

[HIGH COURT OF AUSTRALIA.]

HOWARD NORMAN SAMPSON APPELLANT;
DEFENDANT,

AND

ETHEL ESTHER SAMPSON RESPONDENT;
PLAINTIFF,

AND

PERPETUAL EXECUTORS TRUSTEES AND } RESPONDENT.
AGENCY COMPANY (W.A.) LIMITED . }
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

H. C. OF A. *Testator's Family Maintenance—Will—Annuity to widow—Application for increase—*
1945. *Material circumstances—Order providing for lump sum together with weekly*
PERTH, *payments—Testator's Family Maintenance Act 1939-1944 (W.A.) (No. 44 of*
Sept. 12, 14. *1939—No. 10 of 1944), s. 3 (1), (4).*

Rich, Dixon
and
McTiernan JJ.

The *Testator's Family Maintenance Act 1939-1944 (W.A.)*, s. 3 (1), provides that, where a testator disposes of his property by will in such a manner that (*inter alia*) the widow is left without proper provision for her maintenance, the court may order such provision for her maintenance out of the estate of the testator as it thinks fit. Section 3 (4) provides that, in making an order under the Act, "the Court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments."

Held that, under s. 3, the court has jurisdiction to provide in one and the same order for a lump sum and a periodic payment.

In an appeal as to the amount awarded by any such order, the appellate court should require a strong and cogent case before interfering with the discretionary estimate made by the court of first instance.

Bosch v. Perpetual Trustee Co., (1938) A.C. 463, discussed.

Order of the Supreme Court of Western Australia (*Northmore C.J.*) affirmed.

APPEAL from the Supreme Court of Western Australia.

This was an appeal from an order made on an originating summons by the Supreme Court of Western Australia (*Northmore C.J.*) pursuant to the provisions of the *Testator's Family Maintenance Act* 1939-1944 (W.A.) increasing the provision made in the will and codicil of the testator, Richard Stanley Sampson, for the maintenance of his widow, the respondent Ethel Esther Sampson. The testator died on 16th February 1944, leaving a will and codicil by which he appointed the Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. to be his executor and that company duly obtained probate of the will and codicil. Ethel Esther Sampson proceeded by way of originating summons under the above Act, joining the executor company and Howard Norman Sampson (representing the residuary beneficiaries) as defendants, for an order by the Supreme Court directing such provision to be made out of the testator's estate for her maintenance and advancement as to the court should seem fit. Section 3 of the Act provides as follows :—

“ 3. (1) If any person (in this Act called ‘ the testator ’) disposes of or has disposed of his property by will in such a manner that the widow, widower, or children of the testator or any of them are left without adequate provision for their proper maintenance, education, or advancement in life, the Court may at its discretion, on application by or on behalf of the said widow, widower, or children, or any of them, order that such provision as the Court thinks fit shall be made out of the estate of the testator for the maintenance, education, and advancement of such widow, widower, or children or any of them.

(2) Notice of such application shall be served by the applicant on the executor, and on such other persons as the Court may direct.

(3) The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient.

(4) In making the order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments.”

Ethel Esther Sampson stated in her affidavit that she and the testator were married in 1900 and there was no issue of the marriage. During the first year of their married life, the testator allowed her only £1 5s. to £1 10s. per week as a house-keeping allowance, and several quarrels took place concerning money matters. Whenever she asked the deceased for an increase in her allowance, he would become angry and quarrelsome. When he

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was absent for meals, he would deduct 1s. 6d. for each meal which he did not have at home. On every occasion when they discussed money matters, the testator would tell her to leave the house if she was not satisfied with her allowance. In the year following their marriage, after a quarrel, the testator left her and subsequently a deed of separation was, on 6th July 1901, executed by the testator and his wife, by which the former agreed to pay the latter "the clear weekly annuity of One pound sterling (£1) per week."

A short time later, the testator and his wife were re-united and lived together for some years during which period there were further quarrels concerning money matters. They again separated in 1909, and a new separation deed, dated 16th July 1909, was executed by which the testator agreed to pay to his wife "a clear weekly payment of two pounds per week." Separation continued from this time until the death of the testator.

In 1910, the testator instituted divorce proceedings against his wife, charging her with adultery. The petition was heard before a jury, which found in favour of the wife. A new trial was granted by the Full Court of the Supreme Court, but the verdict was restored upon appeal to the High Court. In her affidavit filed in the present application, Ethel Esther Sampson asserted that the allegations made in support of the testator's petition were wholly false.

In July 1931, the weekly allowance was increased to £3 at the request of Ethel Esther Sampson, and later to £4. In December 1940, after she had instituted proceedings by way of summons under the *Married Women's Protection Act* 1922 (W.A.), a new deed was executed increasing her allowance to £9 per week, to be paid during her life and not to cease on the death of the testator. Although she knew, through her legal advisers, that the testator had by then amassed a considerable fortune, she stated that she accepted this sum to avoid expensive litigation, since the testator had threatened that he would persist in appealing against every decision of the court until he reached the highest judicial authority.

In his will and codicil, the testator made no new provision for his wife, but directed his trustees to continue the payment to her during her life of the weekly sum of £9. He further directed his trustees to appropriate an amount sufficient to answer the weekly payments and he declared that the income should be the primary fund for that purpose and the capital the secondary fund.

Ethel Esther Sampson had no assets of her own other than a small sum of money in the Commonwealth Savings Bank. She was unable

to live on the maintenance allowed her by the testator before December 1940 and incurred debts which she was able to discharge only after that date. Shortly after December 1940, she suffered a severe illness and was obliged to pay considerable sums of money for hospital accounts and doctors' and dentists' accounts.

Affidavits filed on behalf of the defendants in the application attributed the testator's leaving home to quarrelsome and violent conduct on the part of his wife ; these allegations were denied by the wife.

On the hearing of the application, *Northmore* C.J. held that Ethel Esther Sampson had been left without adequate provision for her proper maintenance and advancement in life and ordered that the will and codicil of the testator be varied and altered so that, in lieu of the provision made therein in favour of the wife for an annuity of £9 per week, there should be substituted a provision that she be paid a lump sum of £5,000, and that she also during her life be paid the weekly sum of £20, such lump sum and weekly payments to be free of all State and Federal probate and estate duty ; that such cash and periodical payments be in lieu of all provisions made for her in the said will and codicil ; and that provision for such extra benefits for her should be raised or paid out of the residuary estate of the testator.

Howard Norman Sampson appealed against the whole of this order, joining Ethel Esther Sampson and the executor company as respondents, on the grounds (a) that the learned judge was wrong in holding that Ethel Esther Sampson had been left without adequate provision for her proper maintenance and advancement in life ; and (b) that, if she had been so left, the provision ordered was excessive, and that the learned judge was wrong in directing payment of a lump sum and of an increased annuity and should have ordered the payment of only one or the other.

Further relevant facts and statutory provisions appear in the judgment hereunder.

Leake K.C. (with him *H. H. Wheatley*), for the appellant. Section 3 of the *Testator's Family Maintenance Act* (W.A.) is relied on by the respondent on the ground that she has not adequate means for her support. [He referred to *Bosch v. Perpetual Trustee Co.* (1) ; *In re Allardice* ; *Allardice v. Allardice* (2).] All relevant facts should be taken into consideration. Extravagant statements made *ex parte* should be regarded by the Court with reserve. The testator, without compulsion, always gave the respondent what the latter thought fair.

(1) (1938) A.C. 463.

(2) (1910) 29 N.Z.L.R. 959.

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The respondent in 1940 agreed to accept £9 per week with full knowledge of the facts and on legal advice (*In re Phillips* (1); *Bosch v. Perpetual Trustee Co.* (2); *Lieberman v. Morris* (3)). It is not for this Court to say whose fault caused the separation. The respondent has not made out a case for greater benefit than she receives under the will. The divorce proceedings were not unfounded. A lump sum payment and periodical payments should not be directed in one and the same order (*In re Allardice*; *Allardice v. Allardice* (4); *Laird v. Laird* (5)). Maintenance means a periodical payment. The only exception is where the estate is so small that it would be ridiculous to award periodical payments; then only should a lump sum be awarded (*In re McInnes*; *McInnes v. Woolerton* (6)). Lump sums or periodical payments are referred to in all the Acts (*Bennett v. Elder's Trustee & Executor Co. Ltd.* (7)). Whether a lump sum and periodical payments can be awarded by the same order has never been decided. "Or" does not mean "and" unless the context shows that it is intended to do so (*Morgan v. Thomas* (8)). The Chief Justice should have considered only what was adequate maintenance for the respondent, and should not have awarded a lump sum which might pass to some other person if she should die in the near future.

Durack K.C. (with him *Hatfield*), for the respondent Ethel Esther Sampson. The testator increased the respondent's maintenance only when he was forced to do so. The deed of separation allowed only a meagre pittance to the respondent. It was the testator who left his wife (*Cooper v. Cooper* (9)). In 1904, the lack of money to defend the threatened litigation forced the respondent to settle for £9 per week. She was not liable to pay income tax on this sum, since it was for maintenance (*Income Tax Assessment Act* 1936-1944, s. 23 (l)), but she must pay such tax on the annuity under the will and will receive only about £6 per week: See *Bosch v. Perpetual Trustee Co.* (10). The separation took place through no fault of the respondent, and therefore she should be treated as though they had continued to live together: *Welsh v. Mulcock* (11). The parsimonious life of the testator should not be taken as a standard of adequate provision for his wife. In exercising its discretion, the Court should not necessarily conform to the discretion of the testator. *Bosch's Case* (2) is authority

(1) (1929) 29 S.R. (N.S.W.) 191; 46 W.N. 22.

(2) (1938) A.C. 463.

(3) (1944) 69 C.L.R. 69.

(4) (1910) 29 N.Z.L.R., at p. 970.

(5) (1903) 5 Gaz.L.R. (N.Z.) 466.

(6) (1942) N.Z.L.R. 547.

(7) (1935) S.A.S.R. 202.

(8) (1882) 9 Q.B.D. 643, at p. 645.

(9) (1941) 65 C.L.R. 162.

(10) (1938) A.C., at p. 477.

(11) (1924) N.Z.L.R. 673.

that the Court has jurisdiction to provide for a lump sum and periodical payments in the same order. [He referred also to *Re Hatte* (1) ; s. 3 (4) of the Act ; *Plimmer v. Plimmer* (2) ; *Holmes v. Permanent Trustee Co. of N.S.W. Ltd.* (3).] Remedial statutes should not be interpreted strictly (*Maxwell on Interpretation of Statutes*, 7th ed. (1929), p. 59). Sub-section 1 of s. 3 should be read and construed with sub-s. 4 (*Re Radburn* (4)). Advancement in life should be considered.

Leake K.C., in reply. The Act is not exclusively remedial and therefore cannot be so classed. It primarily limits the right of testamentary disposition, and therefore should not be given a benevolent construction.

E. F. Downing, for the respondent, the Perpetual Executors Trustees & Agency Co. (W.A.) Ltd., as to costs.

Leake K.C. referred to *In re Just* (5) on the question of costs.

Cur. adv. vult.

The following written judgment was delivered :—

RICH, DIXON and McTIERNAN JJ. This is an appeal by a party appointed to represent the residuary legatees under the will of Richard Stanley Sampson deceased against an order of *Northmore C.J.* made in favour of the widow of the testator under the *Testator's Family Maintenance Act 1939-1944 (W.A.)*. By the order under appeal, the Chief Justice directed that the will and codicil of the deceased should be varied so as to provide that, in lieu of the provision made therein in favour of the widow for an annuity of £9 a week, there should be substituted a provision that the plaintiff be paid a lump sum of £5,000, and that during her life she should also be paid a weekly sum of £20, such lump sum and weekly payments to be free of all State and Federal probate and estate duty. His Honour further ordered that the provision for the foregoing extra benefit for the plaintiff should be raised and paid out of the residuary estate of the testator. The appeal on behalf of the residuary legatees does not extend to the direction as to the incidence of the provision but attacks only the order providing the extra benefits for the widow.

The case is a peculiar one. The testator was married to the respondent Ethel Esther Sampson on 30th April 1900. At that

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(1) (1943) Q.S.R. 1.
(2) (1906) 9 Gaz.L.R. (N.Z.) 10.
(3) (1932) 47 C.L.R. 113.

(4) (1941) V.L.R. 91.
(5) (1938) Q.S.R. 93.

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time, he does not seem to have been in good circumstances. The affidavit does not state his age, but his widow was then twenty years of age. After a year of marriage, they separated. A deed of separation was executed, dated 6th July 1901. Under it, the testator agreed to pay her what is described as a clear weekly annuity of £1 weekly, a somewhat exiguous sum for an annuity. After a short time, however, they re-united and the deed lapsed. They lived together for some years, but again fell apart in 1909. A deed of separation dated 16th July 1909 was made between them, and by that he agreed to pay her £2 a week for maintenance. The separation continued from that time until the testator's death. In 1910, he instituted proceedings against her for divorce on the ground of adultery. The petition was tried before a jury, which found for the respondent. A new trial was moved for before the Full Court and was granted. Upon appeal to this Court, however, the verdict was restored. In her affidavit filed in this application, the widow alleges that the allegations made in support of the suit were wholly false. In July 1931, the weekly maintenance was increased to £3 at her instance, and later to £4 a week. In December 1940, after she had instituted proceedings before the magistrates, a new deed was executed increasing her allowance to £9 a week. During this period, the testator appears to have been amassing not inconsiderable wealth. The solicitor acting for his wife in 1940 obtained, not a full, but a not inadequate understanding of his financial position. His client nevertheless accepted £9 a week for her maintenance on the ground that she says that she was faced with expensive litigation which she knew her husband would carry to the highest court. By the indenture, the allowance of £9 a week was expressed to be payable to her during her life and did not terminate with the death of her husband. In his testamentary dispositions, which on this point are expressed in a codicil, the testator made no new provision for his widow, but directed his trustees to continue the payment to her during her life of the weekly sum of £9, being the same sum as he had covenanted and agreed to pay her. He further directed his trustees to appropriate an amount sufficient to answer the weekly payments and he declared that the income should be the primary fund for that purpose and the capital the secondary fund.

It appears from the facts that the testator was, to say the least of it, parsimonious in his habits and outlook, and there is not much reason to doubt that the breakdown of the marriage was attributable to his nature and his unfitness for the matrimonial state. At the same time, it must be remembered that he is not here and that the

statements made concerning him are *ex parte* and cannot be answered, and, further, that in the divorce proceedings in 1910 the Full Court considered that the verdict for the respondent ought not to stand.

The gross amount of the estate of the testator, as appearing from the statement of assets and liabilities, was £231,209, and the liabilities shown upon that statement amounted only to £8,360. After payment of probate duty, debts and portion of the administration expenses, the amount of the estate was reduced to £172,501. Pecuniary and specific legacies, apart from the provision for the widow, amount to £40,837. There are liabilities for Federal estate duty, income tax and further administration expenses amounting to £65,265. Without allowing for any provision for the respondent, the net value of the residuary estate appears to be £66,400 or thereabouts. It is said that to answer the annuity of £20 a week directed by the Chief Justice £35,000 must be set aside. The specific and pecuniary legacies include considerable gifts to charities.

The first ground taken in support of the appeal is that the *Testator's Family Maintenance Act* does not authorize the allowance of both a lump sum and a periodical payment. Section 3 (1) of that Act provides that, if any testator disposes of his property by will in such a manner that his widow widower or children or any of them are left without adequate provision for their proper maintenance education or advancement in life, the court may at its discretion order that such provision as the court thinks fit shall be made out of the estate of the testator for the maintenance education and advancement of such widow widower or children or any of them. Sub-section 4 of s. 3 then provides that, in making the order, the court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments. The contention is that sub-s. 4 empowers the court to do one or other of three things, viz., to make a provision consisting of a lump sum, a provision consisting of a periodic payment or a provision consisting of other payments, but that it does not empower the court to do any two of them.

In one sense, the *Testator's Family Maintenance Act* is restrictive or derogates from private right; for it derogates from the absolute power of the testator to dispose of his property by will. In another sense it is remedial; for it empowers the court to remedy the injustice which a capricious or unfair use of the testamentary power may inflict upon those who may be considered to have moral claims upon the *post mortem* dispositions of the testator.

The provision which we are now considering concerns the remedies put at the service of the court for carrying out the policy, rather than the qualification which the statute makes of the testamentary power

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of the individual. The question is whether the powers are more or are less flexible, and upon that question we should interpret the provision so as to provide as complete a remedy as the language permits. In construing sub-s. 4, its relation to sub-s. 1 should be kept in mind. Sub-section 4 does not confer a new and independent power. It is enacted by way of explanation or amplification of sub-s. 3, to which it may be said to be epxegetical. The substantive power is given by sub-s. 1 and it is to order that such provision as the court thinks fit shall be made out of the estate. The alternatives stated by sub-s. 4 are to make it clear that, within the power conferred by sub-s. 1, there is enough authority to make a lump sum order as well as enough authority to make an order for periodic or other payments. The intention of sub-s. 4 might have been as well expressed if it had said that it should be no objection to the exercise of the power under sub-s. 1 that the order was for a lump sum or periodic or other payments. We think there is nothing in the language which precludes us from holding that an order may be made for a lump sum, as well as for periodic payments, and we so construe sub-s. 4. The first objection to the order of the Chief Justice therefore fails.

The second ground upon which the appellant relied was that it was not shown that the dispositions made by the testator's will were such that his widow had been left without adequate provision for her proper maintenance, education or advancement in life, and that his Honour the Chief Justice had no jurisdiction under s. 3 unless he was satisfied that she had been so left without adequate provision.

In considering whether the provision made for the widow was adequate, all the circumstances must be taken into account. The purposes of the legislation have been recently stated by the Privy Council in *Bosch v. Perpetual Trustee Co.* (1), and it is unnecessary to set out textually what is there said. It is no doubt true that the circumstance that the testator and his wife had lived so long apart and that by agreement between them her maintenance had been fixed at £9 a week in 1940 formed part of the material circumstances. On the other hand, the disparity between this provision and the size of his estate is another material circumstance. The reasons which the widow gives for accepting £9 a week and the evidence of the testator's persistent and inflexible attitude towards the allowance for her maintenance cannot be left out of consideration. An important matter too is the incidence of income tax upon her allowance

(1) (1938) A.C. 463, at pp. 477-479.

under the deed of separation. By s. 23 (l) of the *Income Tax Assessment Act* 1936-1944, the income received by way of periodical payments in the nature of alimony or maintenance by a woman from her husband is exempt from income tax. But that provision would not appear to carry the exemption beyond the death of the husband. We were informed from the Bar that the income tax which she would bear if her income remained at £9 a week would be £151 per annum. We were also informed that, if her allowance were fixed, as the Chief Justice fixed it, at £20 a week, the income tax payable would be £467 per annum, leaving her about £11 a week. No doubt these calculations were made at rates at present in force. These are material considerations, and we think that no cogent reason has been advanced for doubting the conclusions of the Chief Justice, that the provision made for her was inadequate, and that the provision of £20 a week would be proper.

The lump sum of £5,000, however, demands separate consideration. In ordering that this sum should be paid in addition to the annual payment of £20 a week, the Chief Justice appears to have been guided by the fact that the applicant was no longer young, appeared to be in poor health, and to require considerable medical attention, that she had for some years been forced to live from hand to mouth on what he described as a beggarly pittance, first of £2, then of £3 and of £4, and that that had affected her health, that she had no furniture and no home, and that whatever her gross income might be it would be seriously affected by high income tax.

These are important considerations, and when the value of the testator's net estate is considered in relation to them, we agree that they do establish the propriety of allowing a capital sum as well as an income allowance. We would not ourselves have been disposed to have allowed so large a sum. It is not a usual course to allow such a large lump sum as well as a periodical payment in the nature of an annuity, but no doubt this is an exceptional case.

The difficult task of fixing an amount in matters of this sort essentially depends upon the exercise of a discretionary judgment. It cannot be done by calculation or computation and must depend upon an estimate of the requirements of the party, a consideration of the competing claims upon the fund and a knowledge of the general conditions which must always affect the adequacy of a pecuniary provision to meet the needs that exist. Upon this last subject, the Privy Council has made the following observations which are repeated in *Bosch's Case* (1):—"These are essentially questions for

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the discretion of the local Courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living, and other matters necessary to be borne in mind in adjudicating on questions of this class, and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge."

These considerations have not the same application as between the various States of Australia as they have between the parts of the Empire, but they cannot be overlooked. In any case, it is the practice of appellate courts to require a strong and cogent case before they interfere with a discretionary estimate made by a court of first instance of a monetary sum of the nature of that now in question. On the whole, we think that we should not disturb the provision for the widow ordered by the Chief Justice of a lump sum of £5,000. The appeal should be dismissed. Having regard to the incidence of such an order for costs and to the circumstances, we think that we should order that the costs of the appeal should be paid out of the estate ; those of the trustee as between solicitor and client.

Appeal dismissed. Costs of all parties out of the residue of the estate ; those of the trustee as between solicitor and client.

Solicitors for the appellant, *Wheatley & Son.*

Solicitors for the respondent Ethel Esther Sampson, *Dwyer, Durack & Dunphy.*

Solicitors for the respondent Perpetual Executors Trustees and Agency Co. (W.A.) Ltd., *Downing & Downing.*

E. L. B.