Neutral Citation [2016] IEHC 695

THE HIGH COURT

[2016 No. 181 S.P.]

IN THE MATTER OF THE ESTATE OF EILEEN CURTIN LATE OF APARTMENT 41, BLOCK C, SEABURY, SYDNEY PARADE AVENUE, SANDYMOUNT, DUBLIN 4 CIVIL SERVANT RETIRED DECEASED

BETWEEN

MAUREEN BLACK

PLAINTIFF

AND

ANNE SULLIVAN CENTRE LIMITED, OUR LADY'S HOSPICE LIMITED AND FAMILY SOLIDARITY LIMITED

DEFENDANTS.

JUDGMENT of Mr. Justice White delivered on the 2nd of December, 2016.

1. This matter comes before the court by way of Special Summons seeking to have admitted extrinsic evidence pursuant to the provisions of s. 90 of the Succession Act 1965, to ascertain the true intention of the deceased in relation to Clause 4 of the last will and testament of Eileen Curtin.

2. At para. 4 of her last will and testament of 1st August, 2013, she made the following bequest:-

> "I give, devise and bequeath unto Rosemary Black (daughter of my niece, Maureen Black) of 51 Beechpark Avenue, Castleknock, Dublin15, my apartment together with its contents at Apartment 41, Block C, Seabury, Sydney Parade Avenue, Sandymount, Dublin 4.

3. She died on the 8th February, 2015 and Probate was granted to the Plaintiff on 18th November, 2015. The plaintiff has three daughters, Barbara, Nicola and Jennifer and never had a daughter named Rosemary.

4. The evidence sought to be relied on is that set out in the affidavit of the Plaintiff together with exhibits and that of her husband Victor Black, and to a lesser extent the affidavits of Brian Whitaker.

5. The Plaintiff deposed as follows:-

> "7. I say that I knew the deceased very well during her lifetime. She was not married and had no children and she visited my family in our house at Castleknock on very many occasions. For many years prior to her death, I was the first point of contact for her in the event that she had an issue of any concern. I say that she was particularly fond of my daughter, Barbara, as she was the only one of my daughters who was still living in our family home up to 2014 and was usually there when the deceased came to visit. Both the deceased and Barbara were able to converse with one another in French and they had a close rapport.
>
> 8. I say that the deceased told me on a number of occasions that she intended to leave her apartment to Barbara. However, she did not at any stage tell me that she had, in fact, done so.
>
> 9. I say that it is my belief that the deceased intended the property specified at Clause 4 of her last will and testament to be devised to my daughter Barbara Black who was the only one of my daughters residing at 51 Beechpark Avenue, Castleknock, Dublin 15 at the time the Will was made.
>
> 10. I say that while the deceased was normally a very careful and fastidious person and such mistake on her part would have been uncharacteristic, I believe that she inadvertently referred to my daughter Barbara as Rosemary when giving instructions to her solicitor for the preparation and execution of her will."

6. Exhibited to the Plaintiff's affidavit are two letters from Jennifer Black and Nicola Black. In her letter of 20th February, 2016, Jennifer Black stated:-

> "I fully understand and appreciate the difficulty that has arisen in connection with Eileen's will and note that an application will be required to the High Court to confirm that the reference made to Rosemary in Clause 4 of the will should in fact refer to my sister Barbara Black.
>
> I confirm that I am in full agreement with this interpretation of the will and will support the application that is to be made." Nicola Black wrote a letter in similar terms.

7. Victor Black's affidavit was sworn on 22nd April, 2016, at para. 3 he stated:-

> "I say that I knew the deceased herein well and she was a frequent visitor to our home at 51 Beechpark Avenue, Castleknock, Dublin 15. She enjoyed a close rapport with our daughter, Barbara Black who was the only one of our children still living at home up until 2014. I specifically recall a telephone call from the deceased in or around April or May 2013, in which she told me that she intended to leave her apartment to Barbara after her death. She explained that our other daughters, Nicola and Jennifer were married and in her view they were "well looked after" whereas Barbara was still single and living at home and that was the reason she wanted to leave the apartment to her."

8. Mr. Whitaker in his first affidavit of 22nd April, 2016, stated at para. 3:-

> "3. On or about 1st August, 2013, the deceased asked to see me and she wanted to make some further changes to her will. As it happened, I had a number of appointments out of the office that day and I offered to call to her apartment that afternoon and I met with her around 2:30pm. She handed me a copy of p. 1 of her then existing will that she had executed with me on 8th July, 2011, and upon which she had made a number of hand written amendments in pencil.
>
> 4. I said to the deceased that the change she was making was quite significant and I asked her why she was doing it.

She told me that David Curtin was now "well off" and that in any event he would be getting other significant benefits under her will and also as a one third beneficiary of her Irish Life policy. She told me that she had decided to give her apartment to a daughter of one of her nieces, Maureen Black as she had visited the deceased regularly."

9. David Curtin was the beneficiary of the specific devise and bequest of the apartment in the will made by the deceased on 8th July, 2011.

10. The third Defendant wished to be represented in circumstances where it was concerned that there was an inherent conflict between the Plaintiff and the residuary legatees. The other residuary legatees wrote to the solicitor for the estate stating they would abide by the direction of the Court.

11. Mr Liam O'hAlmhain Chairman of the third Defendant, in his affidavit sworn on 13th July, 2016, had a number of concerns which are set out in the following paragraphs of his affidavit:-

"15. Accordingly I say and am advised that a relevant factor in construing the meaning of clause 4 is the fact that there is a clear reference to Barbara Black in Clause 5.3 of the deceased's will which states as follows:-

5. I give devise and bequeath the following pecuniary legacies.

(iii) to my niece Maureen Black (nee Curtin) of 51 Beechpark Avenue, Castleknock, Dublin 15, aforesaid the sum of €20,000 (twenty thousand euro) and to her daughter Barbara the sum of €10,000 (ten thousand euro).

16. I say that the wording of the will raises a significant question regarding the construction of Clause 4 sought by the Plaintiff. I say that even with extrinsic evidence offered by the Plaintiff, there is no evidence on affidavit that addresses why Barbara Black is correctly referred to as Barbara in one gift and incorrectly referred to as Rosemary in another gift within the same will.

17. I further say and am advised that the sequence of events described in the affidavit of Brian Whitaker raises a question as to the provenance of the instruction regarding the inclusion of the address referred to in Clause 4. Mr. Whitaker exhibits a copy of the Deceased's previous will showing a number of handwritten amendments thereto at exhibit A of his first affidavit. I say that from perusing those amendments it is apparent that the address of Rosemary Black which appears at Clause 4 in the final sworn version of the will (being of 51 Beechpark Avenue, Castleknock, Dublin 15) was not amongst the annotations marked on the Deceased's previous will.

18. Accordingly, I say and am advised that at present there is a lacuna in the affidavit evidence as to the circumstances wherein the addition was made, but it appears to have been made by Mr. Whitaker prior to the swearing of the will. I say that this appears to be a relevant factual matter which it is appropriate for this Honourable Court to have regard to in determining whether the extrinsic evidence offered by the Plaintiff is, in fact, capable of conclusively determining that the Deceased intended to benefit Barbara Black when devising the property at Clause 4 to Rosemary Black.

19. Finally, I say that there does not appear to be any corroborative independent evidence of what the testator meant when she identified Rosemary Black as a legatee. In this regard, it is notable that there is no contemporaneous note or attendance exhibited by Mr. Whitaker which records the instructions or representations that Mr. Whitaker refers to having been made by the deceased prior to the drafting and execution of her will on 1st August, 2013."

12. Subsequently, Mr. Whitaker swore another affidavit on 25th July, 2016, exhibiting the written attendance on the Deceased.

13. There is a residuary clause in the will set out at para. 6 of the will which states:-

"I give devise and bequeath all the rest residue and remainder of my estate in equal parts unto:-

(i) The Anne Sullivan Foundation for Deaf, Blind – 40 Lower Drumcondra Road, Dublin 9. (Charity Reg No. CH9600) (Tel No. 01-8300562), otherwise known as The Anne Sullivan Centre for the Care of Low Functioning Deaf/Blind Persons, located in the grounds of St. Joseph's House, Brewery Road, Stillorgan, County Dublin (Tel No. 01-2898339) and I declare that the receipt of the Committee for the time being shall be a good discharge.

(ii) Our Lady's Hospice (Sisters of Charity) located at Harold's Cross, Dublin 6 West (Tel No. 01-4068700) and I declare that the receipt of the Sister Superior for the time being shall be a good discharge.

(iii) Family Solidarity (promoting Christian values in all aspects of family life) P.O. Box 7456 Dublin 3. Postal address – 7 Ely Place, Dublin 2 (Tel No. 01-6611113) and I declare that the receipt of the Assistant Secretary for the time being of Family Solidarity shall be a good discharge."

Relevant Sections of the Succession Act 1965

"89. Every will shall, with reference to all estate comprised in the will and every devise or bequest contained in it, be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.

90. Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will.

91. Unless a contrary intention appears from the will, any estate comprised or intended to be comprised in any devise or bequest contained in the will which fails or is void by reason of the fact that the devisee or legatee did not survive the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, shall be included in any residuary devise or bequest, as the case may be, contained in the will.

99. If the purport of a devise or bequest admits of more than one interpretation, then, in case of doubt, the

interpretation according to which the devise or bequest will be operative shall be preferred."

14. A number of relevant cases where the section has been considered have been opened to the court which the court considers of relevance.

15. In *Bennett v. Bennett & Ors*, a judgment of Parke J. delivered on 24th January, 1977, he stated:-

> "It seems to me that s. 90 is fundamentally novel in that it places no such limitation on the purpose for which extrinsic evidence may be admitted. I believe that it does amend the common law and directs the courts in a proper instance to look outside the will altogether in order to ascertain the testator's intentions, if (but only if) the will cannot be construed literally having regard to the facts existing at the testator's death. It is quite clear that the scheme of the Succession Act was in part to declare and in part to reform the law relating to wills and to the inheritance of property. The way in which s. 90 is worded leads me to the conclusion that it belongs to the second type of section. In support of this construction I have also been referred to s. 99 which provides:-
>
> > 'If the purport of a devise or bequest admits of more than one interpretation, then, in case of doubt, the interpretation according to which the devise or bequest will be operative shall be preferred.'
>
> I doubt, however, if this section is of assistance in the present case. The devise in this case is to "my nephew Denis Bennett." On its face this admits of only one construction unless I first apply s. 90 so as to alter it "to my nephew, William Bennett." In that case, it again is capable of only one construction.
>
> However, the general principles that a will be construed so as to avoid an intestacy is long settled law and unaltered by the Act. I think nobody can have any doubt that the testator in the present case did not wish to die partially intestate or to appoint a non-existent person as one of his executors. Prior to the enactment of s. 90 there was no way by which a court could have avoided such a result. It would have been impossible to have looked outside the will.
>
> I think s. 90 was designed to save the courts from having to come to what was frequently a most frustrating conclusion in cases where it was perfectly obvious to everybody that if the testator could have been recalled to life and asked what he meant to benefit, it is clear that he would have answered the question in only one way."

16. In *Rowe v. Law* [1978] I.R. 55, Henchy J. stated at p. 72 of the judgment:-

> "I read s. 90 as allowing extrinsic evidence to be received if it meets the double requirement of (a) showing the intention of a testator and (b) assisting in the construction of, or explaining any contradiction in, a will. The alternative reading would treat the section as making extrinsic evidence admissible if it meets the requirement of either (a) or (b). That, however, would produce unreasonable and illogical consequences which the legislature could not have intended. If the section made extrinsic evidence admissible merely because it satisfies requirement (a), then in any case the court could go outside the will and receive and act on extrinsic evidence as to the intention of the testator. The grant of probate would no longer provide an exclusive and conclusive version of the testamentary intention as embodied in a will. However, it would be unreasonable and contradictory for the legislature, on the one hand to lay down in s. 78 the formal requirements for the disposition of one's property by will, and on the other to allow by s. 90 (without qualification or limitation as to purpose or circumstances or time) extrinsic evidence of the intention of the testator to be admitted. Such a sweeping and disruptive change, fraught with possibilities for fraud, mistake, unfairness and uncertainty, should not be read into the section if another and reasonable interpretation is open."

17. In a judgment of the Supreme Court in *In Re Collins; O'Connell v. Governor and Company of Bank of Ireland* [1998] 2 I.R. 596, Keane J. approving Rowe v Law stated:- at p 611 The alternative construction, which was upheld in the High Court and by the majority of this Court in *Rowe v. Law* [1978] I.R. 55, is that extrinsic evidence was henceforth to be admissible as to the intention of the testator, not merely in the severely confined category of cases already referred to, but in every case where it assisted in the construction of, or resolved contradictions, in the will. That reading of the section is not only logical, but in grammatical terms is consistent with the use of the conjunctive "and" rather than the disjunctive "or". There are thus two conditions which must be met before such evidence is admissible: it must assist in the construction of the will or resolve a contradiction and it must, in either event, show what the intention, in the particular context, of the testator was."

18. The court has also considered a substantial submission submitted on behalf of the third Defendant in which it was submitted that the extrinsic evidence offered by the Plaintiff does not indicate the intention of the testator and therefore is not admissible and that it does not meet the two part test set out by the Supreme Court in *Rowe v. Law* and confirmed in *In Re Collins, O'Connell v. Governor and Company of the Bank of Ireland*. It is submitted that there is no evidence offered which explains why Barbara Black would be referred to as Rosemary Black and that the facts are distinguishable in this case from the Bennett case. The submissions also rely on the judgment of Laffoy J. in *Thornton v. Timlin* [2012] IEHC 239, to argue that the opinions and views of relatives or other connected persons as to which number of potential beneficiaries can be singled out as having been close to the deceased is not evidence which demonstrates a testator's intention to benefit such persons. The third Defendant also submits that mere frustration by an omission will not be sufficient to require the admission of extrinsic evidence and also that there was insufficient evidence of intention to prefer Barbara Black over her other two sisters.

19. The third Defendant also contends in the submissions that the evidence if it is admissible is not sufficient to support the construction sought by the Plaintiff.

Conclusion

20. On reading the will it is obvious that the testator intended to leave her apartment by a specific devise and did not intend it to be part of the residual estate. She intended to bequeath it to one person, the daughter of her niece Maureen Black.

21. While the extrinsic evidence is primarily from the family members of the intended beneficiary, the combined evidence helps to explain the contradiction of the will and the identity of the daughter whom the testator wished to benefit.

22. The extrinsic evidence is admissible in accordance with s. 90 of the Succession Act 1965, to show the intention of the testator and to assist in the construction of her will to explain the contradiction in same. The extrinsic evidence does meet the two part test set out by the Supreme Court in *Rowe v. Law* approved in, *In Re Collins O'Connell v. Governor and Company of the Bank of Ireland.*

23. Section 99 is also relevant as the court should if the bequest admits of more than one interpretation prefer the interpretation that facilitates the operation of the bequest.

24. The court is not rewriting the will or changing an ambiguous clause. It is reading the will with the assistance of the extrinsic evidence and giving effect to the intention of the will when it is clear that there was an error in that the testator's niece, Maureen Black, never had a daughter called Rosemary.

25. I am satisfied that the extrinsic evidence does meet the requirement of showing the intention of the testator and assisting in the interpretation of the contradiction in the will.

26. In those circumstances, it is appropriate to make an order that in accordance with s. 90 and 99 of the Succession Act 1965, the court directs that Clause 4 of the last will and testament of Eileen Curtin of 1st August, 2013, has the effect of devising and bequeathing all the property with its contents of apartment 41, Block C, Seabury, Sydney Parade Avenue, Sandymount, Dublin 4 to Barbara Black.