IN THE HIGH COURT OF AUSTRALIA

LEARY & ORS.

V.

CUTTS

ORIGINAL

REASONS FOR JUDGMENT

Oral *Judgment delivered at* Sydney

on Wednesday, 29th August 1956.

W. M. Houston, Govt. Print., Melb.

C.1978/55

LEARY & ORS.

v.

CUTTS

JUDGMENT (ORAL)

DIXON C.J.
WILLIAMS J.
FULLAGAR J.
KITTO J.
TAYLOR J.

LEARY & ORS.

v.

CUTTS

This is an appeal from a decretal order made by Hardie J. under the Testators' Family Maintenance and Guardianship of Infants Act 1916-1954. The order makes provision for the maintenance of the widow of a testator who died on 21st October 1954. He was a retired hotelkeeper, 83 years of age. Eighteen years before his death, that is to say on 15th April 1936, being then a widower of seven years standing, he had married a lady of about 30 years of age who, at that time, earned her living as a trained nurse. By his first wife he had had children of whom four have survived, two sons and two daughters. They all married and three of them are older than the testator's widow. The two sons are engaged in business and do not appear to be unprosperous. The daughters, so far as appears, seem to be satisfactorily maintained by their husbands, at all events for the present.

The testator's last will was made on 31st October 1951 and was admitted to probate on 15th April 1955. By this will the testator devised and bequeathed his property to trustees upon trust for conversion and directed that the net proceeds should be divided into five equal parts, of which one was to be paid to his widow and the other four were to be paid respectively to his surviving children. His liabilities were few and the net value of his assets was £9,840. The assets included the matrimonial home at 1 Duke Street, Five Dock, which was valued at £3,400:0:0, the furniture valued at £202, and a mortgage upon which £6,000 stood invested. Death and estate duties amounted to £713. The widow applied by originating summons for an order making provision for her maintenance and advancement.

Hardie, J., who heard the application, took the view that the widow had a strong moral claim which was quite unsatisfied by the disposition in her favour contained in the will, which left her without adequate provision for her maintenance. His Honour accordingly made an order making further and other provision for her. The order, first of all, required that the furniture should be held upon trust for her absolutely. Next, it directed that the matrimonial home in Five Dock should be held in trust for her for life so long as she remained a widow. Then it ordered that as from the date of the testator's death the trustees should pay her £8 a week during her widowhood and should meet any expenses of a medical character she might incur in any given year in excess of £26. The order proceeded to give certain directions for the repair and for the insurance of the house and for the payment of rates by the trustees, provided that no more should be involved than £1 a week. Since these benefits well might not be met out of income the order went on to provide that so far as income would not suffice the money needed should be raised out of capital, resort being had to the property in Duke Street, Five Dock, only with the widow's written consent. Finally, the benefits given by the order were exonerated from death and estate duties.

From this order the executors of the will now appeal to this Court. They are a daughter and a son of the testator. Another daughter was named as an appellant in the notice of appeal, but apparently by mistake. She did not join in obtaining probate, was not a party to the originating summons, and her name has been struck out of the appeal. In support of the appeal it is said in the first place that the testator was not free to make any disposition in the widow's favour and the property was subject in his hands to a trust in favour of the four children. The contention was based on the

allegation that the testator had made an agreement with his former wife in his lifetime that they should make mutual wills and the survivor should bequeath the property he or she died possessed of to their children in equal shares. All that there is to support this allegation is comprised in three paragraphs in respective affidavits of the three children.

George Cutts, a son, says: "My mother, Amy Sparling Cutts, died in July 1929. Shortly after her death my father said to me, 'Your mother and I have always been partners. We had agreed to make our wills in favour of each other to enable the business to be carried on after the death of one of us and we have agreed that the surviving one should make a new will immediately in favour of the estate divided equally', or words to that effect."

Winifred Hartnett, a daughter, says: "I can remember each of my mother and father saying to me at various times during my mother's lifetime that they were in partnership and that the whole of their assets would be divided equally between the children. I cannot remember the exact words she used on any one occasion."

Clarice Emma Leary, a daughter, says: "On one of the visits of myself and my husband and the children to the Richmond Hotel, my mother said to me in the presence of my father and my husband,'Your father and I are partners in the business and in the event of the death of either of us that one's share will go to the other one and we have agreed that one who survives shall make a will leaving all he or she possesses at death to be divided equally between the surviving children', or words to that effect. In words that I cannot remember, my father agreed that this was the arrangement."

It is evident that if a serious attempt were to be made to establish a trust based upon agreement for mutual wills it would be necessary to show what will the deceased's first wife in fact made and what the husband took under it and

it would be desirable to show what will he had made in her favour during her lifetime in pursuance of the supposed agreement. None of these things was proved in evidence. A suit for the purpose would have been the appropriate proceeding to establish such a trust. It is little wonder that the Judge brushed aside these paragraphs and treated them as deposing to conversations which did not prove contract at all. His Honour did, however, regard the evidence as aiding the moral claims which the children possessed. Nevertheless, he felt that his discretion must be exercised in favour of the widow.

We think that it is impossible for this Court to treat the evidence as establishing a trust which would stand in the way of the making of the order. It was, we think, proper in the circumstances for Hardie J. to disregard the allegation that a trust existed and leave the children to whatever remedy they might have.

A second contention was made in support of the appeal. It was that the learned Judge had gone wrong in principle in adopting a set of provisions for the widow which would surely exhaust the capital if she did not remarry and if she lived for the period of the average expectation of life and which, moreover, would prevent the children from enjoying during their lifetimes any benefit from their father's property. In aid of this contention it was said that the order might have been moulded so that the widow would have found no obstacle in obtaining the widow's pension under Part IV of the Social Services Act 1947-1955.

As to this last argument it is enough to say that the present is not a case where it can be claimed that the effect of the order is merely to relieve a public authority of a charge otherwise falling upon it. Such a case we are not called upon to consider. For as the will stood before the order the

widow would not have qualified for a widow's pension: see sec. 62(1)(d)(iii) of the Social Services Act. What is said is that the Judge should have devised an order which would leave the widow under the necessity of claiming under Part IV of the Act and at the same time should have done nothing to detract from the probable success of such a claim of this kind if she made it.

We do not think that the Judge's exercise of discretion can be attacked because he did not adopt such a course. In the provision which his Honour in fact made for the widow he may have gone further than perhaps we might have done if we were exercising a discretion as a primary court, but we think that the view that the learned judge took of the widow's claim upon the testator's exercise of his testamentary powers was correct and we do not think that he erred in principle. The order represents an exercise of discretion which cannot be challenged on any tenable ground. The appeal should be dismissed with costs.

ORDER.

Appeal dismissed with costs.