Neutral Citation Number: [2011] IEHC 511

THE HIGH COURT

2011 166 SP

IN THE MATTER OF THE ESTATE OF JOHN O'DONOHUE, LATE OF GLENTRASNA, CAMUS, CONNEMARA, IN THE COUNTY OF GALWAY, AUTHOR, DECEASED

AND IN THE MATTER OF QUESTIONS ARISING IN THE ADMINISTRATION OF THE ESTATE OF THE SAID JOHN O'DONOHUE DECEASED

BETWEEN

JOSEPHINE (OTHERWISE JOSIE) O'DONOHUE

PLAINTIFF

AND

PETER O'DONOHUE

DEFENDANT

JUDGMENT of Mr. Justice Gilligan delivered on the 1st day of December, 2011

Introduction

1. The making of a last will and testament is one of the most important tasks most people face and unfortunately it is one often approached in haste and without due consideration for its effect. A primary purpose of a will is to make a definitive statement regarding the disposition of a person's assets on the event of their death. A properly drawn up will, prepared with the benefit of legal advice provided by a solicitor, should ensure that the testator's wishes for the disposition of their estate will be fully complied with.

2. Where, however, there is any doubt as to the correct interpretation or construction of a will, the Court is charged with the task of determining the deceased's wishes insofar as it is possible so to do. This case concerns the construction of a will and the approach of the court when confronted with such situations of uncertainty.

3. I turn first to the facts as presented.

Background Facts

4. Dr. John O'Donohue (the "Testator") was born on the 2nd day of January, 1956. He was ordained a priest on the 6th day of June, 1979, and later gained considerable acclaim as an author and broadcaster. He died testate on the 4th day of January, 2008, a bachelor without issue. He is survived by his mother, Mrs. Josephine (otherwise Josie) O'Donohue (the plaintiff herein), his brothers, Patrick, and Peter O'Donohue (the defendant herein) and his sister, Mary O'Donohue. The testator is also survived by two nieces and two nephews who are the children of his brothers.

5. The Testator's will (the "Will" or the "2001 will") is in the following terms:

> "Last will [&] Testament of John O'Donohue
>
> Made on night of Feb 21st before Australian Tour.
>
> I leave all my worldly possessions to Josie O'Donohue, my mother, to be divided equally & fairly among my family with special care [&] extra help to be given to Mary O'Donohue, my sister.
>
> Also gifts of money to be given to Olivia [&] family, & Marian O'Beirn.
>
> Smaller gifts to Downey, Ethel, Sheila [&] Pat O'Brien, Laurie Johnson, Ellen Wingard, Deirdre O'Donohue –
>
> Executor of will: Martin Downey [&] Johnny Casey –
>
> Signed: John O'Donohue
>
> Witness: Josie O'Donohue.
>
> Witness: Pat O'Donohue"

6. The Will is holographic and was prepared without the benefit of legal advice. The named executors subsequently renounced their rights to probate of the Will in early 2009. The plaintiff, as the testator's statutory next of kin, was thereafter appointed as the administratrix. She had previously sworn an affidavit averring to the fact that the "Australian Tour" referred to in the Will took place in 2001 and a copy of the Testator's passport was exhibited in corroboration. The Testator had previously executed a will dated the 19th day of February, 1998 (the "1998 will"), which was prepared with the benefit of legal advice. Nevertheless the Probate Office was satisfied that letters of administration be extracted in respect of the 2001 will and it was admitted to probate on the 11th day of December, 2009. The Inland Revenue Affidavit certified the net value of the estate at a sum in excess of €2M.

Procedure

7. These proceedings were commenced by special summons, issued on the 7th day of March, 2011, in accordance with Order 3 rule 7 of the Rules of the Superior Courts by the plaintiff, Mrs. Josie O'Donohue, as personal representative of the deceased. The special

indorsement of claim provides that as certain issues have arisen in the administration of the estate of the Testator, the court's assistance is sought to determine a number of matters regarding the true construction of the Will. Pursuant to Order 54 rule 2 of the Rules of the Superior Courts the defendant, Mr. Peter O'Donohue, was named as the defendant, on the grounds that he is one of the persons whose rights or interests were sought to be affected by the proceedings.

8. The matter was listed before the Master's Court for the 3rd day of June, 2011, where, having satisfied himself that the papers were in order, the Master then transferred the proceedings to the Judge's List. The matter then came before this Court on the 9th day of November, 2011 following an application for an urgent hearing on the grounds that the plaintiff was terminally ill. The court issued a direction on the 10th day of November, 2011, that all of the parties referred to in the Will were to be notified of the proceedings, that any requests for information be facilitated by the plaintiff's solicitors and that they be given the opportunity to be heard at the substantive hearing which was listed for the 22nd day of November last.

Submissions of the Parties

9. At that hearing, it was contended on the plaintiffs behalf that although the "2001 will" did not contain an express revocation clause, in accordance with the decision *In the Goods of Martin* [1968] I.R. 1, the 1998 will was revoked by implication.

10. As regards the structure of the Will, it was submitted on the plaintiffs behalf that three groups are created who are potentially to benefit from the estate namely: (1) "my family"; (2) gifts of money to Olivia and family and Marion O'Beirn; and (3) smaller gifts to Downey, Ethel, Sheila, Pat O'Brien, Laurie Johnson, Ellen Wingard and Deirdre O'Donohue.

11. The starting point, it was submitted, is to ascertain the intention of the testator. Where the construction of a will is doubtful, there is a presumption against intestacy, provided that on a fair construction there is no ground for a contrary conclusion. It was further submitted that to avoid a will on the grounds of uncertainty, it is not sufficient that the dispositions in it are so absurd and irrational that it is difficult to be believed that they could have been intended by the testator, but rather that the will must be incapable of any clear meaning.

12. The plaintiff accepts that there is some uncertainty regarding the delimitation of the term "family" which word is used twice in the Will. It was also accepted that there is an arguable case of uncertainty in relation to the objects and quantum of the gift to the second and third groups.

13. It was submitted that s. 90 of the Succession Act 1965 (the "1965 Act") can be used to overcome these uncertainties as this section entitles the court to admit extrinsic evidence to ascertain the intended meaning of "family" and the identity of the other objects of the gifts. In particular the plaintiff urged the court to have regard to the affidavit evidence which avers that the Testator's reference to "my family" was referring to his mother and siblings. It is also urged that the court have regard to the terms of the 1998 will, which was exhibited on affidavit, insofar as it aids in identifying any of the ambiguous objects under the Will.

14. The plaintiff pointed to a second difficulty on the face of the Will which was the contradiction between dividing the estate "equally and fairly" among the Testator's family but with "special care and extra help" to be given to his sister. The submission was canvassed that in order to apply the presumption against intestacy, the court is entitled to omit words which would cause the Will to be declared void for uncertainty. The basis of this proposition was the decision in *Robinson v. Waddelow* 8 Sim. 134 (1836), which was said to vest in the court the jurisdiction to reject the words "with special care and extra help to be given to Mary O'Donohue, my sister".

15. The plaintiff submitted that, with the omission of those words, the most reasonable construction of the Will would be to understand it as creating a hybrid form of trust which contains elements of a fixed trust as well as a discretionary trust, of which the plaintiff is to be the trustee. Counsel for the plaintiff was unable, however, to point the court to any authority for the proposition that a "hybrid trust" could be found as a matter of law. The plaintiff nevertheless described this trust in terms whereby the gifts to the Testator's family are part of a fixed trust from which each is entitled to a quarter share in the residue of the estate. Given that both the plaintiff and Mr. Patrick O'Donohue witnessed the Will, s. 90 of the 1965 Act prevents both of them from benefiting under the Will and creates a situation of partial intestacy. This half share of the residual estate held as tenants in common therefore falls to the statutory next of kin, who in accordance with s. 68 of the 1965 Act, is the plaintiff. The gifts to the second and third groups form part of a discretionary trust over which the trustee has discretion as to quantum subject to the condition that the third group receive smaller sums than the second group. It was submitted that the court is not therefore required nor is it entitled to determine the amounts to be bequeathed to the second and third groups.

16. However the plaintiff does contend that were the court to find the gifts to the second and third groups void for uncertainty then the fixed trust would remain unaffected. On the other hand, were the court to find that the gift to the first group was void for uncertainty it was argued that the entire Will must fall as to find otherwise would be to hold that the Testator intended to benefit his friends only to the exclusion of his own family, which it is contended would be a perverse result.

17. The defendant represented the interests of the immediate O'Donohue family at the trial, namely the Testator's three siblings and his nieces and nephews and Mrs. Josephine O'Donohue in her capacity as a designated beneficiary. The submissions on their behalf largely echoed those of the plaintiff in that they contended that the Will creates a trust requiring Mrs. O'Donohue, as trustee, to divide the Testator's entire estate relatively equally among his mother and siblings but subject to such funds as might be required to give effect to the gifts provided for the other named beneficiaries. Such gifts were to be subject to the discretion of the trustee.

18. Orla O'Connell, a solicitor representing Ms. Olivia Moriarty and her children, attended court and in writing expressed the view that the Testator created a discretionary trust wherein Mrs. Moriarty and her family have an absolute right to a gift of money under the Will. It was her view that the Testator made a valid will benefiting the Testator's family and Mrs. Moriarty and her three children.

19. Ms. Marian O'Beirn, in a number of letters before the court, expressed the view that the Testator "would have afforded his family priority in the first instance and would have wanted to ensure that each member of his family was treated fairly in connection with any distribution as indeed he references in the will". She was happy for the court to decide the nature and extent of the benefit to each beneficiary provided copies of her letters and the previous will were before the court, as was the case.

20. Fr. Patrick O'Brien, Dr. Laurie Johnson, Ms. Ellen Wingard, Ms. Sheila O'Sullivan and Ms. Ethel Balfe were satisfied to leave the matter entirely to the discretion of the Testator's family and did not intend to attend or make representations before the court.

21. Mr. Martin Downey and Dr. Deirdre O'Donohue made it clear that they did not wish to benefit from the Testator's estate.

Legal Issues

Implied revocation of earlier will

22. The first question is the status to be afforded to the 1998 will in circumstances where the 2001 will did not contain an express revocation clause.

23. O'Keeffe P. *In the Goods of Martin* [1968] I.R. 1, was confronted with two wills, the earlier of which contained an express revocation clause, whereas the later one did not. He found that as the second will contained a bequest of "all my money", this constituted an implied revocation of the first will. Here, the Testator used the phrase "all my worldly possessions" which would leave little doubt, in the light of the judgment of O'Keeffe P., that the Testator intended to revoke and as matter of law did so revoke the 1998 will. Accordingly, the court is satisfied that the 1998 will has been revoked and that the court therefore has the task of discerning the intention of the Testator exclusively according to the 2001 will.

The Testator's intention

24. The issue that arises is the proper approach that is to be adopted by the court.

25. In the case of *In re Curtin Deceased* [1991] 2 I.R. 562, at 573, O'Flaherty J. in the Supreme Court, held that:

> "The first duty of a court in construing a will is to give effect to the intention of the testator."

The court's consideration of the Will is therefore subject to the principal duty that it must seek to give effect to the testator's intention.

Construction of a will

26. Guidance, on the construction of a will generally, comes from the judgment of Carroll J. in *Howell v. Howell* [1992] 1 I.R. 290 in which she expressly approved the statement of Lowry LCJ in the Northern Irish case of *Heron v. Ulster Bank Ltd* [1974] N.I. 44, at 52, regarding the procedure to be adopted in construing a will. Although Carroll. J. recited Lowry LCJ's statement *verbatim*, I believe that for present purposes it can be distilled into the following steps:

27. Firstly, consider the relevant portion of the will as a piece of English in an effort to extract its meaning. Secondly, seek to compare that portion with other sections from the will in order to seek confirmation of the apparent meaning of that portion. If any ambiguity or contradiction remains then it is useful to consider the overall scheme or framework of the will for the purposes of discerning what the testator was trying to achieve by its terms. Thirdly, where any doubt remains, the court must then determine whether any modification is required to resolve that ambiguity or so as to provide harmonious sense to the meaning of the will. Fourthly, the court should examine whether the rules of construction or the provisions of the relevant legislation provide authority for the court to make the necessary modifications. Fifthly, consideration must be given to any rules of law which would prevent the particular course of action proposed to save a will. Finally, although "no will has a twin brother" the court may have regard for precedent as a guide to how judicial minds have interpreted words in similar contexts.

28. In broad terms, the above approach provides a useful template as to how the court should address the interpretation of a will. Each of the steps will now in turn be considered and the facts of the present case applied.

The plain meaning

29. I am satisfied to adopt counsel for the plaintiff's suggestion that the Will may be regarding in three parts. On a plain reading, in the first part, the Testator gives all of his possessions to his mother with the direction that she divides them equally and fairly among his family but that something extra is to be given to his sister. The second portion directs that monetary gifts be given to Olivia and her family as well as to Marian O'Beirn. Finally, the third portion directs that smaller gifts are to be given to seven identifiable individuals.

30. As a piece of English, the Will is unclear on its face and raises a number of questions. How is the court to interpret the apparently contradictory intention that the estate is to be divided equally among the Testator's family but that his sister is to receive extra care and help? Further, if the Testator's entire estate is to be divided equally and fairly among his family, from where are the gifts to the second and third groups to be sourced? If the court were to accept that the gifts to the second and third group were to derive from the Testator's estate, how are they to be quantified? These questions go to the heart of the issue and present a significant stumbling block to ascertaining the Testator's intention.

31. The only fact that is undoubtedly clear is that the Testator did intend that a group of people are to benefit from his will. That group, it appears to the court, is readily distinguishable and were it necessary, the court would have little hesitation in identifying the individuals concerned on the basis of the extrinsic evidence put before the court. However, what is significantly less clear is the manner in which the Testator intended his estate to be divided between those people.

The scheme and material parts of the Will

32. When comparing the second and third portion of the Will, it would appear to be clear that the Testator intended the third group to benefit in the same manner as the second group, that is to say from a monetary gift, but at different levels. Taking into account the brevity of the Will, the court does not have before it other material from within the four corners of the Will from which to seek to identify the intention of the Testator through a comparison.

33. A consideration of the scheme of the Will is itself unhelpful. The approach suggested by the plaintiff was that the court should, in effect, start reading the Will from the bottom up. This would mean that the gifts to the second and third groups should be made first, leaving the remainder to be divided among the family members within the first group. Such an approach or "scheme" is not clear from the face of the Will. In fact the opposite is arguably more apparent in that it is difficult to infer any scheme from the will in which at the outset it is provided that one group benefits from the entirety of the estate. Furthermore, it is difficult to envisage a situation in which a Testator would seek to benefit his friends before his family. In the circumstances, the court is not assisted by the scheme of the Will in attempting to come to a view on the Testator's intention.

Modification of the will

34. This leads to a consideration of whether the terms of the Will suggest the need for modification in order to resolve any

uncertainty or ambiguity. For present purposes, and without deciding the point, I will assume that the plaintiff's suggestion is the most appropriate statement of the Testator's intention.

35. In order to give effect to the hybrid trust model proposed, it is suggested on the plaintiff's behalf that the words "with special care and extra help to be given to Mary O'Donohue, my sister" be removed to allow for the more reasonable construction that a fixed trust was intended in respect of the first group. I would comment that the word "and" should be substituted by the word "also" at the start of the second portion and the word "with" inserted before the third portion to provide for a discretionary trust which would be executed before allowing for the fixed trust to account for the residue of the estate. The modified version would then read:

> "I leave all my worldly possessions to Josie O'Donohue, my mother, to be divided equally & fairly among my family [] *after* gifts of money to be given to Olivia [&] family, & Marian O'Beirn *with* Smaller gifts to Downey, Ethel, Sheila [&] Pat O'Brien, Laurie Johnson, Ellen Wingard, Deirdre O'Donohue"

Aids to construction

36. The court's duty in seeking to identify the Testator's intention from his will is weighted by the presumption against intestacy. The 1965 Act, in particular, provides the court with a number of tools with which it can seek to construe the words in a will in a positive manner so as to save a devise or legacy that would otherwise be void for uncertainty.

37. Section 90 of the 1965 Act 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."

38. In this case the extrinsic evidence put before the court is of assistance in identifying the intended beneficiaries under the Will. However, no evidence was put before the court which provided any clarity as to how they were to benefit save to the extent that it was commoncase that the Testator's family should benefit first. There is a very real sense that even this small and apparently innocuous piece of evidence only serves to confuse matters further. If the Testator's family are to benefit first then it would be difficult to see how the gifts to the second and third groups could be given any real meaning. Alternatively if the Testator's family are to benefit the most from the Will then the difficulty remains that a comparator or superlative is only as good as the basis of comparison provided and there is none in the circumstances that prevail here.

39. Moving then to s.99 of the 1965 Act which has been described in some academic commentaries as the "golden rule" of construction, it provides that:

> "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."

40. The Will does not immediately suggest any interpretation which would allow the various bequests to be operative. In truth, the plaintiff's suggestion is to be preferred as it is the least worst option. That is to say, it seeks to vindicate the Testator's apparent intention while doing the least violence to the wording of the Will itself. In a sense the Testator's intention that his family share equally in a portion or all of his estate is as clear as his intention that his sister should be singled out and bequeathed more than the rest. However, both intentions are mutually exclusive and as such removing the latter words allows the rest of the portion to stand, while removing the former words would rule that portion out almost automatically. It is in this way that the plaintiff's suggestion is the least worst option. Nevertheless finding the "least worst" option is not the test which the court is charged with implementing. As such, consideration must be given to whether the modifications proposed are permissible as a matter of law.

Rules which bar the particular course of action

41. O'Flaherty J. *In re Curtin Deceased* [1991] 2 I.R., 562 at P. 573 sounded a note of caution when approaching the task of modifying a will, stating that:

> "A judge is to tread cautiously so as not to offend against the judicial inheritance which is that one is entitled to construe a will but not to make one."

In that case O'Flaherty J. was satisfied to insert a "simple clause" as it would "supply a proper sense" to the will. Having considering the terms of the Will at length and listened to the submissions of the parties I come to the conclusion that there is no such simple insertion or removal that I can make to the terms of the Testator's will which would supply the proper sense intended by the Testator. To accede to the proposal outlined above would be to do more than insert a simple clause and instead would see this court attempting to remake the Testator's will, which is a function that I cannot presume to exercise.

42. Furthermore, I am uneasy with the proposition advocated by the plaintiff that the court may presume that there was an intention to create a "hybrid trust". This suggestion was, however, unsupported by any authority. Furthermore, although the court is mindful of the presumption against intestacy, that presumption does not extend to the creation of new concepts as and when the need arises.

43. Having found myself in the circumstances unable to decipher the exact meaning of the Will, I reject the proposition submitted by the plaintiff as to the intention of the Testator.

Previous case law

44. I now turn, as a last resort, to previous case law in an effort to seek the guidance of my peers who have previously faced similar difficult situations.

45. In the case of *Peck v. Halsey* [1726] 2 P W.M.S. 388, a bequest of "some of my best linen" was held to be void for uncertainty. In the later case of *Jubber v. Jubber* 9 Sim 503 (1839), a provision in a will which directed that "a handsome gratuity to be given" was held to be void for uncertainty.

46. Neither of these cases provides assistance to the court in trying to rescue the intention of the Testator and in fact they provide persuasive authority to the contrary in respect of the second and third groups.

Conclusion

47. The Testator has unfortunately provided an illustration of exactly how a person should not make a will. While there can be little doubt but that the Testator was a man of considerable learning, the fact that he did not benefit from legal advice or assistance is evident from the will he drew up. Not only was it deficient in terms of the lack of certainty as to his intention but moreover he unwittingly made the classic error of having two of the intended beneficiaries act as witnesses to his signature, thereby depriving both as a matter of law from benefiting under the terms of the will.

48. Accordingly, it is with regret that in the circumstances as outlined I must hold that, although the will before this Court is valid as it satisfies the requirements of s. 78 of the 1965 Act, and also revokes the prior will of 1998, the terms of the Will render it void for uncertainty. The entirety of the Testator's estate consequently falls into intestacy and the statutory rules apply thereby bringing about a situation, pursuant to s. 68 of the 1965 Act, that the deceased's mother takes the entire estate. Accordingly, it is unnecessary for me to make any findings in respect of the other questions posed in the special summons.