Privy Council Appeal No. 1 of 1940

Amy Dillon - - - - - - - - - - *Appellant*

v.

The Public Trustee of New Zealand and others - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH APRIL, 1941

Present at the Hearing:

THE LORD CHANCELLOR
(Viscount Simon)
VISCOUNT MAUGHAM
LORD THANKERTON
LORD WRIGHT
LORD PORTER

[*Delivered by* THE LORD CHANCELLOR]

This is an appeal from a judgment of the Court of Appeal of New Zealand (Myers C.J., Ostler and Smith JJ.) delivered on the 7th July, 1939, allowing by a majority (Smith J. dissenting) an appeal by the respondents, other than the Public Trustee of New Zealand, from an order of the Supreme Court made by Northcroft J. on the 12th August, 1938, whereby, upon an application by originating summons taken out by the appellant it was ordered, pursuant to the Family Protection Act 1908 of New Zealand, that further provision as set out in the order should be made in favour of the appellant out of the estate of her deceased husband, Henry Dillon, senior.

Henry Dillon senior was twice married. By his first wife he had two sons and three daughters. The appellant was his second wife and the wedding took place on 24th August, 1935, when her husband was 81 years of age and she herself was 50. He died on 29th January, 1937, leaving a will dated 17th March, 1936, under the terms of which he appointed the Public Trustee of New Zealand to be his executor and trustee. He specifically devised all his farming lands to three of his children by his first wife, viz., Henry Dillon, Mary Kathleen Dillon (now a married woman named Mrs. Stuart), and Eileen Dillon, in equal shares subject to subsisting mortgages and charges, and subject also to the payment thereout of an annuity of £50 per annum in favour of Elsie Higgins (another daughter by his first wife) during her lifetime. Apart from this specific devise (which, as will be seen later, was in due performance of a contract so to frame his will which he had made for good and valuable consideration with his sons, Henry Dillon and Michael Francis Dillon, on 2nd February, 1933), he devised and bequeathed the whole of his estate both real and personal, after paying debts, funeral and testamentary expenses, and death duties, upon trust for his widow, the appellant, Amy Dillon, absolutely.

Henry Dillon senior's first wife had died before the agreement of 2nd February, 1933, was made, and he had not at that date married a second time. Accordingly, the agreement amounted to a family arrangement between a widower and his children at a time when there was no

wife to consider. The general nature of the arrangement provided for by the agreement was that all the farm lands, in which Henry Dillon senior and his two sons were respectively interested, should be worked together as one sheep and cattle farm; that Henry Dillon junior should devote his whole time and energy to the management of the farming business, and that the other son, Michael Francis Dillon, should work as a general hand upon the farm. Henry Dillon senior forthwith gave to each of his two sons a one-third share in all his stock of every description on the farm lands, and also released to Michael Francis Dillon a sum of £2,000, which was secured by mortgage given by the latter to the former. The business was to be carried on on a partnership basis as long as Henry Dillon senior lived, and there was to be paid out of the partnership banking account weekly wages to each of the two sons, and also to Mary Kathleen Dillon and Eileen Dillon (the remaining sister, Elsie, had already married), as well as other specified expenditure, before arriving at the balance of profit which was to be divided annually in equal shares between the three parties to the agreement.

Clause 17 of the agreement was to the following effect:—

> " 17. That the said Henry Dillon senior shall by his last Will devise and bequeath his own farm lands to his Trustees upon trust for his son Henry Dillon junior and his two daughters, Mary Kathleen Dillon and Eileen Dillon, in equal shares subject however to an annuity or rent charge of Fifty Pounds (£50) per annum in favour of his daughter, Elsie Higgins, and shall forthwith execute a Will containing such devise and bequest."

Henry Dillon senior duly fulfilled the obligation of this clause by making a will in the terms stipulated. His subsequent marriage with the appellant invalidated this will, but his final will, made on 17th March, 1936, reproduced the provisions which he had agreed to make in favour of his children. The residue of his estate he left, as already stated, to the appellant. At his death the gross assets of the testator amounted to £9,175 and his liabilities to £3,334, leaving a net estate of £5,841. Of this net estate £3,875 was the estimated value of the benefits to be received by the three devisees under the clause in his will which conformed to the agreement he had made. The net residual estate, which was given to the appellant, was accordingly equivalent to £1,416.

The Family Protection Act 1908 of New Zealand is divided into two parts. Part I, with which we are not in this case directly concerned, deals with " family homes' protection ", and Part II deals with " testator's family maintenance ". Section 33, sub-section 1, of Part II, under which the appellant made her application to Mr. Justice Northcroft, runs as follows:—

> " If any person (hereinafter called the ' testator ') dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children."

The contention of the appellant was that what she received under her husband's will was not, in all the circumstances, " adequate provision for her proper maintenance and support ", and accordingly she applied for the Court to exercise its discretion and to order further provision out of the estate of the testator for herself. The necessary effect of such an order would, of course, be to reduce the benefits passing to her step-children under the will. In opposition to this application it was argued before Mr. Justice Northcroft that the provisions which the will contained in favour of the testator's children, were made in strict conformity with clause 17 of the agreement of the 2nd February, 1933, and that, since additional provision for the widow could only be secured by encroaching upon the contractual devise, the Court had no power to vary the provisions of the will in the appellant's favour. Mr. Justice Northcroft, however, ruled that the Court was not precluded from encroaching upon the devise of

farm lands to the testator's children should it be necessary to do so to make adequate provision for his widow. The learned judge proceeded as follows:—

> " Upon the facts of this case there is no suggestion that the widow's claim lacks merit. It is true that the testator was a very old man at the time of the marriage and that he died within eighteen months. At the same time he assumed responsibility for his wife when he married her and was under an obligation imposed upon him by the statute to make adequate testamentary provision for her proper maintenance and support, and this, I think, he has failed to do. The affidavits filed contain no criticism of the plaintiff nor of her claim nor is there any evidence that the circumstances of the testator's first family are such that it will be a hardship to them to resort to their gifts under the Will to supplement the provision to the widow."

Their Lordships cannot regard it as a correct exposition of section 33 of the Family Protection Act to say that it imposes upon a husband the obligation to make adequate testamentary provision for the maintenance and support of his wife. The statute does not impose any duty to frame a will in any particular way, and the testator did not fail to observe any statutory obligation by making his will as he did. What the statute does is to confer upon the Court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute; his will-making power remains unrestricted; but the statute in such a case authorises the Court to interpose in order to carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for. The interposition of the Court should take place, of course, only after considering all relevant circumstances and among these circumstances may be the fact that the testator was under obligation to third parties.

The trial judge, having come to the conclusion that the appellant's claim was well-founded in fact in that she was inadequately provided for by the will, and having observed that there was no evidence to show that it would be a hardship on the respondents to reduce their benefits under the will in order to find a supplementary provision for the widow, considered the figures and came to the conclusion that two changes should be made in her favour. The will already gave the appellant a house valued at £480, but this house was subject to a mortgage of £173. The learned judge's order gave the house to the appellant free of encumbrance, and consequently the amount needed to pay off the mortgage would have to be found from some other source. Secondly, Mr. Justice Northcroft further changed the effect of the will by providing that the farming lands should be charged in the appellant's favour with an annuity, which would bring up her total income derived from the testator's estate to £150 per annum. All parties were to have liberty to apply to the court if alteration of circumstances made this proper.

The children, whose benefits under their father's will were thus reduced, appealed to the Court of Appeal in New Zealand upon the ground that Mr. Justice Northcroft's judgment " is erroneous in fact and law ". Chief Justice Myers and Mr. Justice Ostler took the view that, inasmuch as the provision in the will for the children was made in fulfilment of a contract for valuable consideration contained in clause 17 of the agreement, the court had no jurisdiction to make an order under section 33 of the Family Protection Act which would cut down what the testator had, in fulfilment of his promise, left to his children for the purpose of increasing the widow's share. Their Lordships cannot accept this view. Chief Justice Myers truly observed that if Henry Dillon senior had transferred his lands to his children during his lifetime, the Family Protection Act could not operate upon them. This is plainly the case, for section 33 of the Act only applies if the testator dies leaving a will without making adequate provision therein for the proper maintenance and support of the testator's wife.

etc. If these conditions are fulfilled, the court has jurisdiction at its discretion to order that such additional provision as the court thinks fit shall be made for the inadequately provided wife out of the testator's estate. There can be no dispute or doubt that the lands left to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their stepmother, unless indeed their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed But these devisees are not creditors of the estate; they are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator's estate; the testator has done what he contracted to do, viz., to make the testamentary provisions defined in clause 17 of the agreement. The testator is under no reproach in the matter at all; his will duly provides for the fulfilment of his contract with his children and gives all that is left for distribution to their stepmother. But the contract cannot oust the jurisdiction of the court and there is nothing in section 33 of the Family Protection Act which restricts the court's power to re-distribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into *inter vivos*.

For these reasons, their Lordships are not able to agree with the view of Chief Justice Myers, when he says at the end of his judgment:

> " A person to whom a devise is made pursuant to an agreement made by the testator for valuable consideration cannot be said to be an object of the testator's bounty, and I cannot think that the Family Protection Act was ever intended to defeat, nor do I think it should be construed as defeating, obligations incurred by a testator, or rights or equities acquired by third parties by contract with the testator, in good faith and for valuable consideration."

As Mr. Justice Smith in his dissenting judgment points out, if this was so, a young bachelor, who had agreed for a consideration to leave all his property by his last will to a relative, friend, or creditor, might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate. The manifest purpose of the Family Protection Act, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do. The Court, in considering how its discretion should be exercised, and how far it is just and necessary to modify the provisions of the will, will pay regard to the circumstances in which the testator's will is drawn as it is, and the interests of the respective members of the family, but if the Court comes to the conclusion that no adequate provision has been made in the will, such as is called for by section 33, then the jurisdiction of the Court to alter the distribution of the estate in favour of the applicant (widow, widower, or children, as the case may be) cannot be doubted.

The Chief Justice in his judgment pointed out a difficulty which, in his view, would arise if the view above stated (which is also the view of the trial judge) were adopted. He says:

> " The effect of the decision appealed against is that where A enters into a contract with B, for valuable consideration, that he will by his last will and testament devise certain lands to B, and A subsequently marries and actually performs his contract, B is to be in a worse position than if A had committed a breach of his contract. It would be an extraordinary thing if our law permitted such a result."

With the greatest respect to the learned Chief Justice, Their Lordships do not think that this result would follow. Their Lordships do not question the binding authority of cases like *Hammersley* v. *De Biel* (1845) 12 Cl. & Fin. 45 and *Coverdale* v. *Eastwood* (1872) L.R. 15 Eq. 121, but the actual result of applying such decisions in New Zealand may be affected by the provisions of the Family Protection Act.

Under a system of law which gives to the Court no jurisdiction to alter, to the detriment of B, the devise made by A in B's favour, the compensation due to B from A's estate, if A fails to fulfil his contract to make the devise, will be the value of that which B should have received under the will. But in New Zealand this value is not necessarily the whole value of the interest which the testator agreed to devise, but is that value less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act. In other words, in accordance with the principle of the cases cited, the loss suffered by B from A's breach of contract is the equivalent of the benefit which B would have enjoyed if the contract had been performed. This benefit, owing to the provisions of the Family Protection Act, is not necessarily equivalent to an unconditional right to receive the devise in full, and the estimate of B's loss is proportionately reduced. Thus, B is in the same position, so far as compensation is concerned, if A breaks his contract as he would be if A had performed it. There may well be instances where all this is difficult to work out, but their Lordships cannot entertain any doubt that, in principle, the Family Protection Act affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken.

Their Lordships were unable to gather from the material brought before them, or from the statements of Counsel, that any issue was discussed in argument before the Court of Appeal other than the question whether in the circumstances the Court had jurisdiction to interfere with the terms of the will, and they have no right to assume that the trial judge, acting on the basis that he had such a discretion, did not make due allowance for the fact that the testator, in framing his will as he did, was fulfilling the terms of a contract entered into in his lifetime for good consideration. There is, moreover, no ground for thinking that he did not pay regard to the pecuniary position of the children, who were represented by counsel on the application before him. It would be manifestly undesirable that the net amount of this comparatively small estate should be reduced by further litigation, and their Lordships propose to put an end to the matter by adopting a variation suggested by Smith J. in the Court of Appeal (which the appellant before this Board offered to accept), viz., that the house, which under the will passes to the widow absolutely, is taken by her subject to liability for the mortgage, and not, as Northcroft J. decreed, freed from the mortgage. The widow's other income from the estate will remain as fixed by the trial Judge, viz., an annuity which will make her total income drawn from the testator's estate up to £150 a year as from the testator's death on the footing that the nett sum paid to her out of the residuary estate will, as from its receipt, produce a return at the rate of 3½ per cent. per annum.

The first respondent, the Public Trustee in and for the Dominion of New Zealand, was separately represented at the hearing before their Lordships and applied for directions as to how the order ultimately made should be worked out. Under section 33, sub-section (4) of the Family Protection Act, 1908, the incidence of payments ordered is to fall rateably upon the whole estate of the testator, unless the Court otherwise determines. It appears to their Lordships that a special direction is needed in the present case. The payments ordered to be made to the appellant should be charged exclusively upon the farming lands devised by the will in priority to, and without reducing, the annuity of £50 in favour of Elsie Higgins. There should be a direction to the Public Trustee to execute a registered charge on the farming lands in favour of the widow to secure first a sum equal to the arrears from the death of the testator to the time at which the residue is paid over to her, and the annuity to be paid to her as from that date which can only then be exactly ascertained. These directions would appear to be sufficient for the purpose, but if they need further amplification or adjustment, the matter could be dealt with by the Court in New Zealand.

There remains the question of costs. The costs of the Public Trustee in this litigation as between solicitor and client must come out of the residue of the estate. The appellant must get her costs here and below from the other respondents.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, and that the order made by Mr. Justice Northcroft should be restored with the variation that the house is to be taken by the appellant, subject to liability for the mortgage, while the appellant's other income from the estate will include the sum necessary to make up an annuity of £150 a year in the manner more particularly described above. The costs of the Public Trustee in and for the Dominion of New Zealand as between solicitor and client will be paid out of the residue and the appellant will have her costs here and below, which must be paid by the other respondents. There will be general liberty to apply to the Court in New Zealand, if any difficulty should arise in working out the order as so varied.

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In the Privy Council

AMY DILLON

v.

THE PUBLIC TRUSTEE OF NEW ZEALAND AND OTHERS

DELIVERED BY THE LORD CHANCELLOR

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