

THE HIGH COURT

[2010 No. 353 SP]

**IN THE MATTER OF THE ESTATE OF EDNA O'FLYNN DECEASED, LATE OF NO. 66
RIVERSIDE DRIVE, RATHFARNHAM IN THE COUNTY OF DUBLIN AND IN THE MATTER
OF THE CHARITIES ACT, 196112009**

BETWEEN

MARTIN ENDA MARREN

PLAINTIFF

AND

MASONIC HAVENS LIMITED

DEFENDANT

AND BY ORDER

COLIN HEMPENSTALL

THIRD PARTY

JUDGMENT of Mr. Justice Roderick Murphy delivered the 11th day of November, 2011

1. By special summons dated the 26th May, 2010, the plaintiff, as sole executor of the deceased, issued proceedings against the defendant company in relation to the beneficiary residual estate of the deceased. The special endorsement of claim recited as follows:-

"Whereas:

1. Edna O'Flynn, widow, of Springfield, Scholarstown Road, Rathfarnham, Dublin 16, deceased died on the 9th October, 2000, having made her Last Will and Testament on the 24th July, 1986. Probate whereof issued forth of the Probate Registry to her sole Executor, Martin E. Marren on the 17th October, 2001."
 2. The Testatrix died a widow without issue her surviving. Her husband, beneficiary under the terms of the said Will, predeceased her, having died in 1996. She died without issue.
 3. After certain specific devices and bequests to the main beneficiaries, the Testatrix devised the residue of her Estate to five specific entities or bodies. The Residuary Clause in the said Will demonstrates general charitable intent on the part of the Testatrix.
 4. The Residuary Clause in the Last Will and testament provides as follows:-
- "All the rest residue and remainder of my property I GIVE DEVISE AND BEQUEATH equally between -

- (i) The Chairman of the board for the time being of the Meath Hospital for the charitable purposes of that hospital;
- (ii) The Authorised Officer for the time being of the Irish Cancer Society Limited of No.5 Northumberland Road, Dublin 4, for the charitable purposes of the Society;
- (iii) The Committee for the time being of The Haven, Blackrock, for the charitable purposes of that Body;
- (iv) To the Rector for the time being of St. Anne's Church, Dawson Street, for the upkeep and maintenance of the said Church;
- (v) To the Rector for the time being of Whitechurch, Whitechurch Road, Rathfarnham, for the upkeep and maintenance of the said Church."

5. The devises to the 1st, 2nd, 4th and 5th named Residuary Devises and Legatees are uncontroversial and have been partially affected.

6. Issues had arisen regarding the intended object of the charitable bequest "to the committee for the time being of The Haven, Blackrock, for the charitable purposes of that Body". Demonstrably the intention of the Testatrix was charitable and it is expressly stated to be so. The exact identity of the beneficiary/object is not definitively clear.

7. It would appear that the deceased married one Dr. Bertrand O'Flynn. He predeceased the Testatrix dying in 1996, some twelve years after the execution of her Will. It would appear that the Deceased's husband's involvement with the Masonic Havens Limited was as follows. He was proposed a member of Ionic Lodge No. 429, on the 16th January, 1934. He

received his first Degree on the 22nd May, 1943, his second Degree on the 26th May, 1943 and his third Degree on the 29th May, 1943. He went on to join Lodge No. 12, Dublin, in 1960. He was also a member of the Royal Arch Chapter, No. 171, Dublin, from 1949, University Preceptory, Dublin from 1953 and original Chapter of Prince Masons, Dublin from 1963.

8. It is asserted by the Grand Lodge of A.F. and A. Masons of Ireland that the deceased's husband was "an extraordinarily diligent and supportive member".

9. Masonic Havens Limited a company limited by guarantee which is the first named defendant to these proceedings, was incorporated on or about the 17th April, 1975. It is registered as a charity with the Revenue Commissioners Charities Branch and as such enjoys charitable status, pursuant to s.205 of the Taxes Consolidation Act 1997.

10. Masonic Havens Limited was incorporated as a charity with a view to providing sheltered accommodation for elderly persons. In the early 1980s the charity purchased a property at Carrickbrennan Road, Monkstown, Co. Dublin, whereupon apartments and bungalows were constructed. The project was funded and supported by members and friends of the Masonic Order through gifts and bequests.

11. This sheltered accommodation project was commonly known as "The Haven", particularly by members of the Masonic Order. Whilst the correct postal address of the charitable enterprise is "Monkstown" it is situated less than one mile from Blackrock.

12. There is no known charity ascertained operating under the name of "The Haven" in Blackrock. The only charitable enterprise operating in the area under the name "The Haven" is a sheltered accommodation being operated by Masonic Havens Limited in Carrickbrennan Road, Monkstown, Co. Dublin.

13. The plaintiff/executor requires the following issues to be determined:-

(a) Whether the said bequest demonstrates general charitable intent,

(b) Whether on its true construction the words "To the Committee for the time being of The Haven, Blackrock, for the charitable purposes of that body" demonstrates non equivocal intention on the part of the testatrix to benefit Masonic Havens Limited and, in particular, their sheltered housing for the elderly project known as "The Haven" otherwise Carrickbrennan Road, Monkstown in the County of Dublin?

(c) If not, whether extrinsic evidence is admissible to demonstrate the true intention of the testatrix to benefit the charity known as Masonic Havens Limited, which operates the sheltered housing for the elderly at Carrick Manor Carrickbrennan Road, Monkstown, Co. Dublin.

(d) If the answer is to (a) is yes and to (b) and (c) is no, does the gift lapse or does the doctrine of Cy-Pres apply?

(e) If yes, whether having due regard to s. 47 of the Charities Act, 1961, and having regard to the spirit and intendment of the gift and the general charitable intent of the testatrix, the gift should be applied Cy-Pres to Masonic Havens Limited, registered charity number CHY 6135, for the purpose of the operation of their housing and accommodation for the elderly known as "The Havens", Carrick Manor, Carrickbrennan Road, Monkstown, Co. Dublin.

(f) In the alternative, such order or direction with regard to the application of the said share of the residuary estate Cy-Pres, pursuant to s.47 of the Charities Act, 1961, as amended, or directing that the Commissioners to Charitable Donations and Bequests (exercise) its statutory powers.

(g) Such further or other order or direction as the court may consider appropriate.

(h) Such directions of this Honourable Court as are necessary to administer the Estate of the Deceased and complete the distribution of her assets.

2. Grounding Affidavit

The affidavit of Martin E. Marren, the sole executor, filed the 26th May, 2010, refers to the residence, death without issue and application for probate by the deponent.

The residuary clause is recited and a description of Masonic Havens Limited and of Dr. Bertrand O'Flynn, the deceased's husband is also averred to.

Mr. Marren, in paras. 18 to 20, avers he believed and was advised by counsel that the language contained in the residuary clause in relation to the devise in question demonstrates general charitable intent on the part of the testatrix and that in the event that the gift should fail to the Masonic Havens Limited registered charity, that the provisions of s.47 of the Charities Act 1961, are engaged. He also refers to the application of Cy-Pres and that both the Commissioner for Charitable Donations and Bequests and the Attorney General have been notified in relation to the seeking of directions of the court and exhibited correspondence in relation thereto.

Mr. Marren referred to s. 29 of the 1961 Act as amended by the s. 8 of the Charities Act 1973, and as duly amended by s.16 of the Social Welfare (Miscellaneous Provisions) Act 2002, and in particular pursuant to the Schedule of the said Act, Part 2, that the Board of the Commissioners could deal with and frame a scheme for the application Cy-Pres of the said property should the need arise.

He averred that the value of entire residue was approximately €5 million and, accordingly, one fifth share of the same was worth approximately €1 million.

3. The Affidavit of David Young

Mr. Young, Chairman of Masonic Havens Limited, (the Company) sworn and affidavit on the 2nd December 2010. From the examination of the files and records of the company, he averred that the Masonic Havens Limited was a charitable company initially promoted by certain members of the Masonic Order and was incorporated on the 17th April, 1975 as a charity with the object of promoting exclusively charitable purposes including providing sheltered accommodation for elderly persons. He said that the Masonic Havens Limited was granted charitable status and he referred to the registered charity number CHY 135. He exhibited memorandum and

articles of association and the certificate of incorporation.

He said that upon incorporation Masonic Havens Limited, purchased The Haven in Clonliffe Road in Dublin, a charitable institution of the European Refugee Home Charity and he said and believed that that property was always known and referred to as "The Haven". That property was sold in the early 1980s and a house and site was purchased in Carrickbrennan Road, for which Masonic Havens Limited obtained planning permission for sheltered housing development. He said that the project was widely discussed among members of the Masonic Order as it represented a new charitable objective for the Masonic Order in the tradition of the Masonic Schools which had been the focus of previous Masonic charitable endeavours. He further said that the project was funded by members of the Masonic Order and by people of the area, and apartments and bungalows were built which now provide sheltered accommodation for elderly persons in need. He said that this property at Carrickbrennan Road was now known and referred to as "The Haven". At the time the housing site was purchased, the project was widely discussed within the Masonic Order and the document entitled "The Haven Monkstown" was circulated among members. He exhibited that document entitled The Haven Monkstown together with a sketch of the existing house and the outline of the development to the side and rear.

The document informed members that "the present Haven in Clonliffe Road, will be sold and the existing residents accommodated in phase 1 at Monkstown". The document informed members that "The New Haven, provides not only an opportunity to fulfil an urgent need for our brethren and their families".

Mr. Young said that the words used by the testatrix, "to the Committee for the time being of "The Haven", for the charitable purposes of that Body" is an accurate of the committee structure of Masonic Havens Limited which is run by a Committee made up of members of the Masonic Order, of which he was chairman.

There were further references in the document to The Haven Committee as follows:

- (a) The Girls and Boys benefit fund have indicated to the Haven Committee that they will participate in the project ... and
- (b) The Haven Committee hopes that phase 2 would commence immediately and subsequently to the completion of phase 1.

He said that the document informed members that the development at Carrickbrennan Road would be in two phases, namely phase 1 which would provide residential and communal accommodation and phase 2 would comprise nine self contained single or double terraced dwellings.

Mr. Young said that the bequest provided for the in the deceased's will to "The Haven, Blackrock", which was the property at Carrickbrennan Road, which was known as "The Haven", but was in Monkstown, though the property was located in the postal district of Blackrock. Accordingly, he said and believed that the bequests in the deceased's will "the Committee for the time being of The Haven, Blackrock for the charitable purposes of that Body" was a bequest to the Masonic Havens Limited.

He said that the deceased's husband, Dr. Bertrand O'Flynn was a Registrar and a very credited person within the Masonic Order and deposed to the details as appear in the special summons.

Finally, he deposed to the fact that Masonic Havens Limited, in pursuance of its exclusively charitable purposes, pursued a continuing programme of providing Masonic accommodation initially in the property known as The Haven at Clonliffe Road, and subsequently in "The New Haven" in Monkstown which was purchased and developed for sheltered accommodation. He said that Masonic Havens Limited currently ran two other projects, St. Joseph's Nursing Home, a 43 bed nursing home in Igan Glebe, Virginia in Co. Cavan and St. Joseph's Close, which is a sheltered housing for the elderly also in Virginia, Co. Cavan. Those properties were acquired approximately eleven years ago in 1999.

4. Affidavit of Michael Ward.

Mr. Ward is a senior member of the Masonic Order and was advised and understood that Ms. Edna O'Flynn, the widow of Dr. Bertrand O'Flynn, had left a bequest in her will to "the Committee for the time being of The Haven, Blackrock, for the charitable purposes of that Body".

He said he knew Dr. Bertrand O'Flynn very well. They were both members of the same Knight Templar's Preceptory at the same time, namely, University Preceptory and they were both members of the same original chapter of Prince Masons in the case of the Preceptory, from around 1969 and of the Chapter from 1972. He deposed to the fact that Dr. Bertrand O'Flynn, as a senior Mason, had keen interest in the Masonic charities and was very supportive of Masonic Havens Limited. He said that at that time, members of the Masonic Order commonly knew and referred to the Masonic Havens Limited as "The Haven" and this is how it continues to be known by members. He said that for his own part, he referred to Masonic Havens Limited as "The Haven" and if another member referred to "The Haven" he understood that that member was referring to the Masonic Havens Limited.

5. Affidavit of Aine Coghill

Ms. Coghill, Solicitor in practice of Martin E. Marren, Solicitors, said that firm were the solicitors on record in the above entitled matter. Edna O'Flynn, the deceased, died testate on the 9th October, 2000, a widow without issue and without issue of the above predeceased son or daughter and without parent, brother or sister. From inquiries to date it appeared that she died without issue of a predeceased sister, leaving her surviving one lawful and only nephew, namely Colin Hempenstall and one lawful and only niece Gail Gordon (nee Hempenstall) two of the children of Thomas Hempenstall who was the lawful of brother and who predeceased the deceased. From inquiries it appears that the deceased died without any other issue of a predeceased brother or sister, her surviving of the date of death.

She said she was in communication with and correspondence with Colin Hempenstall, who confirmed that his father's names was Thomas Hempenstall and that he was the lawful brother of the deceased and that he predeceased the deceased. Colin Hempenstall confirmed that he had only one sister, named Gail Gordon and that he had only one brother namely, Thomas Hempenstall, who predeceased the deceased in 1998 and who had seven children (grandnieces and grandnephews of the deceased) who were alive at the date of the death of Edna O'Flynn. She said that she was informed by a Mr. Colin Hempenstall that his sister Ms. Gail Gordon resided at an address in New York and that she survived the deceased and had since died on the 30th November, 2009. Colin Hempenstall subsequently furnished the names and addresses of Gail Gordon's two daughters, namely Rebecca Hickey and Hilary Gordon. He said that he had entered into correspondence with Gail Gordon's daughters and they confirmed that they are named as executors in her last will and testament. He referred to correspondence between himself and Gail Gordon and between himself and Gail Gordon's daughters and to correspondence referring to Rebecca Hickey and Hilary Gordon as the executors named in the last will and testament of their mother Gail Gordon.

She said that the legal persons who were the representatives of estate of Thomas Hempenstall, the nephew of the deceased, who predeceased the deceased in 1998 were represented by Messrs Christie & Co. Solicitors of Thomand House, Clonskeagh, Dublin 14 and he referred to correspondence between his firm and Christie & Co. Solicitors and to correspondence between his firm and Mr. Colin Hempenstall.

She was satisfied that from that correspondence that the legal personal representatives of the estate of Thomas Hempenstall, deceased, the legal personal representatives of estate of Gail Gordon, deceased and Mr. Colin Hempenstall were all satisfied that the High Court should adjudicate on the matter now before the court.

She referred to the sealed and certified copy of the last will and testament of Edna O'Flynn, deceased and to para. 3 of her will which confirmed the sum of IRE5,000- €6,348.69 was conferred upon the individuals set out in para. 3(f) of the will and testament which read as follows: "To my adopted nephew Patrick Robinson,... Molton, England". She called upon Mr. Robinson to furnish a form of adoption papers to the offices of Martin E. Marren to prove that he was in fact a nephew of the deceased. Mr. Robinson, despite having been called upon to do so, never furnished the said documents. Mr. Robinson confirmed that the deceased and his mother were the best of friends and that for as long as he could remember he would refer to Ms. O'Flynn as "Aunt Edna". However, he confirmed that his mother and the deceased were not related in any way and he does not know if any formal adoption had taken place nor had furnished any documentary evidence to support that an adoption did in fact take place. Ms. Coghill exhibited that correspondence.

She made inquiries to Mr. Colin Hempenstall regarding Mr. Patrick Robinson's relationship to the deceased. Mr. Hempenstall confirmed that he did not know Mr. Patrick Robinson and the first time his sister Gail Gordon and his sister in law Helen Hempenstall, the lawful widow of Thomas Hempenstall, and he became aware of Mr. Patrick Robinson was when they received a copy of the last will and testament of the deceased. Mr. Colin Hempenstall confirmed that in the many years of being with and talking to Mrs. O'Flynn, she never mentioned any adopted nephew. He further confirmed that neither did any other member of her generation and he confirmed that the deceased had four brothers and sisters. Ms. Coghill referred to an email of the 1st September, 2010, in that regard.

She said he believed that had Edna O'Flynn formally adopted Mr. Patrick Robinson, he would in fact be a child of the deceased and not an "adopted nephew". Ms. Coghill accepted that had one of Edna O'Flynn's siblings formally adopted Mr. Patrick Robinson, then he would be regarded as a nephew of the deceased and he would be entitled to share in any portion of the estate of the deceased that fell to be distributed in accordance with the rules of the administration of the estate intestate. Colin Hempenstall had confirmed that the deceased's brothers and sisters did not adopt Patrick Robinson and in the circumstances, she said and believed that Patrick Robinson, notwithstanding the reference in the deceased's last will and testament to him as being an adopted nephew, is in fact a stranger in blood.

Ms. Coghill was advised by counsel and believed that in the course of the provisions of the Succession Act 1965, and in the event of partial intestacy arising under the terms of the last will of the deceased, and in circumstances where the deceased died a widow without issue and without issue a predeceased son or daughter her surviving and without parent and without brother or her surviving that any portion of the estate that fell to be distributed in accordance with the rules of the administration of the estate's intestate would be distributed per capita and not *per stirpes*.

She was further advised by counsel and believed that in accordance with s. 3 and s. 67 of the Succession Act 1965 and in the event of a partial intestacy arising, the children of Thomas Hempenstall (who was the lawful nephew and who predeceased the deceased) are not entitled to participate in the administration intestate of the estate of the deceased.

She said she was advised and believed that in the event of a partial intestacy arising and in circumstances where Patrick Robinson had not demonstrated that he was a nephew of the deceased and in circumstances where the deceased died without any other nieces or nephews being the issue of any other predeceased brothers or sisters the only individuals entitled to share in the administration intestate of the estate of the deceased are Colin Hempenstall and the estate of Gail Gordon. She was further advised by counsel and believed that in circumstances where Gail Gordon was alive at the date of the death of the deceased having subsequently died and in the event of a partial intestacy arising under the last will of the deceased, the 50% of that portion of the estate falls to be distributed in accordance with the rules of the administration of the estate's intestate must be distributed by the executors of Gail Gordon deceased who thereafter must administer same in accordance with the last will and testament of Gail Gordon deceased. She is further advised by counsel and believes that the remaining 50% fell to be distributed to Colin Hempenstall.

6. Supplemental Affidavit

By subsequent affidavit of Anne Coghill, she said that while preparing briefs for the hearing of the action, she carried out a further search of the files and located attendance note prepared by the plaintiff dated the 11th June, 1986, along with attendance dockets stating that a letter dated the 12th June, 1986, found the addresses of the beneficiaries outlined in para. 3 of Mrs. O'Flynn's will.

7. High Court Order

By order of the High Court, Laffoy J. made the 23rd May, 2011 it was ordered by consent that Colin Hempenstall be joined as co-defendant in the proceedings representing the interest of the persons entitled to share in the administration and testate of the estate of the deceased.

8. Affidavit of Colin Hempenstall

Colin Hempenstall by affidavit filed on the 14th June, 2011, confirmed that he was nominated next of kin; that he was the surviving son of Thomas Hempenstall and lawful brother of the testatrix who had predeceased her and had one sister, Gail Gordon and a brother Thomas Hempenstall who predeceased the testatrix in 1998 and who had seven children who were alive at the date of the death of the testatrix.

He deposed that Gail Gordon died on the 30th November, 2009, and had two daughters, Rebecca Hickey and Hilary Haldiman who were named as executors in Gail Gordon's last will and testament.

He referred to correspondence and said that he was satisfied that the High Court should adjudicate in the matter before it and that he had no objection to the final bequest being made to The Haven, Blackrock.

He said that the first time he became aware that Patrick Robinson's relationship to the testatrix was when he received a copy of the last will and testament of the testatrix. Neither the testatrix nor any other person of her generation had mentioned him to the deponent and he confirmed that none of her siblings adopted him at any point.

He said from the advice he had received and having regard to the spirit and intendment of the gift at issue and the general charitable

intent of the testatrix, he objected neither to the application for direction that Masonic Havens Limited and haven Blackrock were the same entity, nor to the application of the gift to the Masonic Havens Limited, registered charity No. CHY 6135, whether it be on the true construction of the words used or through an application of Cy-Pres jurisdiction.

While Mr. Hempenstall said that with regard to the above he joined issue with the paras. 18 to 22 of the affidavit of Martin E. Marren sworn on the 24th May, 2010, under the heading "Charitable Bequest" and it is clear that he did not object to the application. He confirmed this is his supplemental affidavit.

9. Supplemental affidavit of Colin Hempenstall

The supplemental affidavit of Colin Hempenstall sworn on the 24th June, 2011. Mr. Hempenstall confirmed that he was the nominated next of kin in the testatrix in the proceedings. He made the affidavit supplemental to that on the 7th June, 2010, and to correct any irregularity which occurred therein and in consideration of new information which came to light in relation to the matter.

He said that Winifred (otherwise Charlotte) Hempenstall, sister of the testatrix, survived her by some two years and bequeathed her residuary estate in trust to Dorothy Walford of Woodley, Reading in Berkshire. Dorothy Walford is since deceased and the beneficiaries of her estate are her two children referred to in the copies of grant of probate and will of Winifred (otherwise Charlotte) Hempenstall. He said that the attitude of the above mentioned next of kin to the application of the plaintiff in the proceedings is that they are satisfied that the High Court should adjudicate on the matters before it and he referred to a copy of a letter from Blandy and Blandy Solicitors of Reading who are solicitors of the next of kin.

He said that the affidavit sworn by him on the 7th June, 2011, averred at paras. (4), (6) and (7) that he objected neither to the final bequest of the charitable gift in the matter being made to The Haven, Blackrock nor to the application of the gift to Masonic Havens Limited whether on the true construction of the words used or through the application of CY-PRES jurisdiction, and that he joined issue with paras. 18 to 22 of the affidavit of Martin E. Marren sworn on the 24th May, 2010. He said he wished to clarify that the actual position was that he was satisfied that the High Court should adjudicate on the matter before it.

10. Affidavit of Leo Kearns of An Post

Mr. Kearns is the delivery service manager of An Post Blackrock delivery office in Blackrock in Co. Dublin and confirmed to the best of his knowledge, information and belief that "The Haven, Blackrock" is located at Carrickmanor Nursing Home, Carrickbrennan Road, Monkstown, Co. Dublin, which is located in the postal district of Blackrock. He confirmed that to the best of his knowledge, information and belief, there was no addressee other than "The Haven" located at Carrickbrennan, Monkstown in the said area or the adjoining district answering to the title of "The Havens" or "The Haven".

11. Legal Principles

Section 90 of the Succession Act, 1956 provides that:

"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. The section enables the court to allow evidence, in addition to that of the testamentary disposition itself

(a) To show the intention of the testator, and

(b) To assist in the construction of the Will generally or, in particular to explain any contradiction in the will.

There is no contradiction in the will but, as the executor puts it, whether the bequest to "the Committee for the time being of The Haven, Blackrock, for the charitable purposes of that Body" demonstrates non equivocal intention on the part of the testatrix to benefit Masonic Havens Limited.

The position before 1965 is well illustrated in the following 1950 case.

In *Re. Julian deceased, O'Brien and Others v. Missions to Seaman's Trust Corporation Limited and Others* [1950] I.R. 57, bequest was to "the Seaman's Institute, Sir John Rogerson's Quay, Dublin", the bequest was subsequently claimed by two bodies. Firstly the Catholic Seaman's Institute, Sir John Rogerson's Quay, Dublin, secondly the Dublin Seaman's Institute, Eden Quay, Dublin. The deceased had association with one of the Institutes named, the Dublin Seaman's Institute of Eden Quay. There was evidence on the part of a solicitor who drafted the Will of his mistake with regard to the address of the Institute as appearing in the Will.

Kingsmill Moore J. held at 65:-

"If I had approached the problem with no knowledge of the facts contained in the evidence which I have excluded, I feel convinced that I would have been driven to the conclusion that for some reason or other, the testatrix had directed Sir John Rogerson's Quay to be inserted with the full intention of benefit to the Catholic Seaman's Institute. Accordingly, I so hold. I regret having to give this decision, for the evidence I have excluded, if I were allowed to take it into account, would convince me to a moral certainty that the testatrix intended to benefit to the Dublin Seaman's Institute. It explains how the mistake was made and fits in with all the other evidence in the case pointing to the Dublin Seaman's Institute. The testatrix, as I have said, was particular as to the exact addresses. When giving instructions for a Will, she had before her the list of the 3rd August, with the name, "Seaman's Institute". She told her solicitor that she was uncertain of the address. She, in her presence, consulted an imperfect work of reference which contained only the address of the Catholic Seaman's Institute, informed her of the address he had discovered, but not the name of the Institute to which it was attached, and inserted this address.

.....

Although the testatrix subsequently received the Will for perusal, and had it in her possession for some time, she did not make any alteration in the address.

.....

This is by no means the first- and, equally certainly, will not be the last - case in which a judge has been forced by the rules of law to give a decision on the construction of a Will which he believed to be contrary to the intentions of the testator. The law reports are allowed with their comments of judges who have found themselves in a similar plight; but I consider the law to be well established and conclusive that I must reject (the testatrix solicitor) evidence and, in the absence of such evidence, I must hold that the Catholic Seaman's Institute is entitled to the bequest."

This was the position prior to the enactment of s. 90 of the Succession Act 1965.

The overriding task of the court when asked to construe a Will is to ascertain the intentions of the testator In *Re. Curtin deceased*, *Curtin v. O'Mahony* [1991] 2 I.R. at 573, Supreme Court.

In *Howell v. Howell* (Unreported, High Court, 7th February, 1992) and *Gaynor v. Bank of Ireland* the court approved the dictum of Lowery L.C.J. in *Herron v. Ulster Bank Limited* [1974] N.I.L.R. 44, which Lord Chief Justice in Northern Ireland laid down suggested guidelines for a court in its construction of Wills. These are as follows:-

"I consider that, having first read the whole of the Will, one may with advantage adopt the following procedure:

1. Read the immediately relevant portion of the Will as a piece of English and decide, if possible, what it means.
2. Look to that the other material parts of the Will and see whether they tend to confirm the apparent 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 immediate relevant position can be resolved.
3. If the ambiguity persists, having regard to the scheme of the Will, consider what the testator was trying to do.
4. One may at this stage resort to the rules of construction, where applicable and aids, such as the presumption of early vesting and the presumption against intestacy and in favour of equality.
5. Then see whether any rule of law prevents a particular interpretation being adopted.
6. Finally, and I suggest not until the disputed passages have been exhaustively studied, one may get help from the opinion of other courts and judges in similar words, rarely as binding precedent since it has been well said that no Will has a twin brother (per. Warner J. in *The Matter of Kane* 2000 NY. 189, 192 [2010]) but more often as examples (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts."

Where the ordinary meaning is clear, then there would appear to be no necessity to invoke the technical rules of construction.

Where there is a lack of precise identity or address of the charitable object, extrinsic evidence pursuant to s. 90 of the Succession Act 1965, is admissible to show the intention of testator to assist in the construction of or to explain any contradiction in a Will.

There is no competing charitable object as there was in the Seaman's Institute case and since 1965 the Society of Prevention of Cruelty to Animals case.

The deficiency in identity can be resolved by the admission of extrinsic evidence.

In this regard it is helpful to consider cases since 1965.

In *Bennett v. Bennett* [1978] I.R. 56, the deceased had given his farm to his wife for life with the remainder to his nephew "Denis Bennett" but had no nephew of that name, but did have a brother named Denis and a nephew named William Bennett. The latter claimed to be the person to whom the deceased had intended to refer. Parke J. considered that s. 90 permitted extrinsic evidence to be admitted, showing that the nephew William Bennett had resided in and had worked at one of the testator's farms without remuneration for several years and he was of the opinion that s. 90 was not merely declaratory:-

"It seems to me that s. 90 is fundamentally novel. I believe it does amend the common law and directs the courts in a proper case to look outside the Will altogether in order to ascertain the testator's intention, if (but only if) the Will cannot be construed literally, having regard to the facts existing at the testator's death."

Rowe v. Law [1978] I.R. 55 and *O'Connor and Another v. Governor and Company of the Bank of Ireland* [1998] 2 I.R. 597, followed *Bennett v. Bennett*.

In *The Matter of the Estate of Evelyn Tomlinson (deceased)* and in *The Matter of the Succession Act 1965: Lyndsey and Wynne v. Tomlinson and the Dublin Society for the Prevention of Cruelty to Animals (Incorporated) and the Irish Society for the Prevention of Cruelty to Animals*, (Carroll J. 13th February, 1996) the court had to consider the residuary bequests to "a number of charitable organisations including

"The National Society for the Prevention of Cruelty to Animals (Dogs and Cats Home), 1 Grand Canal Quay, in the city of Dublin".

There was no such entity, but there were two bodies Dublin Society for the Prevention of Cruelty to Animals and the Irish Society for the Prevention of Cruelty to Animals. The former owned the premises at 1 Grand Canal Quay, and the Irish Society was also located at the same address. Both Societies moved to separate premises in 1993 after the Will was made.

The court held that an ambiguity existed and that therefore extrinsic evidence was admissible under section 90. Carroll J. approved of *Rowe v. Law* [1978] I.R. 55, and held that there was a legitimate dispute as to the meaning or effect of the language used in the Will and that extrinsic evidence should be admissible. Carroll J. concluded as follows:-

"Given that she was a dog lover of many years standing and an active volunteer in a clinic devoted to the care of animals and that she subscribed to the Dublin Society, and given that the Irish SPCA is an administrative body not involved in active field work, I consider on the balance of probabilities that the testatrix intended the Dublin Society for the Prevention of Cruelty to Animals, which operated the Dogs and Cats Home at Grand Canal Quay, to the beneficiary."

12. Decision of the Court

Having considered the case law and the evidence on affidavit, the court is of the view that extrinsic evidence is admissible in this case and that it is not necessary to consider a partial intestacy arising. It is clear that there was a general charitable intention on

the part of the deceased and that the evidence of the Executor and Ms. Coghill as to the instructions in relation to and the drafting of the Will, the common reference among members of the Masonic Order to The Haven at Monkstown (affidavits of Mr. Young and Mr. Ward) and to the averments of the post office delivery service manager of Blackrock as to The Haven, Blackrock being located at Carrick Manor, Carrickbrennan Road, Monkstown, County Dublin. The court also has considered the averments of Mr. Hempenstall and the submissions made on his behalf in the event of the failure of the bequest.

The court, accordingly determines the issues as follows:

(a) The said bequest demonstrates general charitable intent,

(b) The true constructions the words "to the Committee for the time being of The Haven, Blackrock, for the charitable purposes of that Body" does not on its own demonstrate non equivocal intention on the part of the testatrix to benefit Masonic Havens Limited and, in particular, their sheltered housing for the elderly project known as "The Haven" otherwise Carrickbrennan Road, Monkstown in the County of Dublin, notwithstanding that the evidence that The Haven, Blackrock, situate at Carrickbrennan Road, Monkstown Road, operated through the Committee.

(c) However, the Court is satisfied that it is proper to permit the admission of extrinsic evidence under s. 90 of the Succession Act 1965, in the form of the affidavits opened to and referred to above as to the true intention of the testatrix. This extrinsic evidence in the affidavits summarised in the judgment and referred to briefly above clearly show the intention of the testatrix to benefit the Masonic Haven, Monkstown which is the postal district of Blackrock and is commonly referred to by members of the Masonic Order as "The Haven" managed by its Committee. The court is satisfied that the defendant, as the corporate charitable body, is entitled to the benefit of the bequest.

(d) As the answer to (a), and (c) is yes, the issue of the gift lapsing for the application of the doctrine of Cy-Pres does not apply.

(e) There is accordingly, no requirement for any order or direction with regard to the application of the said share of the residuary pursuant to s. 47 of the Charities Act 1961, as amended nor is there any requirement to direct the Commissioners for Charitable Donations and Bequests to exercise its statutory powers.