JACK STANLEY THORNICROFT v MURRAY EVANS AND IVAN McKlLLOP (1985) Z.R. 172 (H.C.)

HIGH COURT
(SAKALA, J., IN CHAMBERS)
14TH JUNE, 1985
(CASE NO.1985/HP/62)

Flynote
Succession - Wills - Inheritance (family Provision) Act 1938 - Time for application - When the six months period within which to make application begins to run.

Headnote
Section 2 (1) of the Inheritance (Family Provision) Act, 1938 provides that to be valid, an application for an order of maintenance out of deceased's estate shall be made within six months from the date on which representation in regard to the testator's estate for general purposes is taken out.

p173

In this case letters of probate were granted on February 16th, 1984. The application for an order of maintenance out of the deceased's estate was made in January,1985, almost a year after the grant of letters of probate. Whether the application was valid.

Held:
The six months period begins to run from the date of the grant of probate since that is the time when representation in regard to the testator's estate for general purposes can be taken out.
Since the plaintiff filed his application after the expiration of the six months period, her claim was barred for being out of time.

Cases cited:
(1) Re Browridge, [1942] 193 L.T.185.
(2) Re Styler, [1942] 2 All E.R.201.
(3) Diamond v Standard Bank (1965) Z.R., 61.
(4) Re Bidie (1948) 2 All E.R.995.

Legislation referred to:
Inheritance [Family Provisions] Act of England, s. 2 (1).

Judgment
SAKALA, J.:

The plaintiff suing by an Attorney, has applied under the Inheritance (Family Provision) Act, 1938 for an order that such reasonable provision as to the court may seem fit may be ordered to be made out of the testator's net estate for her maintenance. The application is supported by an affidavit sworn by the Attorney. There is also an affidavit in opposition sworn by counsel for the defendant.

The facts of the case as can be ascertained from the affidavit evidence and the exhibits attached thereto are that the testator and the plaintiff were married sometime in 1929 in the United Kingdom. The testator died on 26th August, 1983 in Livingstone, Zambia. At the time of the

testator's death the parties had been on separation. They had been on separation for about 30 years during which period the plaintiff lived in South Africa and was not maintained by the testator. The plaintiff is now aged about 76 years. During the separation the marriage between the parties was still valid and subsisting; but the testator lived with lady now deceased with whom he had a daughter named Sheila Rankin still living. The testator left a will in which he left his entire estate to Sheila Rankin. The testator's estate comprises of residential house at plot 594, Livingstone and cash at the Bank. The testator did not make any provision for the plaintiff. The foregoing facts are common cause.

On behalf of the plaintiff Mr Muzyamba pointed out that the testator's estate at the time of his death was estimated at K65,000, consisting of a house and cash at the bank. He contended that the points the court should take note of are that the plaintiff's health is now failing,

p174

and that at 76 years of age she is quite advanced. She has no means of her own and is unable to provide herself as a result of her age and poor health. Counsel submitted that at the time of the testator's death the parties were married to each other and thus the deceased had moral and legal obligation to provide for the plaintiff's maintenance despite the fact that the parties lived apart for a long period.

Mr Muzyamba cited several authorities, some of which I will be dealing with later in this ruling, in support of his arguments and submissions. He further submitted relying on the authorities that in the circumstances of this case the deceased's non-providing for the plaintiff was unreasonable and unwarranted to merit the intervention by this court by making an appointment for her out of the estate. Counsel urged the court to consider lump sum payment in the light of foreign exchange problems which would make periodical payments difficult as they would require exchange control permission each time they became due.

Mr Jearey on behalf of the defendant submitted first that the court has no jurisdiction to grant the application as it is out of time since in terms of Section 2 of the Act it was to be made within six months. He pointed out that the grant of probate was on 16th February, 1984. and the application was not filed until January, 1985. Mr Jearey submitted that under the Act there is discretion on the part of the court. The time provisions are mandatory.

The second part of Mr Jearey's submission is that as the plaintiff seeks for a lump sum payment, Section 1(2) of the Act provides that any maintenance must be by way of periodical payments except where the value of the estate does not exceed 2,000 pounds. Counsel pointed out that according to the affidavit in opposition the value of the estate is under K50,000 and that the liquid assets of the estate are very small. The expenses incurred by the executors since the deceased's death have almost exhausted the case in the estate living only the deceased's house recited at K400 per month. Mr Jearey further submitted that this is a case where the plaintiff must satisfy the court that the deceased acted unreasonably in leaving the estate for the maintenance of the infant daughter in its entirety disregarding the claims of his wife whom he had neither seen nor maintained for approximately 30 years. After referring to some of the authorities cited by Mr Muzyamba, Mr Jearey submitted that in the light of inflation the estate is small and clearly insufficient to maintain both the daughter and the widow.

In reply Mr Muzyamba argued that this is an application on merit.

Paragraphs 7,8,9,10,11,13,14, and 16 of the affidavit in support read as follows:

> "7. During the early part of the said period of separation the widow (donor) who is now aged 76 years enjoyed relatively good health and was able to sustain herself for her basic requirements without the assistance of the said late husband.

p175

8. Due to poor health and old age however she has, found it increasingly difficult to sustain herself as she is due to ill-health prevented from supplementing her, meagre old age pension by engaging in gainful employment, and has had to endure the misery of being the occasional beneficiary of sympathetic relatives and friends, as her savings have now been exhausted.
9. The widow's basic requirements now average R529 per month to enable her meet her living expenses which include:

(a) Rent ... ... R 215.92
(b) Lighting and Gas ... ... R 13.28
(c) Telephone ... ... R 20.00
(d) Medical Aid ... ... R 30.00
(e) Food and Sundry .... R 250.00

10. Her only (regular) sources of income are:

(a) Old-age Pension ... ... R149.50 per month
(b) Son-in - Law's contribution R100.00 per month
(c) Daughter's contribution ... .. R 75.00 per month

R324.50

The shortfall of R204.70 is occasionally provided by sympathisers and friends as the widow is a virtual pauper.

11. This situation I am informed by the widow and verily believe causes her grave mental anguish and is adversely affecting her health and especially in view of the ever increasing cost of living.

13. I am verily informed by the donor and reasonably believe that as a direct consequence of her negligible means her relatives and sympathisers are increasingly finding it intolerable to contribute to her basic expenses as they themselves have other commitments and responsibilities to cater for which may sooner or later drove her into the old people's home which she severely resents, and would in the circumstances be ill-fitting.

14. The deceased's estate is estimated to constitute a residential house on Plot 594, Livingstone, valued at over K50,000.00, cash at Bank of over K15,000.00 and other household goods and equipment.

16. The deceased failed to make provision for the widow and numerous representations have been made to the executors of the estate to consider voluntarily paying out the estate for the maintenance of the widow but without success."

p176

And paragraphs 6,7,8 and 9 of the affidavit in opposition read:

"6. That the gross value of this estate for estate duty purposes was as follows:

Cash at Bank on current account ... . K 1,211.83
Cash at Bank on deposit K11,063.39
Household goods, furniture etc. ... . K 2,000.00
Leasehold property (Stand 594 Livingstone
as per valuation by Messrs Anderson and
Anderson).... ... ... K35,000.00

K49,275.22

7. Estate duty paid was K2,463.7 and the legal costs of administering the estate estimated at approximately K1,500.00.

8. I am informed by the said Ian McKillop that the estate's only income is rent of K400.00 per month gross being received from a tenant of the above property together with a small amount of interest on the funds on bank deposit.

9. I am similarly informed and verily believed that the beneficiary of the estate Sheila Rankin is presently attending a Masonic School England where she is maintained free of charge to the estate but that this arrangement will terminate in two years time and at that stage the Executors will require all the assets for the purposes of her education and maintenance."

At this stage it is convenient to observe that the purported will of the testator, despite the contents of paragraph 15 of the affidavit in support was not made part of the exhibits. The age of Sheila Rankin has also not been revealed to court.

At this juncture it is also necessary to consider some of the tests applied in applications based on the Inheritance (Family Provision) Act, 1938. In *Re v Brownbridge* (1) Bennet, J., observed that the Act did not throw upon the testator a duty to make provision for his dependants. It only gave the court the right to interfere if it come to the conclusion that the dispositions which were made were unwarranted. In *Re Styler* (2) at page 204 Morton J., agreeing with Bennet, J.'s observations said:

> "I do not think the court should interfere with a testatrix's or testator's dispositions merely because the judge may think that he would have been inclined, if he were in the position of the testator or testatrix, to make some provision for a particular person. I think the court has to find that it was unreasonable on the part of the testatrix or the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision."

p177

Coming here at home is the case of *Diamond v The Standard Bank* (3). This case was cited by counsel for the plaintiff in reply. At pages 65-66 Charles, J., stated:

> "The court's jurisdiction to make reasonable provision for the maintenance of a dependent only arises if it is of the opinion, that is if it is satisfied, that such provision has not been made by the testator. If it is satisfied as to that, the court then is bound, in my opinion, to make such provision or further provision as appears to it to be reasonable, notwithstanding the use of the permissive word 'may'. It would be contrary to the manifest object of the legislature to construe the word 'may' literally, so to enable the court to find that reasonable provision has not been made by the testator and then to refuse to correct the discrepancy. The court may, of course, consider that the testator had good reason for not making provision or greater provision for a dependent but that is a consideration relating to the question whether he had made reasonable provision, and not to the question whether a failure to make reasonable provision should be corrected by the court."

The issue for me to decide, applying the tests set out above appears to be whether on the facts not in dispute it was unreasonable on the part of the deceased to make no provision for the plaintiff and leave the entire estate to the infant daughter. In applying this test I am very mindful that each case has to be decided on its particular facts.

Mr Jearey has raised in his submission two important preliminary issues, namely, that this court has no jurisdiction to entertain this application as it was made out of time and that the court cannot make lump sum payment as requested. Section 2 (1) of the Inheritance (Family Provision) Act, 1938 provisos as follows:

"2 (1) Except as provided by section four of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out."

Mr Jearey's submission is that the application should have been made within six months from the grant of letters of probate. In the instant case the grant of probate was on 16th February, 1984. The application was filed in January, 1985, almost a year after the grant of letters of probate. The provisions of section 2 (1) of the Inheritance (Family Provision) Act, 1938 were considered at great length in the court of appeal in Re Bidie (4). The facts were that:

> "A testastor, who made a will dated February 10th, 1937, died on January, 16th, 1945. The will was not found, and on April 13th, 1945, on the assumption that the testator had died intestate, full grant of administration was made to the widow and one of her children. When the will was discovered the grant of administration was revoked, and on September 7th, 1946, grant

p178

> of probate was made to the executor named in the will, which made no provision for the widow. On January 8th, 1947, a summons was issued by the widow claiming that some provision should be made for her under the Act of 1938."

The trial court held that on construction of section 2(1) of the Act, the date on which representation in regard to the testators estate for general purposes was first taken out was April 13th, 1945, when the letters of administration were granted and, notwithstanding the subsequent revocation thereof, time began to run for the purposes that section from that date. The widow's claim was held barred. But on appeal the court of appeal held that the widow's claim could be considered, since her application was made within six months from the date of the grant of probate , though more than six months from the grant of administration. The reasoning of the court of appeal seems logical in that the Act applies only to distribution of testamentary dispositions and not to distribution of intestate estates. The operation of the Act is based on the existence of a will that does not make reasonable provision for the dependants. The existence of a will is only brought to light by letters of probate. It would therefore appear that the six months period begins to run from the date of the grant of probate since that is the time when representation in regard to the testators estate for general purposes can be taken out. Applying this principle I uphold Mr Jearey's submission and rule that the widow's claim is barred for having been made out of time.

In the event I am wrong on this point I propose to deal with the other preliminary point as well as the merit of the whole application. The other preliminary point is that maintenance under section 2(1) of the Act must be by way of periodical payments except where the value of the estate does not exceed 2,000 pounds. I agree with Mr Jearey's submission on this point but I do not think that the submission on the facts of the case before me goes to the root of the whole application because if the application was to succeed there would be nothing stopping me from ordering periodical payments. This disposes off the second preliminary issue and I now turn to the merits of the application.

The fact that the testier made no provision for the plaintiff is not in dispute. It is common cause that his entire estate was left with the infant daughter. From the affidavit evidence I will accept that at the time of the deceased's death the estate comprised of a house and cash at the bank valued at about K65,000. Was it, therefore, unreasonable or unwarranted for the testator not to make provision for the widow? The crucial facts in this application are that the widow was separated from the deceased for 30 years. During that period she was not dependent on the deceased. During that period he lived in South Africa where she continues to live up to now. The reasons for separation have not been disclosed to court. There is now an infant daughter whose mother is

now deceased. On all these facts and terms of section 1 (6) (7) of

p179

the Act, I am unable to say that the testator's failure to make any provision for the widow was unreasonable or unwarranted. Thus this application on both the first preliminary issue and on merit cannot succeed. It is therefore refused. I make no order as to costs.

Application refused
