ESTHER MINA MEYER.....APPELLANT;

AND

CAPITAL TRUST CORPORATION LIMITED, EXECUTORS OF THE ESTATE OF CHARLES CONRAD MEYER; CHRISTINA BRETHOUR, WILLIAM CONRAD MEYER, CARL ROBERT MEYER, OLGA CLAREY and GORDON CLAREY.. } RESPONDENTS.

*1948
April 9,
April 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Dependants' Relief—Provision for Widow—Matters to be considered in determining proper allowance—Impropriety of considering relations between Testator and Applicant—The Dependants' Relief Act, R.S.O., 1937, c. 214 ss. 2, 7 and 9.

Section 7 of *The Dependants' Relief Act,* R.S.O. 1937, c. 214, requires a judge hearing an application to enquire into and consider the matters therein specifically enumerated, including under clause (*g*) "generally any other matters which the judge deems should be fairly taken into account in deciding upon the application."

Held: In the case of an application made on behalf of the widow of a testator, it is sufficient that the appellant is the widow and is not disentitled to relief under the Act by reason of section 9. Any considerations other than those specifically mentioned in section 7 are entirely foreign to a matter arising under the provisions of the Act. (In *Re McCaffrey* 1931 O.R. 512, followed.)

APPEAL from the judgment of the Court of Appeal for Ontario (1), varying an Order of a Surrogate Court judge made on the application of the widow of the testator under the provisions of *The Dependants' Relief Act,* R.S.O., 1937, c. 214. The material facts of the case are stated in the judgment now reported.

W. J. Green K.C. and *T. K. Allen* for the widow appellant.

W. E. Haughton K.C. and *Charles F. Scott* for different groups of beneficiaries, respondents.

Gordon T. McMichael for the Executor.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock and Locke JJ.

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The judgment of the Chief Justice, Kerwin, Rand, Kellock and Locke, JJ. was delivered by:

KELLOCK J.:—This is an appeal from an order of the Court of Appeal for Ontario (1) varying an order of a Surrogate Court Judge made on the application of the widow of the testator under the provisions of the *Dependants' Relief Act*, R.S.O., 1937, *cap.* 214. The learned Surrogate Court Judge directed that there be paid out of the estate to the appellant the sum of $5,000 less the value of certain assets amounting to some $4,300 in the event that the applicant should, in certain pending litigation, be declared to be the owner thereof. He also directed that there be paid to the applicant a monthly sum of $50 out of the revenue. By the order in appeal the item of $5,000 was struck out and the instalment payments were increased to $100. There is no person within the statutory class of dependants save the appellant who was, at the date of the death of the testator, fifty-one years of age.

A great deal of the record was taken up with the history of the marital relations between the appellant and the testator, including the fact that the testator had been previously married. These considerations evidently affected the decision of the learned Surrogate Court Judge, notwithstanding the decision of the Court of Appeal in *Re McCaffrey* (2) in which it is made very clear that such considerations are entirely foreign to a matter arising under the provisions of the Ontario Statute. This is again pointed out by the Court of Appeal in the present case. On the argument before us, however, these matters were sought to be relied upon by counsel for the respondents. It is therefore necessary to consider the statutory provisions in question.

By sub-section 1 of section 2 it is provided that where it is made to appear to the Surrogate Court Judge that a testator has by his will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants, or any of them, the judge may make an order charging the estate with payment of an allowance sufficient to provide "such maintenance". Sub-section 2 provides that the allowance

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(2) [1931] O.R. 512; [1931] 4 D.L.R. 930.

may be by way of instalments or of a lump sum or by the transfer of property. Section 10 as it stood at the death of the testator, by *cap.* 34, section 11 of the 1942 Statutes, provides that the value of any allowance ordered shall not exceed the amount to which the applicant would have been entitled on an intestacy.

Section 7 requires the judge hearing the application to enquire into and consider a number of different matters. These are (*a*) the circumstances of the testator at the time of his death; (*b*) the circumstances of the person on whose behalf the application is made; (*c*) the claims which any other person may have as a dependant of the testator; (*d*) any provision which the testator may have made *inter vivos* for the dependant; (*e*) any services rendered by the dependant to the testator; (*f*) any sum of money or property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses; (*g*) "generally any other matters which the judge deems should be fairly taken into account in deciding upon the application".

It is the presence in the statute of the last mentioned clause which formed the basis for the above contention. It is plain, however, that as by section 2 what is to be provided is "such maintenance", namely, adequate provision for the future maintenance of the dependant, clause (*g*) cannot be considered as authorizing the consideration of such matters. This is further emphasized by section 9, which disentitles a wife to relief where at the time of his death she was living apart from her husband under circumstances which would disentitle her to alimony. Conduct of any other character is irrelevant. It is sufficient therefore that the appellant is the widow of the testator.

During the argument on this phase of the matter, as well as with regard to the principles to be applied generally in determining the proper allowance under the statute, we were referred to a number of authorities arising in other jurisdictions, notably, New Zealand and the United Kingdom. In considering such authorities it has to be borne in mind that the statutory provisions of those jurisdictions in the authorities cited differ from those in question in the present litigation. In the case of *The Family Protection*

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Act of New Zealand, 1908, the court is authorized by section 33, sub-section 1, to order that "such provision as the court thinks fit" shall be made and by sub-section 2 the court may attach such conditions as it thinks fit or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the court to disentitle him or her to the benefit of the Act. By sub-section 13 also, the court may, after having made an order, discharge or vary it.

The relevant United Kingdom legislation is the *Inheritance (Family Provision) Act, 1938.* By section 1, (1), the court may order such reasonable provision as it thinks fit to be made subject to such conditions or restrictions as it may impose, and by sub-section 6 the court shall have regard to the conduct of the dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise. By sub-section 7 the court must also have regard to the testator's reasons, so far as ascertainable, for making the dispositions in his will, or for not making any provision or any further provision, as the case may be, for a dependant.

These provisions therefore are sufficient to differentiate substantially the task imposed upon the court under the Ontario Statute from that imposed by the New Zealand and the United Kingdom Statutes. Authorities under such statutes therefore are to be accepted with caution in applying the provisions of the legislation here in question.

In the case at bar the testator, who left a substantial estate of approximately $98,000, made no provision for the appellant. On payment of debts, succession duties and expenses the net estate will be approximately $83,000.

The position with respect to the assets which were taken into consideration by the learned Surrogate Court Judge in connection with the capital amount which he awarded the appellant, is left on the record in an unsatisfactory state. Whether the appellant is or is not the owner is a relevant circumstance to be taken into consideration under both clauses (*b*) and (*d*) of section 7. All of these assets are claimed by the executor. If, therefore, this matter has to be determined now, as all parties desire that it should

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be, consideration has to be given to this claim. The respondents also desire that any allowance in favour of the appellant be by way of periodical payments and not by way of lump sum and I think that that course should be followed.

While the record contains much evidence of the character already referred to, it is devoid of evidence as to such relevant matters as the scale of living of the testator, whether or not he had any income other than from investments, and the amount needed by the appellant to provide sufficient for her maintenance. It does appear that she has some qualifications for earning an income by nursing but the nature of those qualifications is not disclosed.

In all these circumstances, and giving due weight to the competing claims to the assets in dispute, I think the monthly sum of $150 should be ordered to be paid out of the estate to the appellant. I would therefore vary the order in appeal to this extent. The appellant should have her costs of this appeal out of the estate.

Order accordingly.

Solicitor for the appellant: *T. K. Allen.*

Solicitor for the respondents Brethour and Meyer: *Duncan A. McIlraith.*

Solicitor for the respondents Clarey: *Haughton & Sweet.*

Solicitor for the Executors: *May, Martin & McMichael.*