Privy Council Appeal No. 52 *of* 1936.

Enid Browne - - - - - - - - - - *Appellant*

v.

Florence Yoda Moody and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

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.
LORD ALNESS.
SIR MICHAEL MYERS

[*Delivered by* LORD MACMILLAN.]

In this appeal their Lordships have to determine the interpretation and effect of certain provisions in the will of the late Mrs. Katherine Hamilton Browne of Toronto.

The testatrix died on 17th March, 1930. She was survived by a son, William George Hamilton Browne, and three daughters, Mrs. Florence Moody, Mrs. Constance Kinnear and Mrs. Helen Smith; she was also survived by a grand-daughter, Enid Browne, the daughter of her son, William George Hamilton Browne.

By her will, which was dated 16th December, 1929, the testatrix appointed executors and after certain specific bequests in favour of her son she gave directions with regard to a sum of $100,000 in the following terms, which it is necessary to quote textually, as the arguments in the appeal turned largely upon the precise language employed :—

> "5. Whereas I have now the sum of $100,000.00 invested in the name of E. H. Watt, of the said firm of Watt & Watt, in trust in the form of a call loan, I hereby direct that the said fund is to be continued to be invested in call loans by the said E. H. Watt during the lifetime of my said son William George Hamilton Browne and the income arising therefrom is to be paid to my said son during his lifetime. In the event of the death of the said E. H. Watt during the lifetime of my said son I direct that the fund now invested by him in the form of a call loan shall be invested by my executors in such securities as are authorized by the laws of the Province of Ontario as trustee investments and the income therefrom is to be paid to my said son during his lifetime. On the death of my said son William George Hamilton Browne I direct that the said

> fund of $100,000.00 is to be divided as follows: One half of the said fund to my grand-daughter Enid Browne, daughter of my son William George Hamilton Browne, and the remainder of the said fund to be divided equally between my daughters Florence Yoda Moody, wife of Robert E. Moody, now of Los Angeles, California; Constance Emma Kinnear, wife of Harold Kinnear, of the City of Detroit in the State of Michigan, and Helen Smith, wife of Herbert P. Smith, of Jamaica, Long Island, New York, share and share alike."

By the sixth purpose of her will the testatrix gave devised and bequeathed all the rest and residue of her estate, both real and personal, to her grand-daughter Enid and her three daughters, Florence, Constance and Helen, to be divided amongst them equally, share and share alike. The seventh clause, the only other clause which need be considered, reads as follows:—

> "7. In the event of my grand-daughter Enid Browne or any of my said daughters predeceasing me or predeceasing my said son leaving issue I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived."

It will be observed that all the beneficiaries mentioned in the fifth, sixth and seventh purposes of the will survived the testatrix. They are all still alive. Each of the three daughters is married and has issue. The items specifically bequeathed by the testatrix to her son and the fund of $100,000.00 as to which she gave the directions above quoted constituted the bulk of her estate and their Lordships were informed that the residue is negligible in amount.

In 1932 by originating motion in the High Court Division of the Supreme Court of Ontario at the instance of the son of the testatrix, who was one of her executors as well as a legatee under her will, the question was raised whether the grand-daughter and daughters of the testatrix had vested interests in the $100,000.00 fund. At the initiation of the proceedings the grand-daughter Enid was an infant and she, as well as the infant children of the daughters, Florence and Constance, and the unborn children of all three daughters, were represented by the official guardian, for whom the Attorney-General of Ontario appeared at their Lordships' bar. In the course of the proceedings the grand-daughter Enid came of age and she is now the appellant in the appeal, the respondents being the three daughters, the official guardian, the executors of the will, and the daughter (who is of age) of Mrs. Helen Smith. There being a question as to whether all parties were represented before their Lordships it was intimated that counsel had now received complete instructions and that the necessary formal steps would be taken to enter appearance for the parties not previously represented in the appeal.

The learned Chief Justice of Ontario found himself unable "to distinguish the gift to the grand-daughter and the daughters from the gifts in *Re Gilmour* (1932) 41 O.W.N.

34 and *Re Gaukel* (1932) 41 O.W.N. 215, which were held to be covered by the rule stated in *Busch* v. *The Eastern Trust Company*, [1928] S.C.R. 479." Regarding himself as bound to follow these judgments the learned Chief Justice held that no vested interest in the fund in question was acquired by the grand-daughter and daughters at the death of the testatrix. The *Busch* case having been previously followed by the Court of Appeal for Ontario in several cases involving the same question (including the case of *Re Gaukel*, which was affirmed by the Court of Appeal as reported in (1932) 41 O.W.N. 365) leave was applied for and granted to appeal against the judgment of the learned Chief Justice *per saltum* direct to the Supreme Court of Canada. A special case was subsequently adjusted and presented to the Supreme Court in which the following questions were submitted :—

> " (*a*) Whether or not the legacies directed by the said testatrix, Katherine Hamilton Browne, deceased, under paragraph 5 of her said will to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith (the appellants herein) upon the death of the life tenant, William George Hamilton Browne, became vested upon the death of the said testatrix?
>
> " (*b*) And should this Honourable Court find that such legacies did become vested upon the death of the testatrix, then, whether or not the legacy of any of such appellants is liable to be divested under or otherwise affected by paragraph 7 of the said will?"

The Supreme Court answered Question (*a*) in the negative and Question (*b*) accordingly did not arise.

The reasons for this judgment were delivered by Rinfret J. and were concurred in by the learned Chief Justice of Canada and Smith, Cannon and Hughes JJ. From these it appears that the grounds of the decision were, first, that there are in clause 5 no words of present gift to the grand-daughter and daughters but only a direction to divide the fund among them on the occurrence of the son's death. " According to the words she uses, grammatically and literally, the testatrix gives when she divides "; second, that " the fund is really treated as separate and distinct from the estate disposed of in the will " and " there is nothing in paragraph 5 necessarily indicating that except in the event mentioned [Mr. Watt's death] the executors are to have anything whatever to do with the fund. In terms it is not given to them either in trust or otherwise "; third, that the language used by the testatrix in clause 5 differs from that which she uses in " every other clause of the will where the testatrix makes a bequest with the evident intention that it should become vested at once. Invariably and in each case without exception the testatrix says, ' I give, devise and bequeath '." The contrast " evidences a desire to postpone the operation of the gift to the appellants until the period of distribution "; finally, that the words in clause 7, " the interest to which their mother would have been entitled had she survived," read fairly and literally,

mean that " the mother (i.e. any of the appellants) takes no title to that interest unless she survives both the testatrix and her son, and that is to say, till the time of distribution." The learned Judge further stated that the *Busch* case ought not to be cited as deciding more than was there actually decided and that there was no intention in that case of laying down a rule of general application. The argument which their Lordships heard from the Attorney-General in support of the judgment followed the same lines.

Their Lordships do not find themselves in agreement with the decision of the Supreme Court. They fully recognise, with Rinfret J., that the golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used, but in the present instance they do not find manifested in the language of the testatrix the intention which the Supreme Court have distilled from it. The testatrix has made her testamentary dispositions in terms of very ordinary occurrence from which the Courts in a long series of cases have drawn a contrary inference as to intention.

Their Lordships observe in the first place that the date of division of the capital of the fund is a *dies certus*, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

The distinction between a present gift coupled with a postponement of the date of payment and a direction to pay at a future date without any words of present gift is no doubt an important distinction and is in certain circumstances an element in determining whether vesting *a morte testatoris* has or has not taken place, as where conditions of survivorship and the like are adjected to the direction to pay. But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place *a morte testatoris* in the remaindermen. The principle is thus stated in " Jarman on Wills," 7th Edition, p. 1377, " Even though there be no other gift than in the direction to pay or distribute *in futuro;* yet if such payment or distribution appear to be postponed for the convenience of the fund or property the vesting will not be deferred until the period in question. Thus where a sum of stock is bequeathed to A. for life; and after his

decease to trustees upon trust to sell and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution is evidently deferred until the decease of A. for the purpose of giving precedence to his life interest the ulterior legatees take a vested interest at the decease of the testator." As the learned editor points out, Sir J. Wigram, V.C., in *Packham* v. *Gregory*, (1844) 4 Ha. 396 at p. 398 " expressed his entire concurrence in the doctrine thus stated by Mr. Jarman, which is further supported by numerous authorities." Their Lordships refer to the admirable opinion of Middleton J.A. in *Re McFarlane* [1934] O.R. 383 at pp. 387 *et seq*. The learned Judge in that case felt himself constrained, with his colleagues of the Court of Appeal for Ontario, to bow to the decision in *Busch's* case, but he indicated that otherwise he would have reached a different conclusion. In the course of his opinion he cited the case of *In re Bennett's Trust*, (1857) 3 K. and J. 280 in which Sir William Page-Wood V.C. at p. 283 used words which may here be repeated: " It is clear that the use of the words ' pay and transfer ' as the only words of gift does not make such a bequest contingent. The true criterion is that which is mentioned in *Leeming* v. *Sherratt* (1842) 2 Hare 14, namely, whether the postponement of the payment or division was on account of the position of the property or of the person to whom the deferred interest is given. If the reason is simply that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift to one for life with a vested remainder to the legatees who are to take subject to the life interest." Middleton J.A. then quotes from the 8th edition of " Theobald on Wills," p. 656 the following passage based on the case just quoted and others:—" When the only gift is to be found in the direction to pay or divide (*a*) if the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life . . . and a direction to pay upon the decease of the legatee for life . . . the gift in remainder vests at once . . . (*b*) but where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time."

Their Lordships are of opinion that the law is correctly stated in these quotations. In *Busch's* case, Newcombe J. referred to a passage in " Williams on Executors ", 11th edition, p. 981 (now 12th ed., pp. 795-6), as supporting the view which that learned Judge and the other members of the Supreme Court adopted. The words are: " Where there is no gift but by a direction to pay or divide and pay at a future time or on a given event or to transfer ' from and after ' a given event the vesting will be postponed till after that time has arrived or that event has happened, unless

from particular circumstances a contrary intention is to be collected." The learned Judge adds: "To the like effect is the text of Mr. Jarman's original edition, as incorporated at p. 1399" (7th ed., p. 1376). But, as has been seen above, Mr. Jarman in the subsequent passage which has been quoted, substantially qualified the generality of his statement and indicated its inapplicability to cases such as the present. Similarly the view expressed in the passage which Newcombe J. quoted from "Williams on Executors" is recognised by the learned author a few pages further on (12th ed., p. 802) as not universally accepted and as possibly subject to qualification, and in this connection he refers to Mr. Jarman's limitation of its application with which their Lordships agree.

Adverting to the other reasons which influenced the Supreme Court in reaching their decision in the present case, their Lordships do not find any special significance, indicative of a different intention, in the contrast between the expressions "I give, devise and bequeath" or "I give and bequeath" used in the case of the legacies payable on the death of the testatrix and the words "I direct that the said fund of $100,000.00 is to be divided, etc." used in the case of the destination of that fund. The difference would appear to be occasioned simply by the circumstance that in the one set of instances the testatrix was giving ordinary legacies immediately payable, whereas in the case of the $100,000.00 fund she desired to give a series of rather elaborate directions. Their Lordships also disagree with the view that the executors of the testatrix are in some way disassociated from the $100,000.00 fund. The whole interest of the testatrix in the fund necessarily passed to the executors on her death and they immediately became responsible for its due administration (see the Ontario Devolution of Estates Act, 1927, R.S.O. c. 148 s. 2). The directions of the testatrix with regard to it are directions which it is the duty of the executors to see carried into effect. Nor do their Lordships draw from the language of clause 7 of the Will any inference that the testatrix intended to postpone vesting till the period of division. The words "would have been entitled had she survived" they read as merely demonstrative of the share in question and not as intended to qualify the title to such share.

As Rinfret J. in giving the reasons of the Supreme Court did not profess to rely on the previous decision of the Court in *Busch's* case and protested against the view that that case had laid down any rule of general application, it would be unnecessary for their Lordships to refer to it were it not that it appears to have been treated as a binding authority, at least in the Courts of Ontario, in the present as well as in other cases. Their Lordships, having read the opinion of Newcombe J., confess to having some sympathy with the Judges who found in *Busch's* case a definite enunciation or at least a definite application of the principle that,

if there are no words of present gift but only a direction to pay or divide at a future time, vesting is postponed to that future time. The observations of the learned Judge himself on what was decided in *Busch's* case, in the subsequent case of *Singer* v. *Singer*, [1932] S.C.R. 44 at p. 49, point in the same direction. It is perhaps sufficient to say that if any such principle is laid down by *Busch's* case their Lordships cannot countenance it.

Their Lordships accordingly are of opinion that the first question submitted to the Supreme Court should be answered not in the negative but in the affirmative. This necessitates a consideration of the second question which on the view of the Supreme Court did not arise. In their Lordships' opinion the destination-over in clause 7 of the Will is plainly applicable to the legacies in clause 5. It was suggested that it applied only to the immediately preceding bequest of residue, but the contingency of the legatees predeceasing the son of the testatrix is inapplicable to the bequest of residue, which admittedly vests *a morte*, and is appropriate only to the legacies in the fifth clause. As to the effect of clause 7 their Lordships entertain no doubt. All the legatees have survived the testatrix so that the only contingency now affecting them is the contingency of predeceasing the son of the testatrix " leaving issue ". A legatee predeceasing the son without leaving issue would not be affected by the clause and the interest of such a legatee would pass on her death to her representatives. But the contingency of death " leaving issue ", with the gift-over in that event to such issue, is, in their Lordships' opinion effectual to render the legacies subject to defeasance or divestiture in that event. The contingency of predecease " leaving issue ", in other words, is a resolutive, though not a suspensive condition; it does not prevent vesting *a morte* but it prevents that vesting from being absolute and renders it subject to divestiture in the event of this specified contingency happening. This is in accordance with well-settled principles.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the Judgment of the Chief Justice of the High Court of Ontario dated 25th March, 1933, so far as declaring that the legacies directed by the testatrix in paragraph 5 of her will to be paid to the beneficiaries therein named did not become vested upon the death of the testatrix, and the judgment of the Supreme Court of Canada dated 6th March, 1934 (except so far as it deals with costs) should be recalled and that the case should be remitted to the Supreme Court with directions to answer the questions appended to the Special Case as follows :—Question (*a*) The legacies referred to became vested upon the death of the testatrix : Question (*b*) The legacies referred to are liable to be divested in the case of any legatee who predeceases the son of the testatrix leaving issue. The costs of all parties as between solicitor and client to the appeal will be borne by the capital of the $100,000.00 fund.

(37154—3A) Wt. 8136—2 100 8/36 P. St G. 338

In the Privy Council.

ENID BROWNE

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FLORENCE YODA MOODY AND OTHERS

DELIVERED BY LORD MACMILLAN

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