Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of George Taylor Fulford v. Dorothy Fulford Hardy and others, from the Court of Appeal for Ontario; delivered the 30th July, 1909.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DUNEDIN.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Dunedin.*]

The question in this case arises under the will of the late George Taylor Fulford.

The will, which is divided into paragraphs, provides in the earlier paragraphs for an annuity to his wife (para. 9), and annuities to his two daughters till they attain the age of 25 (para. 10). It then goes on to leave certain annuities and legacies to other persons, and, after making provision for the case of other children being born, proceeds (para. 17) to make special provision as to his house and grounds in the event of his leaving a son. No questions arise on these paragraphs, but then follow the paragraphs which give rise to the controversy.

[41] P.C.J. 111. L. & M.—100—14/7/09. Wt. 98.

Paragraph 18 provides :—

> 18. I direct that as each child attains the age of twenty-five years his or her income from my estate is to be, during the ten-year period of accumulation hereinafter provided for, his or her proportionate part of ninety per cent. of the income of my estate after all charges are paid (excluding always, as hereinafter directed, the income of my business), it being my intention that my children are to share equally in such income, but until each child attains the age of twenty-five years, what would have been his or her share is to accumulate and form part of my general estate.

It will be observed at once that this paragraph is couched in what may be termed anticipatory language. Up to this time there has been no gift to a child of an "income from my estate," and the ten years period has not yet been mentioned. Accordingly the next paragraphs bring out the testator's meaning.

Paragraph 19 provides :—

> 19. I direct that for the ten years after my death the surplus income of my estate, after paying the annuities and other charges and amounts to be paid, shall be allowed to accumulate, and at the expiration of such ten years ten per cent. of the total amount of my estate, exceeding two million five hundred thousand dollars, but not exceeding four hundred thousand dollars in all, shall be set apart and be paid out of my personal estate to the Brockville General Hospital for the purpose of establishing a Home for the Indigent Protestant old women who are *bonâ fide* residents of Canada and without adequate means of support. . . .

Paragraph 20 provides :—

> 20. I direct that the revenues and income from my said business, whether in the form of a joint stock company or companies or otherwise, shall not be paid over as part of the income of my estate, but that the surplus income of said business, after making all proper allowances and provisions, shall be accumulated from year to year and invested and form part of the capital of my estate, from which the income to be paid over under this will is to be derived.

And Paragraph 21 provides :—

> 21. I give, devise, and bequeath all the rest, residue, and remainder of my property of every kind (including the amounts reserved to pay annuities as they cease to be required), to be disposed of as follows :
>
> Subject to the preceding provisions, including those as to accumulation and the times of being entitled to payment, the income each year is to be divided between my children equally, share and share alike ; on the death of each child, his or her children shall be entitled in equal shares to the same proportion of the capital of my estate as he or she was entitled to of the income, and the same shall be paid over by my executors accordingly (the issue of any who may be dead leaving issue to take their parents' share), but should he or she die without issue the same share or proportion of capital shall belong to my estate.

The testator died in 1905, survived by his widow and 3 children, Dorothy, at that time 24 but now over 25 ; Martha, at that time 22 but now over 25 ; and George, then 3, and still an infant.

The actual question for decision arises by Dorothy claiming, as from the date of her attaining the age of 25, a third of 90 per cent. of the income of the total estate (other than the business income), and insisting that the total estate falls each year to be swelled by (1) the third of income which, till she attained 25, Martha could not receive and (2) the third which, up to the time of his attaining 25, George cannot receive.

This is resisted on behalf of the infant, whose guardians contend, first, that the third falling to him, though not payable till he attains 25, must nevertheless be accumulated for his benefit ; and, secondly, that, however that may be at present, at any rate it is so after the 10 years period has elapsed.

Their Lordships do not think that there is any real doubt as to the meaning of the directions. The confusion, such as it is, only arises from what has already been noted, viz., that paragraph 18 deals by anticipation with what is actually given thereafter.

The ruling gift is undoubtedly to be found in paragraph 21, which gives each child an equal share of the income of the whole of the residue of the estate; *i.e.* the residue, after payment of the annuities and legacies. But this gift is made expressly subject to the "preceding provisions including those as to accumulation and the times of being entitled to payment."

Now, there is no mention of times of being entitled to payment except that contained in the 18th paragraph; from which it seems duly to follow that the expression "it being my intention "that my children are to share equally in "such income, but until each child attains the "age of 25 years, what would have been his or "her share is to accumulate and form part of my "general estate," is a general expression applicable to the whole will, and not limited in its application to the 10 years period. If this be so, the whole question is solved. But it may be as well to deal specially with two arguments which were pressed against this construction. It was said, first, that this was penalising the son in favour of his sisters. To this the answer is, that, if the language be plain, it must be given effect to, and cannot be made to bend to a supposed predilection in favour of male offspring; that, so far as the residue is concerned, it is clear no distinction is made in favour of son as against daughter; and further, that the son is expressly given certain advantages in the matter of the house and an allowance for a yacht.

It was said, secondly, that this construction, if given effect to, would have the iniquitous effect, if the son married and then died before he attained 25, leaving issue, of giving that issue a share of the capital only proportionate to the small annuity taken by the son during conventional minority. Their Lordships do not think any such result would happen. In their view the expression, "same proportion of capital . . . as he or she was entitled to of the income," refers back to the taking equally share and share alike in what has sometimes been called a "notional" sense, and is not referable to the amount of income actually up to that time enjoyed. It has only been thought necessary to mention this, as some remarks of the Trial Judge might seem to give countenance to the opposite idea.

The scheme of the will seems simple. A mere annuity is given to each child during conventional minority. Each child, as it attains conventional majority, is to take an equal share of the income which is determined by division by the divisor representing the number of the children, the shares which would have fallen to the others not yet conventionally major being accumulated and going to swell the capital. The ten years' accumulation for the purpose of the hospital works out simply and side by side with this, as also does the accumulation scheme for the business income; and both of these can be given full effect to, except in in so far as the latter in the future may be disturbed by the Thelusson Act, or any corresponding Act of Ontario.

Their Lordships are accordingly of opinion that the conclusion reached by the Court below was right in substance. Technically the Order made is not quite accurate, because it affirms that not only now, but also in the future, Dorothy and

Martha are entitled to one-third each, whereas it is possible that by the death of one or other of them, or by the death of George, the proportion might alter.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed, and the Judgment affirmed, with a variation giving liberty to the infant Defendant, George Taylor Fulford, to apply to the Court on attaining 25, and to any party interested under the testator's will to apply to the Court, for such modification of the Judgment as may be proper in the event of the death of any one or more of the testator's children.

The costs of all parties will be paid out of the estate, and will be taxed and disposed of by the Courts in Ontario.

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