IN RE ESTATE OF HAROLD ALFRED JONES DECEASED;

BEVERLEY LOUISE McCARVILL (*Respondent*) ..... APPELLANT;

AND

CATHERINE LOUISE JONES (*Petitioner*) ..... RESPONDENT,

AND

MILDRED CLEMENTS FOX and NORMAN ROBERT McCARVILL, Executors of the Will of Harold Alfred Jones, Deceased (*Respondents*) ..... RESPONDENTS.

1962

*Feb. 6, 7
Mar. 12

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Devolution of estates—Application by widow under Testator's Family Maintenance Act, R.S.B.C. 1948, c. 336—Award—Factors to be considered in deciding what is "adequate, just and equitable".*

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

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IN RE JONES, MCCARVILL v. JONES et al.

In 1948 the testator and his wife, the petitioner respondent, separated and later entered into a separation agreement under which the former conveyed the matrimonial home to the latter and paid her an allowance of $375 a month. It was provided that should the property be sold or subdivided the monthly payments would be reduced to $350. In his will the testator, who died in 1956, directed that his executors should pay to the respondent until her death or remarriage the monthly sum required by the separation agreement, but this was the only provision made for her. The bulk of the estate, which had a net aggregate value of approximately $1,300,000, was bequeathed to a daughter.

On application by the widow under s. 3 of the *Testator's Family Maintenance Act*, R.S.B.C. 1948, c. 336, the trial judge increased the maintenance allowance to $700 a month. The widow appealed and by the judgment of the Court of Appeal the judgment at trial was amended to provide that the petitioner should receive $25,000 in cash and $1,000 a month free of income tax. The daughter then appealed to this Court, and the widow cross-appealed, asking that the award be varied by granting to her a one-third interest in the net estate, or, in the alternative, an increase in the amount of the monthly allowance provided by the judgment of the Court of Appeal.

*Held:* The appeal and cross-appeal should be dismissed.

The language of s. 3 of the *Testator's Family Maintenance Act* authorizes the Court in its discretion on the application of a wife to direct that such provision as is deemed adequate, just and equitable in the circumstances shall be made out of the estate of the testator. In deciding what is adequate, just and equitable in the circumstances, the Court should properly consider the magnitude of the estate and the situation of others having claims upon the testator. *Walker v. McDermott*, [1931] S.C.R. 94, applied. The respondent should receive sufficient to maintain her in the manner in which a wife would normally be maintained by a husband financially situated as was the present testator. No sound reason was shown to justify this Court in interfering with the award made by the majority of the Court of Appeal.

The cross-appeal was also dismissed; the amount awarded was adequate, just and equitable in the circumstances disclosed by the evidence. *Re Dupaul* (1941), 56 B.C.R. 532; *Barker v. Westminster Trust Co.* (1941), 57 B.C.R. 21; *Re Callegari* (1958), 13 D.L.R. (2d) 585, distinguished.

APPEAL and cross-appeal from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Ruttan J. allowing a petition under the *Testator's Family Maintenance Act*. Appeal and cross-appeal dismissed.

*J. G. Gould* and *T. Reagh*, for the appellant.

*J. J. Robinette, Q.C.*, and *A. B. Ferris*, for the petitioner, respondent.

[1] (1961-62), 36 W.W.R. 337, 30 D.L.R. (2d) 316.

*F. H. Bonnell, Q.C.*, for the executors.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal by Beverley Louise McCarvill, the residuary legatee named in the will of Harold Alfred Jones, deceased, from a judgment of the Court of Appeal[1] allowing an appeal by the present respondent, Catherine Louise Jones, from an order made by Ruttan J. under the provisions of the *Testator's Family Maintenance Act*, R.S.B.C. 1948, c. 336. The respondent is the appellant's mother and has cross-appealed, asking that the award made by the judgment appealed from be increased.

The respondent is the widow of Harold Alfred Jones who died at Vancouver on December 24, 1956. The parties were married on April 15, 1922, and the appellant, born October 10, 1929, is the only child of the marriage. Throughout their married life together they lived at 1775 Trimble Street in Vancouver. In 1948 they separated and the respondent brought an action for a judicial separation at Vancouver, in consequence of which they entered into a separation agreement dated April 7, 1949. By the terms of this agreement, Jones agreed to pay to his wife during their joint lives $350 a month and to convey to her the property on Trimble Street, a desirable residential street in Vancouver, the property being between three and four acres in extent. The agreement provided that until such time as the wife should sell or subdivide the property the monthly allowance should be $375 and contained the usual provisions that the wife should support and maintain herself and indemnify the husband against any debts which she might incur. The property upon which an eleven-room house was situate was transferred to the respondent and she has continued to live there up to the present time. No steps have been taken by her to subdivide or to sell the property.

Following the transfer of this property to the respondent she executed a mortgage upon it, at her husband's request, to secure a sum of $3,500 of which Jones received $1,500 on terms that he would repay it and this was subsequently done. At that time, according to the respondent, Jones claimed that he was hard up financially but, as the evidence indicates, his circumstances improved greatly between the dates of the separation and of his death.

[1] (1961-62), 36 W.W.R. 337, 30 D.L.R. (2d) 316.

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The will in question was dated December 9, 1955, and was amended by a codicil dated December 19, 1956. The value of the estate for succession duty purposes was shown as $1,971,531.87 and the total debts $654,406.05, leaving a net aggregate value for succession duty purposes of $1,317,125.82. The executors named were described as Mildred Clements Fox Jones and McCarvill, the son-in-law of the testator. The former was referred to in the will of the testator as his wife. However, this was inaccurate since his marriage to the respondent, referred to in the will as his former wife, had not been dissolved.

The will provided that the trustees appointed should pay to the respondent until her death or remarriage the monthly sum required by the separation agreement. That agreement had stipulated that the payments were to be made only during the joint lives of the parties and the provision for the maintenance of the payments was the only provision made by the testator for the respondent.

Section 3(1) of the *Testator's Family Maintenance Act* reads 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.

The petition was filed on December 12, 1957, and was heard by Ruttan J., the present appellant opposing the making of any order. Evidence was given at length by the parties and, by an order entered on April 20, 1960, that learned judge directed that the executors should pay to the petitioner during her lifetime the sum of $700 a month, this amount to include the $375 payable under the will, the order to be effective from December 24, 1956, being the date of the death of the testator.

The respondent appealed from that order and by the judgment of the Court of Appeal the judgment at the trial was amended by providing that the executors pay to the petitioner the lump sum of $25,000 in cash from the *corpus* of the estate and during her lifetime the sum of $1,000 a

month, the amount to include the $375 payable under the terms of the will and to be paid income tax free from the date of the death of the testator. Davey J., dissenting in part, agreed that the award of $25,000 should be made but considered that the monthly allowance made by Ruttan J. was sufficient in the circumstances.

The principal assets of the testator were shares in the Vancouver Tug Boat Co. Ltd., Vancouver Tug and Barge Ltd., Vancouver Towing Co. Ltd., Vancouver Lighterage and Salvage Co. Ltd., Vancouver Scow Co. Ltd., and several other companies engaged in the tug boat and towing business on the West coast. Shortly prior to his death, he had purchased sixty per cent of the shares of the Dolmage Towing Co. Ltd. and its subsidiaries for $600,000, his liability for this purchase constituting the greater part of the debts owing at the time of his death.

The will authorized the executors to carry on the business of the first five of the companies above named for a period not to exceed twenty-one years and to accumulate the net income or to pay it to his daughter, the present appellant. At the end of such period of operation it was directed that the shares of Vancouver Scow Co. Ltd. should be given to certain named persons and at such time the rest of the shares were to be transferred to his daughter. The annuity directed to be paid to the respondent was to be paid out of the residue of the estate or out of dividends received by the executors on the shares hereinbefore mentioned and, subject to this, the entire residue, after payment of the debts and certain small specific legacies, was bequeathed to the daughter. This legacy, after payment of succession duties, was valued at $727,359. In addition to this, the appellant as the beneficiary of his life insurance policies and from gifts made in advance of the testator's death received approximately $125,000. He had also given to Mrs. Fox assets valued in excess of $42,000.

The evidence of the witnesses Vallance and Pearson, the latter of whom was the controller of the companies at the time of the trial, described the steps taken by the executors to provide for the payment of succession duties and of the debts. It is sufficient to say that, following the death of the testator, the executors deemed it advisable to reorganize the set-up of the various companies, to acquire the remaining

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forty per cent of the shares of the Dolmage Towing Company and its subsidiaries, and to continue the operations. The company now controlling the various other companies in which the testator was interested is the Vancouver Tug and Barge Co. Ltd. and the consolidated balance sheet of that company and its wholly owned subsidiaries showed a profit in excess of $77,000 in 1957, and in excess of $157,000 in 1958.

The executors did not give evidence at the trial and the purpose of adducing evidence as to the financial position of the companies was apparently to indicate the difficulties faced by them in administering the estate and, presumably, those that might be met in paying any substantially increased allowance to the respondent.

The respondent was born in the year 1898 and since the date of the separation from her husband has endeavoured to supplement her income by renting portions of the house from time to time and by permitting its use for wedding receptions. The taxes upon the property approximate $1,200 a year and, at the time of the trial, there were arrears to the City of Vancouver and accumulated penalties amounting to $3,309. In addition, she was indebted to a bank for moneys borrowed in the amount of $3,000, owed trade accounts of $600 and there remained payable upon the mortgage given by her at the instance of her husband in 1940 the sum of $2,200. She was also indebted to her daughter, the present appellant, in the sum of $1,000 which she had borrowed in 1957 following her husband's death. The respondent had applied to the executors to lend her this amount but they had refused and her daughter then lent it to her on condition that if she proceeded with a claim against the estate the money must be repaid. Giving evidence at the trial the respondent said that she was in very poor health and her medical adviser, Dr. Grimson who had attended her for many years, gave evidence as to this and considered that she had a life expectancy of a little less than ten years.

Upon the appeal much was made of the fact that the respondent had not taken any steps to subdivide the property which she received at the time of the separation agreement. As above stated the separation agreement provided that until this property should be sold or subdivided the monthly payments should be $375 but upon such sale or subdivision they should be reduced to $350. The respondent

wished to continue to live in the house which had been her home since the early days of her marriage and, apparently, had made no serious effort either to sell the property or to have it subdivided. Evidence at the trial indicated, however, that there were serious difficulties in obtaining approval to a plan of subdivision which would permit the sale of the northerly part of the property for building lots. Davey J.A. considered that the property sold en bloc as a home was worth about $40,000. The wishes of the respondent in the matter are not, in the circumstances of this case, to be ignored.

The language of s. 3 of the Act authorizes the Court in its discretion on the application of a wife to direct that such provision as is deemed adequate, just and equitable in the circumstances shall be made out of the estate of the testator. Section 3 of the *Testator's Family Maintenance Act*, R.S.B.C. 1924, c. 256, the terms of which were identical with s. 3(1) above quoted, was considered by this Court in *Walker v. McDermott*[1]. Duff J. (as he then was) in delivering the judgment of the majority of the Court, said in part (p. 96):

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of a child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

It is clear, in my opinion, that in this case the will did not make adequate provision for the proper maintenance and support of the testator's wife, within the meaning of that language in the Act. The difference in opinion between the learned judges who have considered the matter is as to the *quantum* of the added allowance that should be made.

So far as the evidence discloses, the only persons for whom the testator was under any moral obligation to provide were

[1] [1931] S.C.R. 94, 1 D.L.R. 662.

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his wife and daughter. There is no dower law in British Columbia and, accordingly, the only relief available to the respondent was under the Act referred to. The Act is not intended to vest in the court the power to make a new will for the testator (*Bosch v. Perpetual Trustee Co., Ltd.*[1]).

It is apparently the fact that the executors had up to the date of the trial exercised their right under the will to operate the companies referred to, and while the exact extent of the estate's shareholdings in the Vancouver Tug and Barge Co. Ltd. is not stated, I construe the evidence as showing that it owns the great majority of the shares in that company and its subsidiaries and that, in addition to the amounts received by the appellant from the life insurance and from gifts from her father, there will be a large annual income available from the company's operations as soon as the balance of the succession duties has been paid.

In deciding what is adequate, just and equitable in the circumstances, the court should properly consider the magnitude of the estate and the situation of others having claims upon the testator, as pointed out in *McDermott's* case. The respondent should, in my opinion, receive sufficient to maintain her in the manner in which a wife would normally be maintained by a husband financially situated as was the present testator in the Trimble street property.

In my opinion, no sound reason has been shown to justify this Court in interfering with the award made by the majority of the Court of Appeal and I would accordingly dismiss this appeal.

The respondent has cross-appealed, asking that the award be varied by granting to her a one-third interest in the net estate or, in the alternative, an increase in the amount of the monthly allowance provided by the judgment of the Court of Appeal.

Section 5 of the Act declares that the court may if it thinks fit order that the provision made shall consist of a lump sum, and we have been referred to three cases decided in the courts of British Columbia where the award made was a definite share of the estate. In *Re Dupaul*[2] and in *Barker v. Westminster Trust Co.*[3], the applications under the

[1] [1938] A.C. 463 at p. 477.
[2] (1941), 56 B.C.R. 532, 4 D.L.R. 246.
[3] (1941), 57 B.C.R. 21, 4 D.L.R. 514.

Act were made by the husbands of the testators. The value of the estate in the former case was some $9,400 and in the latter approximately $18,000 and in each case the husband claimed to have contributed substantially to the building up of the estate. The respective awards were something less than a third of the estate in *Re Dupaul* and the larger part of it in *Barker's* case. In a more recent case, *Re Callegari*[1], the applicant was the wife and the net value of the estate was something less than $7,300. The other claimants were nephews of the deceased and the award was one-half of the estate.

The disposition made of applications under the Act where the estates involved such small amounts are of no assistance in deciding the question to be determined in the present matter. In each of them there were special circumstances to be considered which are absent in the present matter and, except possibly in the case of the Barker estate, there was no income from which the provision referred to in s. 3 could have been made.

In my view, the amount that has been awarded is adequate, just and equitable in the circumstances disclosed by the evidence and I would dismiss the cross-appeal.

The respondent contended in argument that if the principal appeal was dismissed she should be awarded her costs as between solicitor and client in this Court. While a similar request was made to the trial judge and in the Court of Appeal it was not acceded to in either court.

The dismissal of the appeal and of the cross-appeal should, in my opinion, be with costs upon a party and party basis. The costs of the executors in this court should be paid as between solicitor and client out of the residue of the estate.

*Appeal and cross-appeal dismissed with costs.*

*Solicitors for the respondent, appellant: Gould, Thorpe & Easton, Vancouver.*

*Solicitors for the petitioner, respondent: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.*

*Solicitors for the executors, respondents: Campney, Owen & Murphy, Vancouver.*

[1] (1958), 13 D.L.R. (2d) 585.