THE PUBLIC TRUSTEE, Administrator Ad Litem of the Estate of JOHN DROZD, Deceased ..... APPELLANT;

1967
*Oct. 25

AND

FRANK WEISBROD and MARY WEISBROD and FRANK WEISBROD, Administrator of the Estate of MARY WEISBROD, Deceased ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Jurisdiction—Supreme Court of Canada—Order appointing Public Trustee administrator ad litem made after discharge of original administrator —Application to discharge order dismissed—Appeal to Supreme Court of Canada quashed—Leave to appeal refused—Supreme Court Act, R.S.C. 1952, c. 259, as amended, ss. 2(b), 44(1)—The Trustee Act, R.S.A. 1955, c. 346, s. 33a [en. 1960, c. 111, s. 1].

The respondents FW and MW sustained injuries in a collision between their automobile and an automobile driven by JD, who died as a result of injuries suffered in the accident. Letters of administration were granted in the estate of the deceased and some six months later the administrator was discharged after having administered the estate and passed his accounts. Subsequently, the respondents obtained an order under s. 33a of *The Trustee Act* of Alberta appointing the Public Trustee, who consented thereto, administrator *ad litem* of the estate of JD, for the purposes of a suit to be commenced by the respondents against the estate of JD. Following the making of this

*PRESENT: Cartwright C.J. and Martland, Ritchie, Spence and Pigeon JJ.

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order an action was commenced by FW and MW against the Public Trustee as administrator *ad litem* as aforesaid. On an application by the Public Trustee to discharge the said order, it was held that the application should be dismissed and this decision was affirmed, on appeal, by the Appellate Division. The Public Trustee then appealed to this Court. The appeal having come on for hearing the question of the Court's jurisdiction was raised from the Bench and argument was heard on that question. Counsel for the appellant asked that, if the Court should come to the conclusion that it did not have jurisdiction, leave to appeal should be granted and the Court heard counsel on that question also.

Held: The appeal should be quashed and leave to appeal should be refused.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming an order of Milvain J. Appeal quashed and leave to appeal refused.

W. G. Chipman, Q.C., for the appellant.

William A. Stevenson, for the respondents.

On the conclusion of the argument, the following judgment was delivered.

THE CHIEF JUSTICE (orally for the Court):—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] pronounced on February 8, 1967, affirming the order of Milvain J., made on April 18, 1966, dismissing an application by the Public Trustee, Administrator *ad litem* of the estate of John Drozd, deceased, to discharge an order made by Cairns J., on December 10, 1964, appointing the Public Trustee Administrator *ad litem* of the estate of John Drozd, deceased, "for the purposes of a suit to be commenced by Frank Weisbrod and Mary Weisbrod against the estate of John Drozd, deceased".

The last-mentioned order of Cairns J. recites that counsel for the Public Trustee had consented to the making of the order.

Following the making of the order of Cairns J. an action was commenced by Frank Weisbrod and Mary Weisbrod against the Public Trustee as Administrator *ad litem* as aforesaid.

[1] (1967), 59 W.W.R. 96.

The notice of motion before Milvain J. to set aside the order of Cairns J. was styled in that action but Milvain J. gave leave to amend and did amend the style of cause to read as follows:

> "IN THE MATTER OF THE ESTATE OF JOHN DROZD, DECEASED, AND IN THE MATTER OF THE TRUSTEE ACT, BEING CHAPTER 346 OF THE REVISED STATUTES OF ALBERTA, 1955, AND THE AMENDMENTS THERETO:
>
> BETWEEN:
>
> FRANK WEISBROD and MARY WEISBROD,
>
> APPLICANTS
>
> AND
>
> THE PUBLIC TRUSTEE, ADMINISTRATOR AD LITEM, OF THE ESTATE OF JOHN DROZD, DECEASED,
>
> RESPONDENT"

This was the style of cause used in the application before Cairns J.

When the appeal came on for hearing the question of our jurisdiction was raised from the Bench and we had the benefit of full argument on that question. Mr. Chipman asked that, if we should come to the conclusion that we have no jurisdiction, leave to appeal should be granted and we heard counsel on that question also.

We have all reached the conclusion that we do not have jurisdiction to hear the appeal.

The only question directly raised is whether the order of Cairns J. appointing the Public Trustee to be Administrator *ad litem* should stand. That order is not a "final judgment" as defined in s. 2(*b*) of the Supreme Court Act reading as follows:

.....

2. (*b*) "final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

The order of Cairns J. does not determine in whole or in part any substantive right of the parties in the judicial proceeding which was before him. The question raised was as to a matter of procedure rather than one of substance.

It is difficult also to see how an order made on consent can be said to determine a matter "in controversy".

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Cartwright C.J.

In view of the wording of s. 33a of *The Trustee Act* of Alberta it is at least arguable that the order of Cairns J. was a discretionary order and that consequently we are deprived of jurisdiction by subs. (1) of s. 44 of the Act.

Assuming for the moment that, contrary to the views we have expressed, the order of Cairns J. was a final judgment within the meaning of the Act and was not discretionary, we are of opinion that we are without jurisdiction because there is no amount or value in controversy in this judicial proceeding. It is not sufficient that the judgment sought to be appealed will have an effect on the pending action against the Administrator *ad litem*. No amount is directly involved.

For all these reasons we conclude that we are without jurisdiction.

After a careful consideration of all that was said by counsel on the application for leave to appeal we are unanimously of opinion that this is a case in which leave to appeal ought not to be granted.

The appeal is quashed for lack of jurisdiction with costs as of a motion to quash.

The application for leave to appeal is dismissed without costs.

Appeal quashed with costs; application for leave to appeal refused without costs.

Solicitors for the appellant: Emery, Jamieson, Chipman, Sinclair, Agrios & Emery, Edmonton.

Solicitors for the respondents: Hurlburt, Reynolds, Stevenson & Agrios, Edmonton.