VEATRICE KATHLEEN SWAIN, VIOLET IRENE CHADWICK and VIVIAN WILFRED WOODS (*Petitioners*) ..... APPELLANTS;

1966
*Nov. 2, 3
Nov. 21

AND

VIMY RIDGE DENNISON and VICTORIA MARGARET HISLOP (*Respondents*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Applications made under Testator's Family Maintenance Act, R.S.B.C. 1960, c. 378, to vary will—Discretion of Court—Whether Court of Appeal erred in substituting its own discretion for that of trial judge.

The testatrix, whose estate had a probable value of some $120,000, by her will bequeathed three legacies; namely, $300 to her daughter S, $200 to a friend B and $2,000 to a grandchild, the daughter of S. One third of the remainder was given to a daughter D, and one third to a daughter H. The remaining one third was to provide for the above legacies, and the balance to be held in trust as a life estate for the testatrix's son W, so long as such balance did not exceed one quarter of the whole estate. Any excess over such one quarter was to be divided equally among D, H and another daughter C. After the fulfilment of the life estate, the remainder of this one third was to be divided equally among the same three daughters.

The appellants, S and C, and the cross-appellant, W, made application under the *Testator's Family Maintenance Act*, R.S.B.C. 1960, c. 378, for a larger provision in their mother's estate than they had been allowed under her will. The trial judge exercised his discretion by directing that, after providing for the legacies to B and the daughter of S, the estate should be divided equally among the five children of the testatrix.

From this decision the present respondents appealed. The Court of Appeal, unanimously, directed that S and C should each receive the sum of $10,000 in addition to the benefits they received under the terms of the will. This total of $20,000 would be paid ratably out of the benefits received by each of the five children under the terms of the will.

From this judgment the appellants S and C appealed and the other three parties cross-appealed. S and C contended that the decision at trial should be restored; D and H sought restoration of the terms of the will. W supported the submission of the appellants, or, in the alternative the restoration of the will.

Held: The appeals and cross-appeals should be dismissed.

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

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The contention that the Court of Appeal had erred in substituting its own discretion for that of the trial judge failed. The entire jurisdiction of the trial judge under the Act in question was discretionary in character. Any person who considered himself prejudicially affected by the discretion exercised by the trial judge had a right to appeal. Consequently, the Act must have contemplated a review of that discretion by the Court of Appeal. It was held, therefore, that that Court had the power and the duty to review the circumstances and reach its own conclusion as to the discretion properly to be exercised.

In any event, in the present case the Court of Appeal was of the opinion that the trial judge had failed to give sufficient weight to relevant considerations and had disregarded principle. This Court agreed with the comments of the Court of Appeal in respect of the judgment at trial and, for that reason, would not restore that judgment.

With respect to the contention that the terms of the will should be restored, there were concurrent findings in the Courts below that the testatrix did not make adequate provision in her will for the maintenance and support of S and C. This Court would not, on the evidence, reverse that finding. No reason found to be persuasive was advanced to warrant this Court altering the order of the Court of Appeal in respect of the provision to be made for them in addition to what they each received under the terms of the will. Furthermore, the Court was not prepared to alter the findings of the Court of Appeal with respect to W.

Appeals—Judgment at trial and that on appeal involving exercise of judicial discretion—Appeal brought without leave—Jurisdiction of Supreme Court of Canada—Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 44.

In view of s. 44 of the *Supreme Court Act,* where it is provided by subs. (1) that no appeal "lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceedings in equity . . .", this appeal was one which could only be brought with leave granted pursuant to s. 41. The submission that the proceedings were in the nature of a suit or proceedings in equity in view of the fact that s. 3(1) of the *Testator's Family Maintenance Act* empowered the Court to order such provision "as the Court thinks adequate, just, and equitable in the circumstances" was not accepted. The jurisdiction conferred upon the Court by s. 3(1) was a statutory jurisdiction giving the power to exercise a statutory discretion. When s. 44(1) referred to "a suit or proceedings in equity" it was referring to that kind of suit or proceedings which, in England, prior to the enactment of *The Judicature Act,* 1873, would have been commenced in a court of equity. (*Carnochan v. Carnochan,* [1955] S.C.R. 669, referred to.) Leave to bring the present appeal had not been obtained. However, counsel having relied on *Walker v. McDermott,* [1931] S.C.R. 94, and *In re Jones, McCarvill v. Jones et al.,* [1962] S.C.R. 273, two cases where the Court had considered appeals from judgments made pursuant to the provisions of the *Testator's Family Maintenance Act* without prior leave having been granted, although the requirement for leave to appeal did not appear to have been raised or considered in either case, it was decided to grant leave to bring this appeal.

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APPEALS and CROSS-APPEALS from a judgment of the Court of Appeal for British Columbia[1], which set aside and varied the judgment of Nemetz J. in respect of certain applications made under the *Testator's Family Maintenance Act*. Appeals and cross-appeals dismissed.

Frank G. P. Lewis, for the appellant, V. K. Swain.

Robert J. Brennan, for the appellant, V. I. Chadwick.

David Sigler, Q.C., for the cross-appellant, V. W. Woods.

B. W. F. McLoughlin, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the Court of Appeal for British Columbia[1], which set aside and varied the judgment of the learned trial judge in respect of applications made under the *Testator's Family Maintenance Act,* R.S.B.C. 1960, c. 378, in respect of the estate of Emma Woods.

The provisions of that statute, which are relevant, are as follows:

3. (1) Notwithstanding the provisions of any law or Statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the Judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband, or children.

* * * *

17. From any order made under this Act a party deeming himself prejudicially affected may appeal to the Court of Appeal within the same time and the same manner as from a final judgment of the Court in a civil cause.

The appeal was brought before this Court without leave having been obtained under s. 41 of the *Supreme Court Act,* R.S.C. 1952, c. 259, and at the commencement of the argument counsel were requested to make their submissions as to whether, without such leave, an appeal could be brought in view of the provisions of s. 44, which provides:

44. (1) No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in

[1] (1965), 54 W.W.R. 606.

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the nature of a suit or proceedings in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

(2) This section does not apply to an appeal under section 41.

It was not contested, in argument, that both the judgment at trial and that on appeal involved the exercise of judicial discretion, but it was contended by counsel for the appellants that the proceedings were in the nature of a suit or proceedings in equity, in view of the fact that s. 3(1) of the *Testator's Family Maintenance Act* empowered the Court to order such provision "as the Court thinks adequate, just, and *equitable* in the circumstances". (The italics are mine.)

I do not agree with this submission. The jurisdiction conferred upon the Court by s. 3(1) is a statutory jurisdiction giving the power to exercise a statutory discretion. When s. 44(1) refers to "a suit or proceedings in equity" it is referring to that kind of suit or proceeding which, in England, prior to the enactment of *The Judicature Act*, 1873, would have been commenced in a court of equity.

This question was considered by Cartwright J., who delivered the judgment of the Court, in *Carnochan v. Carnochan*[1], at p. 674:

> I conclude that the judgment of Schroeder J. in the case at bar was "a judgment or order made in the exercise of judicial discretion".
>
> It is next necessary to inquire whether it was made "in proceedings in the nature of a suit or proceeding in equity". In my opinion it was not. The judgments of Kellock J.A., as he then was, and of Laidlaw J.A. in H. v. H., [1944] O.R. 438; 4 D.L.R. 173, set out the history of the jurisdiction of the Supreme Court of Ontario to grant alimony and shew that it was formerly exercised in the Court of Chancery; but in the case at bar the learned trial judge was not, I think, exercising the jurisdiction formerly exercised by that Court or one which he would have possessed, apart from statute, in a proceeding in equity, but rather a statutory jurisdiction conferred upon him by s. 12 calling upon him in the circumstances of this case, in the exercise of his discretion to make such order as he saw fit. That in making such order the learned judge was called upon to exercise his discretion judicially goes without saying and was fully recognized by him.
>
> For these reasons I am of opinion that the judgment of the learned trial judge in regard to issue (a) was one as to which under the terms of s. 44 of the *Supreme Court Act* no appeal lies to this Court.

The present appeal is, therefore, one which could only be brought with leave granted pursuant to s. 41.

In the course of argument it was pointed out that this Court had considered two appeals from judgments made pursuant to the provisions of the *Testator's Family*

[1] [1955] S.C.R. 669.

Maintenance Act without prior leave having been granted (*Walker v. McDermott*[1] and *In re Jones, McCarvill v. Jones et al.*[2]). Counsel for the appellants, in preparing this appeal, had, quite naturally, relied upon these authorities in reaching the conclusion that leave to appeal was not necessary. The requirement for leave to appeal does not appear to have been raised or considered in either of those cases. However, in view of counsel's reliance upon those cases, it was decided to grant leave to bring the present appeal.

This case involves the will of Emma Woods, who had been the sole beneficiary under the will of her husband, who predeceased her, and who was at the time of her death enabled to dispose of the whole of the family estate, which, we were advised, would probably have a value of some $120,000. The parties to the proceedings are five of her children, four daughters and one son. Another son had been given a life estate under the will, but died during the course of the proceedings.

Under the will three legacies had been bequeathed; namely, $300 to the appellant daughter, Mrs. Swain, $200 to a friend of the testatrix, Mrs. Bradley, and $2,000 to Mrs. Swain's daughter, Virginia Nash.

One third of the remainder was given to the respondent Mrs. Dennison, and one third to the respondent Mrs. Hislop. The remaining one third was to provide for the legacies above mentioned, and the balance to be held in trust as a life estate for the son Vivian Woods, so long as such balance did not exceed one quarter of the whole estate. Any excess over such one quarter was to be divided equally among Mrs. Dennison, Mrs. Hislop and the appellant Mrs. Chadwick. After the fulfilment of the life estate, the remainder of this one third portion was to be divided equally among the same three daughters.

The proceedings under the Act were commenced by Mrs. Swain, and, subsequently, Vivian Woods and Mrs. Chadwick filed affidavits to support claims for benefits from the estate in excess of those provided for them by the will.

The learned trial judge exercised his discretion by directing that, after providing for the legacies to Mrs. Bradley and Virginia Nash, the estate should be divided equally among the five children of Mrs. Emma Woods.

[1] [1931] S.C.R. 94.

[2] [1962] S.C.R. 273.

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From this decision the present respondents appealed. The Court of Appeal, unanimously, directed that Mrs. Swain and Mrs. Chadwick should each receive the sum of $10,000 in addition to the benefits they received under the terms of the will. This total of $20,000 would be paid ratably out of the benefits received by each of the five children under the terms of the will.

From this judgment the appellants Mrs. Swain and Mrs. Chadwick have appealed and the other three parties have cross-appealed.

The only issue of law raised by the appellants and by Vivian Woods was that the Court of Appeal had erred in substituting its own discretion for that of the trial judge. It was contended, on the authority of *Evans v. Bartlam*[1], *Charles Osenton & Co. v. Johnston*[2], and *Blunt v. Blunt*[3], that an appellate court should not interfere with the exercise of a discretion by a trial judge unless clearly of the opinion that he had acted on a wrong principle; wrongly exercised his discretion, in the sense that no sufficient weight had been given to relevant considerations; or that on other grounds the decision might result in injustice.

In my opinion, in view of the special nature of the provisions of the Act in question and the specific right of appeal which it confers, it is not proper to impose any fetters on the powers of the Court of Appeal in considering appeals under this Act. The entire jurisdiction of the trial judge under this statute is discretionary in character. The relief which may be granted under it is completely dependent on his opinion, first, as to whether adequate provision for proper maintenance and support has been provided for the spouse and children under the will, and second, if adequate provision is not thought to be made, as to what provision should be made. Notwithstanding this, the Act, by s. 14, gives to any party deeming himself to be prejudicially affected, a right to appeal. I construe s. 14 as meaning that any person who considers himself prejudicially affected by the discretion exercised by the trial judge has a right to appeal, and, in consequence, the Act must contemplate a review of that discretion by the Court of Appeal. This being so, that Court has the power and the duty

[1] [1937] A.C. 473 at 479.
[2] [1942] A.C. 130 at 138.
[3] [1943] 2 All E.R. 76 at 79.

to review the circumstances and reach its own conclusion as to the discretion properly to be exercised.

In any event, in the present case the Court of Appeal was of the opinion that the learned trial judge had failed to give sufficient weight to relevant considerations and had disregarded principle. Bull J.A., who delivered the judgment of the Court, said:

> With respect, I am of the view that he was wrong in concluding that everyone's entitlements were equal. In my opinion he failed to give due consideration to the circumstances of the appellants and their claims in the estate. By failing so to do he disregarded the principle that so long as a proper and just provision is made for each, a testator may prefer one child or more over others: *In re Testator's Family Maintenance Act; in re Dawson Estate* (1945) 61 B.C.R. 481; here the testatrix had some very definite preferences and by treating all children alike, rather than to interfere only to the extent necessary to right the wrong found, comes very close indeed to the making of a new will for the testatrix rather than remedying the fault of the old: *In re The Testator's Family Maintenance Act, In re Gill Estate* [1941] 3 W.W.R. 888.

Most of the argument before us, on behalf of each of the parties, was in respect of the merits of the case. The appellants Mrs. Swain and Mrs. Chadwick contended that the decision at trial should be restored. The respondents Mrs. Dennison and Mrs. Hislop sought the restoration of the terms of the will. Vivian Woods supported the submission of the appellants, or, in the alternative, the restoration of the will. The respective moral claims of each of the parties have been reviewed in the reasons for judgment of the Courts below. In view of the conclusions I have reached, it is unnecessary to review them here.

I have already cited the comments of the Court of Appeal in respect of the judgment at trial. I agree with them and, for that reason, would not be prepared to restore that judgment.

With respect to the contention that the terms of the will should be restored, there are concurrent findings in the Courts below that the testatrix did not make adequate provision in her will for the maintenance and support of Mrs. Swain and Mrs. Chadwick. I would not, on the evidence, reverse that finding. No reason which I found persuasive was advanced to warrant this Court altering the order of the Court of Appeal in respect of the provision to be made for them in addition to what they each receive

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under the terms of the will. Furthermore, I am not prepared to alter the findings of that Court with respect to Vivian Woods.

In the result, therefore, I would dismiss each of the appeals, and each of the cross-appeals. In the circumstances, I think that each of the parties should be responsible for his or her own costs.

Appeals and cross-appeals dismissed.

Solicitors for the appellant, V. K. Swain: Griffiths, McLelland & Co., Vancouver.

Solicitors for the appellant, V. I. Chadwick: Brennan & Becker, Vancouver.

Solicitors for the cross-appellant, V. W. Woods: Sigler, MacLennan & Clarke, Vancouver.

Solicitors for the respondents: Lawrence, Shaw & Co., Vancouver.