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IN THE MATTER OF THE WILL OF MICHAEL MULCAHY.

JUDGMENT. RICH J.

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I agree with the judgment of the Chief Justice.

I desire to add that in cases where infants are concerned great care should be taken that competent persons having no interest adverse to that of the infants are appointed as guardians ad litem and that except by leave of a Judge a distinct and independent solicitor shpuld appear for them.

IN THE MATTER of the Will of Michael Mulcahy.

Judgment Knox C.J.

The only questions raised by this appeal are whether ~~the Justice~~ Draper J. was right in holding that under the will of Michael Mulcahy the surplus income ~~of interest~~ accruing on the shares of the children must be added to the original share of such children respectively and devolved as if it formed part of such original share.

Secondly whether he was right in deciding that the trustees of the will have no power to pay Danial Mulcahy by way of advancement or by way of premium the sum of £750 or any part thereof as requested. The petition on which the order was made raised certain other questions on the construction of the will which are not the subject of appeal & as to which it is not within the province of this Court to express a judicial opinion, and I refrain from doing so. In my opinion the learned Judge arrived at a right conclusion on both questions covered by this appeal. As to the first I think clause 6 of the will contains a reasonably clear direction that so much of the income accruing on a son's share before he attains the age of 25 years, or qualifies for either of the professions mentioned, as shall not have been applied for his maintenance education and advancement shall be added to the corpus of such share and thenceforth form part of such corpus. The beneficial interest of the son in such share is to receive the income thereof during his life. On his death leaving issue the share is to be divided amongst his children in equal shares and on his death without issue in a certain specified event the corpus of the share goes over to his brothers and sisters and the issue of any deceased brother or sister. In these circumstances I think it is clear ~~that~~ that the son has no right to the surplus income of his share accumulated before he either attained 25 years of age or qualified for one of the named professions. An argument was addressed to us founded on the provisions of section 45 of the Trustee Act 1900 and particularly on sub-section 3 of that section. I am inclined to think that the authority given by that section extends no further than to enable the Court to disregard the ~~trustees' precautions~~ testator's directions as to what may be termed matters

of administration. But however this may be I am clearly of opinion that no authority can be found in that section for taking property from a beneficiary to whom it is given by the will and handing it over to one to whom it is not so given.

On the second question also I think Mr Justice Draper was clearly right. The power of advancement in clause 6 of the will ~~is clearly inoperative~~ clearly fails in the case of any son when he had qualified for either of the professions mentioned and in the present case it is clear that Daniel Mulcahy is so qualified. ~~It is so sought to apply~~ The argument was addressed to us based on the provisions of section 26 of Lord Cranworth's Act ~~to this case~~ but in my opinion it is clear ~~they~~ that last section have no application to the circumstances of the case.

For these reasons I am of opinion that the appeal should be dismissed.

IN RE THE WILL OF MICHAEL MULCAHY

AND THE TRUSTEE ACT 1900.

Judgment. Higgins J.

I am of opinion that this appeal should be dismissed. I desire, however, to guard myself against any misunderstanding.

The appellants, the trustees of the will, impugn two only of the answers given by the learned judge to the petition under section 45 of the Trustee Act 1900 of Western Australia; and I regard these answers, (b) and (e), as correct, so far as ~~as~~ the mere interpretation of the Will is concerned. The provision of paragraph 6 enabling the trustees to pay or make up a premium "out of the corpus of my son's life share in my rediduary estate" does not apply after the son has already become a member of the profession. Under the same paragraph, any surplus of the income of the son's share, after providing for his maintenance education and advancement has to be invested, and until the son takes a "vested life interest" in the share, that surplus with any interest on the investment has to be added to the share and held by the trustees for the life of the son; and then the life share in the residue is to be divided among the son's children (par. 11), or, if he leave no issue, the share is to go to the surviving children of the testator and their issue (par. 12). Cases such as Saunders v. Vautier (4 Bev. 115; Cr & Ph 240) do not apply, because persons other than the son - grandchildren of the testator born or unborn, - are interested in the ~~corpus~~ and surplus income.

There is no appeal from that part of the order of the learned judge which declares (a) that "each of the children of the testator attained

a vested life interest in the residuary estate upon the testator's death". It is not necessary, for the purpose of our decision, to decide whether this answer is correct or not. So far as it goes, it is in favour of the argument of the trustees in support of the power which they claim. But I am not sure that I should come to the same conclusion on this point. There is much in favour of the view that the life share of the son becomes "vested", under paragraphs 11 and 12, when the son attains 25 or qualifies for the profession at an earlier age.

So far as to the mere interpretation of this will. But sec. 45 of the Trustee Act 1900 does not confine the powers of the Court to the terms of the will as truly interpreted. It contains a provision in subsection 3, which enables the Court, to some extent at any rate, to over ride the provisions of the will - to make an order which is (not merely additional, but) contrary to the will -

> "Any order may be made under this section <u>notwithstanding anything</u> to <u>the contrary contained or expressed in the instrument creating the trust:</u> Provided that such order is, in the opinion of the Court beneficial, having regard to the estate and all persons or the majority of persons interested therein".

This extraordinary power may be invoked some day on appropriate facts; but, in my opinion, none but extraordinary facts would be appropriate, under this will, for an order such as that sought by Dr D.M.Mulcahy. There are cases, familiar to practising lawyers, in which a literal adherence to the words of a will might leave a beneficiary to starve while the corpus of his share is to be increased by accumulations; or in which the interests of grandchildren would be best served by allowances from

their moneys to their parents. I give this merely as an illustration, not as a definition of the ambit of the powor; for I do not think that we are entitled to place any limitation on this power conferred on the Supreme Court that is not placed by the legislature itself. Subsection (1) covers the subject matters in respect of which that Court may make an order, and it covers even the purchase of land for the protection or improvement of the trust estate; subsection (2) enables the Court to say against whose interest any expenditure is to be charged; and subsection (3) allows an order to be made which is directly contrary to the instrument. This subsection (3) does not make it a condition that the order shall be for the benefit of all the persons interested, or of a majority of the persons interested, but merely directs the Court, in exercising its discretion, to have regard to the benefit of such persons. But here the beneficiary merely wants to add a French degree to his other degree; and he does not even say that he wishes to practise in France or under French law. For aught that we are told, the French degree may be a mere feather in the cap. To make such an order under such circumstances for application of the accumulated surplus income of the share - accumulations which in no contingency belong to the son himself - would not in my opinion, be a proper exercise of the discretion of the Court. A very wide discretion is given to the trustees to apply as much as they think fit of the income for the maintenance education and "advancement" of the son; but when they have once thrown the surplus of the income into the same fund as the corpus of the share, so that it belongs to the remainder -

man and not to the son, it looks like robbing Peter to pay Paul to deflect it from the rightful owner. And the rightful owners here are persons who are infants or unborn.