THE HIGH COURT

PROBATE

Record no. 2014/70SP

IN THE ESTATE OF PATRICK JOSEPH McCARTHY LATE OF TIMORE, NEWCASTLE, IN THE COUNTY OF WICKLOW, RETIRED CORAS IOMPAIR EIREANN EMPLOYEE, DECEASED

AND

IN THE MATTER OF THE SUCCESSION ACT, 1965

AND

IN THE MATTER OF QUESTIONS ARISING IN THE COURSE OF THE ADMINISTRATION OF THE ESTATE OF THE DECEASED.

Between/

William Gregory and Myles Maguire

Plaintiffs

-and-

Leonard McCarthy

Defendant

Judgment of Mr. Justice Tony Hunt, delivered on 17 April 2015.

Pleadings
The claims made in this case were pursued by the plaintiffs by way Special Summons. The Special Indorsement of Claim claims at paragraph (b) an Order determining the following questions:-

> *"(i) To whom was the deceased referring when he referred to "any additional issue born to my said son Leonard McCarthy after the date of this will."*
>
> *(ii) Does the reference to "issue" include children, grandchildren and other descendants of Leonard McCarthy?*
>
> *(iii) If the answer to (ii) is yes, then does the reference to "issue" include children, grandchildren and other descendants of Leonard McCarthy begotten prior to the date of the death of the deceased and not yet born?*
>
> *(iv) Does the reference to "issue" include children to whom Leonard McCarthy may be in loco parentis in the future?*
>
> *(v) If the answers to (ii) and (iii) and (iv) are affirmative, then how is that class of beneficiaries to be determined?*
>
> *(vi) Does the reference to "issue" include Megan McCarthy, born to Leonard McCarthy on the 11th day of March 2011, who appears to have been begotten during the lifetime of the deceased?*
>
> *(vii) If Megan McCarthy was not begotten during the lifetime of the deceased, is she entitled to a bequest of €25,000?*
>
> *(viii) Is the reference to "issue" limited to "the children" of Leonard McCarthy?*
>
> *(ix) If the answer to (viii) is yes, is the bequest limited to the children of Leonard McCarthy born or begotten during the lifetime of the deceased?*
>
> *(x) If the answer to (ix) is no, the directions of this Honourable Court in respect of honouring the bequests to the children of Leonard McCarthy not yet begotten born?*
>
> *(xi) Is the reference to "the additional issue born to my said son Leonard McCarthy after the date of this will" void for uncertainty?*
>
> *(xii) If the answer to (xi) is yes, are Callum McCarthy and Cian McCarthy (and Megan McCarthy if the answers to (vi) and (i) at yes) still entitled to their bequests of €25,000 each?"*

Facts
The relevant facts are proved by the affidavits and exhibits filed by the parties. The affidavit of the first named plaintiff establishes that the deceased died on 22 June 2010. He made and duly executed his last will and testament on 4 September 2009, and died without subsequently altering or revoking the said will. The defendant is a son of the deceased, and is sued in a representative capacity to represent the issue of the deceased to be defined, determined or identified by the court in these proceedings. Probate to the estate of the deceased issued from the Principal Probate Registry to the plaintiffs on 26 November 2012.

The deceased died a widower, without issue of a predeceased son or daughter, and is survived by two lawful sons and one lawful daughter, namely Leonard McCarthy, Francis McCarthy and Mary-Ann McCarthy. The deceased is further survived by Jenny Gregory, the deceased's stepdaughter, who is also named as a beneficiary in the will of the deceased.

The deceased's said last will and testament contained the following bequests:-

> *"I GIVE AND DEVISE my dwelling house at Timore, Newcastle, Co Wicklow in equal shares between Mary and McCarthy, my daughter, Leonard McCarthy, my son and Jenny Gregory, my stepdaughter, in equal shares between them and I DIRECT that unless they unanimously otherwise agree my said dwelling house is to be sold as soon as is possible after my death and the net sale proceeds be distributed between them as to one third equal share each.*
>
> *I GIVE AND BEQUEATH to my son Francis McCarthy the sum of €10,000.*
>
> *I GIVE DEVISE AND BEQUEATH to my Trustees the money set out hereunder for the benefit of the individual beneficiaries to hold the same upon trust until such time as any beneficiary shall have attained the age of 21 years or said monies to be paid out immediately to any beneficiary who has attained the said age of 21 years at the date of my death.*
>
> *To Leon McCarthy, Lynsey McCarthy and Leah McCarthy, children of my son Francis McCarthy, the sum of €25,000 each.*
>
> ***To Callum McCarthy and Cian McCarthy, children of my son Leonard McCarthy and to any additional issue born to my said son Leonard McCarthy after the date of this will, the sum of €25,000 to each of the said children.***
>
> *I GIVE AND BEQUEATH the sum of €1000 to my grandson Marcus McCarthy.*
>
> *I GIVE AND BEQUEATH the sum of €1000 to Rachel Lindsay, my step grandchild.*
>
> *I GIVE AND BEQUEATH the sum of €2000 to Jean Gregory, my step grandchild.*
>
> *I GIVE AND BEQUEATH the sum of €2000 to Emma Gregory, my step grandchild.*

The said last will and testament also contained a bequest by the deceased of the residue of his estate as follows:-

> *"I GIVE DEVISE AND BEQUEATH all the rest residue and remainder of my estate person wherever situate and of every nature and kind whatsoever in equal shares between my children Leonard McCarthy, Mary McCarthy and Francis McCarthy and my stepdaughter Jenny Gregory in quarter equal shares for their own use and benefit absolutely."*

The gross value of the estate of the deceased at the date of his death was returned in the Inland Revenue affidavit sworn by the plaintiffs on 29 May 2012 in the sum of €640,555. After deduction of debts in the sum of €6235, the net value of the estate of the deceased at the date of his death was returned in the sum of €634,320. The estate was comprised of the deceased's real property at Timore, Newcastle, Co Wicklow and personal property in the form of An Post bonds and sums standing to the credit of three Irish Life accounts.

Francis McCarthy, one of the sons and named beneficiaries of the deceased, has since died on 1 October 2014. He was a bachelor with issue, and it is believed that he died intestate. In that event, any benefit arising from the estate of the deceased will be distributed in accordance with rules of administration intestate, or otherwise in accordance with his will, if such a document is subsequently located.

The portion of the deceased's will giving rise to difficulty in the administration is the bequest of €25,000 to the children of his son Leonard McCarthy and to any additional issue of Leonard McCarthy born after the date of the will (as emphasised above).

At the date of the execution of the will in September 2009, and at the date of the deceased in June 2010, his son Leonard McCarthy had two children alive, namely two sons Callum (born on 9 September 2007) and Cian (born on 25 March 2009). On 11 March 2011, approximately 9 months after the death of the deceased, Leonard McCarthy and his wife Suzanne had a daughter named Megan.

By medical report dated 11 October 2011, Dr Deirdre O'Gorman opined that Suzanne McCarthy (*nee* Redmond) was pregnant on 22 June 2010, and she calculated on the information available to her that Megan was conceived on or around the 17th of June 2010. Dr O'Gorman also confirmed that an estimated date of delivery of the baby was 10 March 2011; the actual date of delivery was 11 March 2011. This medical opinion is not disputed in any way and, accordingly, the dates and events referred to therein are accepted for the purposes of this decision.

Therefore, as of the date of the death of the deceased on 22 June 2010, it was at least probable that Megan had been conceived and was *en ventre sa mere*. The deceased's will had been prepared by Neville Murphy & Co., solicitors, and after the death, the first named plaintiff collected the will from them. When the sealed envelope was opened by him, it was not found to contain any attendance notes. No such notes have been located to date by the firm who prepared this will.

The plaintiffs as legal personal representatives of the deceased received legal advice to the effect that the bequest to any additional issue born to Leonard McCarthy was ambiguous, open to alternative interpretation and in need of clarification. In correspondence, Neville Murphy & Co. expressed the view that the wording of the bequest ought to exclude Megan from the benefit of the will, on the basis that the beneficiaries became fixed at the date of death. The policy of that firm was to endeavour to draft wills on the basis of ensuring certainty at the date of death, but they could not be more definitive in the absence of notes or instructions recording of the specific will of the testator in this case.

The solicitors retained by the plaintiffs were of the opinion that the terms of the will generally indicated that the testator held open the possibility that Leonard McCarthy might have further children, and on that basis Megan ought to be a beneficiary under the will as drafted. Accordingly, these proceedings were issued, requesting determination of the issues outlined above.

In essence, it appears that the answer to these questions depends on a resolution of three issues. Firstly, does Megan fall within the ambit of the bequest in favour of any issue of Leonard McCarthy additional to Callum and Cian. Secondly, should the term "issue" used in the bequest be construed as being limited to Callum, Cian and possibly issue *en ventre sa mere* at the date of death of the deceased, or ought it include children or grandchildren born in the future. The latter conclusion would present obvious difficulties for

the orderly administration of the estate of the deceased. Thirdly, is the bequest is to be construed as a class gift, or as a series of individual bequests to identified individuals.

The action was heard on 20 January 2015. The plaintiffs were represented by Mr Vinog Faughnan SC, (with Mr Declan Whittle). The defendant was represented by Mr Rudi Neuman Shanahan. Helpful written submissions were also made available.

The first issue
This issue may be resolved with the assistance of the provisions of section 3(2) of the Succession Act, 1965 which provides as follows:-

> *"Descendants and relatives of a deceased person begotten before his death but born alive thereafter shall, for the purposes of this Act, be regarded as having been born in the lifetime of the deceased and as having survived him."*

A possible difficulty with this provision is that it is confined to the purposes of the 1965 Act, and probably cannot be treated as a general rule for the construction of wills. However, in a case such as this, it is a reasonable working assumption that where the will has been drafted by a legally qualified person, regard was had to the provisions of the Act, and that the will encapsulates the general intentions of the testator.

A helpful decision in this respect is that of Joyce J. in ***Re Griffith's Settlement, Griffiths v. Waghorne [1911] Ch. 246***, This case concerned the provisions of s.33 of the Wills Acts 1837 (as replicated by s.98 of the 1965 Act), which prevented a gift to a testator's issue from lapse, provided that the intended beneficiaries should have issue living at the time of the death of the testator. Joyce J. held that the statutory requirement was satisfied where a son of a testator died in his father's lifetime leaving a child *en ventre sa mere*, even though the child was not born until after the testator's death.

Although the House of Lords in ***Elliott v. Joicey [1935] A.C. 209*** cast grave doubt upon this decision, the enactment of s.3(2) of the 1965 Act suggests that the policy set out therein should also govern the construction of relevant words or terms in wills. In the absence of binding authority, as a matter of principle the term "issue" encompasses children conceived but not yet born at the date of death of the testator, unless a contrary intention appears from other language used in the will, or from admissible extrinsic evidence. More recent constitutional provisions also suggest that the unborn are regarded as capable of possessing legal rights, which in an appropriate case, may include the right to succeed to property.

There is nothing in the other provisions of the will or extrinsic evidence to displace the conclusion that Megan ought to be qualified to benefit by the fact that this bequest clearly expressed the testator's view that Leonard McCarthy might have further "issue". Therefore, a child such as Megan was clearly within the contemplation of her grandfather when he included this provision in his will.

The second issue
The applicable rules for the construction of such bequests were set out in the decision of ***The Governor and Company of the Bank of Ireland and Bank of Ireland Nominees Ltd v. Gaynor and others, The High Court, unreported, 29 June 1999***. Macken J. approved in the approach of Lowry L.C.J. in ***Heron v. Ulster Bank Limited [1974] N.I. 44***, which reads as follows:-

> *a) Read the immediately relevant portion of the will as a piece of English and decide, if possible, what it means;*
>
> *b) Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole, or alternatively, whether an ambiguity in the immediately relevant portion can be resolved;*
>
> *c) If ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do;*
>
> *d) One may, at this stage, have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and presumptions against intestacy and in favour of equality;*
>
> *e) See whether any rule of law prevents a particular interpretation being adopted; and*
>
> *f) Finally, one may get help from the opinion of other Courts on similar words (with some caution in the approach to be taken).*

Reading the immediately relevant portion of the will as a piece of English, it appears that the bequest to Callum, Cian and any additional issue of Leonard McCarthy is qualified and defined by the phrase "to each of the said children" at the conclusion of the bequest. This supports the conclusion that the testator's intention as expressed in the words of the bequest was that the class of beneficiaries was confined to the named children of Leonard, or any further children either born, or living but unborn at the date of his death.

There is nothing in the other material parts of the will to suggest any alternative intention on the part of testator. The fact that he made specific bequests to other grandchildren and step-grandchildren also tends to support the conclusion that the testator intended that his estate would be distributed in accordance with the specific directions set out in his will, and did not intend to benefit an unascertainable class of descendant, which would serve to render execution of the express scheme of the will unworkable. In the absence of persistent ambiguity in the terms of the part of the will under consideration, it is not necessary to have recourse to any of the further rules of construction set out above.

Support for this construction may be gleaned from para. 76.3 of Williams on Wills (9th edition), which suggests that where the testator in a later part of the will or in a codicil speaks of the gift in question as a gift to children, or otherwise defines the issue taking under the gift as children, courts have inferred that the word "issue" has been used by the testator as meaning "children".

Another example of a context from which the term "issue" has been inferred to have this meaning is the decision of Hall V.C. in ***In re Hopkins' Trusts, [1878] 9 Ch.D. 131***. The bequest in question in that will read as follows:-

> *"For the lawful issue of the said Francis Hales surviving him equally to be divided between them, if more than one, share and share alike, and if but one then only for such child."*

The Vice-Chancellor considered that the right and correct interpretation of the plain meaning of the words of the will was that the testator had used the word "issue" in the sense of children, and had thereby provided his own explanation and interpretation of the

word used by him. It was also found in that case that there was nothing in the subsequent parts of the will to detract from this interpretation. This conclusion was derived from a consideration of the will devoid of any reference to other authorities. Accordingly, the only persons who could benefit were the two children of Francis Hales who had survived him.

Accordingly, the question of the admission of extrinsic evidence does not arise, as the intention of the testator is ascertainable from the plain meaning of the words used by him in the will, nor is such evidence required to assist in the construction of or to explain a contradiction in the will. Furthermore, since the bequest in question has been interpreted as being confined to the children of Leonard McCarthy born or begotten at the date of death of the testator, and as the beneficiaries are thereby readily identifiable, this bequest cannot be said to fail for uncertainty. Consequently, it is not necessary to avail of the provisions of s.99 of the 1965 Act to make the bequest operative.

The third issue
A class gift may be defined as a gift to a number of persons linked together in a class, so that the share of each member varies according to the number of members in the class. This must be distinguished from a series of independent gifts to different people, whose shares are fixed and quantified from the start. The bequest made by the testator in this case appears to consist of a number of gifts in the ascertained sum of €25,000 to a number of persons whose identity was not ascertained at the date of the will. Accordingly, as this bequest is not a class gift, class closing rules do not apply in determining the identity of the beneficiaries of the bequest, who are ascertainable by reference to the proper construction of the words of the bequest.

Accordingly, the questions posed in the Special Summons may be answered by directing the plaintiffs to execute the bequest highlighted above by the distribution of the sum of €25,000 each to Callum, Cian and Megan McCarthy from the estate of the deceased, to the exclusion of any other children or lineal descendants of Leonard McCarthy.