Osgoode Hall Law Journal

Volume 3, Number 3 (October 1965)

Article 4

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CONFLICT OF LAWS — SUCCESSION TO MOVEABLES — LEGITIMACY AND LEGITIMATION — STATUS AND INCIDENTS OF STATUS.

In *Montano v. Sanchez*,[1] on an appeal from the Ontario Court of Appeal,[2] the Supreme Court of Canada considered the very confusing field of legitimacy as related to the problem of succession to moveables under the will of an Ontario domiciliary. In a concise judgment, in effect approving unanimously the decision of the Court below, the Supreme Court[3] held that, for the purposes of succession, legitimacy was a question of status to be governed by the *lex domicilii* and not a matter of construction of the will to be determined by the *lex successionis*. However, in so holding, they assumed what appears to be a rather novel approach to what is in fact a very old problem, an approach which was inherited from the Court below.

1. THE FACTUAL BACKGROUND

A testator domiciled in Ontario bequeathed certain personalty to the "issue" of a grandson. The grandson, John Macdonald Wardrope, died domiciled in the State of Michoacan in the Republic of Mexico. He left two daughters surviving him, Elizabeth Macdonald Wardrope Montano, born in lawful wedlock, and Maria Sanchez, born eight years later, out of wedlock. At the time of the birth of Maria Sanchez, John Wardrope was domiciled in Mexico. He later married her mother in a religious ceremony but not in a civil ceremony which is required for legitimation by subsequent marriage under the Mexican Civil Code.

The testator having been an Ontario domiciliary the *lex successionis* was Ontario law. The will in question had provided for such an eventuality as here ensued by leaving the residue to his grandchildren

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1 [1964] S.C.R. 317.

2 *Sub nom., Re Macdonald,* [1962] O.R. 762.

3 Consisting of Taschereau C. J. and Cartwright, Judson, Ritchie and Spence JJ.

or "the issue then living of any grandchild." The sole question before the Court was whether Maria Sanchez was one of the "issue of any deceased grandchild" of the testator so as to be entitled under Ontario law to share in the estate.
It was conceded by all parties that in construing the Ontario will the word "issue" meant "legitimate children". The parties also conceded[4] that it was first necessary to determine the status of any child claiming under the will.

Considerable emphasis was put on the testimony of a legal expert as to the law of Mexico, especially the State of Michoacan. By the evidence it was established that Maria Sanchez had obtained there an order as to the paternity of John Wardrope. It was further established that by the law of her domicile she was "illegitimate". However, the testimony indicated that there was no difference in Mexico between the legal rights and obligations incident to legitimacy and those incident to illegitimacy; the only difference between the rights of the respective types of children was social.

2. SUCCESSION AND LEGITIMACY

As noted above, the Court did not contest the submission that the legitimacy or illegitimacy of a child was a question of status, but assumed this to be so. It supported this by reference to the case of *Re Andros,*[5] wherein Kay J. said:

> A bequest in an English will to the children of A means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of *status.*

By relying on this case the Court impliedly rejected the competing view founded on *Shaw v. Gould*[6] that legitimacy was a question of construction of the will and not status. It is interesting to note that the Court of Appeal began on the same assumption.[7] While the Court of last resort gave no further support to its premise than is set out above, the Ontario Court did elaborate on the matter, relying heavily on *Cheshire's Private International Law,*[8] a source which on careful reading is rather cloudy on this particular area of the law (for which it has this writer's understanding sympathy). The Court of Appeal also referred to the case of *Re Goodman's Trusts*[9] wherein it was said that:

> . . . the question as to legitimacy is one of *status,* and in my opinion by the law of England questions of *status* depend on the law of the domicil.

The Court also relied on the passage from *Re Andros*[10] cited by the Supreme Court. It is significant to note that both *Re Andros* and *Re*

4 *Supra,* footnote 1 at 319.
5 (1883), 24 Ch.D. 637.
6 (1868), L.R. 3 H.L. 55.
7 *Supra,* footnote 2 at 766.
8 5th edition.
9 (1881), 17 Ch.D. 266.
10 *Supra,* footnote 5.

Goodman's Trusts were legitimation cases and that no mention was made of *Shaw v. Gould* in either Court. Passing reference was made in the Court of Appeal to the much maligned decision of *Re Bischoffsheim*[11] wherein Romer J. held:

> . . . where succession to personal property depends on the legitimacy of the claimant, the *status* of legitimacy conferred on him by his domicile of origin (i.e., the domicile of his parents at his birth) will be recognized by our courts;

This case has since been widely criticized by writers[12] as failing to perpetuate the traditional distinction between legitimacy and legitimation[13] in that it applied the rule of law laid down in legitimation situations to a case where the sole issue was that of legitimacy. The similarity of *Re Bischoffsheim* to the present case will be further noted later in this paper.

3. THE "BUNDLE OF RIGHTS" CONCEPT

Having established to *their* satisfaction that the question of legitimacy was to be governed by the *lex domicilii* as being a matter of status, the Court set about the task of ascertaining the status of Maria Sanchez. Clearly on the expert testimony presented to the Court she was "illegitimate" by the law of Mexico. However, the Court relied heavily on that same evidence to point out that by the law of her domicile, she enjoyed all the rights and obligations that would be enjoyed by a "legitimate" child by the law of Ontario, that is, the *lex successionis*.[14] In effect the Court took the position that legitimacy is a matter of *status* to be governed by the *lex domicilii*, but that what is important is not the "tagname" that the *lex domicilii* puts on that status, but what is the substance of the bundle of rights and obligations which goes to make up that status. Here, while Maria Sanchez was called "illegitimate", she enjoyed all the legal rights which by Ontario law, the *lex successionis* would be enjoyed only by a legitimate child. This principle, originating with the Court of Appeal, was approved by the Supreme Court.

This concept is in keeping with the principle of English law that the mere fact that a person has the *status* of a legitimate child does not mean that he will be entitled to succeed as such under an English will. That principle is that there is a distinction between the existence of a status and the legal effects are incidents of that status.[15] While the existence of a status will be governed by the *lex domicilii*, the mere fact that such a status will be recognized by the *lex fori* does not necesarily mean that the *lex fori* will accept the incidents flowing therefrom. The extent to which such incidents will be allowed is governed by the local law, and the public policy of the forum. This concept is summed up by Falconbridge:

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11 [1948], Ch. 79.
12 See Falconbridge (1949) 27 Can. Bar Rev. 1163.
13 *Shaw v. Gould, supra,* footnote 6.
14 *Supra,* footnote 1 at 323.
15 C. K. Allen (1930), 46 L.Q.R. 277.

> In other words, the child's right to claim as successor depended always on whether he was within the definition of child in English succession law and was not a mere question of status governed by the foreign law.[16]

In the present case Maria Sanchez had the status of "illegitimate" but by her personal law she had all the rights and obligations of what would be, by Ontario law, a "legitimate" child. Granted, the Court took a large step from the traditional concept, but it is submitted that it was a logical step. There can be no meaning to a "tagname"; *status* only becomes significant when its substance is analysed, and the Court so held.

4. THE BASIC ASSUMPTION

As remarked above, both the Court of Appeal and the Supreme Court of Canada commenced their judgments on the assumption that legitimacy is a matter of *status* to be governed by the *lex domicilii.* Such an asumption is not in keeping with the traditional current of the law, as developed from *Shaw v. Gould,*[17] the House of Lords' classic decision on this point. The issue in that case was one of legitimacy and the House of Lords said that legitimacy was a question of construction of the will to be determined by the *lex successionis*:

> Whatever may be the views of Scotch Courts to the legitimacy of the appellants, your lordships are called upon to determine whether they answer a particular description upon principles of English law, and by the rules of construction of an English will.[18]

What the Court was saying was that the *lex successionis* dictates what "issue" means and goes on to decide by its own rules whether a claimant falls within the class of legitimate children.

The contrary opinion was perhaps best propounded in the decision of Romer L. J. in *Re Bischoffsheim*[19] which, although a case involving legitimacy, relied for its authority on legitimation cases such as *Re Goodman's Trusts.*[20] It is this very reliance which has caused the decision to be the subject of so much scorn by legal writers. Despite this adverse criticism, the case has since been approved by the Privy Council.[21] The statement of Romer L. J. that has been the centre of this linguistic tempest is to the effect that:

> Where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicil of origin (i.e. the domicil of his parents at birth), will be recognized by our courts; and . . . if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation.[22]

The essence of the criticism of that decision is that by relying on *Re Goodman's Trusts* and other legitimation cases, Romer L. J. was

16 *Supra,* footnote 12 at 1194.
17 *Supra,* footnote 6.
18 *Id.* at 57.
19 *Supra,* footnote 11.
20 *Supra,* footnote 9.
21 *Bamgbose v. Daniel,* [1955] A.C. 107.
22 *Supra,* footnote 11 at 92.

ignoring the long-standing distinction between legitimacy and legitimation. Falconbridge argues along this same line.[23] He contends that the decision confuses the distinction between status and the incidents flowing from that status in a particular forum on a question governed by the *lex fori*. This same criticism has been levelled at the Court of Appeal decision of the present case.[24] There is merit in this criticism of *Re Bischoffsheim* because in that case, having held that legitimacy is a matter of status, the court put full weight on the "tagname" given the child by his *lex domicilii* — if "legitimate" by that law, he is legitimate by English law. Clearly that does contradict the traditional view, assuming that the *Shaw v. Gould* line of authority itself has any merit.

It is submitted, however, that in the end result, the same criticism cannot be made of the present case. As argued earlier in this paper, the Supreme Court, in approving the "bundle of rights" concept propounded by the Court of Appeal, is indirectly putting forward exactly the concept that Falconbridge says was ignored in *Re Bischoffsheim*. The only difference is that the court here is saying that, both in the case of legitimacy and legitimation, the question is primarily one of status, but in the final analysis what really counts is whether the child in question has the attributes required by the *lex successionis* to qualify under a will as "issue". This rather novel approach presents a much simplified process for solving an old problem, and the court is to be commended for an uncharacteristic simplification of a field which has suffered from much semantic confusion. It also resolves the complaint expressed by Cheshire:

> That there should be one test for legitimation, another for legitimacy, argues some confusion of thought and is a proposition that on principle has nothing whatsoever to commend it.[25]

It would finally seem to be established, at least for Canadian Courts, that the uniform test of *status* (as interpreted by the courts in the present case) will now be applied equally to the question of legitimacy as it has in the past been applied to legitimation.

5. Conclusion

Taking the case at its face value, the result is that the Court allows Maria Sanchez to succeed under an Ontario will, although she is "illegitimate" both by the *lex domicilii* and by the *lex successionis*. This raises the question of the propriety of the rule of construction that "issue" is to be treated as meaning "legitimate issue" only unless it is impossible in the circumstances that any legitimate children could have been intended to take, or it is clear from the words of the will that the testator intended to include illegitimate children.[26] It is difficult to conceive the original basis for this view, but it is presumed

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23 *Supra*, footnote 12 at 1163, 1166, 1167.
24 2 O.H.L.J. 508.
25 *Private International Law*, 5th ed. at 402.
26 *Id.* at 391.

to arise from a view that illegitimate children — that is, children born out of lawful wedlock — are a form of second-class citizens and should not have the protection of the law that legitimate children have. The question is whether this is a relevant consideration today. While originally only birth in lawful wedlock could prevent the child having the stigma of bastardy, today the benefit of legitimation is quite wide. A child can be legitimated by subsequent marriage of his parents. Does this make the illicit relationship out of which he was born any the more respectable? If not, then why should such a child have all the legal advantages of succession to his father's estate while the non-legitimated, but none-the-less natural, son is deprived of that protection?

In Ontario a child can also, in effect, be legitimated, vis-à-vis his adopting father, by adoption.[27] He becomes "for all purposes of the law of Ontario" the natural and legitimate child of his adopting parents. This presents another anomaly of our law. A child being adopted might quite conceivably have been an illegitimate child and likely was a stranger in blood to his adopting parents. By adoption he will have all the benefits of a natural-born legitimate child of those parents, and if his adopting father had an illegitimate child of his own, the adopted child would be put in preference to the illegitimate child although the latter was flesh and blood.

It is submitted that all forms of classification of children into legitimate and illegitimate is outmoded and unsuited to the present state of social development. This is especially true in view of the current trend away from any classification of children, as is seen in the present state of adoption legislation, whereby any distinction that existed in the past between natural children and adopted children has been abolished. In the recent case of *Re Blackwell,*[28] McRuer, C.J.H.C., as he then was, ably summed up the history of adoption legislation in Ontario and elsewhere. He points out that, prior to 1958:

> There was a progressive legislative development toward putting the adopted child in substantially the same legal position as a child born in lawful wedlock.

This development culminated with the present legislation whereby:

> This Act did not purport to declare rights but created a legal relationship from which legal rights and legal responsibilities flowed and likewise it destroyed the legal relationship arising out of the natural birth of the child.[29]

This same concept of social justice should be applied to the plight of the "illegitimate" child. There is no valid reason why a person should be allowed to propagate the human species at will and deprive his offspring of their personal right by the mere fact that he has not complied with the *formality* of marriage, which in the eyes of the law

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[27] *Child Welfare Act,* R.S.O. 1960, c. 53, s. 76.
[28] [1959] O.R. 377.
[29] *Id.* at 401, 402.

is all that it is! If the traditional test of legitimacy, birth in lawful wedlock, has been watered down to its present state, then it might profitably be forgotten altogether.

The only conscionable excuse for maintaining the present anomalous situation is that the stigma of bastardy is some form of deterrent to the prospective father. The fallacy of this is readily apparent — it is very unlikely that any such thought would enter his mind at the only time that the deterrent could be operative. It might also be defended from the standpoint of any legitimate children of the testator. But it is illogical that such children should be allowed the benefit of a state of affairs with which they had absolutely nothing to do. The time is therefore ripe to complete the spring-cleaning of the law on this matter with appropriate legislation.