Privy Council Appeal No. 40 *of* 1936

Hugh Crawford Magee - - - - - - - - *Appellant*

v.

Charles W. Magee and others - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1936

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
SIR LYMAN POORE DUFF.
SIR MICHAEL MYERS.

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from a judgment of the Court of Appeal of British Columbia which declared the true intent and meaning of the will of one Hugh Magee, who died on the 9th March, 1909. The testator devised certain lands and bequeathed all his personal property to his wife. No question arises in regard thereto. It is only in relation to his residuary real estate that controversy has arisen. This he devised to trustees upon trusts declared in the following words:—

> "Upon trust to retain manage lease sell or otherwise dispose of the whole or any part thereof as to them may seem fit with the discretion of absolute owners and after paying my funeral and testamentary expenses and debts to invest the proceeds of the said monies of my real estate in or upon any public stocks funds shares or securities of whatsoever nature or kind as to them may seem fit.
>
> "Upon trust to pay the income of the trust premises first thereout discharging all liabilities in respect to my estate as follows: One-half thereof to my wife during her life in manner hereinafter described and the rest as follows:—To such of my children including the said George F. Magee from time to time as to my executors shall appear to be most in need the payments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my desire being that as far as possible the division shall be made so as to give the larger

> shares to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees. The money hereinbefore directed to be paid to my wife shall be paid by my executors only and when they are satisfied the money is required for her maintenance and support and I give them absolute discretion as to the times when payments shall be made and these payments may be made direct to her or to the others for her support or for necessaries of life supplied or to be supplied to her as to my trustees shall seem fit."

The testator was survived by his wife and eleven children of whom one, George E. Magee, died on the 8th August, 1912. The widow died on the 7th September, 1927. Since her death three of the testator's children have died, viz. Eliza Jane Carson, Walter E. Magee and James D. Magee. At the date of the testator's will his eldest child was aged 51 years and his youngest child was aged 22 years.

After the death of the testator's widow the trustees of the will acted on the view that the income from the estate should be kept available for distribution amongst the children of the testator, until the time arrived when none of them was in need of assistance and all were unembarrassed financially; and that meanwhile the corpus of the estate should not be divided. In accordance with this view, and since it has not at any time appeared to the trustees that none of the children was in need of assistance or that all were unembarrassed financially, the corpus of the estate has not been divided, but the income has been divided, among such of the children as appeared to the trustees most in need, and in such amounts as the trustees in their discretion thought proper.

By an originating summons issued on the 13th October, 1933, one of the children applied to have various questions of construction arising under the will determined by the Court, and in particular the question whether the trustees were not bound to make an immediate division and distribution of the corpus of the estate.

By an order dated the 22nd August, 1934, Fisher J. ordered and adjudged that the children of the testator who survived the widow were entitled share and share alike to the distribution of the estate remaining undistributed, except such income as had accrued up to the date of the judgment, which income was distributable in accordance with the discretion of the trustees pursuant to the will; and he further ordered the estate to be distributed in equal shares among the children who survived the widow and were still living, and the legal personal representatives of those children who survived the widow but had since died.

On appeal, this order was set aside, and by order dated the 8th January, 1935, the Court of Appeal of British Columbia declared the true intent and meaning of the will to be as follows:—

> "(1) The trustees of the estate of the said Hugh Magee may distribute the said estate among the children of the said Hugh Magee

living at the time of such distribution, but only if and when it appears to the said trustees that none of the said children are in need of assistance, but all are unembarrassed financially.

"(2) That until the time for such distribution shall have arrived the said trustees shall pay the income from the said estate from time to time to such of the children of the said Hugh Magee as to the said trustees shall appear most in need."

It was contended on behalf of the appellant, on appeal to His Majesty in Council, that the power to pay the income to such of the children as should appear most in need came to an end with the death of the widow; that the will contained an implied gift or trust of the residuary real estate to or for such of the children as survived the widow; that the power conferred on the trustees to divide the corpus among those children was merely a power to determine the proportions in which those children should take; that this power was void owing to the uncertainty of the event or events upon which its existence depended; and that accordingly the implied gift or trust took effect in favour of those children in equal shares freed from any power in the trustees to determine proportions. It was also contended that the power had ceased to be exerciseable on the death of any child who had survived the widow, with the same consequence, viz. that the implied gift or trust took effect freed from any exercise of the power.

In their Lordships' opinion none of these contentions can succeed. The decision of the Court of Appeal appears to them to be plainly right.

Read according to their literal and natural meaning, the words used by the testator seem free from ambiguity. He has declared trusts of the income of his residuary real estate which continue operative during the lives of his children unless and until the event happens which brings the power into existence, and the trustees in fact exercise the power.

While the widow was alive part of the income (not exceeding one-half) was payable to her or for her benefit; but since her death the whole income is available for such of the children from time to time as to the trustees shall appear most in need.

The only express disposition of corpus is such disposition as will result from the exercise (if any) by the trustees of their power of dividing the estate, and their Lordships find themselves unable on the language of this will to imply any other gift or trust of corpus. Neither can they say that any uncertainty exists in relation to the event or events which give rise to the power. The trustees have experienced no difficulty during the widow's survivorship (a period of over 18 years) and down to the present time in estimating the varying needs of the different children, and their Lordships see no reason to suppose that they will

experience any difficulty in appreciating the fact, if it ever comes about, that no child is in need of assistance with the resulting corollary that all are unembarrassed financially.

Nor can their Lordships accept the view that the power of dividing corpus ceased on the death of George E. Magee. In their opinion it is a power which the trustees can exercise if at any time after the widow's death it appears to them that none of the children then living are in need of assistance but are all financially unembarrassed.

As M. A. Macdonald J.A. in his careful and lucid judgment points out the power to divide corpus may never become exerciseable, or (even if it becomes exerciseable) may never be exercised, with the result that intestacy may ensue. But though a Court may of two possible constructions prefer that one which avoids an intestacy, there is here no room for such a consideration in view of the clear language used by the testator; nor indeed would such an ultimate disposition of the testator's property appear in this case to be of necessity unreasonable.

Their Lordships are of opinion that the order of the Court of Appeal of British Columbia was right and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

They think, however, that it is a proper case in which they should order that the costs of all parties of this appeal should be taxed as between solicitor and client and paid out of the testator's residuary estate.

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In the Privy Council

HUGH CRAWFORD MAGEE

v.

CHARLES W. MAGEE AND OTHERS

DELIVERED BY LORD RUSSELL OF KILLOWEN

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