

THE HIGH COURT

[2012 No. 7825 E]

BETWEEN

JOAN DONNELLY

PLAINTIFF

AND

RICHARD DONNELLY AND ANTHONY DONNELLY

DEFENDANTS

AND

REVENUE COMMISSIONERS

NOTICE PARTY

JUDGMENT of Mr. Justice Hedigan delivered on the 27th day of November 2013

1. This is a very sad case. I am sorry to see that in the family, things have come to such a sorry pass.
2. The plaintiff, in her pleadings, endorsement of claim and statement of claim has made a number of claims. In more recent days, because of developments in property value, she has now limited her claim to:
 - (i) Winding down of the trust;
 - (ii) costs and
 - (iii) return of monies she claims have been misappropriated.
3. In the plaintiff's submissions to the court, she charged that the defendants have failed:
 - (i) To extract a grant of probate;
 - (ii) to pay discretionary trust tax;
 - (iii) to repair the house;
 - (iv) to sell the house, and
 - (v) to resign.
4. In relation to (i) and (ii), the defendants have in fact extracted a grant of probate. They are in the process of trying to get an exemption from discretionary trust tax. The plaintiff queries the basis on which they are doing this. She says that following her communication with the Revenue Commissioners, they have indicated that she does not meet the definition of "incapacitated person". As of 22nd November 2013, this matter is still ongoing.
5. In relation to (iii) and (iv), the situation is a very difficult one. The house is in bad repair but neither party wishes to sell. The whole point of the arrangement put in place by their parents was to provide a roof over her head for the daughter *i.e.* the plaintiff. The Will of Mrs. Mary Donnelly, dated 14th March 1996, was proved and registered in the Probate Office on 16th April 2013.
6. By this Will, the defendants are appointed as executors and trustees. It establishes a discretionary trust for the benefit of Mrs. Donnelly and a charity. The trust property referred to in the Will is now comprised entirely of the house at 14A, Convent Road, Dalkey, County Dublin known as 'The Cabin'.
7. The Will further provides that in default of and subject to the trust provisions declared and contained therein, the trust property *i.e.* the house, is held by the trustees upon trust for the benefit of the children of the defendants. This means, in essence, in the circumstances of this case, that when the plaintiff dies, the grandchildren will inherit the house between them. The trustees have the duty to preserve the house or the capital generated by its sale for the benefit of these children subject to any charges for repairs made or taxes paid in respect thereof.
8. What does all this mean in the present circumstances? It means the defendants must allow the plaintiff, Ms. Donnelly, to live in the house for her life. If the house should be sold, then the proceeds of sale must be invested so as to maintain the integrity of the capital whilst providing such income as this allows. Such income, if the situation should arise, should be used for the benefit of the plaintiff, Ms. Donnelly. Were this to come to pass, the income derived would be very small. The course of action agreed upon at the moment may be the most desirable one *i.e.* the house will not be sold. However it is in bad repair and there is no income from the trust. This obviously gives rise to problems. The liability for the cost of repairs in such circumstances is well established.
9. In '*Equity and the Law of Trusts in Ireland*' Hilary Delany, 5th Ed., the learned author states:

"Where repairs which are necessitated by ordinary wear and tear and which can be considered merely as maintenance are effected to trust property, the cost of such work should come out of the income of the trust and must be borne by the

tenant for life. However, where work can be regarded as affecting a permanent improvement to property, it is considered that the costs should be deducted from trust capital and therefore this will have a greater effect on the interest of the remainder."

Cited as authority for those statements are *Re Kingham* [1897] First Irish Reports p. 170; *Re Waldron & Bogue's 'Contract'* 1904, First Irish Reports 240, and *Brearton v. Day* [1895] First Irish Reports p. 518.

10. Applying these principles to this case, in the financial circumstances of the trust, there is no income to provide for repairs. The plaintiff has presently no income herself. The house should be inspected and, if possible, repaired. This constitutes maintenance. Thus, the cost of doing so should be recorded and ultimately recovered to the benefit of the trustees from the trust property upon the demise of the plaintiff. In the event this cannot be done, the house should be sold and the proceeds invested so as to maintain the capital integrity of the trust while providing whatever income is generated.

11. I have heard the evidence of the plaintiff and her submissions. I have also heard the evidence of Anthony Donnelly who spoke on behalf of himself and his brother. I am satisfied that there exists no grounds upon which the clearly expressed wishes of the deceased, Mrs. Mary Donnelly, in her Will should be set aside or interfered with in any way. Nor am I satisfied that there exist any grounds for removing the defendants as trustees. The question of monies being removed from the joint account is being dealt with in the District Court. It is stated in defence that any monies removed were for the purposes of funeral expenses.

12. To summarize; the discretionary trust exists. It came into existence upon the death of Mrs. Mary Donnelly and its terms must be implemented as best the trustees can. If possible, the house should be repaired by the trustees and the cost of doing so should be a charge on the trust to the benefit of the trustees. If possible the trustees should pay any tax that may be due on the trust now and annually. If they cannot do this, then the house will have to be sold and the funds there from, after the expenses of the sale are paid, should be invested in such a way as to provide as best can be done for the maintenance of the capital integrity of the trust *i.e.* to maintain its real value. Such income generated from this fund should be used for the benefit of the plaintiff for as long as she lives. Any discretionary trust tax that needs to be paid should also be carefully recorded and ultimately should be a charge on the fund and paid to the benefit of the trustees upon the eventual sale of the house.

13. In the result, I will dismiss these proceedings. In the unfortunate circumstances of the case, I will make no order as to costs.