Privy Council Appeal No. 61 *of* 1943

Thomas Kay Stuart Sidey - - - - - - *Appellant*

v.

The Perpetual Trustees Estate and Agency Company of New Zealand Limited and another - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH JULY, 1944

Present at the Hearing:

THE LORD CHANCELLOR
LORD THANKERTON
LORD WRIGHT
LORD PORTER
LORD SIMONDS

[*Delivered by* LORD SIMONDS]

This appeal which is brought from an order of the Court of Appeal of New Zealand raises a question as to the true construction of the will of John Sidey who died in the year 1915. By his will which was dated the 18th November, 1911, the testator after making a specific devise and certain specific and pecuniary bequests, including an annuity of £1,000 to his wife during her life, appointed his two sons Thomas Kay Sidey and Arthur Murray Sidey and his two daughters Jessie Ann Adam and Eliza Johanna Jolly executors and trustees thereof, and gave his real and personal estate not thereby otherwise disposed of to his trustees on trust for conversion and investment. He then directed his trustees to stand possessed of the whole of his residuary estate and the investments representing the same upon the following trusts (the paragraphic form and numbering of which were not in the original will but have been adopted for the sake of convenience):

" 21. After providing for the annuity hereinbefore given to my wife for her life all legacies and other outgoings directed by this my Will to be paid in trust to pay the income thereof as follows that is to say:

" 22. To each of my two grand-daughters (the daughters of my said daughter Jessie Ann) I give an annuity of One hundred pounds for her life.

" 23. To each of my two said daughters Jessie Ann and Eliza Johanna and after their deaths respectively to their issue equally amongst them I give an annuity of Five hundred pounds.

" 24. To my said son Arthur Murray Sidey and after his death to his issue equally amongst them I give an annuity of One thousand two hundred pounds.

" 25. And to my son Thomas Kay Sidey and after his death to his issue equally amongst them I give the whole of the remaining income of my said trust estate year by year after paying thereout the respective annuities or yearly payments above specified.

" 26. And from and after the death of the last survivor of my said four children I declare that the said several annuities or yearly payments to my said children and their issue shall cease and determine (except the annuities of One hundred pounds each to my two grand-daughters).

" 27. And from and after the death of the last survivor of my said four children as aforesaid I give devise and bequeath the whole of my residuary estate real and personal to and amongst my then surviving descendants in

such manner that the same shall be divisible per stirpes among the children grandchildren and remoter issue of such of my children as shall have left issue.

"28. And I declare that during the minority of any of the issue who may take a benefit hereunder it shall be lawful for my Trustees to pay the presumptive share or so much of it as they shall think requisite of such child to his or her parent or guardian or to the person for the time being having the actual custody of such child without the calling upon such parent or person for any account of the expenditure thereof or otherwise to apply the same for the benefit of such child in such manner as they or he in their or his absolute discretion shall think fit.

"29. And I further declare that in such case whenever there are two or more of such children of one of my children or of his or her issue then my Trustees shall not be bound to divide such income but may similarly pay or apply the same or any part thereof generally to such parent or guardian or for the benefit of such children.

"30. And I further declare that no grandchild or remoter issue of mine shall take a vested share in the income or capital of my estate until being a male he shall have attained the age of twenty one years or being a female she shall have attained that age or married under that age.

"31. And I further declare that such part of the presumptive shares of any of my issue as shall not be paid or applied during his or her minority for the benefit of any of my grandchildren or remoter issue shall be accumulated as income for his or her benefit until he or she shall attain the age of twenty one years or being a female attain that age or marry and if he or she shall not live to obtain a vested interest therein the same shall be added to the capital shares of his or her brothers and sisters if any and if he or she shall have no brother or sister the same shall be added to the capital of my trust estate."

The testator appears to have had four children only, namely, the two sons and two daughters named in his will. Of these the last survivor was his daughter Jessie Ann Adam who died on the 3rd June, 1941. At this date therefore the capital of the testator's residuary estate became distributable under clause 27 of his will. At the same date the position of the testator's family so far as is material to this appeal was as follows:

(1) The son Thomas Kay Sidey had one child only, namely, the appellant Thomas Kay Stuart Sidey, who was of full age,

(2) the son Arthur Murray Sidey had four children, namely, the respondent Lorna Murray Lewin and three others, all of them living and of full age:

(3) the daughter Jessie Ann Adam had three children living and of full age and another son who died long since leaving one child then living and of full age:

(4) the daughter Eliza Johanna Jolly had no child.

From this recital it will appear that if, as the appellant contends, the testator's own children are to be taken as the stirpes for the purpose of the stirpital division of the residuary estate, which is directed by clause 27 of the will, the distribution will be primarily in thirds, of which the appellant will take one-third, the four children of Arthur Murray Sidey will between them take another third, and the three surviving children of Jessie Ann Adam and the child of her deceased child will between them take the remaining third: if on the other hand, as is contended by the respondent, Lorna Murray Lewin (who was appointed in these proceedings to represent all those descendants of the testator whose interest was the same as her own), the grandchildren of the testator are to be taken as the stirpes for the purpose of such division, then the distribution will be in ninths, each of the eight surviving grandchildren taking one-ninth and the great-grandchild representing the stirps of the deceased grandchild taking the remaining ninth. It is the latter view which has commended itself to the Court of Appeal in New Zealand by a majority of four Judges to one, Northcroft J. dissenting from the opinion of Myers C.J. and Blair, Kennedy and Callan JJ.

Their Lordships upon a consideration of the whole of the relevant provisions of this will have come to the conclusion that the view of Northcroft J. is to be preferred. It does not appear to them that the authorities, to which reference will be made later, afford any real guidance upon the construction of the will now under consideration. They cannot accept the suggestion made in the argument of this appeal that there is any rule of construction

which requires a stirpital division to begin at one generation rather than another. In every case the result must depend upon the language that is used and the context in which it is used.

In the will now under review the testator by clauses 22 to 26 inclusive dealt with the income of his residuary estate until the death of the last survivor of his four children, making separate provision during that period for each child and the issue of each child. By clause 27 he provided for the distribution of the capital of the estate; to this clause further reference will be made. By clauses 28 to 31 the testator made further provisions which appear to be mainly if not entirely referable to the disposition made by clause 27, and, though too much weight should not be given to clauses which are of an ancillary character, the language of clause 31 in particular is favourable to the view that the stirpital division should proceed upon the footing that the testator's own children were the stirpes. Clause 30 having, by way of limitation or qualification of clause 27, provided that no grandchild or remoter issue should take a vested share in the income or capital of the estate until being a male he had attained the age of 21 years or being a female attained that age or married, provision is made by the latter part of clause 31 for the event of such a person not attaining a vested interest. If the stirpital division was based on each grandchild being a stirps, it would be consistent that upon a grandchild failing to attain a vested interest, the share of that grandchild should go over to the other stirpes, i.e. to the other grandchildren or their representatives. But clause 31 does not so provide; on the contrary it provides that the share of a grandchild failing to attain a vested interest is to be added to the capital shares of his or her brothers or sisters if any. This is precisely the provision to be expected if the testator's own children constituted the stirpes: for if the children of a child represent one stirps and take one share between them, the share of one of them dying without attaining a vested interest would naturally go to his brothers or sisters.

It is however primarily on the language of clause 27 itself that the question must be determined. Its opening words cannot be wholly disregarded. The event for which the testator now provides is the death of the last survivor of his four children, for whom and their issue he had previously made separate provision out of income. Upon this event happening he gives the whole of his residuary estate " to and amongst my then surviving descendants in such manner that the same shall be divisible per stirpes amongst the children grandchildren and remoter issue of such of my children as shall have left issue." As this clause opens with a reference to the testator's four children, so it ends with a reference to such of his children as shall have left issue. This framework suggests that for the testator each child established the stirps for which he was making provision. The class of beneficiaries is " my then living descendants ": some assistance again may be derived from the use of the word " my." There seems no reason why a testator, providing for his own descendants living at a certain time but intending them to take not per capita, but per stirpes, should pass over the generation of his own children and direct not that each of their families should take an equal share of his estate between them but that each of his grandchildren or their families should take an equal share. Then come the decisive words. The testator's estate is to be divided amongst his then surviving descendants " in such manner that the same shall be divisible per stirpes among the children grandchildren and remoter issue of such of my children as shall have left issue." But for this provision the estate would presumably have been divisible among all the testator's living descendants per capita, every member of every generation taking an equal share. The effect of this provision is two-fold. In the first place, as is conceded by both sides on this appeal, it qualifies the generality of the expression " my then surviving descendants," and operates to preclude a remoter descendant from taking in competition with his own living ancestor so that in a particular line, for example, a great-grandchild could take no share if his parent, being a grandchild of the testator, was living at the date of distribution. But in the second place it operates or may operate to alter the proportions in which the participating descendants share in the estate. For the provision demands that the division should be not according to the number of capita but according to the number of stirpes and, as the present case illustrates, the participating descendants may take in different proportions according to

the generation which is determined to be the stirps. Thus it becomes necessary to determine in this case whether the testator's own children, who have issue living at the date of distribution, or his grandchildren, themselves living or having issue living at that date, form the stirpes for the purpose of the prescribed stirpital division. The argument in favour of the latter view which appears to have been decisive in the Court of Appeal and has been urged with much force before their Lordships is that the natural construction of a gift to persons per stirpes is that the stocks of descent shall be found among the takers and not among their ancestors. It has been contended that this has been accepted as a principle of construction since the decision of Lord Westbury in *Robinson* v. *Shepherd* 4 De G.J. & S. 129, and this consideration has largely influenced the decision of the learned Chief Justice and the other Judges forming the majority of the C.A. It is the fact that in the case cited the Lord Chancellor upon the language of the will under consideration came to the conclusion that legatees who themselves participated were to be regarded as forming the stirpes and that this line of reasoning commended itself to North J. in re *Wilson, Parker* v. *Winder* 24 C.D. 664 and to Warrington J. in re *Dering, Neall* v. *Beale* 105 L.T. 404 upon the construction of wills which appeared to those learned Judges to be similar to that under review in *Robinson* v. *Shepherd.* And in re *Alexander* [1919] 1 Ch. 371, Sargant J. felt himself constrained to follow the same line of reasoning and to reach a similar result, though his inclination and preference were for the view expressed by Lord Romilly in *Gibson* v. *Fisher,* L.R. 5 Eq. 51. Their Lordships do not think it necessary to question the correctness of any of the decisions to which reference has been made but they cannot elevate the reasoning which led to such decisions into a rule of construction. There appears to them on principle to be no reason why in the construction of a gift per stirpes the stocks should be found among the takers and not among their ancestors. In the simplest case, where a gift is made to a number of persons of different stocks but of the same generation per stirpes and not per capita, it is manifest that the stocks are to be found not in the takers but in the ancestors, and this result is reached not by the displacement of any prima facie rule of construction but by the consideration of the language of the gift without any predilection. The language of the will under appeal is to be approached in the same way.

Reference has already been made to the scheme of the will and to the indications to be found in the clauses which precede and follow clause 27. That clause, as has also been observed, opens and ends with references to the testator's own children. It is the final reference which affords the clearest indication of the testator's intention. If the division had been directed " per stirpes among the children of such of my children as shall have left issue " it could not have been doubted that the testator's own children leaving issue formed the stirpes. Or again, if the division had been directed " per stirpes between the issue of such of my children as shall have left issue " the same conclusion would be reached: for the stirpes are directly associated with the children who have left issue and there would appear to be no reason why any particular remoter generation should form the stirps, if a child of the testator does not. So also if the issue are written out at length as " the children, grandchildren or remoter issue of such of my children as shall have left issue." The introduction of the remoter generations into the gift by way of explanation of the words " my then surviving descendants " is for the purpose of substituting such remoter generations for earlier generations of which there are no living representatives. The framework of the gift remains one in which the final reference is always to the testator's own children who have left issue surviving at the relevant date. It is in their Lordships' view these children who form the stocks of descent. This construction of clause 27 is entirely consistent, as no other construction is consistent, with the provisions of clauses 30 and 31. The testator's estate accordingly became divisible upon the death of the survivor of his children into three equal parts and those three parts will be distributable in the manner already indicated, i.e. the appellant will take one-third, the four children of Arthur Murray Sidey will take another third between them and the three surviving children of Jessie Ann Adam and the child of her deceased child will take the remaining third between them. The costs as between solicitor and client of each party of this appeal will be paid out of the estate. Their Lordships will humbly advise His Majesty that the appeal ought to be allowed accordingly.

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In the Privy Council

THOMAS KAY STUART SIDEY

v.

THE PERPETUAL TRUSTEES ESTATE AND AGENCY COMPANY OF NEW ZEALAND LIMITED AND ANOTHER

DELIVERED BY LORD SIMONDS

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS.
DRURY LANE, W.C.2.

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