CASE NO:

THE SUPREME COURT OF JUDICATURE
THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand
London WC2

Date: Friday, 2nd February 1996

B e f o r e :
LORD JUSTICE RUSSELL
SIR IAIN GLIDEWELL
- - - - - - -- -

MR CAPOCCI

- v -

MR COOKE & OTHERS
- - - - - - -- -
(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071-404 7464
Official Shorthand Writers to the Court)
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MR P MOULDER (instructed by Looma & Burke, Newcastle upon Tyne) appeared on behalf of the Applicant.

MR J SMART (instructed by Kid & Spoor & Harper, Newcastle upon Tyne) appeared on behalf of the Respondents

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JUDGMENT (As Approved by the Court

JUSTICE RUSSELL:

This is an appeal from the judgment of Mr Assistant Recorder Hyland, sitting at the Newcastle-upon-Tyne County Court who, on 31 March 1995, dismissed an application made by the appellant, Mr John Capocci, under s 2 of the Inheritance (Provision for Family and Dependants) Act 1975. The complaint of the appellant was that the provision made by the applicant's deceased wife in her Will did not make reasonable financial provision for him.

Before relating the facts, I would refer to the Statute and its structure. Section 1 of the Act enables a husband of a deceased woman to make a claim if the disposition of her estate is "not such as to make reasonable financial provision for the applicant". Section 2 gives the court very wide discretionary

powers to make various orders so as to achieve reasonable financial provision. Section 3 contains a check list to which the court is enjoined to have regard when determining whether the financial provision, if any, made by the deceased is such as to be a reasonable provision for an individual applicant.

I find it unnecessary to rehearse in this judgment all the factors to which the court should have regard in making its decision. Amongst others, the court must have regard (and I use those words advisedly) to the financial resources and financial needs which the applicant has, or is likely to have, in the foreseeable future, the size and nature of the net estate of the deceased and, by subsection (2) this further important provision which relates to cases such as the present where the applicant is the husband of the deceased.

Subsection (2) reads:

> "Without prejudice to the generality of subsection (1) above, where an application for an order under Section 2 of the Act is made by virtue of Section 1(1)(a)...."

which is an application made by a husband,

> "....the court shall in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection have regard to-
>
> (a) the age of the applicant and the duration of the marriage;
>
> (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family;
>
> and in the case of an application by the wife or husband of the deceased the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of

> being terminated by death, had been terminated by a decree of divorce."

It is important, in my judgment, to bear in mind that s 3(2) does not require the court to equate the position which might have prevailed in the event of the marriage of the deceased and the applicant being terminated by divorce, to the position which prevails in the event of the wife's death. It requires the court to have regard to that situation in carrying out the exercise which the court has to perform in order to determine whether the provision made by the wife in her Will is reasonable or otherwise.

As the learned Assistant Recorder commented, there are authorities which assist the court in applying the statute. In particular, the Assistant Recorder referred in his judgment to Re Coventry (deceased) [1980] Ch 461, [1979] 3 All ER 815. That was a case where the applicant was the son of the deceased, but there were some observations, both at first instance by Oliver J and in the Court of Appeal, which are of, and were intended to be of, general effect.

At page 472 of the report, Oliver J at first instance referred to earlier cases under earlier statutes whilst commenting that the principles still prevailed when considering the 1975 Act. He cited from Re Styler [1942] Ch 387 and repeated the words of Morton J to the following effect:

> "There are one or two observations in the cases decided on this Act to which I desire to refer, although I fully appreciate that every case must rest on its own facts. In Re Brownbridge (1942) 193 LT Jour 185 Bennett J said that the Act did not throw on a testator a duty to make a provision for his dependants. It only gave the court the right to interfere if it came to the conclusion that the dispositions which were made were unwarranted. In that case Bennett J did not think it right to interfere with the testator's disposition. I respectfully agree with the observations which he made. I do not think that a judge should interfere with a testator's

dispositions merely because he thinks that he would have been inclined, if he had been in the position of the testator, to make provision for some particular person. I think that the court has to find that it was unreasonable on the part of the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision. Again, in Re Sylvester [1941] Ch 87, Farwell J said: 'I do not consider in the ordinary way applications by husbands for this sort of assistance should readily be entertained. Prima facie a husband should be able to maintain himself, and ought not to ask the court to give him, out of his wife's estate, more than she has thought fit to provide for him. There are, of course, exceptional cases in which such an application may be justified, but personally I should not be very willing to assist husbands in cases of this sort, unless the circumstances were indeed exceptional.' With that observation also I respectfully agree. I think the court would, however, regard it as a circumstance of some importance, if the husband were unable to earn a living wage and did not possess sufficient means for his support."

At page 474 of the Coventry case, Oliver J said:

"It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant and that means - in the case of an applicant other than a spouse for that applicant's maintenance."

Finally at page 487 of the report of Coventry, Goff LJ in the

Court of Appeal when commenting upon the question whether a particular disposition is to be regarded as reasonable or not said:

> "The problem is clearly a question of discretion.... It is a question of fact, but it is a value judgment, or a qualitative decision, which I think ought not to be interfered with by us unless we are satisfied that it was plainly wrong."

Against the statutory provisions to which I have referred, and the guidance to be found in Coventry, I turn to the facts of this case, though I emphasise that I shall not find it necessary to go into the meticulous detail which the Assistant Recorder chose to do in his judgment.

The applicant is now 58/59 years of age. He married the deceased 34 or 35 years ago in July 1958. His wife sadly died after the marriage had subsisted for about 34 years on 30 June 1992. Until comparatively shortly before her death, the husband and his wife had lived in a house which they had acquired together in 1961. It was a three-bedroomed property 35 Hillhead Parkway, Chapel House Estate, Newcastle. Throughout the marriage, and until about two years before the death of the wife, the judge recorded that the applicant had worked hard and had made his contribution to the household purse. The wife too had worked. Unhappily, by the middle of 1990, however, the marriage had deteriorated. The applicant was drinking too much and that led to discord. So much so that in September 1990 the deceased went to solicitors who drafted a document which she signed to the effect that her joint tenancy of the property was converted so that thereafter she and her husband were tenants in common.

In 1991 the deceased left the matrimonial home and went to live with her sister. That sister ultimately became a beneficiary under the terms of the deceased's Will. In the Will the deceased bequeathed to her husband a life interest in her share of the property which hitherto she had owned jointly with her husband. It was subject to some conditions; namely, that the right of the husband to continue living in the property depended upon his not

remarrying or cohabiting with anybody else. In the event of a sale of the property during the applicant's lifetime, there was a provision that he should account for the proceeds of sale to the beneficiaries of the wife's Will.

The Assistant Recorder went on to review in greater detail some of the facts which bore upon the decision which he ultimately took. In particular, the Recorder dealt with the financial resources of the deceased and then of the applicant. The net value of the estate was about £55,000 represented by a half share in the former matrimonial home on an agreed valuation of £52,000, and the balance of £24,000 odd was to be found in banks and building societies in the deceased's names. There was some jewellery which was disposed of by disposition in the Will.

So far as the applicant was concerned, the judge rehearsed his capital and income. The capital was far from substantial, it was in three figures. As to income, the judge discovered on inquiry that the applicant earned £768 per month (just over £9,000 per year). He lived in such a way that his expenditure enabled him to have, in comparative terms, a fairly considerable income available to him.

Toward the end of the judgment, the judge reminded himself of the terms of the Act and in particular, it is to be observed, had regard to the length of the marriage. He came to the crucial finding at page 13 of the judgment and said:

> "Having considered carefully all the evidence in this case, the relevant law and the helpful submissions of counsel, I have come to the conclusion that the provision made to the Applicant by the will of the Deceased is reasonable and, accordingly, this action fails."

Miss Moulder attacks the judgment of the Assistant Recorder, basically on two bases. She contends that the Assistant Recorder applied the wrong standard of reasonable financial provision. More particularly, she submits that he did not have proper regard to s 3(2) of the statute which I have already rehearsed. That

section deals with the position of a husband and his application (such as was before the court in the instant case) being one which should be viewed as if there had been at the date of the termination of the wife's life, instead a decree of divorce.

I repeat my comment that s 3(2) is not a freestanding subsection, it is to be read as its terms provide "Subject to Section 3(1)". What is said in s 3(2) is simply an extension of the various criteria to which the court must have regard before reaching its ultimate decision. Miss Moulder contends that the judgment does not make it plain that the court did have proper regard to s 3(2). There is force in that submission because, in specific terms, the judge does not refer to s 3(2). In my judgment, it is inescapable, having regard to the judgment read as a whole, that the Assistant Recorder must have had regard to s 3(2) when, for example, he deals in the transcript with the length and duration of the marriage.

For my part, I would wish to pay tribute to the judgment of the Assistant Recorder for his meticulous attention to detail and, subject to the small reservation as to an omission relating to s 3(2), in terms, as to his application of the law.

I do not find any misdirection in the judgment read as a whole and, in my view, the decision reached by the Assistant Recorder is one that was plainly open to him. Following the dicta in Re Coventry I am satisfied that it would be quite wrong for us in this court to assert that the Assistant Recorder was plainly wrong. I go so far as to say that I suspect that if I had had to deal with this case at first instance, I would have reached the same conclusion as the judge. I would, therefore, dismiss this appeal.

SIR IAIN GLIDEWELL

I agree. In my judgment the Assistant Recorder made no error of principle and arrived at a decision which I regard as sensible.

Appeal dismissed.