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*May 21, 22
*Oct. 2

CHARLES JAMES MOORE AND JANET MOORE (*Defendants*) ..... } APPELLANTS;

AND

THE ROYAL TRUST COMPANY (*Plaintiff*) ..... } RESPONDENT;

AND

GORDON B. MOORE, FRANCES MOORE, CHARLES GEORGE MOORE AND THE UNASCERTAINED ISSUE OF GEORGE MOORE (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Construction—Direction to trustees to permit beneficiaries to have "use and enjoyment" of property "as long as either of them shall occupy the same".

A testator, by clause 6 of his will, directed his trustees to permit his son A and his wife "as long as either of them shall occupy the same to have the use and enjoyment of" a named property. By clause 7 he provided in identical terms for another son, B, and his wife, in respect of a different property. At the time the will was made, both A and B were in occupation of the properties designated for their benefit, but before the testator's death B and his wife had left the property referred to in clause 7. By clause 9 the testator, "subject as aforesaid", devised and bequeathed all his property to his trustees on trust to convert and hold the proceeds for his children, their wives and issue.

Held, the effect of clauses 6 and 7 was to give to the beneficiaries named a licence to occupy the properties mentioned personally, whenever and so long as they desired, but no other right to the rents or profits of the properties. B and his wife, although they were not in occupation at the time of the testator's death, had a right at any time in the future, if they desired to do so, to occupy the property, and to have the use and enjoyment of it as directed by clause 7.

*PRESENT: Taschereau, Rand, Locke, Cartwright and Nolan JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment at trial (2). Appeal allowed.

D. A. Freeman, for the defendants, appellants.

T. G. Norris, Q.C., for Gordon B. Moore *et al.,* defendants, respondents.

R. D. Plommer, for The Royal Trust Company, plaintiff, respondent.

T. C. Marshall, for Frances Moore, defendant, respondent.

The judgment of Taschereau, Rand, Cartwright and Nolan JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) allowing an appeal from a judgment of Macfarlane J. (2) construing the will of the late George Moore, hereinafter referred to as "the testator".

The testator died on August 18, 1950, leaving a will dated February 8, 1944, probate of which was granted to the respondent The Royal Trust Company, the other persons named as executors having renounced their right to probate.

By clause 9 of the will, "subject as aforesaid", that is, subject to the provisions made in the preceding paragraphs of the will, the testator devises and bequeaths all his real and personal property to his trustees upon trust to convert and hold the proceeds for his children, their wives and issue in shares and subject to provisions the terms of which are not relevant to the questions before us.

Clauses 6 and 7 of the will are as follows:—

6. I DIRECT my Trustees to permit my son George Moore Junior and his wife Frances as long as either of them shall occupy the same to have the use and enjoyment of my property known as 3008 Thirty-sixth Avenue West in the said City of Vancouver otherwise known and described as Lot Twenty-five Block Thirty-one District Lot Two Thousand and Twenty-seven free of any duty rent or taxes and I DIRECT that my Trustees shall out of my Trust Fund pay the cost of maintaining any building thereon and the insurance of the same against damage by fire.

7. I DIRECT my Trustees to permit my son Charles James Moore and his wife Janet as long as either of them shall occupy the same to have the use and enjoyment of my property in the Municipality of Penticton British Columbia which is known as Lots Twenty-five and Twenty-six

(1) 16 W.W.R. 204, [1955] 4 D.L.R. 313.

(2) 13 W.W.R. 113, [1954] 3 D.L.R. 407.

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Block Twenty Map Nine Hundred and Thirty-seven free of any duty rent or taxes and I DIRECT that my trustees shall out of my Trust Fund pay the cost of maintaining any building thereon and the insurance of the same against damage by fire.

A number of questions were raised in the originating summons and an amendment made thereto by consent but in the Court of Appeal it was agreed that that Court was called upon to decide only the three following questions:—

(1) Was the learned Judge right in holding that Clauses 6 and 7 of the Will were entirely void for uncertainty?

(2) If not, is the restriction imposed by the words "as long as either of them shall occupy the same" void for uncertainty?

(3) If the learned Judge was wrong in holding Clauses 6 and 7 entirely void for uncertainty, and if the restriction imposed by the words "as long as either of them shall occupy the same" is not void for uncertainty, what is the meaning and effect of Clauses 6 and 7 of the Will?

It will be observed that the only difference between the wording of clause 6 and that of clause 7 is as to the names of the son and his wife and the description of the property; and, for purposes of construction, it will be sufficient to consider the wording of clause 6.

Macfarlane J. was of opinion that the words in this clause "as long as either of them shall occupy the same" constituted a determinable limitation and not a condition subsequent, that they were void for uncertainty and that, consequently, the gift failed. O'Halloran J.A. who delivered the unanimous judgment of the Court of Appeal was of the view that the words quoted were certain and unambiguous. The meaning he ascribes to them appears in clause (*a*) of the answer to question 3, set out above, as contained in the formal judgment of the Court of Appeal; the complete answer to question 3 being as follows:—

(*a*) Under clauses 6 and 7 of the said Will the beneficiaries respectively named therein are entitled to the use and enjoyment of the premises respectively described in the said clauses as long as they continue to live there or do not abandon them as a home and the direction in favour of such beneficiaries shall terminate if, as and when they cease to live there in the ordinary sense that they abandon their occupancy or possession of the premises as a home;

(*b*) Insofar as clause 6 is concerned, Frances Moore, widow of George Moore Junior is entitled to the use of the premises described in the said clause as long as she shall continue to live there or not abandon such premises as a home; such occupancy is free of any duty or rent and it is the duty of the Trustee out of the Trust Fund created under the said Will to pay the taxes on the said premises, the cost of maintaining the building thereon and the insurance of the same against fire.

(c) Insofar as clause 7 is concerned, Charles James Moore and Janet Moore do not retain any right to the use and enjoyment of the premises described in the said clause, and the said premises form part of the estate of the deceased George Moore in the same manner as if the said clause had not been written into the Will;

At the date of the will, George Moore Junior and his wife Frances were residing in the property described in clause 6 of the will and continued to do so until the death of the former on February 4, 1955 and Frances Moore has ever since continued to reside there.

At the date of the will, Charles James Moore and his wife Janet were residing in the property described in clause 7 of the will but a few years before the death of the testator they moved to Westview, British Columbia and the property described in clause 7 was let to a tenant. This was the situation at the death of the testator and since then the trustees have continued to let the property and have received the rentals. Up to the time of his death the testator allowed Charles James Moore and his wife to retain the rental income from the property, but I do not regard that fact as relevant to the question of the construction of the will.

Charles James Moore and Janet Moore have appealed from the judgment of the Court of Appeal and ask a declaration that they are jointly entitled to the property described in clause 7 as tenants for life. The respondent Frances Moore supports the judgment of the Court of Appeal. The other respondents, for whom Mr. Norris appears, support the judgment of the Court of Appeal; alternatively, they ask that the judgment of Macfarlane J. be restored.

After examining all the cases referred to by counsel in argument and in the factums, some of which are not easy to reconcile with each other, and returning to the words of the will before us I have concluded that the intention of the testator according to the true construction of the will was not to give to George Moore Junior and Frances his wife an estate for life in the property described in clause 6, determinable on their ceasing to occupy such property, or indeed any estate therein, but merely a licence to occupy such property personally, such occupation to be by both or by one of them. From the death of the testator the legal estate in the property in question was in the trustees on

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trusts for sale, with a power of postponement (under clause 12 of the will), but subject to the obligation to permit George and Frances, or either of them, personally to occupy the property rent free and with the other benefits set out in clause 6. I do not think that the words "as long as", as used in clause 6, necessarily require continuous occupation by one or other of George and Frances as a condition of their being entitled to the permission given by the clause, but rather that the testator has used these words as the equivalent of "while" or "during the time that" or "during such times as". Bearing in mind the limited assistance that is to be derived from the construction placed upon similar words in another instrument, I am to some extent fortified in this view by the decision of R. M. Meredith J., affirmed by W. R. Meredith C.J. and MacMahon J. in *Wilkinson v. Wilson* (1), in which words conferring benefits on the plaintiff "so long as he shall remain a resident on said lands" were construed as not requiring continuous residence but as entitling the plaintiff to the benefits during such times as he resided on the lands; and in which it was held that the plaintiff's absence during several years did not bring about a forfeiture of his rights.

If I am right in this view of the meaning of the clause, it follows that during such times as either George or Frances is in personal occupation of the property described in clause 6 they are entitled to use and enjoy it free of rent or of any obligation to pay taxes, insurance premiums or costs of maintenance, but that they are not entitled to let the property or to claim any rents or profits that may be derived from it when neither of them is in personal occupation. Any rents or profits received during such periods would go to the trustees on the trusts declared for the residue of the estate. A similar construction should be placed on clause 7 of the will.

It follows from what I have said above that, in my opinion, Frances Moore is entitled to continue to reside in the property described in clause 6 and that should she cease to reside there in the future she could none the less return to the property and claim the benefits of such clause.

(1) (1894), 26 O.R. 213.

It follows also that Charles and Janet Moore have the right to call upon the trustees to permit them to occupy the property described in clause 7 and are entitled while either of them is residing there to the benefits of such clause.

It is true that on this construction the sale of the properties described in clauses 6 and 7 cannot take place during the lifetime of the beneficiaries unless they consent, and that practical difficulties may be encountered in regard to the trustees renting the properties during such times as the beneficiaries do not wish to avail themselves of the permission to occupy; but it will be to the advantage of such beneficiaries, inasmuch as they share in the income from the residue, to facilitate the renting of the properties during any substantial periods of absence and it is to be hoped that the suggested difficulties will not prove insurmountable.

I would allow the appeal to the extent of varying the formal order of the Court of Appeal so that the answer to question 3 therein set out shall read as follows:—

(*a*) Under clauses 6 and 7 of the said Will the beneficiaries respectively named therein are entitled to the use and enjoyment of the premises respectively described in the said clauses during such time or times as they or either of them occupy such premises personally, but are not otherwise entitled to the rents or profits thereof.

(*b*) In so far as clause 7 is concerned, Charles James Moore and Janet Moore or either of them are entitled to occupy the premises described in the said clause in the manner set out in clause (*a*) of this answer, upon giving the trustees reasonable notice of their desire so to do.

The order as to costs made by the Court of Appeal should stand and the costs of all parties in this Court should be paid out of the estate, those of the respondents The Royal Trust Company, Gordon B. Moore and the unascertained class represented by Mr. Norris as between solicitor and client.

LOCKE J.:—Some assistance in construing clauses 6 and 7 of the will is to be obtained by a consideration of its other provisions and of the circumstances existing at the time of the death of the testator in August 1950.

After the clauses which have occasioned the present dispute, the testator bequeathed his entire estate to the trustees upon trust to invest the capital and to divide what was referred to as the trust fund into three equal shares. As to one of these, the trustees were directed to hold the same upon trust during the life of the testator's son Gordon

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Moore to pay him from time to time or to employ for his maintenance and advantage such part of the capital and income thereof as they, in their uncontrolled discretion, should think fit. The reason for this provision appears to have been that Gordon Moore was apparently regarded by his father as incapable of wisely handling his own affairs and it was shown that, as of the date of the application made by the Royal Trust Company, he was mentally infirm and incapable of doing so or understanding the nature of the proceedings.

The other two shares of the trust fund were directed to be held upon similar trusts, namely, to pay one-half of the income to the sons George and Charles James and one-half to their respective wives and, upon the death of either husband or wife, to pay all of the income to the survivor in the case of the sons during their lifetime or, should the survivor be the wife, until her death or remarriage. Upon the death of the sons and, should their wives survive them, upon the death or remarriage of either of them, the shares were to be held as to both capital and income in trust for their children.

A further provision of the will enabled the trustees in their uncontrolled discretion to raise from time to time any part of the capital of the shares held in trust for the sons George and Charles and to employ it for the benefit, maintenance or advantage of the son, his wife or their children.

The trustees named in the will, in addition to the trust company, were Mr. J. R. Kerr and Mr. R. J. Filberg, personal friends of the testator in whose judgment he had confidence.

By s. 22 of the *Wills Act*, R.S.B.C. 1948, c. 365, every will is to be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will. As the material shows, the testator had purchased the house in Penticton as a place of residence for Charles James Moore and his family in 1936 and they resided there until April 1948, when the son decided to change his occupation and endeavour to obtain employment elsewhere. At that time he and his family moved to Westview, British Columbia. Charles James Moore says that he discussed the matter at that time with his father and rented the Pentic-

ton house with his father's approval and consent on April 8, 1948, for a term of two years. A short memorandum of lease dated April 8, 1948, signed by the son and by the testator was produced with the material filed on the application. Charles James Moore thereafter moved to White Rock, British Columbia, where he has since lived. Between the date the Penticton house was leased and the death of the testator, the son received the rent by his consent.

Affidavits were filed by Charles James Moore and by his wife stating that they were desirous of returning to reside in Penticton but were restrained from doing so in the meantime by consideration for their daughter who was in a state of ill health.

In the case of the son George Moore and his wife Frances, they appear to have lived continuously in the house on 36th Avenue in Vancouver since a period some years prior to the death of the testator, and upon the death of her husband Frances Moore has continued to live there.

In *Perrin et al. v. Morgan et al.* (1), Viscount Simon L.C. said that the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended, and that the question is not what the testator meant to do when he made his will but what the written words he used mean in the particular case. As required by the section of the *Wills Act* above referred to, the will is to be construed as if it had been made immediately before the death of George Moore in August 1950.

In my opinion, in considering the will as a whole, it is apparent that the desire of the testator was to ensure a competence to his sons, their wives and their children, and not to permit the sons George or Charles to obtain control of any part of the capital unless, in the good judgment of the three trustees, this would be advisable in the interests of themselves and their families. It was, I think, part of his plan that both George and Charles and their families should have a home provided by his estate and maintained at its expense.

(1) [1943] A.C. 399 at 406, [1943] 1 All E.R. 187.

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Immediately prior to the death of the testator, the situation in regard to the Penticton house was that it had been rented and Charles James Moore was living elsewhere. The son had vacated it under the above-mentioned circumstances. The language of clause 7 permitting Charles James Moore and his wife to have the use and enjoyment of the Penticton property "as long as either of them shall occupy the same" obviously did not mean as long as they continued to occupy it since neither was in possession, to the knowledge of the testator. The licence, as I think it is, was thus clearly to be exercised by them thereafter and, in my opinion, has not been affected by the fact that at least from 1950 to the time of the application in 1954 they continued to live at White Rock and may still be exercised by them.

As to clause 6, the rights of Frances Moore are unaffected and continue for the period defined by the will.

I have considered with care the judgment of the learned trial judge, Macfarlane J., and the authorities relied upon by him for his conclusion. With great respect, my consideration of the evidence leads me to the conclusion that the intention of the testator in this case is ascertainable by consideration of the terms of the will and the circumstances permissible to be considered in construing it.

I agree with the answers to the questions proposed by my brother Cartwright and would allow the appeal to the extent indicated by him. I also agree with his proposed order as to costs.

Appeal allowed with costs; order of Court below varied.

Solicitors for the appellants: Freeman, Freeman, Silver & Koffman, Vancouver.

Solicitors for Gordon B. Moore et al., defendants, respondents: Norris & Cumming, Vancouver.

Solicitors for The Royal Trust Company, plaintiff, respondent: Douglas, Symes & Brissenden, Vancouver.

Solicitors for Frances Moore, defendant, respondent: Taylor, Marshall & Munro, Vancouver.