the trust, then the assignment would have been effective.[34] Alternatively, if the appellant had assigned the quantified sum for valuable consideration, the assignment would have been effective.[35]

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30 Above n 27, 395.
31 Ibid 398.
32 Ibid 399.
33 Above n 27, 399.
34 Ibid.
35 Ibid. Equity will recognize a purported assignment of future property for value on the basis that there is, between the parties, an enforceable contract to assign. Williams v Commissioner of Inland Revenue (1965) NZLR 395, 399 per J Turner.

What can be seen from this case is that although the beneficiary (the appellant) has an interest in the income of the trust, it cannot be said that he has an interest in a quantifiable amount of the income which is to be derived in the future. Like the cases of unadministered estates, the beneficiary has an interest of the property of the trust; what this beneficiary does not have is an interest in property not yet in existence.[36] To effectively assign such 'future property', the appellant would need to adopt the specific techniques evolved by equity for this purpose.

The deeming provisions in ITAA36

There are several deeming provisions that affect a beneficiary under a trust. One that has particular relevance to this discussion is s 95A(2) ITAA36. The deeming provision provides that

> where a beneficiary has a vested and indefeasible interest in any of the income of a trust estate but is not presently entitled to that income, the beneficiary shall be deemed to be presently entitled to that income.[37]

This provision was inserted by *Income Tax Laws Amendment Act 1980*. The purpose of its insertion was to simplify the determination of a beneficiary's entitlement to income under a trust.[38] The explanatory memorandum outlines the proposed effect of the amendment:

> the income in respect of which a beneficiary is so deemed to be presently entitled will in most cases be taxed in the trustee's hands under s98, whether or not the beneficiary is under a legal disability.[39]

In practice, however, reference must still be made to equitable principles in order to determine whether or not the beneficiary has a 'vested and indefeasible interest'.[40]

The inclusion of this provision does not provide much clarity to the determination of tax liability under trusts. The provision does, however, attempt to clarify the position

36 *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694; *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306.
37 *Income Tax Assessment Act 1936* s 95A(2), see further Barkoczy, above n 1.
38 Explanatory Memorandum circulated by the authority of the Treasurer in relation to the *Income Tax laws Amendment Act 1980.*
39 Explanatory Memorandum, clause 9.
40 Section 95A(2) ITAA36.

where the beneficiary is under a legal disability and where it would be unfair to assess the income in the hands of the infant beneficiary.

The determination of a beneficiary's 'present entitlement' still requires the application of equitable principles, with the added obstacle of determining whether or not s 95A(2) ITAA36 applies in the particular circumstances of the case.

Harmer v FCT[41] (Harmer) was a decision of the High Court, on appeal from the Federal Court. The question was whether claimants were 'presently entitled', under s 97 (1) of the ITAA36, to interest on an amount of money deposited into a bank account pending a resolution by the court of their claims, or whether the solicitors were assessable under s 99 of the Act as trustees.

The judgment was delivered jointly. Their Honours outlined the facts of the case.[42] A company, unsure of whom it was obliged to pay money, started proceedings and paid money into court. The court ordered that this money be held on trust by the solicitors for the successful claimants. The question was whether there was, at any time before the resolution of the claims, an identifiable beneficiary who was 'presently entitled' to the income.

The appellants claimed that during the relevant years one or other of the claimants was 'presently entitled' to the income, either by virtue of the 'primary meaning'[43] of the phrase, or by reason of the deeming provision of s 95A(2) of the Act. Their Honours then turned to the principles established in *Whiting* and *Taylor* as to whether a beneficiary was 'presently entitled' to income under a trust. Their Honours held that the authorities established two requirements to be satisfied to ascertain whether a beneficiary was 'presently entitled'. The beneficiary would be 'presently entitled' to a share of the income of a trust if:

a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and

b) the beneficiary has a present legal right to demand and receive payment of the income, whether or not the precise entitlement can be ascertained before

41 (1991) 173 CLR 264.
42 Mason CJ, Deane, Dawson, Toohey and McHugh JJ.
43 Above n 40, 271.

> the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment.[44]

Therefore, the question became whether any of the claimants could be held to be 'presently entitled' in the sense of the above statement. The monies paid into court by the company were held not to be the subject of a pre- existing[45] trust and that the reference to 'trust moneys' was applied in the general sense[46] to the obligations of the solicitors to apply the monies properly in accordance with the order of the court.[47] This being so, the claimants acquired an interest in the monies in the sense that they could insist that they be properly administered.[48] However, no claimant could be said to be 'presently entitled' until the resolution of the litigation. At best, the respective claimants' interests were contingent.[49]

At this point it should be noted that this case differs from the case of a beneficiary who has a contingent interest under a declared trust. In those cases, the trust deed validly divests an interest to a beneficiary with a contingent interest. In the present case, the monies paid into court did not constitute a pre-existing trust and therefore, the claimants could not be said to be beneficiaries under a trust until the resolution of the litigation. Their interest was contingent in the sense that 'any beneficial interest of an individual claimant was contingent upon an order being made in his or its favour'.[50]

Their Honours concluded that the Full Court of the Federal Court was correct in concluding that there was no beneficiary presently entitled to the monies paid into court by the company and that the appellants were assessable as trustees pursuant to s 99A ITAA36.

A further case involving a similar set of facts to that of *Harmer* is of interest. In *Dwight v Federal Commissioner of Taxation*[51] (*Dwight*) *Harmer* was distinguished on the facts in relation to the nature of the monies held. In *Dwight*, the monies were held as security for costs. The monies held in *Harmer* were to be dealt with in accordance with the ultimate resolution to the conflicting claims.

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44 Above n 40, 271.
45 Ibid 274.
46 Ibid 272.
47 Ibid 274.
48 Ibid.
49 Ibid.
50 Ibid 273.
51 (1992) 37 FCR 178.

The questions in *Dwight* were:

(1) whether the applicant was a trustee pursuant to Division 6 of Part III ITAA36 in respect of the security fund and the interest income from that fund;[52] and,

(2) whether the company was 'presently entitled', or deemed to be 'presently entitled', to that income.

Hill J, referred initially to the scheme of Division 6 of Part III ITAA36 and noted that the object of the scheme is to determine the liability to tax, either in the hands of the trustee or, alternatively, in the hands of the beneficiary if he or she is 'presently entitled' to the income of the trust.[53] Hill J then noted the inclusion of the deeming provision in s 95A(2) ITAA36, which provides:

> For the purposes of this Act, where a beneficiary has a vested and indefeasible interest in any of the income of a trust estate but is not presently entitled to that income, the beneficiary shall be deemed to be presently entitled to that income of the trust estate.[54]

His Honour turned to the effect of the order for security for costs.[55] After referring to the procedural measures used in the case of such an order, he concluded that the effect of the order resulted in the monies being held on trust by the solicitors for the company and that the monies remained the property of the plaintiff.[56] However, the monies were subject to an equitable charge in favor of the defendants.

The distinction between this case and *Harmer* is important. In this case the monies remained the property of the plaintiffs, although they were held in trust. The plaintiff retained beneficial ownership of the monies.[57] The defendants had an equitable interest in the monies but were not beneficiaries of the fund.[58] In *Harmer*, the identity of any beneficiary would not be determined until the resolution of the litigation. In that case the ownership of the monies could not be determined until the resolution of the litigation. In *Dwight* the ownership of the monies remained with the plaintiff.

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52 Ibid 182.
53 Ibid 183.
54 Ibid 184, referring to s 95A(2) ITAA 36.
55 Ibid 185.
56 Ibid 188.
57 Ibid.
58 Ibid 178.

His Honour then turned to the question of whether the beneficial interest that the plaintiff held was sufficient enough to attract the operation of s 95A(2) ITAA36.[59] His analysis of the requirements of the subsection was:

> Since it is a prerequisite to the operation of the subsection that there be no *present entitlement* in the income, it may, at least, be assumed that the requirement that the beneficiary have a vested and indefeasible interest in the income is different from the requirement that the beneficiary be presently entitled to that income. To put it another way, to the extent that the beneficiary be able to call for the income of the trust fund at least by the end of the year of income in all cases, that can be put to one side when considering whether the beneficiary has a vested and indefeasible interest in the income.[60]

His Honour then addressed the definition of the terms 'vested' and 'indefeasible',[61] noting the use of these terms in the context of trust law.[62] He explained that these are terms of 'limitation'.[63] Firstly he turned to the definition of the term 'vested'. He noted that an estate may be 'vested in interest' or 'vested in possession'.[64] The difference being, in the present nature of the rights of the beneficiary. Where an estate is vested in interest the beneficiary has 'a present fixed right of future enjoyment,[65]' alternatively, where the estate is vested in possession the beneficiary has 'a present right of present enjoyment'.[66]

Secondly, his Honour defined the term 'indefeasible' as referring to an interest that cannot be brought to an end.[67] The example he gives is where a beneficiary has a non-contingent interest, but the interest could be brought to an end by the exercise of a power of appointment. Here, Hill J asserts, the beneficiary would have a vested but defeasible interest.[68]

Hill J concluded that in the present case, the plaintiff has a vested and indefeasible interest in the income of the trust. This is notwithstanding that the interest the

59 Ibid 191.
60 Ibid.
61 Ibid 192.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.

plaintiff holds is taken subject to the security interest of the defendant.[69] The plaintiff was therefore deemed to be presently entitled pursuant to s 95A(2) ITAA36, and liable for income tax on the income generated by the trust.

The result of this case is that the terms under which monies are paid into court pursuant to a court order are determinative of the beneficial interests of the parties. The result in this case was that the plaintiff was held to have a beneficial interest in the monies that were the subject of a pre-existing trust and therefore, 'presently entitled' to the income of that trust.

Conclusion

The determination of a beneficiary's 'present entitlement' is important, not only for the direct allocation of tax liability arising out of the income of the trust, but because it has implications elsewhere in the ITAA. For example, when changes are made to the trust instrument; a change to the beneficiary's entitlement; or a change in the number of beneficiaries, the issue becomes whether there has been a resettlement of the trust. If the trust is resettled, it will result in the creation of a new trust and therefore, new tax liabilities arise.

It is apparent from an analysis of the cases, that in order to determine the tax liability in relation to a trust, it is necessary to apply the equitable principles referred to in the cases to the particular terms of the trust instrument, along with the ordinary principles of statutory interpretation.

The many amendments made to the tax legislation in relation to 'present entitlement' have not simplified the determination of an individual's tax liability in relation to trust income. In order to alleviate the heavy reliance on judicial pronouncements there should be a definitive legislative clarification of the rules relating to the determination of a beneficiary's 'present entitlement'.

69 Ibid.