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Re Macdonald

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Commentary

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Case Comment

RE MACDONALD — CONFLICT OF LAWS — SUCCESSION — LEGITIMACY — LEGITIMATION — STATUS — In the case of *Re Macdonald*[1] the Ontario Court of Appeal[2] had an opportunity to consider the important and difficult question of the succession of a foreign domicillary as a beneficiary under an Ontario will. The facts as proved at trial before Landreville J. are clear and were not in dispute. John Duff Macdonald, the testator, died domiciled in Ontario. His will provided in part for life tenancies and the distribution of any remainder following such life tenancies to the persons entitled. The will then continued, "and the issue then living of any grandchild, such issue taking the share their parent would have taken if then alive."

The last surviving life tenant, John Duff Macdonald Wardrope, died intestate, and the estate of the testator was to be distributed amongst the persons entitled thereto. The assets of the estate consisted of personalty situated in Ontario. It is well settled law that the law governing succession in the case of personalty is the law of the last domicil of the testator, which in this case was Ontario.

John Duff Macdonald Wardrope, the testator's grandson, died domiciled in the State of Michoacan in the Republic of Mexico. He left two daughters surviving him both of whom were over twenty-one years of age and domiciled in Mexico. One of his daughters was born in lawful wedlock while the appellant, Maria Sanchez Wardrope, was conceived and born out of lawful wedlock in the State of Michoacan where the court found her to be domiciled.

Following her father's death, the appellant brought an action in the Mexican Courts against his estate for a declaration of paternity. She received judgment in her favour and it was established by expert evidence that the effect of such a judgment, while it did not confer the status of legitimacy upon her according to her personal law, nevertheless, gave her all the rights of inheritance enjoyed by a legitimate child domiciled in the State of Michoacan in competition with a legitimate child as understood by Mexican law. Furthermore, it was established that she could use her father's name and had the right to support from him as well as the obligation to support him while he was alive.

By the *lex successionis,* Ontario law, it has been established that the word "issue" used in a will means "legitimate issue". The question before the Court of Appeal, therefore was, whether or not Maria Sanchez was the legitimate issue of John Duff Macdonald Wardrope? At trial, Landreville J., held that Maria Sanchez to be

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1 (1962) 34 D.L.R. (2d) 14; [1962] O.R. 762.
2 Consisting of Porter C.J.O., McLennan and MacKay J.J.A.

illegitimate as she was not born or conceived in lawful wedlock and therefore was not entitled to succeed as a beneficiary under the will. The Court of Appeal reversed the trial judge's finding and held that the appellant was the legitimate issue of John Duff Macdonald Wardrope and consequently entitled to succeed.

The Court considered the question whether or not the appellant was legitimate to be a question of status to be determined by the *lex domicilii* of the beneficiary which was the State of Michoacan. According to that law she was illegitimate, but Mr. Justice MacKay, who delivered the judgment on behalf of the Court, did not feel himself bound by the use of the words legitimate or illegitimate. He held accordingly, that since the appellant had the same rights of inheritance as had a legitimate child in competition with another legitimate child, she should therefore succeed to a share of the estate of the testator. The judgment provided in part as follows:

> It was ably argued by counsel for the respondent that nevertheless Maria Sanchez is, by the law of Mexico, an illegitimate child of John Wardrope. On this point we must return again to what is meant by the word "status". Is it the name which the foreign law attaches or do we look behind to determine what incidents, capacities, and obligations the foreign law imposes? In other words, is status the name which the foreign jurisdiction employs to describe the child in question or do we look behind to examine the rights and obligations imposed by the foreign law to determine whether those rights and obligations are so closely akin to those imposed in this jurisdiction in the case of a child born in lawful wedlock? And, as I have said, on the facts of this case I have reached the conclusion that the sum total of the capacities and obligations vested in the child in question by the lex domicilii are the same as those of a child born in lawful wedlock.[3]

The curious result therefore, it is submitted, is that the appellant succeeded as a beneficiary under an Ontario estate although she was illegitimate both by her lex domicilii and by the *lex successionis*.

As authority for the result, the learned judge relied on extracts from Cheshire's *Private International Law,* fifth edition, where the distinguished author suggests that in cases of legitimacy with a foreign element, the question ought to be whether the person is legitimate by his personal law and not whether he is legitimate according to the law of succession. (i.e. Was he born or conceived in lawful wedlock?) Cheshire suggests that the *lex successionis* ought to decide what class of persons are included by the use of the word "issue" in the will. The second question, whether or not the particular person falls within this class is a question of status to be determined by the individual's personal law. If a person is legitimate according to his personal law then he should be entitled to succeed under an English will. The question the author argues is one of status. He says, "It is determined by the law obtaining in the child's domicile of origin, i.e. by the law of his father's domicile at the time of his birth."[4]

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[3] *Supra,* footnote 1 at p. 21.
[4] Cheshire, *Private International Law,* 5th ed., p. 393.

According to Cheshire birth in lawful wedlock is the proper test of legitimacy only for children who have an English domicil. As authority for his proposed rule in legitimacy cases, the author cites *obiter dicta* from legitimation cases[5] and the much disputed legitimacy case of *In re Bischoffsheim.*[6] None of these cases is, it is submitted, a convincing or even relevant authority for the proposition that legitimacy is a question of status. The first cases deal with the issue of legitimation. *In re Bischoffsheim*[7] might perhaps best be dealt with by a simple statement that it is wrong and ought not to be followed.[8] This, however, is not satisfactory and therefore I will discuss this case more fully later in this paper.

Furthermore, there is no authority for saying that the domicil of origin of a child in all circumstances is the domicil of his father at the time of the child's birth. The domicil of a child depends on whether or not the child is legitimate.[9] The author acknowledges this, it is submitted, on pages 395-396 of his fifth edition.[10] This fact, however, had no effect in this case as both the parents were apparently domiciled in the State of Michoacan.

There is a fundamental difference between those succession cases involving questions of legitimacy and those dealing with legitimation. English law has long recognized that children could succeed under a testacy or intestacy governed by English law as "child", "issue", or "children" even though they were not born in lawful wedlock because they were legitimated according to their personal law. It is submitted that the rule is different and should not be confused with legitimacy cases such as *Re Macdonald.*[11] Questions of legitimation have been held to depend upon considerations that are not applicable to questions of legitimacy. The Court of appeal held in *Re Grove*[12] that the domicil must be in a jurisdiction, both at the time of the marriage and at the time of the birth, that allows legitimation by subsequent marriage. This has been changed by statute in England insofar as it applies to subsequent marriages, but it is still law where the child claims to have been legitimated in any other manner.[13] Meanwhile, the classic House of Lords case of *Shaw v. Gould,*[14] in which the issue was legitimacy and not legitimation, held legitimacy to be a question of construction in construing

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5 *Birthwhistle v. Vardill* (1835) 2 Cl. & F 571, 573-4; *In re Don's Estate* (1857) Drew 194, 197-8; *In re Goodman's Trusts* (1881) 17 Ch. D. 266, 291; *In re Andros* (1883) 24 Ch. D., 637.

6 [1948] Ch. 79.

7 *Ibid.*

8 Falconbridge, *Conflict of Laws,* c. 39, p. 754.

9 *Udny v. Udny* [1869] L.R. 1 Sc. & Div. 441, 457.

10 *Supra,* footnote 4.

11 *Supra,* footnote 1.

12 [1887] 40 Ch. D. 216.

13 *Re Luck* [1940] Ch. 864.

14 [1868] L.R. 3 H.L. 55.

a will to be determined by the *lex successionis*. Lord Chelmsford said:

> Whatever may be the views of Scotch Courts as 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. It is clear that the words "son", "lawfully begotten" and "children" can apply only to legitimate children.[15]

That is to say that the *lex successionis* lays down what "issue" includes and goes on to determine *by its own rules* (including its conflicts rules) whether or not the person in question falls within the class so described (i.e. was he born in lawful wedlock). The law of succession could, it is submitted, declare by its own rules that "issue" means legitimate issue which in turn might include children who have been adopted or legitimated as well as those born in lawful wedlock. Where the question is neither one of legitimation nor adoption (as in *Re Macdonald*),[16] it is submitted that the Court should follow *Shaw v. Gould*[17] and determine the validity of the marriage of the child's parents by the law of succession.[18]

In the present case,[19] the issue was clearly one of legitimacy. On the questions of legitimation and legitimacy Cheshire has this to say:

> 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.[20]

Another learned author takes a different view of the matter than Cheshire:

> It is not easy to find any strong reasons in legal principle for this somewhat arbitrary distinction, but there seems to be little prospect now that even the House of Lords will be able to put the cases of legitimation on a common and national basis with the cases of legitimacy. A very peculiar and artificial doctrine has emerged from the legitimation cases; and the most one can hope for is that dicta from the legitimation cases will not be permitted to confuse the clear and intelligible rule for legitimacy which was laid down by the House of Lords in *Shaw v. Gould*.[21]

That comment was made before the decision in the case of *In re Bischoffsheim*[22] referred to earlier. Until that case, the legitimacy of a child in an English succession depended on the validity of the marriage of the child's parents.[23]

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[15] *Supra*, footnote 14 at p. 57.
[16] *Supra*, footnote 1.
[17] *Supra*, footnote 14.
[18] This follows *Shaw v. Gould* and Kindersley V.C. in *Re Wilson's Trusts*, [1865] L.R. 1 Eg. 247, 263-4.
[19] *Supra*, footnote 1.
[20] *Supra*, footnote 4 at p. 402.
[21] R. S. Welsh, 63 L.Q.R. 65, at pp. 91-2.
[22] *Supra*, footnote 6.
[23] *Brook v. Brook* 1861 9 H.L. 193, *Mette v. Mette* (1859) 1 S.W. & T. 416. *In re Paine* (1940) ch. 46.

It is submitted that the learned judge may have erred in *In re Bischoffsheim* when he employed, in a case involving legitimacy, Cotton L. J.'s statements from a legitimation case that:

> If a child is legitimate by the law of the county where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of the domicil.[24]

Romer J. remarked in *In re Bischoffsheim* that there was no real distinction between legitimacy and legitimation.

The distinction between legitimacy and legitimation remains important for purposes of succession despite the dictum of a learned judge.[25] Dicey formulated clause 2 of rule 120 to conform with the result in *In re Bischoffsheim* where a child was held to be legitimate for the purposes of succession under an English will even though he was not born in lawful wedlock, because he was legitimate by the law of the domicil of each of his parents at the time of his birth. The facts of the case were important. *Both* parents were domiciled in the same place at the time of the child's birth. The case did not refer to the case of *In re Paine*[26] where a beneficiary was held unable to succeed under an English will because the marriage of his parents, was invalid by English law.

Re Paine points up the fundamental distinction between status and capacity. The general rule in English law is that a person's status is determined by his personal law, the law of his domicil. But, a person's capacity to succeed under a will or intestacy is governed by the *lex successionis*. The bald fact is that an individual may be legitimate or legitimated according to one law and yet may not be entitled to succeed according to the law of another country. If this seems harsh, it is quite possible that the matter could be reversed. The person attempting to succeed under a will as "issue" might be illegitimate according to his or her personal law and as such not entitled to succeed, while at the same time being so entitled by the law of succession (eg. putative marriage).

It is submitted that the Court in *Re Macdonald*[27] goes further than Romer J. went in *In re Bischoffsheim.*[28] But both cases failed to deal with *In re Paine.*[29] The Court in *Re Macdonald* also failed to consider the case of *Shaw v. Gould*[30] which clearly laid down the test for succession in an estate governed by English law (i.e. birth in a lawful marriage, the validity of which is tested by English law). It is submitted that Romer J. makes an inappropriate application of legitimation principles and finds the child legitimate because

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24 *In re Goodman's Trusts* (1881) 17 Ch. D. 266, 299.
25 *M. v. M.* (1946) p. 31, 34, Denning J.
26 *Supra,* footnote 23.
27 *Supra,* footnote 1.
28 *Supra,* footnote 6.
29 *Supra,* footnote 23.
30 *Supra,* footnote 14.

legitimacy is governed by the child's domicil of origin. Such a conclusion is inaccurate both with reference to legitimacy and legitimation.[31] The child was legitimate by its domicil of origin in *In re Bischoffsheim*.[32] In the present case the child succeeds despite the fact that she was illegitimate by her domicil of origin and the *lex successionis*.

The reason why the Court in *Re Macdonald* appears to go further than the Court in *In re Bischoffsheim* is because the Court in the former case considered status to be a bundle of rights, obligations and privileges vested in certain persons, while the Court in the latter case considered a status to be a "tag-name".

Indeed, Romer J. was not concerned at all with whether or not the child could have succeeded by New York law. He merely wanted to know what name New York law attached to a person in the same position as this child. He concluded that New York law would "tag" him "legitimate" and therefore he was "legitimate" no matter what incidents attached to that status.

It is submitted that there are two principal questions involved in cases of succession under an English will, involving a foreign domicillary in which a word such as "issue" is used. First; is the question to be answered entirely by the *lex successionis,* or is the *lex successionis* to determine only what general class of persons the testator intended should benefit, allowing the *lex domicilii,* of the intended beneficiary to determine whether or not he belongs to that class? Secondly; if the personal law is to determine whether or not the person in question belongs to the class designated by the *lex successionis* (i.e. what status does he have by his personal law?), what in fact does "status" mean? Is it a bundle of rights and obligations possessed by certain persons who may therefore be called "legitimate", for example, or is it a "tag name," so to speak, hung on him by his personal law?

The House of Lords have treated the issue of legitimacy entirely as a question to be decided by the *lex successionis*.[33] It is submitted that the House of Lords considers a person's status to be a "tag name" ascribed to him by the *lex successionis* in questions of succession under an English will.[34]

If *Re Bischoffsheim* and *Re Macdonald* are correct, (neither has been overruled), which has the correct view of "status"? Is it a tag name or a bundle of rights? The testator when he made his will is deemed to have intended a certain class of persons to benefit when he used the word "issue". These persons the Court of Appeal

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[31] *Supra,* footnote 12, 13.
[32] *Supra,* footnote 6.
[33] *Shaw v. Gould, Supra,* footnote 14.
[34] *Supra,* footnote 14.

in *Re Macdonald*[35] seems to say, are all those that possess the rights, obligations and privileges of a legitimate child according to the law of the child's domicil. This comparison ignores the fact that in all cases the domicils of the child's parents are not the same as they were in the present case and in *In re Bischoffsheim.*[36] A child's domicil of origin depends on whether or not it is legitimate.[37]

It is here submitted that the Court of Appeal may have erred in failing to appreciate the consequences of such a rule. When will the relationships be the same so that it can be said that the testator intended the person to share in his estate? How many of the incidents of such a relationship must be the same for the Court to be able to say that the appellant has the same "status" as a legitimate person? Furthermore, the persons comprehended by the use of the words "legitimate issue" by the law of child's domicil of origin may be entirely different from those included by the *lex successionis.*

The comparison of the rights and obligations of the appellant would have been less objectionable if these rights and obligations had been compared to those of a child domiciled in Ontario who was born in lawful wedlock or who otherwise, by Ontario law, fell within the class of persons designated by the words "legitimate issue". This would have been more in accord with the testator's intention. However, it would not escape the difficulty of deciding whether or not they had the same status.

To avoid the problems presented by *In re Bischoffsheim*[38] should the parents have separate domicils, and the difficulties involved in deciding when two personal relationships are the same or even of deciding what the incidents, rights, and obligations of a particular relationship are; it is submitted that in cases of succession involving a question of legitimacy the law of succession should apply throughout.[39] This rule may appear insular but it is certain and best accords with the intention of the testator or the deemed intention of the intestate, and the authorities.

DONALD C. MATHESON*

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[35] *Supra,* footnote 1.
[36] *Supra,* footnote 6.
[37] *Supra,* footnote 9.
[38] *Supra,* footnote 6.
[39] *Supra,* footnote 4.

*Mr. Matheson is in the third year at Osgoode Hall Law School.