Saskatchewan King's Bench

Shawaga Estate (No. 2), Re

[1944] 2 W.W.R. 402, [1944] 4 D.L.R. 410

In re The Saskatchewan Insurance Act In re Shawaga Estate (No. 2)

Doiron, J.

Judgment: May 15, 1944

Counsel: *E. C. Leslie, K.C.*, for applicant.
S. R. Curtin, K.C., for Custodian of Enemy Property.

***Doiron, J.*:**

1 This is an application by Annie Bogucki (otherwise known as Annie Shawaga) for an order that moneys paid into Court by the Dominion Life Assurance Company, pursuant to an order of the Court, be paid out to her.

2 The applicant in December, 1925, went to live with one Mike Shawaga as his wife. She claims that her husband Carl Bogucki deserted her some time previously to live with another woman and that she is unaware of his present address. At the time she began living with Shawaga, he informed her that he had been married in Poland where his wife remained when he came to Canada several years previously. She assumed the name of Shawaga, was known as Mrs. Shawaga, was introduced by the insured as his wife and was at all times treated by him as his wife.

3 On January 18, 1927, the Dominion Life Assurance Company issued a 15-payment life insurance policy on the life of Mike Shawaga in the amount of $2,000 in which the beneficiary named is "Annie Shawaga, wife of the Assured." The name of the insured's wife is Annie Shawaga. Mike Shawaga died at Finnie, Saskatchewan, on December 14, 1941.

4 The Custodian of Enemy Property on behalf of the wife of the insured opposes the application. He objects to the introduction of evidence as to the intention of the deceased on the ground that there is no ambiguity in the insurance policy in so far as the desigated beneficiary is concerned.

5 This insurance contract is subject to the provisions of *The Saskatchewan Insurance Act*, R.S.S., 1940, ch. 121.

6 Sec. 158 (1):

> ... any term in a contract inconsistent with the provisions of this Part [Part V., Life Insurance] shall be null and void.

7 Sec. 163 (1):

> ... no term or condition of a contract of insurance which is not set out in full in the policy, or in a document or documents in writing attached to it, when issued, shall be valid or admissible in evidence to the prejudice of the insured or a beneficiary.

8 Sec. 180 enumerates the classes of beneficiaries: (1) Beneficiaries for value; (2) Preferred beneficiaries; (3) Ordinary beneficiaries.

9 The applicant falls within the class of ordinary beneficiaries. Sec. 185 provides that where a member of the class of preferred beneficiaries is designated a trust is created in favour of the designated beneficiary and the insurance money shall not be subject to the control of the insured.

10 Both counsel have cited a considerable number of cases in support of their argument and reference to these cases, especially the facts set out therein, will be of assistance.

11 *In re Moran* (1910) 2 O.W.N. 293, 17 O.W.R. 578. The facts in this case are that Patrick Moran insured with the Ocean Accident and Guarantee Co. for $1,500 in favour of his "sister Laura Moran." After his death his sister Nora Moran applied for the insurance money. He had no sister "Laura" but his sister Nora had been nicknamed "Laura." Mr. Justice Riddell found "that the rule must be substantially the same as in the case of a will" and cited *Theobald*, 4th ed., p. 221:

> The testator may have habitually called certain persons or things by peculiar names by which they are not commonly known, and this evidence is admissible; thus where a gift was to Catherine Eamley, evidence was admitted to show whom the testator was in the habit of calling by that name.

12 He gave judgment for Nora. The facts in this case bear no similarity to the case at bar — there was no sister named Laura and evidence was admitted to establish the intention of the insured.

13 Again in *Marks v. Marks* (1908) 40 S.C.R. 210, the facts therein stated may be distinguished from those in this application. The deceased had actually gone through a form of marriage with the respondent in British Columbia, had thereafter lived with him and was known as his wife, and Idington, J. assumed on the facts that the deceased was convinced the appellant had obtained a divorce in the U.S.A. The insured had corresponded with his former wife and had addressed her not as Mrs. Marks but as Annie Flocklan. Both the insured and the respondent were convinced that they were legally married and proof of marriage was accepted. Duff, J. found that the previous marriage between the insured and the appellant was not proved. The Court gave effect to the evident intention.

14 In *Blanchett v. Hansell*, [1943] 3 W.W.R. 275 (affirmed [1944] 1 W.W.R. 432) the applicant Blanchett was a widow who went to live with Hansell after the latter's wife had left him. Both knew they were unable to marry but the applicant assumed the name of Nellie Hansell and passed as Hansell's wife. Mrs. Hansell's name was Edith Catherine. A benefit certificate in a fraternal society was issued to Hansell in which Nellie Hansell described as "wife of the insured" was the designated beneficiary. Here evidence as to the intention of the insured was admitted for reasons that are patent and the insurance money ordered paid to the applicant.

15 The rule as to the admissibility of evidence as to intention applies in cases of statutes, wills and contracts including insurance contracts and the fundamental principle of construction was stated by Lord Wensleydale in *Grey v. Pearson* (1857) 6 H.L. Cas. 61, at 106, 26 L.J. Ch. 473, at 481, 10 E.R. 1216:

> ... in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

16 This was cited in *Beiswanger v. Swift Current (City)*, [1930] 3 W.W.R. 519, 25 Sask. L.R. 141, 12 C.B.R. 133, by Martin, J.A. (now C.J.S.) and he added:

> When the words admit of but one meaning, the Court is not at liberty to construe them according to its own ideas as to what should have been enacted.

17 In *Friesen v. G.W. Permanent Loan Co.*, [1924] 3 W.W.R. 883, at 894, [1925] A.C. 208, at 221, 94 L.J.P.C. 49:

> The words of the agreement being, in their Lordships' opinion, unambiguous, there is no occasion to speculate on the objects or motives of the parties, or on the probabilities.

18 *Burritt v. Stone*, [1917] 3 W.W.R. 978, 10 Sask. L.R. 384, is also authority in point.

19 In my opinion the strongest authority in point on the exclusion of evidence of intention of this application is *Ellis v. Houstoun* (1878) 10 Ch. D. 236, at 242, 27 W.R. 501:

> Then it is suggested that I am not to read this will as I find it; that the will was not prepared by the testatrix, but by somebody else, and that therefore I am to hear what that somebody else says was the intention of the testatrix, instead of looking at the will itself. The law is so clear that it does not admit of any such contention. I must look at the will itself; I cannot go from the words which are used in the will. We can never go behind a will to construe it. The words to be found in the will, whoever prepared it, became the words of the testatrix as soon as she executed the will. Therefore how can I go into an inquiry to see what this lady intended by 'children?' Suppose — to put the illustration which Mr. Brice gave — a man says 'I give my property to my son John,' and there is another son William, and it is beyond all possibility of doubt that he did not intend John to take, you cannot allow William to take, because there is a son John who answers the description but if he says, 'I give to my son John,' and there is no son John, then that ambiguity is explained away by parol evidence. Upon the same principle a gift to a child is not a gift to an illegitimate child in the eyes of the law; and therefore when you find a person who does strictly answer the description in the will, you do not try to find anybody else who does not answer the description, because, directly you find persons answering the descrip tion, the words are satisfied, and you require no parol evidence to see what was intended. If that were admitted no man would be safe in making his will.

20 It was argued by counsel for the Custodian of Enemy Property that the contract was founded on illegal consideration.

As there is no evidence of an illegal contract between the assured and the applicant I need not go into that question.

21 In the light of the authorities, although I am convinced that the insured intended to designate the applicant as the beneficiary, I have come to the conclusion that there is no ambiguity and therefore I cannot admit evidence of the intention of the insured. The wife of the assured answers the accurate description of the designated beneficiary. She is (1) the wife of the assured; (2) her Christian name is Annie; (3) her surname is Shawaga. On the other hand, the applicant's name answers the description of the beneficiary in one respect only — her Christian name. She is not the wife of the insured, and her surname is Bogucki. She cannot be referred to as a common-law wife as neither the insured nor the applicant had a legal right to marry, of which they were both aware. The moneys will be paid out to the Custodian of Enemy Property.

22 As to costs I see no reason why costs of the parties should not be paid out of the funds in Court and so order.