30/4 NZ Law Reports

IN THE HIGH COURT OF NEW ZEALAND A.125/83
HAMILTON REGISTRY

359

IN THE MATTER of the Estate of MARY ELIZABETH DASHFIELD late of Auckland, Widow, deceased

BETWEEN WILLIAM NEWALL OLSON of Hamilton, Bank Manager, and HAROLD FREDERICK OLSON of Hamilton, Retired, executors and trustees of the estate of Mary Elizabeth Dashfield deceased

PLAINTIFFS

AND DASHFIELD
and DASHFIELD
and DASHFIELD
all of Auckland, infants.

FIRST DEFENDANTS

AND TIMOTHY BRIAN DASHFIELD of Auckland, University Student

SECOND DEFENDANT

Hearing: 9th April, 1984

Counsel: G.J.MacAskill for Plaintiffs
W.J.Scotter for First Defendants

Judgment: 17 April, 1984.

JUDGMENT OF GALLEN, J.

The last will and testament of Mrs. Mary Elizabeth Dashfield is a short document which unfortunately gives rise to a number of problems in interpretation.

The principal clause in the will is clause 2 which is in the following terms:

"2. I APPOINT HAROLD FREDERICK OLSON of Eltham, Retired and WILLIAM NEWALL OLSON of Hamilton, Bank Manager (hereinafter called 'my Trustees') to be Executors and Trustees of this my will AND I GIVE DEVISE AND BEQUEATH the whole of my real and personal property as aforesaid unto my Trustees UPON TRUST to sell call in and convert the same into money with power at their absolute discretionto postpone such sale calling in and conversion for such time as they shall determine and to stand possessed of the proceeds of such sale calling and conversion together with my ready money upon the following trusts namely:

(a) TO pay thereout my just debts funeral and testamentary expenses.

(b) TO pay or apply the remainder of the said net annual income in or towards the maintenance education or advancement or otherwise for the benefit of my children or any one or more of them exclusively whether of full age or not so long as any one of my children is under the age of twenty (20) in the absolute discretion of my trustees; with power for that purpose to pay the income or any part of it to the guardian or parent of any such child withount being bound to see to the application of it; and after the last of my children to attain the age of twenty (20) has attained that age to divide the remainder of the net annual income equally among all my children. "

Clause 3 provides for the appointment of guardians. Clause 4 is a substitutionary clause and clause 5 deals with the power to charge.

The first question raises the following issue:

"Whether the direction in clause 2 (b) of the will 'to pay or apply the remainder of the said net annual income...' is to be interpreted as 'to pay or apply the the net annual income"."

Clause 2 (b) uses the word "remainder" in connection with net annual income twice. On the first occasion the term is "remainder of the said net annual income" and on the second it is "the remainder of the net annual income". There is no previous reference to net

annual income. Indeed, there is no other reference in the will at all to income nor is there any disposition which deals with income. Under those circumstances the reference to "remainder" and to "said net annual income" simply do not make sense. Debts, funeral and testamentary expenses are to be paid from capital and there are no obligations imposed on the trustees which would involve the expenditure of income other than those appearing in clause 2 (b). I think it likely that the draft resulted from the use of clauses from another will by way of precedent, the draftsman failing to note that the reference to remainder was inept.

There is ample authority to the fact that words which amount to mere surplusage may be omitted when a will is admitted to probate: In the case of Louis Schott (1901) P. 190. There the President of the Probate Division was concerned with a will which by mistake contained the words "to stand possessed of the net revenue of the said proceeds" which in the circumstances was nonsensical. The learned President struck out the words "revenue of the said" from the residuary clause which effectively resulted in the clause dealing with capital rather than income. If it is possible for a Court to strike words out of a document on a probate application, it would seem in principle that it should be able to interpret a will already admitted to probate on the same basis and there is no inconsistency in the rules of interpretation which are generally applied.

In my view the purpose of the will is clear. The testatrix has set out to make provision for her children. I consider the words relating to remainder in clause 2 (b)

to be surplusage and I therefore answer the first issue "Yes".

The second question is in the following terms:

> "Whether the direction in clause 2(b) of the will to pay or apply income 'in or towards the maintenance, education or advancement or otherwise for the benefit of my children or any one or more of them exclusively whether of full age or not so long as any one of my children is under the age of twenty (20) in the absolute discretion of my trustees....' is to be interpreted as requiring the trustees to pay or apply the whole of the income in each year."

This issue also arises from the provisions of clause 2(b) set out above. The trustees are given an absolute discretion as to the payment of income and may pay the income or any part of it to the guardian or parent of a child under the age of 20. They have a power of selection as to children. There is no power of accumulation and no specific power of investment, but the scheme of the will clearly contemplates investment. The whole scheme of the clause involves a discretion as far as the trustees are concerned. It would run counter to this to require them to pay the whole of the income and, in my view, there is no such fetter on the discretion of the trustees.

The use of the term "remainder"at the end of the clause might seem to contemplate an accumulation although that word could have been included as part of a repetition of the reference to income appearing in the first line of the clause. It does make sense to interpret its use as a final disposition of undistributed

accumulated annual income when the youngest child attains the age of 20 years. There would also be a practical difficulty in making payment of the whole of the income in any year in that the trustees could be left at the end of the year with an unexpended portion because of their discretion to pay unequally during the course of the year and this would then presumably have to be paid whether or not the maintenance, education or advancement of the children required it. In my view the trustees are not required to pay the whole of the income in each year and I accordingly answer issue (b) "No."

Issue (c) is in the following terms:

"Whether the expression 'the remainder of the net annual income' in the direction of clause 2(b) of the will to '....after the last of my children to attain the age of twenty (2) years has attained that age to divide the remainder of the net annual income equally among my children' is to be interpreted as meaning:

(i) The remainder of the net annual income not applied in accordance with the first part of clause 2(b) and/or

(ii) The net annual income accruing after the last of the testator's children attains the age of twenty years

Or
(iii) (i) and/or (ii) and the capital "

In accordance with my conclusions on the first two issues, issue (c) must be answered to the effect that the expression contained in the issue is to be interpreted as meaning the remainder of the net annual income not applied in accordance with the first part of clause 2(b).

Issue (d) is in the following terms:

"Whether the concluding words of clause 2(b) of the will 'all my children' mean:

(i) All my children living at my death; or
(ii) All my children living when the last of my children attains the age of 20 years".

There were children alive at the date of death of the testatrix and in accordance with the general rules relating to the determination of a class, I consider that the expression "all my children", where used in the concluding words of clause 2(b), means all those children of the testatrix who were alive at the date of her death. Although the clause refers to the attainment of the age of 20 years, I believe that that provision in context does not result in a divesting but merely specifies the time for division.

It is noteworthy that clause 4 of the will, which is a substitutionary clause, provides that the children of any child predeceasing the testatrix should take their parent's share. This is at least an indication that the qualification to take under the will was to survive the testatrix and not to attain a fixed age.

I therefore answer the issue as follows: the words "all my children" where used in the concluding part of clause 2(b) mean all the children of the testatrix living at her death.

The fifth issue deals with questions as to disposition of capital and is in the following terms:-

> "As to the capital of the estate, whether:
>
> (i) The capital is disposed of by clause 2 (b) of the will.
>
> (ii) The capital goes to the persons entitled to the net annual income of the estate after the last of the testatrix's children attains the age of twenty years.
>
> (iii) There is an intestacy as to the capital. "

There is no express provision in the will relating to capital. Clause 2 (b) in specific terms deals with income. Clause 4 is a substitutionary clause and it refers to children of a deceased child taking the share his or her parent would have taken had he or she survived the testatrix. This is a clause which is more normally found dealing with capital than with income. It could not apply to the income distribution taking place during minority because the shares during minority are discretionary in the trustees and there would in fact be no share/absolutely payable until the youngest child attained the age of 20. It is possible that clause 4 could be interpreted as applying to equal income distribution as from that date but this seems an unlikely intention. There are no beneficiaries mentioned in the will other than children. It is possible that the testatrix had in mind a permanent trust, the children to receive the income equally after the attainment of the age of 20 by the youngest, but this not only makes no final distribution of capital but it offends the rule against perpetuities and, in any event, there is ample authority to the effect that the gift of the income for an unlimited period amounts to a gift of the capital, see Lyndon v. Lyndon

(1930) N.Z.L.R. 76. Further, adult beneficiaries under a trust absolutely entitled can require the capital of the fund to be paid to them. I should be prepared, taking an overall view of the will, to hold that clause 2 (b) was to be interpreted as disposing of capital having regard to the considerations expressed above. If it were necessary to do so, I should be prepared to consider the will by inserting the words "and capital" between "income" and "equally" in the last line of clause 2 (b), since I consider the intention of the testatrix is clear. I therefore answer the question posed by issue (e) that the capital is disposed of by clause 2 (b) of the will. It is to be divided equally among the children of the testatrix after the last of those children attains the age of 20 years.

Issue (f) asks whether or not there is an intestacy. In accordance with the foregoing conclusions, I answer that question "No".

Issue (g) raises the question as to whether or not there ia an infringement of the rule against perpetuities and again in accordance with my earlier conclusions I answer that it does not.

R G Gallen J.

Solicitors: Tompkins Wake & Co. Hamilton, for Plaintiffs