Privy Council Appeal No. 59 of 1937

Henry Bosch and another - - - - - *Appellants*

v.

Perpetual Trustee Company (Limited) and others - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1938.

Present at the Hearing:

LORD WRIGHT.
LORD ROMER.
SIR SIDNEY ROWLATT.
SIR GEORGE RANKIN.

[*Delivered by* LORD ROMER.]

This appeal is concerned with section 3 (1) of a statute of New South Wales the short title of which is the "Testator's Family Maintenance and Guardianship of Infants Act, 1916." The subsection, so far as material for the present purpose, is as follows:—

> "If any person (hereinafter called 'the testator') dying or having died since the 7th of October, 1915, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the Court may at its discretion and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."

The circumstances in which the appeal comes before this Board are these. George Henry Bosch (hereinafter called "the testator") who died on the 30th August, 1934, was married once only, viz. on the 11th October, 1929, to the respondent Gwendoline Bosch, then a spinster. Of that union a son was born on the 20th January, 1931, such son being the appellant Henry Bosch. On the 29th December, 1932, the testator made his will. By clause 1 he appointed the respondents Gwendoline Bosch and Perpetual Trustee Company, Limited, executors and trustees thereof. By clauses 3 to 10 he bequeathed to or upon trusts for the respondent Gwendoline Bosch free of duty divers specific and pecuniary legacies of an approximate value of

£10,000, and a life annuity of £800 reducible on remarriage to £400. By clause 11 the testator directed his trustees to set aside and invest a sum of £15,000 (therein called his son's fund) upon trust with such consent or at such discretion as therein mentioned to apply so much of the income thereof as his trustees should think proper for the maintenance, benefit, education or advancement in life of his son the appellant Henry Bosch until he should attain the age of 25 years and upon his attaining that age upon trust for the appellant Henry Bosch absolutely. By clauses 14 and 15 the testator directed that if his said son or any other person should before his said son should attain the age of 25 years take any proceedings in Court to compel his trustees to pay any part of the capital of his son's fund, or if his said son should do or attempt to do any act whereby his son's fund or any part thereof or the income or any part thereof would or might become vested in or payable to any other person, the son's fund and any unapplied income thereof should fall into his residuary estate. By clause 16 the testator provided that if his said son should die before attaining the age of 25 years without leaving any child or children him surviving then his son's fund and all accumulations of income thereof should fall into his residuary estate. The fund and such accumulations of income were otherwise to be held in trust for such child or children as therein mentioned. By clauses 17 and 18 the testator bequeathed divers legacies of comparatively trifling amounts to persons not parties to this appeal and by clause 19 he devised and bequeathed the whole of his residuary real and personal estate to the respondents the University of Sydney.

On the 24th May, 1933, there was born a second son of the testator, namely, the appellant Edward Graham Bosch, and on the 4th July of the same year the testator executed a second codicil to his will. By such codicil he increased the amount of the annuity to his wife to £1,000 reducible on re-marriage to £500, and directed his trustees out of his residuary personal estate to appropriate and invest the sum of £15,000 and hold the same for his son Edward Graham upon trusts similar in all respects *mutatis mutandis* to those contained in his will in respect of the sum of £15,000 therein directed to be held in trust for his son Henry.

The testator had no further children and, as already stated, died on the 30th August, 1934. He was a man of considerable wealth, his estate for probate purposes being sworn at the net amount of just over £257,000. This sum would have been considerably larger had it not been for the fact that in the year 1928, and therefore while still a bachelor, he had made a gift to the University of Sydney of land and personal estate of the aggregate value of £220,000 or thereabouts.

The respondents, Perpetual Trustee Company, Limited, and Gwendoline Bosch having in due course proved the will and codicils appropriated and set aside in satisfaction of each of the said sons' legacies of £15,000 certain investments which their Lordships are given to understand will

produce for each son a net annual income of £502 17s. 2d. or £491 7s. 10d. (Australian currency) according to whether the son resides within or outside New South Wales.

Apart from the provisions made for them by the will and second codicil of the testator the two infant sons have no property or means. Their Lordships have no information whether the same observation would have been applicable to the testator's widow at the date of his death. However this may be, she took the view that the provisions made for her by her husband's will and codicil were not adequate for her proper maintenance, and on the 11th November, 1935, she instituted appropriate proceedings in the Supreme Court of the State of New South Wales (In Equity) under the subsection to which their Lordships have already referred. On the same day similar proceedings were instituted by the next friend of the infant sons. The widow's application was heard on the 29th November, 1935, by Nicholas J. It proved successful. The learned Judge ordered the trustees of the will to pay to the widow out of the estate of the testator free of all duties the sum of £33,800 and an annuity for her life of £2,000 a year as from the death of the testator. He further ordered that the provision so made for the applicant should be in substitution for all benefits to which she was entitled under the will and codicils other than a bequest to her of the testator's jewellery, wearing apparel, household furniture, goods and effects. It is stated on behalf of the respondents the University of Sydney that they offered no opposition to this order. Their Lordships, of course, accept that statement. But it is plain that the learned Judge must have been satisfied that the widow had been left without adequate provision for her proper maintenance. Otherwise he would have had no jurisdiction to make the order.

The application of the infant sons came on for hearing before the same learned Judge on the 23rd October, 1936. It was supported by (amongst others) an affidavit of a Sydney solicitor, Mr. H. M. Taylor, who deposed to the following facts:—That shortly before his death the testator had several discussions with the deponent with a view to the preparation of a new will: that the testator was particularly exercised in his mind upon two matters in connection with his testamentary dispositions as they then stood, such matters being, so far as material for the present purpose (*a*) the effect of the forfeiture clauses contained in clauses 14 and 15 of the will and (*b*) that, having regard to money values and the declining rate of interest, he had made inadequate provision for his widow and children in his will. The affidavit further stated that during these discussions it was emphasised that since the existing will was made rates of interest had considerably fallen and that it was not unlikely that they might continue to fall; that in these circumstances the testator considered that the bequests to his two children ought to be considerably increased; that he definitely determined to increase the amounts thereof though he had not at the date of his death finally settled

by how much; that while the testator expressed the view that notwithstanding he was a wealthy man he did not wish his sons to be similarly wealthy, yet he was obviously feeling that the provision he had made for each of them was quite inadequate having regard to the very large amounts he had given and was giving to the University, and also having regard to the fact that the income from the bequest of £15,000 to each son would be and would likely to be considerably less than the income he had anticipated when making his existing will.

The learned Judge, however, declined to make any order increasing either of the two legacies. He merely ordered that the provisions made by the will and codicil be varied by deleting clauses 14 and 15 of the will and ordered that the trustees were to be at liberty to expend such portion of the corpus of each son's fund as they should think fit for the advancement and benefit of that son until that son should attain the age of 25 years. He directed the costs of all parties to the application to be paid or retained out of the estate of the testator.

On the 11th December, 1936, and before the last mentioned order had been drawn up, the two sons by their next friend restored their applications supported by some further evidence. Such further evidence consisted of two affidavits by the widow of the testator and an affidavit of a Mr. Murray. The widow stated that during the year ending in June, 1930, during which she and the testator travelled extensively, the testator's expenditure was approximately £6,000 and that during the year ending June, 1931, they lived on the same scale; that their living expenses during the years ending June, 1933, and June, 1934, were approximately £3,000 and £2,200 respectively. She also deposed as follows:—

> "It is my intention to ensure as far as possible that my sons should have every advantage and inducement to mould their lives and futures on lines that my late husband would have wished and consequently, if my sons, or either of them desire at any appropriate age to study at Oxford or Cambridge or any other University abroad I intend that they should have the opportunity to do so."

Mr. Murray in his affidavit stated that after taking his degrees at the University of Sydney he proceeded to the University of Cambridge where he spent one academic year, and he estimated that the total cost of one year at the latter University, including vacations, was £750. Nicholas J., however declined to add anything to the order he had made on the 23rd October, 1936, and ordered the next friend to pay the costs of all parties (other than the applicants) of the further hearing. A formal order was thereupon drawn up embodying the order made on the 23rd October, 1936, and the order made on the further hearing, the whole of the order being dated as of the 11th December, 1936. It is from so much of that order as constitutes a refusal to increase the two sums of £15,000 and orders the next friend to pay the costs of the further hearing that the present appeal

has been brought to His Majesty in Council, leave for that purpose having been obtained from Nicholas J. on the 28th July, 1937.

Before stating the reasons given by the learned Judge for taking the course that he did, their Lordships think that it will be convenient to consider carefully the language and effect of the subsection with which the appeal is concerned.

The first thing to be noticed is that the powers given to the Court only arise when any of the persons mentioned is left without adequate provision for his or her proper maintenance, which word will be used in this judgment where necessary as including education and advancement. The use of the word "proper" in this connection is of considerable importance. It connotes something different from the word "adequate." A small sum may be sufficient for the "adequate" maintenance of a child for instance, but having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his "proper" maintenance. So, too, a sum may be quite insufficient for the "adequate" maintenance of a child and yet may be sufficient for his maintenance on a scale that is "proper" in all the circumstances. A father with a large family and a small fortune can often only afford to leave each of his children a sum insufficient for his "adequate" maintenance. Nevertheless, such sum cannot be described as not providing for his "proper" maintenance taking into consideration "all the circumstances of the case" as the subsection requires shall be done. In the next place it is to be observed that, when the condition precedent to the exercise of the powers given by the subsection is shown to be fulfilled, those powers extend to making such provision as the Court thinks fit for "such" maintenance, that is to say, for proper maintenance. The task thus imposed upon the Court is obviously one of great difficulty. Upon what principles is the Court to act in determining what constitutes proper maintenance? This is a question that has been discussed in several cases to which their Lordships' attention has been directed. They are for the most part decisions of the New Zealand Courts. For New South Wales is not the only State in Australasia that has made statutory provisions of the nature now in question. Indeed, every State in Australasia has done so, and of them New Zealand appears to have been the pioneer. The provision now in force in that State is contained in section 33 (1) of the Family Protection Act, 1908, and is in the same form for all practical purposes as the provision with which this appeal is concerned. The principal differences in language are that in the New Zealand statute the words "maintenance and support" are used instead of "maintenance, education and advancement" and the Court is not in terms directed to take into consideration all the circumstances of the case, although such words would seem to be necessarily implied.

Of the cases cited their Lordships desire particularly to refer to that of *Allardice* v. *Allardice* 29 N.Z. Rep., (1910), p. 959, a decision of the Court of Appeal of

New Zealand that ultimately came before this Board. In that case Stout C.J. stated the principles to be followed by the Court in administering section 33 (1) of the Family Protection Act, 1908. They could, he said, be summarised as follows:—(1) That the Act is something more than a statute to extend the provisions of the Destitute Persons Act; (2) that the Act is not a statute to empower the Court to make a new will for a testator; (3) that the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance or support of wife, husband or children where adequate provision has not been made for this purpose; (4) that in the case of a widow the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves. Later on (p. 970) he said:—

> "The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first enquiry in every case must be what is the need of maintenance and support; and the second what property has the testator left."

With these observations of the Chief Justice their Lordships are in agreement. The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, a material consideration is their age. If a son is of mature or nearly mature age his needs both for the present and the future can be estimated without much difficulty. In the case, however, of a son of tender age, although his immediate needs can be readily ascertained, it is extraordinarily difficult even to guess what his needs may be in the future. Where, therefore, the testator's estate is a large one the Court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small. In the same case Edwards J. (p. 972) expressed himself as follows:—

> "It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it."

Their Lordships agree that in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just rather than a fond and foolish husband or father. This no doubt is what the learned Judge meant by a just but not

a loving husband or father. As was truly said by Salmond J. in the case of *In re Allen* 41 N.Z. Rep. (1922) 218, at p. 220:—

> "The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

The case of *Allardice* v. *Allardice* when it came before this Board by way of appeal is reported in [1911] A.C. p. 730. As it appeared to their Lordships that the Court of Appeal in New Zealand had exercised a discretion in the matter the appeal was dismissed. Their Lordships, however, stated that they saw no reason to differ from the Judges of the Court of Appeal in the general view they had taken as to the proper scope and application of the powers conferred upon them by the Act. Referring to the facts of the case they said:—

> "These are essentially questions for the discretion of the local Courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living and other matters necessary to be borne in mind in adjudicating on questions of this class, and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge."

These observations must be carefully borne in mind in dealing with the present appeal. If the learned Judge, whose decision this Board is now called upon to review, has directed himself properly as to the principles applicable to the case and in so directing himself exercised his discretion in the matter, their Lordships would indeed be slow to advise any interference with the discretion so exercised. In these circumstances it becomes necessary to consider the reasons that were given by Nicholas J. for refusing to increase the legacies provided by the testator for his two infant children.

No record appears to have been kept of what was said by the learned Judge on the first occasion that their application came before him. But upon the renewal of their application on the 11th December, 1936, he expressed himself as follows:—

> "The application . . . rests on a view of the Act which appears to me to be wholly erroneous. It rests, it seems to me, on the belief that a young man has not been given adequate provision for his proper maintenance, education or advancement in life unless he is able to attend one of the English Universities. I think that is a fallacy."

He then referred to Mr. Murray's estimate of the cost of going to one of those universities as being another fallacy and said:—

> "The application rests on the equally fallacious belief that a young man who has the sum of £15,000 in cash has not adequate provisions for his proper maintenance, education and advancement in life. In my opinion the Act was not intended to provide for a case of this sort at all."

Pausing there it is to be observed that the learned Judge is not dealing merely with the particular case before him. He seems to be expressing a view of the Act that is of general application; and that this is so is strongly corroborated by what he said when giving leave to appeal to His Majesty in Council. He said that the question was one of great general public importance; that a view of the Act was put forward which to his mind was untenable; that it was a new view of the application of the Act and one which had not yet been considered by a Court of Appeal. Now what was the view of the Act taken by the learned Judge? It seems to have been this, that whatever the fortune left by his father might be, whatever might be his station in life, and whatever might be his plans for his future career, in other words whatever might be the circumstances of the case, no young man who was in possession of a sum of £15,000 could bring himself within the Act, and the fact that a young man was unable in view of the means available for his maintenance, education and advancement to attend one of the English Universities was in all circumstances a wholly irrelevant consideration. Their Lordships are unable to take this view of the Act. Leaving out of consideration sums that are obviously fantastic it cannot be said of any particular sum such as £15,000 for instance, that it affords proper maintenance, education and advancement in all conceivable circumstances. The subsection in question contains no other limitation than is involved by the words "proper" and "all the circumstances of the case," and their Lordships would strongly deprecate the introduction into the subsection of any limitation by reference to a particular figure or any limitation by reference to the kind of education for which provision should be made.

But Nicholas J. gave further reasons for refusing to increase the appellants' legacies. He said this:

> "Nor was it," i.e., the Act, "intended to provide for a case in which the testator has intended to alter his will but by an unfortunate accident his solicitor has not made his arrangements in time, or for a case in which the mother of the infant has ideas for his education or mode of living which she thinks entail a greater expenditure than is provided for in the will."

Here again the learned Judge seems to be expressing a general view of the Act, and here again their Lordships, with all respect, find themselves unable to agree with him. It is true that in many and perhaps in most of the cases with which the Court is called upon to deal the testator has deliberately omitted to perform the duty that he owes of making proper provision for his wife and children. In such cases the intentions and wishes of the testator plainly can carry no weight with the Court. But in other cases the testator's omission to perform that duty will have been due to some mistake or oversight, and in such cases the wishes of the testator may legitimately be taken into consideration. So too in the case of the mother of the testator's children. If she appears to be a just and wise mother her opinions and her wishes are not to be excluded from the circumstances

of the case to which under the Act the Court has to pay attention, and this is especially the case where the children are of tender age.

But the learned Judge concluded his statement of the reasons by which he was actuated in coming to his conclusion in the following terms:

> "When the will is taken into consideration with the orders already made under the Testator's Family Maintenance Act this family will have an annual income in excess of what it had previously been spending; and all I can say is that on my view of this Act I cannot make any addition to the order which I have already made."

Now one of the orders to which the learned Judge was referring was the order made upon the application of the testator's widow. But the provision for her made by that order was not made subject to any condition as to her contributing thereout anything to the maintenance, education or advancement of the appellant children. That she would in fact do so if the present state of affairs were to continue may be readily conceded. But there can be no certainty that the present state of affairs will not in the future be materially altered. The widow for instance might remarry and have further children. Her second husband might be a man of slender means and the provision made for her by the order of the 29th November, 1935, might be no more than sufficient to enable her to make provision for the proper maintenance of her second husband and the children of her second marriage. It cannot, therefore, be predicted that the appellants will benefit in any way by the order in question. In these circumstances it is not, in their Lordships' opinion, a valid reason for refusing to increase the appellants' legacies that an increase has been made in the provisions made by the testator for his widow. In considering all the circumstances of the case, the learned Judge should have borne in mind that the circumstances as they exist at present will not necessarily remain unchanged, and in omitting to do so he has, in their Lordships' opinion, inadvertently misdirected himself.

For these reasons their Lordships are of opinion that the discretion of the learned Judge must be reviewed, and that inasmuch as they are in possession of all the material facts, they should indicate how in their opinion the discretionary power given to the Court by the subsection in question should be exercised in the present case. The task of exercising the power must always be one of great difficulty and delicacy. It must always be one largely of guess work, especially in a case like the present which is concerned with children of tender age of whose needs in the future nothing can be predicted with any certainty. But guiding themselves by the principles which have been discussed in an earlier part of this judgment, bearing in mind that the testator died possessed of a fortune of over a quarter of a million pounds, that he himself just before his death was of the opinion that the provision made for his sons by his will and second codicil was inadequate in the circumstances,

and that he was a person who, to say the least of it, was not likely to take an exaggerated view of what would constitute proper maintenance, education and advancement, bearing in mind also the tender age of the appellants and the possibility, therefore, that by the time they are of an age to embark upon a career or to marry, the value of money and the rates of interest may be much depreciated, not forgetting the wishes of their mother as to their education, and taking into consideration all the other circumstances of the case, their Lordships have come to the conclusion that in order to make adequate provision for the proper maintenance, education and advancement of the appellants, there should be provided out of the residuary estate of the testator for each appellant the additional sum of £10,000 to be held by the trustees upon the same trusts in all respects as are declared by the will or by the will and second codicil of the testator (as the case may be) as such trusts are varied by the order of Nicholas J. of the 11th December, 1936.

Their Lordships are therefore of opinion and will humbly advise His Majesty that this appeal should be allowed, that the order of Nicholas J. of the 11th December, 1936, should be varied by directing the trustees to provide out of the testator's residuary estate the two additional sums of £10,000 to be held upon the trusts that have been indicated, and by directing that the costs of all parties of the further hearing before him of the appellants' motion should be dealt with in the same manner as were the costs of the first hearing.

The costs of all parties of this appeal must be borne by the residuary estate of the testator.

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In the Privy Council.

HENRY BOSCH AND ANOTHER

v.

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DELIVERED BY LORD ROMER.

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1938