Privy Council Appeal No. 7 of 1983

Helen Margaret Hogan and Others — *Appellants*

v.

Brian Robert Hogan and Another — *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1983

Present at the Hearing:

LORD DIPLOCK
LORD WILBERFORCE
LORD KEITH OF KINKEL
LORD SCARMAN
LORD TEMPLEMAN

*[Delivered by **Lord Templeman**]*

The question in this appeal is whether the Children (Equality of Status) Act, 1976 of New South Wales had retrospective effect so as to enable a child born out of wedlock of a testator, who died before the Act came into force, to claim to be awarded under the Testator's Family Maintenance and Guardianship of Infants Act, 1916 maintenance out of the estate of the testator on the ground that the will of the testator ought to have made provision for that child.

Section 3 of the 1916 Act provides *inter alia* that where a testator disposes of property by will in such a manner that his children are left without adequate provision for their proper maintenance, the court may order such provision if the court shall think fit. By section 4 any provision ordered by the court shall take effect as if it had been made by a codicil to the will executed by the testator immediately before his death.

In the present case the testator Bede Leo Hogan by his last will dated 1st March 1946 appointed the first respondent to be his executor and gave all his estate to the second respondent. The appellants are eight children of the testator born out of wedlock. The testator died on 30th April 1977. The relevant provisions of the 1976 Act, including sections 6 to 9 inclusive, came into force on 1st July 1977. The appellants in 1978 issued summonses claiming maintenance under section 3 of the 1916 Act.

By section 6 of the 1976 Act:-

> ".... whenever the relationship of a child with his father and mother, or with either of them, falls to be determined by or under the law of New South Wales, whether in proceedings before a court or otherwise, that relationship shall be determined irrespective of whether the father and mother of the child are or have ever been married to each other, ..."

It is possible but not essential to construe section 6 standing on its own as disclosing an intention that the Court shall be able to award maintenance under the 1916 Act to persons who were not children of the testator at the time of his death but achieved the status of children subsequently when the 1976 Act came into force. McLelland J. in the Supreme Court of New South Wales and the Court of Appeal of New South Wales (Street C.J., Glass and Mahoney JJ.A.) decided that the 1976 Act did not have the retrospective effect claimed by the appellants. Their Lordships agree.

The scheme of the 1976 Act read as a whole is only consistent with the view that the equality of status obtained on 1st July 1977 by a child born out of wedlock does not entitle that child to be treated as though he had attained that status on 30th April 1977 for the purposes of the 1916 Act. Sections 8 and 9 of the 1976 Act provide that dispositions *inter vivos* made before commencement of the 1976 Act, testamentary dispositions of testators who die before the Act and the devolution of the estates of intestates who die before the Act shall not be affected by the Act. It is inconceivable that the legislature intended that the appellants should be treated as strangers for the purposes of the dispositions contained in the will of the testator and for the purposes of the devolution of the estate upon intestacy but should be treated as children of the testator for the purposes of enabling the court to make dispositions under the 1916 Act which would take effect as if they had been made by a codicil executed immediately before the death of the testator.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the first respondent of the appeal to Her Majesty in Council. The first respondent will be entitled to his costs as a trustee out of the estate of the testator, so far as those costs are not borne and paid by the appellants.