1930
*Oct. 7.
*Oct. 27.

PEARL WALKER (PETITIONER).....APPELLANT;

AND

IDA McDERMOTT (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Testator's Family Maintenance Act—Will—Whole estate bequeathed to widow—Petition by married daughter—Interpretation of Act—R.S.B.C. 1294, c. 256, s. 3.*

Under the *Testator's Family Maintenance Act* (R.S.B.C. 1924, c. 256), the provision, which the court is authorized to make in the circumstances stated in section 3, is "such provision as the court thinks adequate, just and equitable." The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the "proper maintenance and support" of the wife, husband or children, as the case may be, on whose behalf the application is made. What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court, on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view) consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account. Applying these principles to the circumstances of this case, where the only daughter of the deceased brought an application under the Act for an order directed against his second wife, sole beneficiary under the will, *held* that the trial judge was right in deciding that the widow should be called upon to forego part of her annual income in order to make some provision for the applicant. Rinfret J. dissenting.

*Per* Rinfret J. (dissenting).—Although the *Testator's Family Maintenance Act* leaves to "the judge before whom the application is made" a wide discretion to pronounce both upon the adequacy of the provision for "proper maintenance and support" already existing at the time of the application and upon the "adequate, just and equitable order" which ought to be made under the circumstances, such discretion, although perhaps elastic, must be exercised judicially and according to legal rules. The "opinion of the judge before whom the application

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

is made" is not in every respect to be held final and conclusive. There are cases when a court of appeal may and should intervene. Failure on the part of the judge of first instance to take the proper view of the scope and application of the Act would be one of those cases.—Upon the circumstances of this case, the appellant has failed to make out a case for the application of the Act, the purview or intent of which is that the husband, the wife or the children should not be left without "proper maintenance and support", while the testator disposes of an estate sufficient to provide for it.

Judgment of the Court of Appeal (42 B.C. Rep. 184) rev.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial court, Morrison C.J.S.C. and dismissing the appellant's petition for an order for proper maintenance under the *Testator's Family Maintenance Act*.

The facts of the case and the questions at issue are stated in the judgments now reported.

*J. A. Ritchie K.C.* for the appellant.

*A. H. Macdonald K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Lamont JJ.) was delivered by

DUFF J.—The pertinent enactments of the *Testator's Family Maintenance Act* of British Columbia, c. 256, R.S.B.C., 1924, are these:

3. Notwithstanding the provisions of any law or statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the court thinks adequate, just and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband or children.

4. The court may attach such conditions to the order 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 an order under this Act.

5. In making an order the court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment.

The provision which the court is authorized to make in the circumstances stated in the section, is, "such provision as the court thinks adequate, just and equitable." The

(1) (1930) 42 B.C. Rep. 184; [1930] 1 W.W.R. 332.

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conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the "proper maintenance and support" of the wife, husband or children, as the case may be, on whose behalf the application is made.

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

The net value of the testator's estate was $25,000. The testator's widow became, on the death of the testator, entitled to $3,000, as insurance, and she was the owner of real estate valued at $2,000. The testator had one daughter by a former wife, the appellant. Before the testator's death, she had married, and since the order made by Mr. Justice Morrison to which I am coming immediately, she has had two children, twins. Her husband is employed in a clerical capacity in Kimberley and receives a salary of $150 a month, and of this $25 a month is required for rent. He has some shares of Big Missouri stock for which he is said to have paid $380; but, apart from this and the furniture in their residence, he has no assets.

By his will, the whole of the testator's estate was left to his widow. No provision was made for his daughter, who, for some years prior to her marriage, had been earning her

own living as a stenographer. Mr. Justice Morrison thought that, in these circumstances, an allowance of $6,000 should be made, but that from this should be deducted a sum of $1,000 that had been voluntarily paid to the applicant by the widow. The Court of Appeal reversed this judgment, and held that the applicant was entitled to nothing in addition to the $1,000 she had already received.

The view of the learned judges in the Court of Appeal seems to have been that no further allowance would be "just and equitable" within the meaning of the statute. This view was very largely based upon considerations touching the claims of the wife on account of her services in the husband's business, in which the greater part of the assets left by him had been acquired.

The widow was married to the testator in 1914; she then possessed the sum of $1,500, profits derived from the keeping of a "rooming-house" somewhere in the State of Idaho. The testator was then a bartender; later he bought the Crown Point Hotel in Trail, British Columbia, the first instalment money ($1,000) being paid by his wife. With the exception of this instalment, the whole of the purchase money was paid out of the profits of the business. The evidence makes it pretty clear that the business was far from prosperous until 1923 or 1924, when the testator obtained a beer licence under the amendment of the *Liquor Act* of 1923. It was during the three and one-half years, in which he enjoyed the benefit of this licence, that the means were acquired from which outlays in repairs and improvements to the hotel were provided for, mortgages were paid off, and the unpaid instalments of the purchase price liquidated.

Shortly before his death, he gave an option on the hotel for $30,000, which was exercised after his death. This sum constitutes the only considerable asset of the estate. It is not disputed that the value of the hotel had its principal source in the enhancement of prices of real estate in Trail, consequent upon the expansion of the business of the Consolidated Smelters.

There is a good deal of evidence that the testator, especially in the years before he obtained the beer licence, drank

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very heavily; and that a considerable share of the burden of carrying on the hotel, both in responsibility and in labour, fell upon the widow. On the other hand, there is little doubt that during the prosperous time following the obtaining of the licence, when the business had become profitable from the selling of beer, the testator managed this part of the business, and the evidence quite fails to establish that the profits accruing therefrom were not due, chiefly at all events, to his exertions.

The testator, no doubt, felt himself under great obligations to his wife, and justly so. But I can see nothing in all this to lead to the conclusion that the testator, if properly alive to his responsibilities, as father no less than as husband, ought to have felt himself under an obligation to hand over all his estate to his wife and leave his only child without provision. Twenty-five thousand dollars, the net value of the testator's estate, would purchase a life annuity of $1,875 for the widow, while the $5,000 she possessed in her own right would purchase her an additional annuity of $375. I do not think the learned trial judge was wrong in thinking that the widow should be called upon to forego $450 of this annual sum, in order to make some provision for the applicant, nor do I think that a father in the position of the testator, and justly appreciating the situation of his daughter, a young married woman, and the possibilities attaching to her situation, would, in the circumstances which I have outlined above, have considered that adequate provision existed for her "proper maintenance and support"; nor, weighing the competing claims of his wife and daughter, that he would have thought such provision as that made under the order of Morrison J. either unjust or inequitable.

Mrs. McDermott's affidavit contains this paragraph:

> That out of the sale price of the said property I received $10,000 cash the balance being payable in annual instalments over a period of seven years.

No point was made on the argument of the facts stated in this paragraph, and, consequently, I have assumed, that the deferred payments under the sale have either been paid or secured in a manner equivalent to payment.

The appeal should be allowed with costs in the Court of Appeal and in this court, and the judgment of Morrison J. restored.

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Rinfret J.

RINFRET J. (dissenting).—Under the *Testators' Family Maintenance Act* of British Columbia (c. 256 of R.S.B.C.), if any person dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of (his) wife, husband or children, the court may * * * order that such provision as the court thinks adequate, just and equitable in the circumstances shall be made out of the estate, etc.

The appeal is from a judgment of the Court of Appeal of British Columbia reversing an order of the Supreme Court of that province granting an application under that statute made by the present appellant.

The statute leaves to "the judge before whom the application is made" a wide discretion to pronounce both upon the adequacy of the provision for "proper maintenance and support" already existing at the time of the application and upon the "adequate, just and equitable order" which ought to be made under the circumstances. It need not be said, however, that such discretion, although perhaps elastic, must be exercised judicially and according to legal rules. The "opinion of the judge before whom the application is made" is not in every respect to be held final and conclusive. There are cases when a court of appeal may and should intervene. Failure on the part of the judge of first instance to take the proper view of the scope and application of the Act would be one of those cases.

With the greatest deference, I think the Court of Appeal of British Columbia was right in applying these considerations to the order under review. Here, the testator made no provision for his child, the petitioner. But I cannot construe the Act to mean that in every case where no provision is made, the section above quoted is mandatory and the court must make an order. In my judgment, the intention of the legislature was that the husband, the wife or the children should not be left without "proper maintenance and support," while the testator disposed of an estate sufficient to provide for it; and to that extent only, in order to carry out such intention, is the court permitted to interfere with the liberty of any person to bequeath his property as he pleases.

The first inquiry therefore must be whether, at the death of the testator, the petitioner lacked those means of maintenance and support which would be proper, having regard

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to her ordinary circumstances in life. For that purpose, the court should consider how she has been maintained in the past and what were, when the testator died, the means of support available to her. So far as the evidence shews, the appellant petitioner was raised in very humble circumstances. When, in 1914, her father purchased an undivided one-half interest in the Crown Point Hotel, at Trail, he did not own any real or personal property whatsoever, and the first cash instalment paid by him on the purchase price had to come out of money supplied by the respondent. For some years following, business was very dull and there was little to do. It was not until 1923, when the *Liquor Control Act* was amended to permit the sale of beer by the glass, that the appellant's father having obtained a bar licence, the hotel began to reap substantial profits. The appellant was then working as a stenographer in the Bank of Montreal at a salary of $60 a month. She continued as such until her marriage, save for two months in another situation and a small yearly increase. She had her room free at the hotel, but was paying for her meals, took care of her room and provided her own linen and laundry service.

In 1927, the petitioner was married to a clerk employed at the office of the Consolidated Mining and Smelting Company of Canada, Limited. At the time of the petition, she and her husband were residing at Kimberley. He was in charge of the office part of the general store of the company, receiving a salary of $150 per month. Upon his marriage, the husband was given by his father a piece of ground in the city of Trail upon which he erected a house. He has since sold it and his equity was $774.81. When the purchaser has completed all payments, there will be a further sum of $500 due them. In Kimberley, they pay a rent of $25 a month for the house in which they live. They own their household furniture, the value of which is placed by them at $500 (exclusive of wedding presents) and by the respondent at $1,000. The petitioner never has been dependent on her father since she got her employment in the Bank of Montreal, in 1923, and certainly not since her marriage. She has never been since then and is not now

in need of maintenance and support out of the estate and is adequately maintained and supported by her husband, who is a young man with a good income, a permanent employment, a reasonable opportunity of advancement and fully capable of supporting her in the future. In fact, from all appearances derived from the record, she lives now more comfortably than during the years prior to her marriage. She does not state that she is in need of maintenance, nor that her husband and herself are unable to meet their necessary household and incidental expenses of living. All she says is that they "are unable to save any money whatsoever." Even that is not borne out by the facts, since they own and maintain a Chevrolet motor car; and when the respondent made them a present of $1,000, they invested part of it in the purchase of Big Missouri stock and the appellant took a trip to Seattle, which cost her $100.

The appellant complains that the judgment of the Court of Appeal does "not take into account not only the chances of dismissal of the ordinary kind, but also the necessarily precarious business in which (the husband) is employed." These and other contingencies are possibilities in every case whatever. A young husband may die prematurely. A widow or a child now rich may lose everything through adverse circumstances. There would be no limit to considerations of that character, and it would mean that, unless provision such as is suggested by the appellant is made in every will, the latter should be recast and some order must be made in all cases. I would not think that, when considering the applicability of the statute, these possibilities should be taken into account. But suffice it to say that, in the present instance, the probabilities lead in a direction contrary to the contention and the claim of the appellant. It is much more likely than otherwise and much more in accordance with ordinary and reasonable expectation that the appellant's present condition will go on improving as years go by and, at all events, that both herself and her husband will be fully capable of maintaining themselves in the future.

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In my view, the appellant has failed to make out a case for the application of *The Testators' Family Maintenance Act*. She does not come within the purview or intent of the Act, and I would dismiss her appeal with costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *R. J. Clegg.*

Solicitors for the respondent: *McDonald & Prentier.*