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In the High Court of Australia

Tasmanian Registry

Nelson
v.
Boyes

Reasons for judgment:—

(1) Knox C.J., Isaacs J., Starke J.

NELSON V. BOYES

JUDGMENT

Knox C.J., Isaacs and Starke J.

The question raised in this appeal is whether on the true construction of the will of T.R.G.Arthur deceased, the appellant Sybil Nelson is entitled to a share in the residuary estate of the testator. The testator died on the 24th Jan. 1919 leaving a will dated the 8th Nov. 1918, whereby he bequeathed certain legacies including one of £200 to the appellant, and directed his trustees to hold the residue of his estate upon the trusts declared in pars. 4 &5 of the will. These paragraphs are as follows:

4. "I direct my trustees to hold the residue of my estate upon trust to divide the same equally between my brothers and sisters and the children (per stirpes and not percapita) of my late brother Charles Arthur and my sister Mary Raynor Mason the last mentioned taking the share which my said brother and sister would have taken had he or she survived me"

5. "In the event of any brother or sister of mine dying in my lifetime leaving children living at my death such children shall stand in the place of such deceased brother or sister and take

per stirpes and equally between them if more than one the share of my residuary estate which such deceased brother or sister would have taken if he or she had survived me with the following exception that in the case of the death of my brother George H.Arthur in my lifetime then the share in my estate to which my said brother would have been entitled had he survived me shall be held by my trustees upon trust for his son George Arthur as I consider his daughter is otherwise provided for"

At the date of the will and at the date of testator's dea a brother George and a sister Charlotte were living, two brothers, John and Albert, and a sister Richarda, had died without having had, had died leaving children then living, and a sister Mary mentioned in the will any children, a brother Charles, mentioned in the will, had died leaving a child then living, and a sister Kate had died on the 27th Nov. 1917, leaving her daughter, the appellant, her surviving. These facts were within the knowledge of the testator.

A great number of cases have been cited to us, from Lorin v. Thomas I Dr & Sm 497 to Gorringe v. Mahlstedt 1907 A.C. 225, Barraclough v. Cooper 1908 2 Ch 121, Re Williams 1914 I Ch 219, 1914 2 Ch. C.A.I, and Re Brown 1917 2 Ch 232, but in the end the intentio of the testator must be gathered from the words he has used.

In Clause 4 , the gift "between my brothers and sisters does not extend to brothers and sisters who are dead, and the testator recognises this, for he goes on to provide for the children of a deceased brother and sister. But the appellant contends that the testator makes, in Clause 5, an original and independent gift for the children of any brother or sister who predeceased him. The introductory words of the gift "prima facie point to futurity". They "appear to be disposing only of the share"of a brother or sister "who shall thereafter die" in the lifetime of the testator, and not to a brother or sister who was dead at the time of the making of the will.

Is there anything in the will which enables the Court to "depart from the natural and first meaning of the words used"? (See Gorringe v. Mahlstedt 1907 A.C. 228). The gift in Clause 4 to the children of the testator's deceased brother Charles and his deceased sister Mary are superfluous unless the introductory words to Clause 5 are

construed according to their natural meaning. Moreover the gift in Clause 4 indicates that the testator's mind was directed to the children of brothers and sisters who were dead at the date of the making of the will . Yet he only provides in that clause for the children of Charles and Mary, omitting any mention of the appellant, the child of his sister Kate. And it cannot be said that the name and position of this child was not present to his mind, for the will contains a legacy to her of £200. The gift to "brothers and sisters" in Clause 4 of the will is not quite appropriate to the condition of the testator's family at the time of the making of the will, for only one brother and one sister were then alive, but the gift cannot, as already pointed out, be construed so as to include all brothers and sisters who were then dead.

Clause 5, in its natural meaning, is given its full effect if applied to the testator's brother and sister George and Charlotte and to their respective children. The exclusion of the daughter of

George was from the benefit of the gift contained in Clause 5 was relied upon by the appellant. But the appellant is not mentioned in the exception in Clause 5 because her mother was dead at the date of the making of the will, whereas the brother, George, was then alive, so that it was necessary that his daughter be specifically referred to if she was to be excepted from the benefits of that clause.

The facts deposed to in pph. 3 of the affidavit of the trustees are inadmissible for the purposes of the construction of the testator's will and have been excluded from consideration.

The decision of the Supreme Court of Tasmania is affirmed, and the appeal is dismissed with costs.