Privy Council Appeal No. 41 of 1958

Eleanor Jessie Dun - - - - - - - - - *Appellant*

v.

Francis Boyce Dun and Charles Edward Dun - - - *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1959

Present at the Hearing:

VISCOUNT SIMONDS
LORD COHEN
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* LORD COHEN]

This appeal raises a short but important point under a New South Wales Statute, the Testator's Family Maintenance and Guardianship of Infants' Act, 1916-1954.

This Act is one of a series of similar, though not identical, Acts which were introduced in New Zealand and in each of the Australian States to enable the Court to modify the provisions of the will of a testator who in the opinion of the Court had not made adequate provision for the maintenance, education or advancement in life of his or her widow husband or children by ordering such provision for that purpose as the Court might think fit. The question which has now to be decided is whether upon an application under the Act by or on behalf of a dependent of a testator the Court in deciding on the adequacy of the provision should have regard to the facts as they existed at the date of the application or to the facts as they existed at the date of the testator's death. It was not disputed that if the latter were the correct date the Courts should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died.

Before going into the facts of the case it will be convenient to consider the New South Wales Statutes which affect the matter. The first Statute was introduced in 1916. Section 3 (1) of the Act (which has remained unchanged throughout) was in the following terms:—

> 3. (1) If any person (hereinafter called "the testator") dying or having died since the 7th day of October one thousand nine hundred and fifteen 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 original Act contained no power to make additional provision for a dependent in the case of intestacy where the Court was of opinion that the Wills, Probate and Administration Act did not make adequate provision for such dependent. That power was conferred by an amending Act in 1938 which added the following new sub-section to section 3:—

> (1A) If any person (hereinafter called the "intestate") dies wholly intestate after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, and, in consequence of the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of his estate as on intestacy, his widow, or children, 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, upon application made by or on behalf of such widow, 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 such person.

Sub-sections (2) and (3) of section 3 contain provisions relating to the exercise of the power conferred by sub-section (1). They read as follows:—

> "(2) The Court may attach such conditions to the Order as it thinks fit, or may refuse to make an Order in favour of any person whose character or conduct is such as to disentitle him to the benefit of such an Order.
>
> (3) In making an Order the Court may, if it thinks fit, order that the provision may consist of a lump sum, or periodical or other payments."

Sub-section (4) enacts that every provision made under the Act shall, subject to the Act, take effect as if it were a codicil executed immediately before the death of the testator.

Section 5 of the 1916 Act contains limitation provisions requiring the application to be made in the case of a testator dying before the passing of the Act within three months of the date of such passing and in any other case within twelve months of the grant of probate of the will of the testator. When in 1938 applications were made possible in the case of an intestacy a new sub-section was added to section 5 requiring any such application to be made within twelve months of the grant of Letters of Administration.

Until 1954 there was no power to extend the time limits thus fixed but in that year power to extend the time was conferred by the Administration of Estates Act 1954 which (inter alia) introduced into section 5 the following new sub-section.

> "(2A) Notwithstanding anything in sub-sections (1) and (2) of this section:
>
> > (*a*) The time for making an application under either of those sub-sections may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary, and this power extends to cases where the time for applying has already expired, including cases where it has expired before the commencement of the Administration of Estates Act 1954 but every application for extension shall be made before the final distribution of the estate, and no distribution of any part of the estate made before the application shall be disturbed by reason of the application or of an Order made thereon."

Their Lordships turn now to the facts of the present case. The applicant (the present appellant) was the widow of Thomas Fitzgerald Dun who died on the 10th September, 1942. By his will made on the 18th

August, 1919, he bequeathed to the applicant certain household and personal effects and pecuniary legacies aggregating £2,000. He also bequeathed to her an annuity of £600 per annum. By a codicil made the 16th May, 1942, he increased this annuity to £800 per annum and directed that it should be paid free of tax. Subject to certain minor bequests and in the events which happened the testator devised and bequeathed the residue of his estate upon trust for such of his brothers and sisters as should be living at the date of his death in equal shares.

The respondents are the present trustees of the testator's will.

At the time of the death of the testator his estate was valued at £22,216. The appellant at that date owned land with a building on it towards which the testator had contributed £3,066. She also owned other property which she had sold for £4,600 before the date of the application herein.

Having regard to these figures it is not surprising that the appellant made no application under section 3 within twelve months of the grant of probate of the testator's will. By the time that the amending Act of 1954 had become law the position had altered. In 1955 the testator's estate consisted almost entirely of liquid assets and their value was said to be £82,000. On the other hand the appellant's position had deteriorated. All that was left of her assets was the former matrimonial home, said to be worth £8,500 but subject to a mortgage to secure the repayment of the sum of £4,200.

Taking advantage of the new sub-section (2A) of section 5 of the Act the appellant applied for an extension of the time allowed for making an application under section 3 sub-section (1) of the Act of 1916 and on the 3rd June, 1955, Myers J. extended the time until the 17th June, 1955. On the 16th June, 1955, the appellant made the substantive application under section 3 (1). This came before the Chief Judge in Equity (Roper C.J.) and on the 16th August, 1956, he granted the application, ordering that in addition to the provisions made for her in the will and codicil of the testator the appellant be paid a legacy of £5,000 payable on the 30th September, 1956, and that as from the 1st July, 1956, in lieu of the annuity and income tax benefits provided in her favour the applicant be paid an annuity of £1,500 per annum.

In reaching his conclusion Roper C.J. in Equity said that he thought it was clear that had the appellant brought her application within twelve months of the grant of Probate and had that application been heard within the normal reasonable time thereafter it must have failed whether the time for considering the circumstances had been taken as the date of death or as the date of hearing the application. He called attention however to the subsequent change in circumstances both of the testator's estate and of the appellant to which their Lordships have already referred and said that he had now to decide which was the correct date to apply. Basing himself on *Re Forsaith* (1926) 26 S.R. N.S.W. 613, he held that the time at which the existing circumstances should be considered is the date on which the Court hears the application. He said that that decision had stood for thirty years and that although the number of cases in which a material difference exists between the results of considering the circumstances existing at the hearing on the one hand and at the date of death on the other are relatively few there must have been a number of them and he referred to *Re Pichon* (1947) 47 S.R. N.S.W. 186.

He recognised that a different view had been taken in cases under similar statutes in Victoria, in Queensland and in Tasmania, but he said that there were slight but important differences between the Acts in force in those States and the New South Wales Act. He also pointed out that under the South Australia Act which, so far as the point under consideration is concerned, is almost identical with the New South Wales Act the principle of *Re Forsaith* supra had been adopted.

Having reached the conclusion that the material time was the date of the hearing of the application he held that the appellant qualified for an order and made the order their Lordships have stated.

Unfortunately, unknown to the Chief Justice in Equity, the correctness of the decision in *Re Forsaith* had been considered by the High Court of Australia in the case of *Coates* v. *National Trustees, Executors & Agency Co. Ltd.* 95 C.L.R. 494. Judgment in that case had been given on the 6th June, 1956. Since the decision in *Coates'* case formed the basis of the High Court decision in the present case their Lordships must consider it at some length. In that case the relevant statutory provision in Victoria was section 139 of the Administration and Probate Act, 1928, as amended by the Administration and Probate (Testators Family Maintenance) Act, 1957. This section as so amended reads, so far as material, as follows :—

> If any person . . . dies . . . leaving a will and without making therein adequate provision for the proper maintenance and support of the testator's widow, widower or children the Court may in its discretion on application by or on behalf of the said widow, widower or children order that such provision as the Court thinks fit shall be made out of the Estate of the testator for such widow, widower or children.

It is unnecessary to refer to the facts of the particular case under consideration in *Re Coates* ; it is sufficient to say that the High Court by a majority consisting of Dixon C.J., Webb J. and Kitto J. came to the conclusion that the question whether the provision made in a will for an applicant is inadequate for his proper maintenance is to be determined, according to the circumstances existing not as at the date of the hearing of the application but as at the date of the death of the testator although, if the question be answered in the affirmative the Court, in exercising its discretionary power to make such provision as it thinks fit, must take into account the facts as they exist at the time of making its order.

In reaching his conclusion Dixon C.J. referred to decisions in New Zealand and some of the Australian States in cases arising under similar statutes. He pointed out that in New Zealand, Tasmania, Victoria and Queensland the view had been taken that the question was to be determined as at the date of the death of the testator or testatrix whereas in New South Wales and South Australia the view had been adopted that the sufficiency of the provision in the will must be determined as at the time when the Court is dealing with the question. Referring to *Re Forsaith* supra he cited the observation of Harvey C.J. in Equity in that case that " looking at the words of the Tasmanian statute there is no loophole of escape from that construction ", i.e. a construction adopting the date of death as the crucial date. Dixon C.J. continued " In spite of the difference in language between the New South Wales Act and the Tasmanian and for that matter the Victorian, it may be doubted whether the distinction taken by Harvey C.J. in Equity is well founded. The legislation of the various states is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided." Accordingly he preferred the Victorian view that the material date was the date of the death but he pointed out that the question what is proper maintenance and support involves the future of the dependant to be maintained or supported and that accordingly the testator must be presumed to take into account contingent events as well as what may be considered certain or exceedingly likely to happen.

Kitto J. summed up his reason for agreeing with the Chief Justice in the following passage:—

> " It remains only to say explicitly that once an applicant establishes that the case falls within the class in which the court is given jurisdiction, the circumstances as they then exist may and should receive full consideration by the court in deciding what provision it thinks fit to make for the proper maintenance and support of the applicant. It is true to say that in the light of all those circumstances the court will do what it considers wise and just for the purpose. But this has no bearing upon the question which is before the court

at the preliminary stage—the question whether the case is shown to be within the limits which the legislature has seen fit to set to the extraordinary jurisdiction it has conferred on the court. At that stage the court must be satisfied, before commencing to think what provision it would be wise and just to make in the circumstances as they then exist, that the testator's will did not operate to make such a provision for the applicant's maintenance and support as would have been made if a complete knowledge of the situation and a due sense of moral obligation with respect to those matters had combined to dictate a new will to the testator immediately before he died."

Having regard to the decision in *Coates'* case the respondent executors appealed to the High Court of Australia in the present case and the High Court by a majority of three (Dixon C.J., Kitto J. and Taylor J.) to two (McTiernan J. and Williams J.) allowed the appeal and dismissed the application. Their Lordships all agreed that in view of the decision in *Coates'* case the material time in deciding whether the Court had a discretion to vary the will must be taken to be the date of the testator's death. They also agreed that in reaching its decision the Court was entitled to take into account circumstances which should have been foreseen by the testator at the time of his death, but they differed in the application of this principle to the facts of the present case. The majority said

"But there is nothing in the case to suggest that the vast increase in the value of the estate could have been foreseen; indeed, it may well be thought that if the events which produced this result could reasonably have been foreseen their actual occurrence would not have occasioned such a marked and rapid increase in the value of the estate. Looking at the circumstances as they existed at the death of the testator we think it is impossible to say that the provision made by him for the applicant was ungenerous and when regard is had to the incidence of death and estate duties and testamentary expenses; it is clear that it cannot be characterised as inadequate. On the contrary, if, as the testator appears to have thought, it was desirable that the main provision for his widow should consist of an annuity, he may well have considered that the annuity provided by his codicil was as much as his estate would be able to provide. As already appears it is clear that Roper J., would have dismissed the respondent's application if he had been aware that *in Re Forsaith* had been overruled. We agree that such a result would have been inevitable and, accordingly, the appeal should be allowed and the order of the Supreme Court set aside."

Webb and Williams JJ. took the opposite view. Since their conclusion is that which Mr. Wallace invited their Lordships to adopt it will be convenient to cite the material passage from the judgment of Williams J.:—

"What he [the testator] did not appear to foresee, but he reasonably might have foreseen, was that the longer the war continued the more serious its economic consequences would be upon the value of money and the cost of living and therefore upon the financial position of people with fixed incomes. He evidently foresaw that it would probably not be advisable to sell his farm or produce business for some time after his death, presumably because he considered that it was likely that the income and assets of his estate would be built up by continuing these businesses, and he must evidently have contemplated that this would assist his widow because he provided that no sale was to take place for five years after his death without her consent. The only vital thing that he appears to have overlooked in deciding what would be adequate for the proper maintenance of his widow in the future stretching forward from his death, which it can be said that as a wise husband he should have been able to foresee, was the danger of providing for his widow, then only forty-two years of age, mainly leaving her a fixed income. The testator in his wisdom should have realised as Mr. Wallace submitted, that the only safe course would be to leave her at least the income or a proportion

of the income of his estate, but with a proviso that if her income fell below a certain amount it should be supplemented out of capital, either as of course or possibly at the discretion of his trustees. As he had no children his widow was the only person with any real moral claim upon his bounty."

From the decision of the High Court the appellant by leave granted by Order in Council made the 3rd June, 1958, appealed to this Board. Mr. Wallace on her behalf submitted that:—

I. Whatever be the true construction of the statutes dealing with similar subject matter in other jursidictions than New South Wales the New South Wales statute must be construed according to its own language and so construed the material date for all purposes under section 3 (1) was the date of hearing the application.

II. Even if the date of death was the material date, the correct conclusion as to what the testator should have foreseen was that indicated by William, J. and on this ground the judgment of the trial judge should be restored.

On the first point Mr. Wallace relied on the decision of Harvey C.J. in Equity in *Re Forsaith* 26 State Reports (N.S.W.) 613. The learned judge in that case based his conclusion on two points (1) the omission in the Victorian statute of the words "upon his death" which in the Tasmanian statute follow upon the words "in such manner that", and (2) the use of the words "are left" bearing in mind that the section applies not only to persons dying after the passing of the Act but also to persons who died between the 7th October, 1915, and the passing of the Act. "I think", said his Honour, "in the cases of such wills the Court would be forced to the conclusion that the period of time which was to be considered was the date on which the Court was dealing with the matter and the same construction, therefore, must apply in the case of all wills which are the subject of the section."

Neither of these points carry conviction to their Lordships' minds. On the first point their Lordships agree with Mr. Wallace that the Courts' first duty is to consider the meaning of the language used in the particular statute under consideration, but quite apart from decisions on other statutes their Lordships are of opinion that the natural construction of a section dealing with the question whether a testator's dependents "are left" without adequate provision is to look at the date when he left them i.e. the date of his death. Nor do their Lordships think that this conclusion is affected by the fact that the section applies to testators who died between the 7th October, 1915, and the passing of the Act on the 18th September, 1916. Their Lordships can see no reason why in deciding whether such a testator had made adequate provisions for his dependents the Court should not look at the position as it was on the date of the testator's death. The case of a testator who died before the 18th September, 1916, is not before their Lordships but their Lordships as at present advised prefer the date of the death in the case of such a testator to the date suggested by Kitto J. in *Coates'* case viz. the date of the commencement of the Act. See 95 C.L.R. at page 525.

Re Pichon (1947) 47 S.R. 186 does not carry the matter any further. In that case the testatrix had made no provision for her only child and left the whole of her estate to her executor M. beneficially. The executor died before the application under section 3 (1) came on for hearing. On these facts quite apart from the fact of the death of M. there was a prima facie case of inadequate provision for the daughter. In exercising his discretion as to the amount of the further provision to be made Roper J. would clearly have been entitled to take into account the fact that the only beneficiary named in the will was dead.

The two South Australian cases to which their Lordships' attention was called also carry the matter no further. In *In re Gerloff* [1941] S.A.S.R. 156 Richards J. at page 161 refers to *Re Forsaith* with approval but expressly says he did not find it necessary to express a definite opinion on the question of date. In *In re Wheare* [1950] S.A.S.R. 61 Paine A.J.

follows *Re Forsaith* and adds " there is I think another provision in our Act which warrants that decision. Section 5 (4) of our Act enables the Court at any time and from time to time to rescind or alter any order." It is not clear whether the learned judge thought that this section would enable a provision already made to be increased. The corresponding section in the New South Wales Act is section 6 sub-section (4). Their Lordships do not think this section would enable a provision made by a previous order to be increased, as was pointed out in *Re Denis Molloy (deceased)* 28 S.R. N.S.W. 546, its purport is to enable a provision made under the Act to be reduced or cancelled. So also section 8 enables the Court to reduce or discharge an order for periodic payments where the circumstances of the dependent in whose favour the order was made improves. Their Lordships do not think therefore that these provisions throw any light on the question they have now to decide.

Mr. Wallace's sheet anchor on his first point was the judgment of Fullagar J. in *Coates'* case in which while agreeing with the order which was made he dissented on the question of the material date. The main grounds of his dissent were :—

(1) that to take the date as the date of hearing the application would be more in accord with the general object of the legislation and would give the Court a freer hand in the exercise of a wide discretion ;

(2) it is more realistic ;

(3) it avoids an unnecessary question—what must the testator be taken to foresee—which savours of artificiality and which often cannot be satisfactorily answered.

Their Lordships recognise the force of these observations but do not think they can justify a disregard of what their Lordships consider to be the plain meaning of the statute. Moreover their Lordships think that the intention of all the statutes in this field was to enable the Court to vary the provisions of a will in cases where it was satisfied that the testator had not made proper provision for a dependent : it would be contrary to this intention to judge a testator not by the position as it was at the time of his death but by the position as it might be as the result of circumstances which the testator could not reasonably have been expected to foresee. Their Lordships recognise that it may sometimes be difficult to determine what the testator should have foreseen but the difficulty is no greater than is often incurred in assessing damages in personal injury cases and Parliament has not hesitated to cast this burden on a judge.

Reference was made in the course of the argument to the decision of this Board in *Bosch* v. *Perpetual Trustee Co.* [1938] A.C. 463, a decision on the section which their Lordships are now considering. The question of the material date in deciding whether the Court had jurisdiction was not in issue but their Lordships think that the observations of Lord Romer delivering the decision of the Board as to the proper approach of a judge dealing with an application of an Act are of assistance. Lord Romer at page 478, 9 said :—

> " 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 In re Allen (deceased), Allen v. Manchester (1922) N.Z.L.R. 218, 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 ' ".

If that be, as their Lordships think it is, the correct approach, it seems to their Lordships necessarily to involve that the Court must look to the position as at the date of the testator's death.

Mr. Wallace also relied on the amending Acts of 1938 and 1954 as supporting his argument.

The first of those Acts introduced section 3 (1A) dealing with cases of intestacy and their Lordships are unable to see any reason for thinking that the Court in deciding the question of jurisdiction in cases of intestacy should look at any other date but the date of the death of the intestate.

The provisions of the 1954 Act on which Mr. Wallace relied were those enabling the Court to extend the time within which application may be made for provision under section 3, sub-section (1) or sub-section (1A). He submitted that the intention must have been to enable the Court to look at the position as it might be at the date of the hearing of the application for an extension of time in deciding whether to grant an extension and that it followed that if leave were granted the Court in dealing with the substantive application must look at the date of hearing of that application for all purposes. Their Lordships do not agree: they think that Mr. Jacobs gave the right answer when he said that the section in question was purely procedural and could not have been intended to effect an alteration in substantive law or to enable an applicant to improve her position by being dilatory in making her application.

Mr. Wallace sought to meet this argument by saying that Parliament when it passed the Act must be taken to have known of the decision in *Re Forsaith* and to have intended that the Court should proceed on the basis that that decision was correct. He said that *Re Forsaith* had stood unchallenged for 30 years and more. He relied on a passage in the Judgment of Lord Buckmaster in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.* [1933] A.C. 402 where he said at page 412 citing James L.J. in *ex parte Campbell*:—

> " Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

Their Lordships accept without question this statement of the law, but the facts of the present case do not make the principle applicable.

Their Lordships desire to refer also on this point to the observations of Denning L.J. in *The Royal Court Derby Porcelain Co. Ld.* v. *Raymond Russell* [1949] 2 K.B. p. 417 where he said at page 429 :—

> " The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms. But if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled."

In the present case Parliament has not re-enacted the relevant section in the same terms; it has only left it unamended. Moreover for the reason their Lordships have given they consider the decision in *Re Forsaith* has been shown to be wrong.

For the reasons their Lordships have stated their Lordships consider that Mr. Wallace's first submission must be rejected and that the material date in determining whether a dependent was left without adequate provision is the date of the Testator's death.

It remains to consider whether the majority of the High Court were right in rejecting his alternative submission that the Testator ought to have foreseen the events which in fact occurred and if he had done must have made more ample provision for the appellant.

Two things seem clear (1) that if the facts as at the date of his death were the only things relevant, the provision made was such that he could not be said to have made inadequate provision for her, (2) that he did take into account what he thought might be the effect of the war, for in May, 1942, he made a codicil increasing the amount of his wife's allowance and made it payable free of tax. Ought he to have foreseen the actual result of the war and post-war conditions? On this point their Lordships are not prepared to differ from the majority of the High Court. It seems to their Lordships that this is just the kind of point on which judges familiar with conditions in Australia are more likely to reach a correct conclusion than their Lordships sitting in London. They would add that on the facts of this case they think they would have reached the same conclusion as the majority of the High Court.

For these reasons their Lordships will humbly advise Her Majesty that the Appeal should be dismissed. The circumstances are very special and having regard to them their Lordships will make a similar order as to costs to that made by the High Court, namely that the costs of both the appellant and the respondents be taxed as between solicitor and client and paid and retained out of the estate of the testator.

(3' 717) Wt. 8021—25 100 4/59 D.L.

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