No. 58/62

ORIGINAL

(10)

IN THE HIGH COURT OF AUSTRALIA

PRICE

V.

PRICE AND ANOTHER

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 21st February 1962

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

C.1978/55

PRICE

v.

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ORDER

Appeal dismissed with costs.

PRICE

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JUDGMENT

DIXON C.J.
MENZIES J.
OWEN J.

PRICE

v.

PRICE AND ANOTHER

This is an appeal from a judgment of Myers J. granting probate of the will of their mother, Mrs. Lily Ada Price, deceased, to the respondents, two of her sons, despite the objection of the appellant, another son, that the deceased when she made the will on 8th July 1959 was not of sound mind, memory or understanding. Her estate consisted of two cottages, one at Sutherland valued at £3,600 and one at Kensington valued at £2,600.

The deceased died on 12th March 1960 aged eighty-nine years. She was an old lady who admittedly up to a year before her death had retained the possession of her faculties to such an extent that when in April 1959 she fell and broke her femur the surgeon who attended thought that she was only in her seventies. She was matriarchal, shrewd, sardonic and held definite opinions which she was ready enough to express. She knew what she wanted and liked her own way.

The family consisted of two daughters and four sons, all at least of middle age. Until the time of the accident she had lived in her cottage at Sutherland with the appellant, her son Leo, an unmarried man employed by the Electricity Commission who was in receipt of a sixty per cent pension on account of disability caused by malaria and neurosis suffered while serving with the R.A.A.F. In addition to paying board he, so he said, had over a period of twenty years expended something like £2,000 upon or in connection with the cottage and had given his mother a great deal of personal care and attention.

In 1955, when the deceased's testamentary capacity was beyond any question, she had made a will appointing one of her daughters, Mrs. Cahill, and the appellant as executrix and executor whereby she left the Sutherland cottage to the appellant and the remainder of her estate to be divided equally between her other children except William, her eldest son, to whom she had previously transferred a block of land. In July 1959 she made the will of which probate has been granted to the executors therein named, her sons Thomas and John, whereby she left the whole of her estate to be divided equally among her children other than William. Under this will the appellant is, therefore, approximately £2,500 worse off and the other children who are beneficiaries are to take a round figure £500 better off than under the earlier will.

Both wills were prepared by a solicitor, R. E. Sanders. The disputed will was prepared without direct instructions from Mrs. Price. The evidence is to the effect that the deceased told her son Thomas to see an accountant, one Wallace, who held her papers and to arrange with him to have her will altered so that the Sutherland property would be equally divided among five of her children excluding William, and the Kensington property among four of her children excluding William and Leo. Thomas' evidence was that he expostulated with his mother and said: "'What about Leo, Ma?' She said, 'Can't worry about that.' I said, 'That is not very fair, that is very unfair and unjust to leave him out of the property if you are going to make another will.' She said, 'All right, go and see him about that.'" Thomas subsequently saw Wallace and later told his mother that Wallace had said that she should have Sanders make her new will and she then asked him to get Sanders to do so. She said that she wanted Thomas and John to be executors and gave her reasons for this.

Thomas then saw Sanders and told him what his mother wanted. Sanders thereupon prepared a new will and, after making an appointment, took the new will to the Sutherland District Hospital where the deceased was then lying after surgical treatment following the accident. Sanders' evidence was to the effect that he said to Mrs. Price "I understand that you wanted to make a new will" and she said "Yes, I wanted to leave it to the family equally as I have decided it was fairer that way". He then discussed with her the exclusion of William as in the earlier will, which she confirmed, and the change of executors when she said "Yes, I have decided I want Jack and Bernie". Not until this stage did he produce the will which he had already prepared and he then went through it with her, she approving of it clause by clause. When Mrs. Price had the will in her hands and was apparently reading he left her to get a nurse to be a witness to its execution and when he came back with a witness, Sister Munro, the will was in her hand resting on the table that straddled her bed. The will was then executed by the deceased and witnessed by Sanders himself and Sister Munro. The evidence of both Sanders and Sister Munro is that the deceased executed the will while sitting up with the table about half-way down the bed. The only substantial difference that we have been able to detect between the evidence of Sanders and Sister Munro is that whereas Sanders was positive that he did not produce the will he had prepared until he had by questioning her ascertained Mrs. Price's testamentary intentions, Sister Munro's evidence was that when she showed Mr. Sanders into the room where Mrs. Price was, he immediately took some papers out of his briefcase and her impression was that he was then about to read the will to her.

The testatrix signed the will on the first page and at the foot. Neither signature is anything like as good as

her signature to the 1955 will and it seems that she made a false start when signing her name "Lily" in the signature at the end of the will. The appellant did not know about the making of this will and it seems that his mother was anxious to have it made while he was himself in hospital so that he would not find out about it.

The evidence for and against the appellant's contention that the testatrix lacked testamentary capacity in July 1959 falls into a small compass. Dr. Cousins, the surgeon who operated to remedy the fracture of the femur, considered that his patient's mental condition, from being good when he first saw her on 24th April, deteriorated even before the operation a few days later and became progressively worse until by July she was so unstable that at times she was incapable of exercising sound judgment upon things that concerned her. His description of her condition was as follows:- " . . . when I first saw her at home she seemed a rational old lady who had just had a bad accident. In hospital before her operation her mental state appeared to deteriorate from my very short impression of her immediately after the accident and certainly after the operation her mental state deteriorated markedly as is common . . . I would say the most significant thing was her ability to completely change her attitude of mind about individuals - myself, the nursing staff, the family - anyone whose existence was brought before her knowledge. Her attitude could change daily, perhaps in the course of a day or from one occasion to another over a few days . . . She would speak endearingly of one on one occasion and perhaps even the same day on a couple of occasions, but frequently on the next occasion would speak very bitterly about them. She was subject to flashes of temper. I had the impression that at first, as is often the case, this was put on.

In the aged after a severe accident what often starts as a play becomes a reality. They say they do in fact retreat from reality and their play becomes their own reality." The opinion he formed was, in his own words, "that the poor old lady was unstable, that in fact it was hard to know what was her real attitude to anything". The eldest son, William, gave evidence that when he saw his mother in hospital between the time of the accident and the operation - which was the last occasion on which he saw her - "She was not her usual self. She was very excited and rambling and she knew me, but she did not know my wife". The appellant gave a good deal of evidence in relation to the making of the earlier will and what he had done for his mother and gave several instances of her being distressed and confused while in hospital, including one occasion when she asked him to bring his bed to the hospital and look after her, another when at her request he killed and cooked a rooster for her and she was concerned whether he should have used too much pepper, and one when he found that the cause of her distress was that "Bernie had been there and had asked her to make a will". Evidence that the mental condition of the deceased was unimpaired at the time of the making of the will was given by her daughter Mrs. Cahill, the two executors and the wife of one of them, John, with whom the deceased had lived for three months immediately upon leaving the Sutherland District Hospital. Sanders and Sister Munro both testified that her mental capacity was good, as did the matron of The Palms Hospital, to which the deceased went when she left her son John's home in November 1959 and in which she died about three months later. Her evidence was:- "Mentally I would say Mrs. Price was quite all right. She was the type of patient who knew what she wanted, where she was and she knew what she was doing". There was also the evidence of Mrs. Dunham, who had known the

deceased since 1934 and who saw her in hospital daily from 8th June until 2nd July 1959. She said that her mental condition while in hospital was much the same as it was before, that her memory was good and her conversation quite rational. Similar evidence was given by a very old acquaintance, Mrs. Townsend. Finally, the hospital records which contained daily reports of Mrs. Price's condition gave no indication of any lack of mental capacity.

From this résumé of the evidence it is clear that there was ample evidence that the testatrix in July 1959 had testamentary capacity. The case of the appellant was, however, that because the circumstances in which the will was made gave rise to suspicion, the learned judge should not have been satisfied that she was of sound mind, memory and understanding. What was relied upon principally as a ground for suspicion was that in changing her will she had without any good reason departed from what was described as "a settled testamentary disposition". In itself we find nothing at all suspicious in the testatrix changing her will to divide her property equally rather than unequally among those members of her family whom she had long ago decided to benefit and we would not do so even if there were nothing but the virtue of equality to explain the change. In this case, however, it seems, apart from anything else, that all her sons and one daughter were contributing to pay her medical expenses and that the testatrix might well have thought that the appellant had overstated to her the part he was playing and furthermore that she might have come quite rationally to the conclusion that he was drinking too much. However these things may be, the second will, like the first, was an entirely reasonable and rational division of her property and the change of itself gives

no ground whatever for suspecting her testamentary capacity.

There were, however, a number of matters that, taken together, did call for a close judicial scrutiny of the circumstances in which the deceased's last will was made. The testatrix was a very old woman; she was weak, as her signatures indicate; she was sick in what proved to be her last illness; the will, surprisingly enough, was actually prepared for execution on second-hand instructions reaching the solicitor through an interested party; the will cut down the interest of the appellant substantially and this was not discussed by the solicitor with the testatrix; knowledge of the execution of the new will was deliberately kept from the appellant; and finally, the testatrix's doctor considered that she was mentally unstable.

The appellant contends that, having regard to these matters, the learned trial judge was too readily satisfied of the testatrix's mental capacity and pointed in particular to the rather cavalier way in which his Honour treated the doctor's evidence, referring to extraneous matters such as the size of the fee he had charged for the operation and his self-assurance as well as to what although relevant was of little moment, that is, that his conviction that the testatrix had unreasonably accused him of having "butchered her leg" might have contributed too much to his low estimate of her mental capacity.

It is a principle, as well-established as it is salutary, that if the conduct of persons by whom or on whose behalf a will is propounded gives rise to a well-grounded suspicion that the document may not express the mind of a testator with a sound understanding of the significance of the dispositions contained therein, a court of probate will not pronounce in favour of the document unless the propounders dispel the suspicion that has been created by evidence of a cogency commensurate with the gravity of the suspicious circumstances.

Furthermore, one circumstance that will inevitably put a court of probate on guard is that the instructions for the document propounded as a will were given not by the testator directly but by a beneficiary.

Although these and like safeguards to ensure the purity of testamentary dispositions have more application when the question is whether the testator knew and approved of the contents of the will than when, as here, the issue is one of testamentary capacity, they were of importance in this case where the appellant's contention was that by reason of mental instability his mother lacked a proper appreciation of his claims to her testamentary consideration so that the circumstances already mentioned did call for critical, even sceptical, scrutiny of the propounders' case. Accepting this, there is, however, no sufficient reason for not accepting the learned trial judge's conclusion that the testatrix was of sound mind, memory and understanding. There was a very strong body of evidence that this was so; the dispositions that she made were quite as reasonable as those which she unmade despite the argument resting somewhat unsatisfactorily upon the appellant's own evidence that he had claims to special consideration which his mother had at one time recognized and must have overlooked; moreover, the somewhat trivial incidents relied upon to show that the testatrix was confused were explicable without assuming mental incapacity, for she was sick, in pain and sedatives were used in her treatment; furthermore, the testatrix's decision that the appellant should not know that her bounty to him had been diminished was not only explicable on rational grounds but indicated with certainty that she knew very well what she had done by her new will; finally, the doctor's evidence, upon which the appellant's case really depended, even at its face value showed nothing more than intermittent mental instability

and afforded little ground for concluding that when she made her will she did not have clearly in mind the situation of the members of her family.

Our study of the evidence suggests that the judgment appealed from was right and satisfies us that this Court should not interfere with it.