1962
*Mar. 6
Apr. 24

IN THE MATTER OF THE ESTATE OF JOHN KARKALATOS, DECEASED;

THE OFFICIAL GUARDIAN, on behalf of the infant MARIA GETTAS .....APPELLANT;

AND

JOHN KARAVOS, LOUKIA KARAVOS, and MARINA KARAVOS, and GEORGE GETTAS, GEORGE CONSTANTINE BOUKYDIS and CONSTANTINE KARAVOS, Executors of the last Will and Testament of John Karkalatos .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Wills—Gift "to among and between my grandchildren, per stirpes, in equal shares"—Whether testator's children or grandchildren constitute the "stirpes" or "stocks".*

A testator's will made provision for his wife out of the income of his estate during her lifetime, and provided that after her death all the net profits of his estate, after paying the amounts required as a result of the illness of either of his daughters or any of his grandchildren, should be paid annually to and between his two daughters in equal shares until the death of one of them. After such death the trustees were to divide and distribute one-half of the estate "to among and between my grandchildren, per stirpes, in equal shares", and to pay all the net profits of the remainder of the estate annually to the surviving daughter until her death. The testator died in 1953 and was survived by his widow who died later in the same year and by his two daughters, one of whom died in 1959 leaving only one child, the appellant herein. The respondents were the three children of the surviving daughter.

In proceedings to determine certain questions arising in the administration of the estate, the trial judge held that one-half of the estate was available for distribution and that the four grandchildren of the testator

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

were entitled to share equally therein. This judgment was affirmed by the majority of the Court of Appeal, and it was from the portion of the judgment of that Court which affirmed the declaration as to equal division of the estate among the four grandchildren that the present appeal was taken.

*Held:* The appeal should be allowed.

The gift "to among and between my grandchildren, per stirpes, in equal shares" was a gift to persons of different stocks but of the same generation "per stirpes", and the testator's own "children leaving children" constituted the stocks between which the estate now available for distribution was to be divided "in equal shares". *Robinson v. Shepherd* (1863), 3 De G. J. & S. 129, distinguished; *Sidey v. Perpetual Trustees Estate & Agency Co. of N.Z.*, [1944] A.C. 194, applied.

The words "my grandchildren" meant "the children of my daughters", and this being the case, the provision for an equal division of profits between the two daughters during their respective lifetimes by the use of the words "to among and between both of them in equal shares", followed as it was by the division of the estate at their respective deaths, "to among and between" their children "per stirpes, in equal shares", supported the view that equality of division between the two daughters during their lifetimes and their respective families after their deaths was a part of the testamentary scheme. This was the only construction which could give effect and meaning both to the words "per stirpes" and the words "in equal shares" used as they were with reference to a gift to persons of different stocks and of the same generation.

The provisions for payment of the illness expenses of all the grandchildren out of the estate moneys in the hands of the trustees could not be construed as reflecting an intention on the part of the testator to have the corpus divided equally between the grandchildren when the time for distribution came, particularly as such an intention would run contrary to that which appeared to be expressed elsewhere in the will to the effect that the two daughters and their two families were to be separately and equally treated as to the division of both the profits and the corpus of the estate.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming, by a majority, a judgment of Barlow J., respecting the distribution of a deceased's estate. Appeal allowed.

*J. J. Robinette, Q.C.*, for the appellant.

*Terence Sheard, Q.C.*, for John Karavos, Loukia Karavos and Marina Karavos, respondents.

*J. P. Bassel*, for the executors.

The judgment of the Court was delivered by

RITCHIE J.:—These proceedings were initiated by an originating notice taken out by the executors of the last will and testament of John Karkalatos (hereinafter called

[1] [1961] O.R. 335, 27 D.L.R. (2d) 327.

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the "testator") pursuant to Rule No. 600 of the Rules of Practice of the Supreme Court of Ontario to obtain the information, advice and direction of that Court upon the following questions arising in the administration of the estate under the said will:

1. Is any portion of the balance of the corpus of the estate distributable at the present time?
2. If the answer to question number 1 is in the affirmative, then:
   (a) What portion is available for distribution?
   (b) Who is entitled to share and in what proportion?

This motion came on for hearing before Barlow J. who rendered judgment declaring that one-half of the estate was available for distribution and that the four grandchildren of the testator were entitled to share equally therein. This judgment was affirmed by the majority of the Court of Appeal of Ontario[1] (MacKay J.A. dissenting), and it is from the portion of the judgment of that Court which affirms the declaration as to equal division of the estate among the four grandchildren that this appeal is now taken on behalf of the infant, Maria Gettas, who is one of the testator's granddaughters.

The testator died on January 24, 1953, having first made his last will dated August 27, 1948, which makes provision for his wife out of the income of his estate during her lifetime, and provides that after her death "all the net profits" of his estate, after paying the amounts required as a result of the illness of either of his daughters or any of his grandchildren, shall be paid annually to and between his two daughters in equal shares until the death of one of them, after which it directs that his trustees:

> . . . shall pay divide and distribute approximately one-half of my then remaining estate to among and between my grandchildren, per stirpes, in equal shares, and—they shall pay all the net profits of the remainder of my estate (available in cash for such payment and distribution), annually and every year, to my surviving daughter until her death.

The testator was survived by his widow who died in 1953 and by his two daughters, Evaggelia Gettas, who died in October 1959 leaving only one child, the infant appellant, Maria Gettas, and Maria Karavos who is still living and has three children, John, Loukia and Marina who are all over 21 years of age and who are the respondents in this appeal.

[1] [1961] O.R. 335, 27 D.L.R. (2d) 327.

The question to be determined is whether, in using the words "to among and between my grandchildren, per stirpes, in equal shares", the testator intended, as the courts below have found that he did, to designate his grandchildren as the *"stirpes"* or "stocks" so that each of the four of them would take an equal share of the portion of the estate made available for distribution by the death of Evaggelia Gettas, or whether he intended, as the appellant contends, to refer to the "stocks" represented by his two daughters so that one-half of that portion of the estate would go to the infant appellant, Maria Gettas, and the other half to the three children of Maria Karavos.

In the course of his reasons for judgment which were rendered on behalf of the majority of the Court of Appeal, Aylesworth J.A. reviews the relevant English authorities as to the meaning to be attached to the words *"per stirpes"* in the case of a gift to beneficiaries of more than one generation, and he notes the early conflict between the decision of Lord Westbury in *Robinson v. Shepherd*[1], where he held that the words were used to designate the different families of each of the first generation of beneficiaries, and the subsequent decision of Lord Romilly M.R. in *Gibson v. Fisher*[2], in which he disregarded Lord Westbury's ruling and held that the "stocks" were to be found amongst the immediate ancestors of the first generation of beneficiaries. Aylesworth J.A. notes also that the decisions of single judges in England in *Re Wilson, Parker v. Winder*[3], *in Re Dering, Neall v. Beale*[4], and *in Re Alexander*[5], follow the construction adopted in *Robinson v. Shepherd, supra,* but after considering what was said by Lord Simonds, speaking on behalf of the Privy Council, in *Sidey v. Perpetual Trustees Estate & Agency Co. of N.Z.*[6], he finds himself free to turn to a consideration of the present will "untrammelled by any hard and fast rule of construction".

The question of where to look for the "stocks" in the case of a stirpital division between beneficiaries of different generations which was the subject of the decision in *Robinson v. Shepherd, supra,* and the cases which followed it does not, however, arise at all where all the beneficiaries are of

[1] (1863), 4 De G. J. & S. 129, 46 E.R. 865.
[2] (1867), L.R. 5 Eq. 51.
[3] (1883), 24 Ch. D. 664.
[4] (1911), 105 L.T. 404.
[5] [1919] 1 Ch. 371.
[6] [1944] A.C. 194.

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the same generation to which latter situation the following language used by Lord Simonds in *Sidey v. Perpetual Trustees Estate & Agency Co. of N.Z., supra,* at pp. 202-3 is directly applicable:

> In the simplest case, where a gift is made to a number of persons of different stocks, but of the same generation per stirpes and not per capita, it is manifest that the stocks are to be found not in the takers, but in the ancestors, and this result is reached not by the displacement of any prima facie rule of construction, but by the construction of the language of the gift without any predilection.

In the same case Lord Simonds later had occasion to observe (p. 203) that:

> If the division had been directed "per stirpes among the children of such of my children as shall have left issue" it could not have been doubted that the testator's own children leaving issue formed the stirpes.

Counsel on behalf of the respondents sought to apply the reasoning employed in *Robinson v. Shepherd, supra,* and other cases where the beneficiaries were of more than one generation to the language of the present will on the ground as he put it in his factum that "it is not impossible for a bequest to grandchildren to be made in a context showing an intention to benefit more remote descendants by substitution;" and he contended that the use of the words "per stirpes, in equal shares" as they occur in the present will evidences an intention to provide for a substitutionary gift in favour of great-grandchildren of the testator. In support of this contention, reference was made to the case of *In re Perlmutter's Will*[1], which was a decision of the Surrogate judge of King's County in the State of New York, holding that in a gift to children "per stirpes and not per capita" the latter words must be taken as "implying a substitutionary gift", but it is not suggested that this case can be taken as establishing anything in the nature of a rule of general application in our Courts.

A consideration of the cases of *Strutt v. Finch*[2], *Hussey v. Dillon*[3], *Orford v. Churchill*[4], and *In re Hall*[5], all of which are concerned with the meaning to be attached to the word "grandchildren", when used in a will, clearly shows that its primary meaning of "descendant of the second degree" can only be extended to include remoter descendants when the

[1] (1935), 282 N.Y.S. 282.
[2] (1829), 7 L.J.O.S. Ch. 176.
[3] (1763), 2 Amb. 603.
[4] (1814), 3 Ves. & B. 59, 35 E.R. 401.
[5] [1932] 1 Ch. 262.

context of the will demonstrates the testator's intention to use the word in this extended sense. I am unable to find that the use of the phrase "per stirpes, in equal shares" or any other language in the present will demonstrates the intention of the present testator to use the word "grandchildren" in any sense that would displace its *prima facie* meaning to "my children's children".

I am of opinion, therefore, that the gift "to among and between my grandchildren, per stirpes, in equal shares" in the 14th clause of the present will is a gift to persons of different stocks but of the same generation "per stirpes" and that the testator's own "children leaving children" constitute the stocks between which the estate now available for distribution is to be divided "in equal shares".

The majority of the Court of Appeal has, however, reached a different conclusion by a consideration of the words of the gift in the context of paras. 13, 14 and 15 of the will which read as follows:

> 13. My said TRUSTEES, after the death of my wife, shall pay all such amounts, if any, as shall be required (after the death of my wife as aforesaid) by my daughters MARIA KARAVOS and EVAGGELIA GETTAS or either of them or the survivor of them, or by any of the children of either of them by reason of illness, for medical, surgical, dental, hospital and nursing services, and for supplies in connection therewith, and for transportation or other expenses caused by or resulting from such illness.
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> 14. My said TRUSTEES, after the death of my wife leaving her surviving both of my said daughters MARIA KARAVOS and EVAGGELIA GETTAS, shall pay divide and distribute all the net profits of my estate (available in cash for such payment division and distribution), annually and every year, to among and between both of them in equal shares, until the death of one of them; and, after the death of one of them—they shall pay divide and distribute approximately one-half of my then remaining estate to among and between my grandchildren, per stirpes, in equal shares, and—they shall pay all the net profits of the remainder of my estate (available in cash for such payment and distribution), annually and every year, to my surviving daughter until her death.
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> 15. My said TRUSTEES, after the death of my wife and both of my said daughters MARIA KARAVOS and EVAGGELIA GETTAS, shall pay divide and distribute all the rest residue and remainder of my estate to among and between my grandchildren, per stirpes, in equal shares.

Mr. Justice Aylesworth considered that the words "to among and between my grandchildren, per stirpes, in equal shares" spoke "eloquently of the testator's intention that each of

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his grandchildren should be treated equally" and he expressed the opinion that if the testator had "had a contrary intention it is unlikely that the word 'equal' would have been chosen".

As I have indicated, I am of opinion that the words "my grandchildren" as used in the present will mean "the children of my daughters", and this being the case it seems to me, with the greatest respect, that the provision for an equal division of profits between the two daughters during their respective lifetimes by the use of the words "to among and between both of them in equal shares", followed as it is by the division of the estate at their respective deaths, "to among and between" their children "per stirpes, in equal shares", supports the view that equality of division between the two daughters during their lifetimes and their respective families after their deaths was a part of the testamentary scheme. It may be added that, in my view, this is the only construction which can give effect and meaning both to the words "per stirpes" and the words "in equal shares" used as they are in the present will with reference to a gift to persons of different stocks and of the same generation.

The decision of the Court of Appeal appears to be based also upon the "considerable significance" which Aylesworth J.A. attached to the provisions of para. 13 of which he said:

> Therein the trustees are directed to pay any amounts required after the death of the widow by his daughters or either of them or the survivor of them "or by any of the children of either of them" by reason of illness for medical expenses and the like. It is to be observed that there is no provision for charging such advances against any particular share; as to such expenses every grandchild is to be treated exactly as every other grandchild. It seems strange that the testator should have had in his mind such an equal sharing among his grandchildren merely up to the point of time of the first distribution of residue and then an intention directly against such equal sharing in the first or final residual division. Such an intention, in my view, would require words of plain meaning for its accomplishment.

It is to be noted that the directions given by clause 13 of the will relate to payments to be made from the estate in the hands of the trustees and that they are quite distinct from the directions subsequently given respecting the equal division of profits and the distribution of capital. I am, with respect, unable to construe the provisions for payment of the illness expenses of all the grandchildren out of estate

moneys in the hands of the trustees as reflecting an intention on the part of the testator to have the corpus divided equally between the grandchildren when the time for distribution comes, particularly as such an intention would run contrary to that which appears to me to be expressed elsewhere in the will to the effect that the two daughters and their two families are to be separately and equally treated as to the division of both the profits and the corpus of the estate.

It was contended by counsel on behalf of the respondents that at the time when the will was drawn the testator must have been aware of the fact that it was unlikely, having regard to their age, that either of his daughters would have any more children, and upon this basis it was submitted that it would not be reasonable to assume that the testator intended that one grandchild would inherit one-half of his estate while the other three only inherited a one-sixth part each. There is no evidence before us as to the financial circumstances of the two daughters, and in my view the mere fact that one daughter had a larger family than the other cannot of itself have the effect of defeating the provisions for stirpital division contained in the 14th and 15th paragraphs of the will.

For all these reasons, as well as for those recorded in the dissenting opinion of MacKay J.A. in the Court of Appeal of Ontario, I would allow this appeal, set aside the judgments of the Court of Appeal and of Barlow J. and direct that the infant appellant, Maria Gettas, is entitled to one-half of the one-half portion of the estate now available for distribution and that the respondents, John Karavos, Loukia Karavos and Marina Karavos, are each entitled to a one-sixth share of that portion of the said estate. The costs of all parties should be paid by the executors out of the said one-half of the said estate, those of the executors to be taxed and allowed as between solicitor and client.

*Appeal allowed with costs of all parties to be paid out of the said one-half of the estate.*

*Solicitor for the appellant: John J. Robinette, Toronto.*

*Solicitors for the respondents, John Karavos, Loukia Karavos and Marina Karavos: Johnston, Sheard & Johnston, Toronto.*

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*Solicitors for the respondents, the executors of the last will and testament of John Karkalatos: Bassel, Sullivan, Holland & Lawson, Toronto.*

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.