MOSES JOEL SINGER, EXECUTOR OF THE ESTATE OF JACOB SINGER, DECEASED, AND OTHERS..... } APPELLANTS;

AND

ANNIE SINGER, EXECUTRIX, AND OTHERS ..... } RESPONDENTS.

1915
*Dec. 2, 3.
1916
*Feb. 1.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Will—Construction—Devise of income — Trust — Codicil—Postponement of division—Maintenance of children.

The will of S. contained the following provision: "I direct my said trustees to pay to my wife Annie Singer, during the term of her natural life and as long as she will remain my widow, the net annual income arising from my estate for the maintenance of herself and our children; should, however, my wife remarry then such annuity shall cease."

Held, that Annie Singer was entitled to said income during her widowhood for her own use absolutely, but subject to an obligation to provide, in her discretion, for the maintenance of the children, which discretion would not be controlled nor interfered with so long as it was exercised in good faith. Such obligation did not extend to a child married or otherwise forisfamiliated.

Per Anglin J.—The jurisdiction to determine the good or bad faith of the widow on an originating notice is questionable.

Another clause of the will directed the trustees "to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother. * * * Such payment to be considered as a loan from the estate." A codicil added several years later contained this provision: "I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death."

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

1915

SINGER v. SINGER.

Held, that the division so postponed was not the final division to be made on the death or marriage of the widow; that it had the effect of postponing any advance to a son thirty years old of half his portion until the ten years from the testators' death had expired so far as such advance would necessitate the sale or mortgage of any of the real estate.

Judgment of the Appellate Division (33 Ont. L.R. 602) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the judgment of Middleton J. at the hearing.

The proceedings in this case were begun by originating summons to obtain the construction of certain provisions in the will of the late Jacob Singer. These provisions are set out in full in the above head-note and in the opinions of the judges one clause gave the net income of the estate to the testator's wife during her life and widowhood for the maintenance of herself and children. The appellants claimed that she received the income in trust for such maintenance and Middleton J. so held. This was overruled by the Appellate Division and the clause construed as giving her the income for her own absolute use with an obligation to provide in her discretion for maintenance of the family.

Another clause provided for the advance, by way of loan, to any son reaching the age of thirty of half the portion he would be entitled to on the death or marriage of his mother. By a codicil the testator directed that his real estate should not be divided until the expiration of ten years from his death. The court below held that the advance to sons of thirty was by this codicil postponed for ten years from testator's death unless it could be made out of the per-

(1) 33 Ont. L.R. 602.

sonalty. These were the two questions raised for decision in the Supreme Court.

Dewart K.C. for the appellant M. J. Singer. According to the later decisions the widow took the income in trust and the rights of the children therein would be enforced by the courts. *In re Booth*(1); *In re G. Infants*(2).

Maintenance is not limited to children not forisfamiliated. *In re Miller*(3).

Cowan K.C. and *Rose K.C.* for the other appellants.

Watson K.C. for the respondent Annie Singer. The testator wished his wife to have the income and use it in her discretion. The court will not interfere with such discretion when exercised in good faith. *Lambe* v. *Eames*(4); *Jones* v. *Greatwood*(5); *In re Atkinson*(6); *In re Barrett*(7).

As to right of children forisfamiliated see *Cook* v. *Noble*(8).

Holman K.C. for the other respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—The difference of opinion between the trial judge, Middleton J., and the Appellate Division as to the rights of the widow Annie Singer to the net annual income arising from the estate during her widowhood is not very great. After consideration of the arguments advanced at bar on the construction

(1) [1894] 2 Ch. 282.
(2) [1899] 1 Ch. 719.
(3) 19 Ont. L.R. 381.
(4) 6 Ch. App. 597.
(5) 16 Beav. 527.
(6) 80 L.T. 505.
(7) 6 Ont. W.N. 267.
(8) 12 O.R. 81.

1915

SINGER v. SINGER.

Davies J.

of the provisions of the will and codicil relating to this net annual income, I accept that of the Appellate Division as probably the more correct one.

With respect to the construction of the clause providing for advancement to those sons of the testator who reached the age of thirty, I entertained at the close of the argument a good deal of doubt. The reasons given in the dissenting judgment of Mr. Justice Magee are strong and cogent in favour of the construction he adopted that the codicil did not interfere with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

While I agree that the solution of the question is surrounded with difficulties, I have reached the conclusion that the arguments in favour of the construction adopted by the Appellate Division preponderate, and that the effect of paragraph 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares except as stated by the Chief Justice

> in so far as it may be precticable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

On the whole, I adopt the reasoning and conclusions of Chief Justice Sir William Meredith and would dismiss the appeal.

Under the circumstances and the reasonable doubts existing as to the true construction of these clauses of the will taken together with Mr. Justice Magee's dissenting opinion, I would not allow costs against appellants but would let each party pay his own.

IDINGTON J.—The conditions existent in this family are unsatisfactory. I should, however, be sorry to in-

crease and intensify their troubles and then perpetuate them by substituting the discretion of the court for that of the mother whom the testator had wisely chosen to be head of the family when he was gone. She may make mistakes, but her maternal instincts will probably rectify or ameliorate them. The court substituting itself for her inevitably must make mistakes it never can rectify.

The carefully prepared judgment of the learned Chief Justice of Ontario, with which I agree, leaves nothing more for me to say on the question of interference with the mode of the mother's exercising her judgment.

The formal judgment of the Appellate Division lays down correctly the lines to be observed and yet as I read it puts no bar in the way of the mother aiding when they deserve it, even those over twenty-one and *forisfamiliated.*

On the question arising upon the construction of clause 10 of the codicil I agree with the result reached by the judgment appealed from.

The testator by a will made in 1904 directed as follows:—

> I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

and on 31st October, 1911, two weeks before his death, made a long codicil thereto of which clause No. 10 is as follows:—

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after

1916

SINGER
v.
SINGER.

Idington J.

the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

And clause No. 14, the last, is as follows:—

14. And I further direct that anything mentioned in the aforesaid will which is at variance with the provisions mentioned in this codicil, shall be subservient and subject to this codicil.

The estate, at his death, consisted chiefly of over three hundred parcels of real estate in Toronto.

Four of his sons had then reached the thirty-year limit.

The estate was under mortgages to three-eighths of its value. Much of it was unproductive or in a state of dilapidation, needing repair. These and many other known circumstances must be borne in mind in attempting the interpretation and construction of this codicil. We can say nothing of the unknown which the prudent testator refrains from disclosing and which we cannot appreciate in order to help construction.

I should have supposed, but for judicial differences of opinion, the mere reading of this clause No. 10, in light of the surrounding facts and circumstances, restricted as it is to real estate, was so plain as to need no aid. But in effect it is urged that it must have read into it the word "finally" as qualifying the word "divided" therein. For the argument presented by appellant means, if anything, that the distribution provided for by the clause I have quoted from the will, was not in substance a division *pro tanto,* though conditionally subject, however, in case of a shrinkage of the estate to a return or reduction in share, but merely a loan, and that according to some

theories put forward, on good security and bearing a good rate of interest; the prospective share in the estate, of course, forming part of the security.

If it was in essential characteristics merely a loan, why all this litigation ? The parties concerned, over thirty years of age, could possibly borrow in Toronto on their respective shares almost as advantageously as the executors without all this expensive litigation to be paid for, in addition to the usual commissions on such transactions.

Plus the contingency of death without issue, possibly insurable against, there is not much difference in the character of the borrowing by the trustees sought herein to be immediately enforced by this proceeding and that obtainable by each of the appellants in respect of his share.

For admittedly the trustees of the estate cannot just now in the present state of the market sell its real estate and can only meet the obligations which the construction contended for would involve, by borrowing at a great disadvantage.

All this is, it may be said, aside from the question of construction. I agree. I only desire to illustrate the real nature of what is contended for by those relying upon the language used in the clause relative to the advances to be made being merely loans to those attaining thirty years of age.

What has happened may, or may not, have been within the contemplation of the testator when making his will, but assuredly it was when making his codicil thereto, and anything in the will at variance therewith is expressly made subservient to the codicil. Such submission extends to the giving, if need be, of an en-

1916

SINGER v. SINGER.

Idington J.

tirely different shade of meaning to that it might have borne standing alone and amid entirely different surrounding circumstances.

I think, however, such advances were merely intended to be *pro tanto* a distribution of the estate, but in order to provide for the contingencies necessary to be kept in view, having regard to the equal division ultimately to be made and contemplated by the testator, should be in such view, but in that only, treated as loans.

Assuming any such advance made upon terms only within the language of the clause and without any further stipulation for its return than implied therein, is it at all conceivable that any court would maintain an action for the recovery back of any part thereof, save so far as needed to produce the equal distribution contemplated ?

If not, then the advance is to the extent not so recoverable neither more nor less than the division in the language of the codicil

among the beneficiaries as directed by my will.

Again, the language of the clause itself presupposes the money in hand; for nowhere is there any direction to sell or mortgage for any such purpose. To imply such an imperative direction in the clause or whole will (to be read now in light of the codicil now dominating its expressions) dealing with such an estate as left at the death of the testator, would be, I think, attributing to him a want of that business sense and foresight which, I think, he was possessed of.

If no other question had been raised than one asking the court to compel the trustees to mortgage and pay for such a purpose, would the court have listened

to it and acceded to that which might spell ruin for the estate ?

The testator realizing, as every sane man of experience and foresight must have done in the end of October, 1911, that by the end of a year thence, when his will would have become operative for purposes of partial distributions, and the fruits of real estate speculation would have begun to ripen; and of these a long period of depression in real estate was sure to ensue, provided against such contingencies. He realized the possibly disastrous results of an enforced distribution under such conditions of a large part of his estate. He wisely anticipated all that and what was or might be involved therein and provided against it by clause No. 10 of this codicil.

We are invited to frustrate his purpose by putting on his will, and on this codicil, a construction that I venture to think would have surprised him. So far common knowledge, if we use it, can guide us.

But in view of the lapse of time betweeen the making of will and codicil, it is not at all improbable, in light of the story unfolded herein by some of those concerned, that in the development of his sons he had found something to warrant him in providing (in a way his earlier hopes in that regard induced him to refrain from) against their possible or probable improvidence or that of some of them.

I do not think we are entitled to frustrate the results he aimed at, whatever they were, by placing upon his language used in clause No. 10, and clearly emphasized in clause No. 14, a construction it does not necessarily bear.

Moreover, it is quite clear he left to the future developments, that time and chance might bring, the

1916

SINGER v. SINGER.

Idington J.

earlier conversion, in the ordinary prudent way, of his real estate into personalty, whereupon the clause for partial distribution would become operative.

The power of sale remained intact, save that impliedly it was not to be used in obedience to an enforced demand for distribution within the period of ten years.

I need not dwell upon the bearing of other minor considerations such as, the income of the estate belonging to the widow and the consequent results upon it by the construction contended for; and the salaries provided in the codicil for the management of the estate by his sons, and the possibility of the codicil having been drawn by a non-professional hand as the providing for a seal in the execution thereof indicates.

The true construction must ever be in the case of a will, the ascertainment of the purposes of the testator to be gathered from the will read in light of the circumstances known to surround him making it and not least of these the condition of the estate.

Then its entire scope and purposes must be kept in view and no single feature, unless so expressed as in this codicil, allowed to dominate the rest. So treating will and codicil I do not feel any doubt in the results I have reached.

I agree that no compensation is allowable to the executors. The actual labour in that connection is provided for by salaries to be paid the sons in regard thereto. The responsibility evidently was not to be compensated for.

I think the appeal should be dismissed with costs.

DUFF J.—The important question turns upon the effect of clause ten of the codicil. It is by no means

free from doubt, but I think effect may be given to the intention of the testator, as I infer from the admitted facts, without doing violence to the language. The intention unquestionably was, I think, to prohibit a sale of any part of the real estate for a period of ten years.

The appeal should be dismissed with costs.

ANGLIN J.—The first question presented on this appeal is as to the effect of the following provision of the will of the late Jacob Singer:—

> I direct my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children; should, however, my wife remarry, then such annuity shall cease.

Middleton J., who heard the case in the first instance on an originating notice, held that:—

> The said Annie Singer is not entitled to the net annual income arising from the said estate to her own use absolutely, but subject to the obligation to use the same not only for her maintenance, but also for the maintenance of the children of the testator, and that the right of any child to maintenance does not cease on attaining majority or marriage;

and he directed a reference to determine what allowance, if any, should be made to each of the children of Jacob Singer out of the income of the estate.

The Appellate Division varied this judgment by declaring that:—

> The said Annie Singer is entitled to the net annual income arising from the said estate during her widowhood for her own use absolutely, but subject to an obligation to provide thereout for the maintenance of the children of the testator or such of them as in her discretion to be exercised in good faith she shall deem to require the same, but such obligation does not extend to any child who has or shall be married or otherwise be forisfamiliated.

1916

SINGER v. SINGER.

Anglin J.

The appellants contend for the restoration of the judgment of Middleton J. The respondent Annie Singer upholds the judgment of the Appellate Division. The other respondents, represented by Mr. Holman, maintain that the interest of Annie Singer is absolute; that any obligation imposed upon her is not in the nature of a trust, but is purely moral; and that the children have no interest legally enforceable. The difference between the respective orders made by Middleton J. and by the Appellate Division (apart from the exclusion of children married, or otherwise forisfamiliated) would seem to be that, under the latter, the discretion of the mother is wider and enables her, for reasons that seem to her sufficient, to exclude any child from maintenance. Interference of the court is limited to a case of *mala fides* in the exercise of her discretion.

With Sir George Mellish L.J.:—

> I do not understand how a Court of Equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have. *Lambe* v. *Eames*(1).

According to many authorities language such as that used by the testator does not create a complete trust in the strict sense; *Bond* v. *Dickinson*(2); *Lambe* v. *Eames*(1); *Mackett* v. *Mackett*(3); *Allen* v. *Furness*(4); *Re Shortreed*(5); *Atkinson* v. *Atkinson*(6). But there are, no doubt, other authorities in which the contrary has been held, *e.g.*, *Scott* v. *Key* (7); *Woods* v. *Woods*(8); *Longmore* v. *Elcum*(9).

(1) 6 Ch. App. 597, at p. 601
(2) 33 L.T. 221.
(3) L.R. 14 Eq. 49.
(4) 20 Ont. App. R. 34.
(5) 2 Ont. W.R. 318.
(6) 80 L.J. Ch. 370-372.
(7) 35 Beav. 291.
(8) 1 My. & Cr. 401.
(9) 2 Y. & C. Ch. 363.

The line is difficult to draw. But the cases rather seem to indicate that a bequest of income will more readily be held to impose a trust, especially if given to the mother, than a similarly phrased gift of the corpus. Eversley on Domestic Relations (3 ed.), p. 688. Yet whether she should, or should not, be held to be a trustee, the authorities seem to establish that there is an obligation toward the children imposed upon a widow to whom money is bequeathed for the support of herself and her children, which the court will, under certain circumstances, enforce. *Allan* v. *Furness*(1), and *Booth* v. *Booth*(2), are instances in which the court interfered to protect the fund in the interests of the children against creditors of a legatee subject to an obligation of maintenance. *In re G. Infants*(3) is a case in which the court interfered on an admission of obligation made by an immoral mother. *Thorp* v. *Owen*(4) was a case of admitted trust. But there are other cases in which, without holding that a trust had been created, the courts have, as against the parent, asserted the existence of an obligation in favour of the children which they would enforce. *Re Robertson's Trust*(5); *Raikes* v. *Ward* (6); *Castle* v. *Castle*(7); *Browne* v. *Paull*(8); *In re Pollock*(9). *A fortiori,* if there be a trust, however wide the discretion, the court will interfere in the event of failure or refusal to exercise it honestly.

As Theobald says (7 ed.), p. 491:—

(1) 20 Ont. App. R. 34.
(2) [1894] 2 Ch. 282.
(3) [1899] 1 Ch. 719.
(4) 2 Hare 607.
(5) 6 W.R. 405.
(6) 1 Hare 445.
(7) 1 De G. & J. 352.
(8) 1 Sim. N.S. 92, at p. 103.
(9) [1906] 1 Ch. 146.

1916

SINGER
v.
SINGER.

Anglin J.

The decisions upon gifts to a parent for the benefit of himself and his children run into fine distinctions.

See cases collected in Lewin on Trusts (10 ed), at p. 157, and Jarman on Wills (10 ed.), pp. 890 *et seq.*

After fully considering all the provisions of Jacob Singer's will, I agree with the view expressed by Middleton J., when, speaking of the testator's intention, he said:—

> Mr. Singer undoubtedly had unbounded confidence in his wife. Many expressions in the will point in that direction; and I think that his dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself.

In that view there would be no trust properly so called. The obligation of the mother would be almost purely moral. The only right enforceable against her in the courts would be the right to support which the law gives to minor children against their father, commensurate with his means and station in life, subject to the further limitation, that the court will not interfere to enforce that right against the mother if she should, in the *bonâ fide* exercise of her discretion, determine that the circumstances warrant her withholding maintenance in part or in whole in the case of any child. That, I take it, is the measure of the children's right which the judgment of the Appellate Division accords.

This wide discretion the mother appears to have under such a provision as that with which we are dealing, which involves determining from time to time and under varying circumstances how much of the income should be used for each and any of the purposes indicated, and it is subject to curial interference or control only when it is shewn that she has not exer-

cised it fairly and honestly; *Costabadie* v. *Costabadie* (1); *Tabor* v. *Brooks* (2); *Re Roper's Trusts* (3).

I am, with respect, of the opinion that this is the correct interpretation of the disposition made by the testator of the income of his estate. I desire, however, not to be understood as dissenting from the view expressed in the Appellate Division that, under the doctrine *stare decisis,* whatever may be the view now prevailing in England (Theobald (7 ed.), 495; Lewin on Trusts (10 ed.), p. 159), in Ontario the view expressed in *Cook* v. *Noble* (4), that married and otherwise forisfamiliated children are not entitled to share in a gift for maintenance such as this should be adhered to. But there is nothing to prevent the mother applying a part of the income for the benefit of adult and married children who may need assistance, if she can do so consistently with her duty to herself and her unmarried minor children.

I question the jurisdiction on an originating notice to determine the issue of good or bad faith on the part of the widow. At all events, if such a jurisdiction exists, I think the better course is that which has been taken in the Appellate Division, viz., in the first instance to dispose of the questions of construction and to determine finally the rights of the parties under the will, leaving it to the children, after that has been done, to proceed, if they should deem it necessary and proper, to seek the aid of the court to enforce the rights so declared.

I would, for these reasons, maintain the judgment of the Appellate Division on the first branch of the appeal.

(1) 6 Hare 410.
(2) 10 Ch. D. 273, at p. 277
(3) 11 Ch. D. 272.
(4) 12 O.R. 81.

1916

SINGER
v.
SINGER.

Anglin J.

The next question is whether the provision of the will which directs the trustees

> to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which that son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

is affected by clause 10 of the codicil.

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

The will provided for the distribution of the estate on the death or remarriage of the widow, any advances previously made being brought into hotchpot. The appellant contends that it is only to this final distribution that the provision of the codicil applies and that it does not control or affect the right of the sons to advancements under the clause above quoted.

The will was made in 1904; the codicil in 1911, a month before the testator died. At his death his estate consisted almost entirely of real property. Up to five years before his death he had carried on the business of a watchmaker, jeweller, and money lender. The capital invested in that business appears upon its discontinuance to have been used in acquiring lands and houses. The condition of the testator's estate, as it existed in 1904, when his will was made, had, therefore, been materially changed when he made the codicil in 1911. Assets of other kinds, no doubt consider-

able in amount, and out of which the advancements to the sons might have been made, had in the interval been converted into real estate. This circumstance must be borne in mind in considering the effect of the codicil, which not only postpones a division of the real estate for a period of ten years, but directs that the business of managing it shall be carried on as theretofore. I am of opinion that the dominant purpose disclosed by this codicil was that, saving the power to make sales demanded by good management, the real estate should be kept intact for a period of ten years, and that any provision of the will in favour of beneficiaries, other than specific or pecuniary legatees, inconsistent with that purpose should yield to it. For the purpose of this provision of the codicil advancements to the sons which would entail a disposition of the real estate would, in my opinion, be in the nature of a division which the testator meant to prohibit. It has been suggested that the portions to be advanced might be raised under the trustees' power to mortgage. But, apart from the fact that the existence of mortgage incumbrances on the estate to the extent of $360,000 might well render that method of procuring money impracticable, it might entail the defeat of the very purpose which the testator had in view in making the codicil and would be an indirect method of accomplishing that which I cannot but think he intended to provide against. For these reasons and for those stated by Mr. Justice Middleton and the Chief Justice of Ontario, I would affirm the judgment in appeal on this question.

I have no doubt that by the 11th clause of the codicil directing that no salary shall be paid to the execu-

1916

SINGER v. SINGER.

Anglin J.

tors for their services as executors, the testator meant to deprive them of all right to remuneration in any form for their services in the administration of his estate.

I would dismiss the appeal with costs. Having had the opinion of two courts against them on the main question — their right to immediate advancements—the appellants should, I think, have been satisfied. The slight difference in opinion between Mr. Justice Middleton and the Appellate Division as to the extent of the widow's discretion and the propriety of curial interference would not, in my opinion, justify our encouraging the carrying of appeals in cases such as this beyond the provincial courts, as we would do were we to award the appellants costs out of the estate or relieve them from payment of the costs of the respondents.

BRODEUR J.—After a great deal of hesitation I have come to the conclusion that this appeal should be dismissed.

In directing his trustees to pay to his wife the annual income arising from his estate, the testator intended to give her discretion as to the way she would dispose of that money for the maintenance of their children. She is expected to exercise that discretion with impartiality and wisdom. It may be that in the past the mandate imposed upon her has not been discharged in a satisfactory way, but it is expected that she will in the future treat all her children in a most just, equitable and impartial way.

1916

SINGER
v.
SINGER.

Brodeur J.

On the other point in issue, I agree with the construction put on the will by the Appellate Division.

Appeal dismissed with costs.

Solicitors for the appellant Moses Joel Singer: *Dewart, May & Hodgson.*

Solicitors for the other appellants: *Beatty, Blackstock, Fasken, Cowan & Chadwick.*

Solicitors for the respondent Annie Singer: *Watson, Smoke, Smith & Sinclair.*

Solicitor for the other respondents: *Charles J. Holman.*