IN RE ESTATE OF JOSEPH KENDALL CLEMENT, DECEASED.

JOHN BRUCE GARDNER and RUSSELL GORDON GARDNER (*Applicants*) .....APPELLANTS;

1961
*Nov. 21

1962
Feb. 6

AND

JOHN BRUCE GARDNER, HENRY LOUIS HAGEY AND THE CANADA PERMANENT TRUST COMPANY, THE EXECUTORS OF MAUD CLEMENT GORDON, THE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH KENDALL CLEMENT,

AND

MAUDE BIXEL, CLARA MONTGOMERY, LILLIAN MESSECAR AND DANIEL J. MONTGOMERY, THE SURVIVING CHILDREN OF THE LATE CHARLES ALEXANDER MONTGOMERY (*Respondents*) .....RESPONDENTS.

Wills—Adoption—Residuary estate to issue of life tenant—Adopted child of life tenant dying before effective date of Child Welfare Act (Ont.)—Children of adopted child surviving life tenant—Effect of ss. 74 and 75 of The Child Welfare Act, as enacted by 1958 (Ont.), c. 11.

A testator left a life interest in his estate to his sister so long as she should remain separated from her then husband R. On the death of the sister, if she left issue by some husband other than R the estate was to go to such issue, but if she left no issue by any husband other than R, the estate was to go to the children of the testator's cousin. After the death of the testator, his sister divorced R and remarried. No children were born of this second marriage but the parties adopted a daughter, who subsequently married and had three children, of whom the two survivors were the appellants. The daughter died in the lifetime of her adoptive mother, the life tenant. The dispute was whether the appellants, the children of an adopted child who died in 1936, became the issue of the testator's sister by any other husband than R by virtue of the 1958 amendment to the Ontario *Child Welfare Act*, which came into effect on January 1, 1959, and was in force on the date of the death of the life tenant on January 1, 1960. The trial judge ruled against the appellants and his judgment was affirmed by the Court of Appeal. A further appeal was brought to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Judson and Ritchie JJ.: Section 74 of *The Child Welfare Act*, as enacted by 1958 (Ont.), c. 11, made the legal relationship of an adopted child and an adopting parent the same as that of parent and child in a lawful marriage. S. 75, which provided that persons "heretofore adopted . . . shall for all purposes . . . be governed

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

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by" Part IV of the Act, could have no effect upon the legal relationship or status of an adopted child who died in the year 1936. On January 1, 1959, when s. 75 came into effect, she was not a person heretofore adopted under the laws of Ontario to whom the section could apply. Accordingly, the section did not operate to make the appellants issue of the testator's sister by a husband other than R.

At the date of the death of the adopted child the legislation in force was *The Adoption Act*, R.S.O. 1927, c. 189. Under the provisions of s. 5(2) and (6) thereof, the adopted child was not a child of the testator's sister for the purposes of this will. It was only under a will made by the sister and only then if the other conditions of that section were met that the adopted child or issue of that child could so qualify.

Per Locke J.: The clear meaning of paragraphs 3 and 4 of the will was that, unless upon the death of the testator's sister she left surviving a child or children born of her body by a husband other than her then husband R, the estate was to be divided as directed by paragraph 3. There were no such children. The adopted daughter was not born of the body of the testator's sister and, accordingly, the former, if living, could have no claim and her children have none.

Per Cartwright J.: Sections 74 and 75 of *The Child Welfare Act* did not have the effect of making the appellants issue of the testator's sister by a husband other than R within the meaning of the words of the testator's will. As to the effect of these sections upon the distribution of the estate of a testator who died prior to their enactment *vide Re Gage, Ketterer et al. v. Griffith et al., infra,* at p. 241.

APPEAL from a judgment of the Court of Appeal for Ontario[1], from a judgment of Stewart J. on a motion for construction of a will. Appeal dismissed.

W. B. Williston, Q.C., and *I. A. McEwan*, for the appellants.

Terence Sheard, Q.C., and *A. H. Boddy, Q.C.*, for the respondents.

M. G. Kneale, Q.C., for the executors of the estate of Joseph Kendall Clement.

The judgment of Kerwin C.J. and of Judson and Ritchie JJ. was delivered by

JUDSON J.:—The issue in this appeal is the effect of *The Child Welfare Amendment Act*, 1958 (Ont.), c. 11, upon the right of the two appellants, who are children of an adopted child who is now dead, to take under the will of a stranger which was executed and came into effect long before there was any legal adoption in Ontario. The judgment of the Court of Appeal[1] is that they cannot take under this will.

[1] (1961), 25 D.L.R. (2d) 558.

The testator, Joseph Kendall Clement, died in 1904. He left a life interest in his estate to his sister, Edith Maud Ritchie, so long as she should remain separated from her then husband, Dr. Ritchie of Warren, Ohio. On the death of the sister, if she left issue by some husband other than Dr. Ritchie the estate was to go to such issue. But if she left no issue by any husband other than Dr. Ritchie, the estate was to go to the children of the testator's cousin, Charles Alexander Montgomery. After the death of the testator, his sister divorced Dr. Ritchie and, in 1911, she married Garfield Bruce Gordon. No children were born of this marriage but in 1924 Mr. and Mrs. Gordon adopted one Margaret Jukes Watson pursuant to an order made under *The Adoption Act* of the Province of Ontario. In 1931 Margaret Jukes Gordon married Frank Kenneth Gardner and had three children, two of whom still survive and are the present appellants. The adopted child, Margaret Jukes Gardner, died in 1936. The life tenant, Mrs. Edith Maud Gordon, the sister of the testator, survived until January 1, 1960.

More precisely, therefore, the dispute is whether the two appellants, John Bruce Gardner and Russell Gordon Gardner, the children of an adopted child who died in 1936, became the issue of the testator's sister by "any other husband than the said Dr. Ritchie" by virtue of the 1958 amendment to *The Child Welfare Act* which came into effect on January 1, 1959, and was in force on the date of the death of the life tenant on January 1, 1960.

The two relevant sections of *The Child Welfare Act* of 1958 are ss. 74 and 75 and read as follows:

74. (1) For all purposes the adopted child, upon the adoption order being made, becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child as if the adopted child had been born in lawful wedlock to the adopting parent.

(2) For all purposes the adopted child, upon the adoption order being made, ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child.

(3) The relationship to one another of all persons, whether the adopted child, the adopting parent, the kindred of the adopting parent, the parent before the making of the adoption order and the kindred of that parent or any other person, shall be determined in accordance with subsections 1 and 2.

(4) Subsections 2 and 3 do not apply for the purposes of the laws relating to incest and the prohibited degrees of marriage to remove any person from a relationship in consanguinity which, but for this section, would have existed.

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Judson J.

75. Every person heretofore adopted under the laws of Ontario and every person adopted under the laws of any other province or territory of Canada or under the laws of any other country shall for all purposes in Ontario be governed by this Part.

Section 74 is a radical departure from any previous adoption legislation in the Province of Ontario in that it states the position of the adopted child and the adopting parent in broad general terms in order to make the legal relationship the same as that of parent and child in a lawful marriage. Prior legislation in Ontario had attempted to define the rights and obligations of the two, and only to the extent of the definition was the relationship analogous to that of parent and child. Section 75 is also new and the difficulty here is whether it has any application to the appellants on January 1, 1960, when their mother, the adopted child of 1924, had died in 1936.

In my opinion, s. 75 can have no effect upon the legal relationship or status of an adopted child who died in the year 1936. On January 1, 1959, when s. 75 came into effect, she was not a person heretofore adopted under the laws of Ontario to whom the section could apply.

Stewart J. held that the appellants' claim failed for two reasons. The first was that "issue by any other husband than the said Dr. Ritchie" meant children and not grandchildren and that the children must be born of a second marriage. The second was that the 1958 legislation only applied to adopted children who were living on January 1, 1959. In the Court of Appeal, the Chief Justice, with MacKay J.A. concurring, decided that in this will the *prima facie* meaning of issue as including descendants of every degree was displaced because the reference to parentage of the issue restricted the meaning to children and that the rule in *Sibley v. Perry*[1], applied. The majority, therefore, agreed in part with Stewart J. on the first point and did not find it necessary to consider s. 75. However, Lebel J.A. held that as a matter of construction, "issue" included descendants of every degree but he did adopt the conclusion of Stewart J. that s. 75 did not apply to an adopted child who had died before the section came into force.

It is unnecessary to decide which construction of the will should be adopted. An insuperable obstacle in the way of the appellants is that s. 75 does not operate to make them

[1] (1802), 7 Ves. 522, 32 E.R. 211.

issue of the testator's sister by a husband other than Dr. Ritchie. It does not confer a posthumous status upon their mother, the adopted child of the testator's sister. At the time of her death she was not a child for all purposes and on January 1, 1959, being dead, she was not a person heretofore adopted under the laws of Ontario "who shall for all purposes in Ontario be governed by this Part." Consequently, her children do not qualify under the will as issue of the second marriage.

At the date of the death of the adopted child in this case, May 30, 1936, the legislation in force was *The Adoption Act,* R.S.O. 1927, c. 189. Section 5(2) of that Act gave the adopted child the same rights of intestate succession as a child born of a marriage, but rights under a will were confined to rights arising under a will made by the adopting parent after the making of the adoption order. The precise words are:

> and the expressions "child", "children" and "issue" where used in any disposition made after the making of an adoption order by an adopting parent, shall, unless a contrary intention appears, include an adopted child or children or the issue of an adopted child.

Subsection (6) of the same section provided:

> Save as herein provided and as to persons other than the adopting parent, the adopted child shall not be deemed the child of the adopting parent.

Under this legislation, the adopted child was not a child of the testator's sister for the purposes of this will. It was only under a will made by the testator's sister and only then if the other conditions of the section were met that the adopted child or issue of that child could so qualify.

The legislation on this point was continued unchanged in R.S.O. 1937, c. 218, by s. 6(3) and s. 6(7), and in R.S.O. 1950, c. 7, by s. 12(3) and s. 12(7). In 1954 *The Adoption Act* was repealed and the provisions as to adoption were made Part IV of *The Child Welfare Act,* 1954 (Ont.), c. 8. In 1958 Part IV of *The Child Welfare Act* of 1954 was repealed and a new Part IV was enacted by Statutes of Ontario 1958, c. 11, from which ss. 74 and 75 are set out in full in these reasons and are the sections under consideration in this appeal.

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Judson J.

The appeal should be dismissed with costs.

LOCKE J.:—The will of the late Joseph Kendall Clement which is the subject matter of these proceedings, after appointing his sister Edith Maud as one of the executors and trustees, reads in part:

> 3. ..... During the life time of my said sister she shall be entitled to the whole income of my estate after payment thereout of all necessary expenses in the maintenance and management thereof and the legacy aforesaid, provided that she continues to live entirely separate from and have no communication of any kind with her present husband Dr. Ritchie of Warren, Ohio. Upon the death of my said sister without leaving any issue by any other husband than the said Dr. Ritchie or upon her failure to comply with the conditions hereinbefore mentioned regarding her said husband (in which event she shall forfeit all further right and title as executor and trustee of my estate, and the same shall vest exclusively in my other executor and trustee) the whole of my estate shall be held in trust for the child or children of my cousin Charles Alexander Montgomery of Brantford in equal shares.
>
> 4. In the event of my said sister leaving issue by some other husband than the said Dr. Ritchie then the whole of my estate shall be held in trust for such issue to be equally divided among them share and share alike.

In my opinion the clear meaning of this language is that, unless upon the death of the sister she left surviving a child or children born of her body by a husband other than her then husband Dr. Ritchie, the estate was to be divided as directed by paragraph 3.

There were no such children. The adopted daughter, Margaret Jukes Gordon, was not born of the body of Edith Maud Gordon and, accordingly, she, if living, could have no claim and her children have none.

I would dismiss the appeal with costs.

CARTWRIGHT J.:—I agree with the conclusion of my brother Judson that sections 74 and 75 of *The Child Welfare Act* as enacted by 1958 (Ont.), c. 11, s. 3, do not have the effect of making the appellants issue of the testator's sister by a husband other than Dr. Ritchie within the meaning of the words of the testator's will.

I express no opinion as to whether as a matter of construction the word "issue" as used in the will includes descendants of every degree.

I have stated my views as to the effect of the sections mentioned above upon the distribution of the estate of a testator who died prior to their enactment in the case of

Re Gage, Ketterer et al. v. Griffith et al.[1], judgment in which is being delivered at the same time as that in this appeal and I refrain from repeating them.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the applicants, appellants: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the respondents Gardner, Hagey, et al.: Trepanier, Hagey, Kneale & Wiacek, Brantford.

Solicitors for the respondents Bixel, Montgomery, et al.: Boddy, Ryerson, Houlding & Clarke, Brantford.