

THE HIGH COURT

[2015 No. 372 SP.]

IN THE MATTER OF THE ESTATE OF JOSEPH DALY DECEASED LATE OF THOMOND LODGE NURSING HOME, BALLYMAHON IN THE
COUNTY OF LONGFORD AND FORMALLY OF KILLALON ROAD, CLONMEL IN THE COUNTY OF WESTMEATH

BETWEEN

MICHAEL DALY

PLAINTIFF

AND

DAVID MURPHY

DEFENDANT

JUDGMENT of Mr. Justice Paul Gilligan delivered on the 27th day of July, 2017

1. These proceedings commenced by way of a special summons issued on the 15th day of December, 2015 and relate to the estate of Joseph Daly deceased late of Thomond Lodge Nursing Home, Ballymahon in the County of Longford.

2. The plaintiff in the proceedings resides in Mount Merrion in the County of Dublin and he brings these proceedings as one of the persons entitled to share in the estate of the deceased on the intestate distribution thereof if the situation arises.

3. The defendant is a solicitor with his place of business at Athboy in the County of Meath and he is sued in his capacity as executor to the estate of Joseph Daly deceased.

4. The deceased died a widower without issue, parents, sibling, uncle or aunt or a nephew or niece surviving him but is survived by four first cousins of whom the plaintiff is one.

5. In the deceased's last will and testament as made on the 2nd day of May, 2013, the defendant was named as the deceased's sole executor and probate issued to him on the 17th day of December, 2014 forth of the principal probate registry.

6. The deceased made a number of pecuniary legacies including *inter alia* a bequest in the sum of €15,000.00 to the plaintiff, a sum of €15,000.00 to Vera Daly, wife of the plaintiff, and sums of €10,000.00 each to Martin Daly and Ann Daly, the son and daughter respectively of the plaintiff and also made a bequest of €100,000.00 to the Administrator for the time being of the General Hospital in Mullingar and the deceased directed that the said sum was to be used for the benefit of patient facilities in the said Hospital.

7. The deceased concluded his will with a final bequest in the following terms:

"I Give Devise and Bequeath all the rest residue and remainder of my Estate of every nature and description and where so ever situate onto my Executor to apply same for such purposes as my executor in his absolute discretion shall think fit."

8. The net estate returned for probate purposes was in the sum of €922,941.00 and the pecuniary legacies as made by the deceased totalled €257,000.00 so on the probate figures the residue of the deceased's estate is a sum in the region of €650,000.00.

9. In the prayer of the special summons the plaintiff seeks a determination as regards the effect of the clause relating to the rest residue and remainder of the deceased's estate in effect as to whether or not the residue is to be distributed in accordance with the residual clause or does the residue fall to be distributed by way of intestacy.

10. The plaintiff claims a determination pursuant to O. 3(2) of the Rules of the Superior Courts of the following questions:

(a) Does the residuary clause contained in the last will of the deceased named in the title thereof confer an absolute gift on the defendant?

(b) Does the said residuary clause create a valid trust?

(c) If the answer to (b) is in the affirmative what are the terms of the said trust?

(d) Does the residuary gift fail?

(e) Does the residue of the estate fall to be distributed on a resulting partial intestacy?

11. The plaintiff requests answers to the aforesaid questions in the following terms:

(a) No

(b) No

(c) No

(d) Yes

(e) Yes

and further if necessary claims an order pursuant to O. 3(4) directing the defendant to distribute to the plaintiff the share of the estate of the deceased to which he is by law entitled.

12. Both parties herein through counsel have made extensive oral and written submissions which I have taken into consideration.

13. The issues that arise are as to the effect of the residual clause, and as to whether extrinsic evidence can be introduced pursuant

to s. 90 of the Succession Act 1965 to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, the will and further as to whether or not s. 49(1) of the Charities Act 1961 has a role to play.

14. Section 90 of the Succession Act 1965 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."

15. Section 49(1) of the Charities Act 1961 provides that:-

"Where any of the purposes of a gift includes or could be deemed to include both charitable and non-charitable objects, its terms shall be so construed and given effect to as to exclude the non-charitable objects and the purpose shall, accordingly, be treated as charitable."

The above section has not been affected by the enactment of the Charities Act 2009 and remains in force.

16. In accordance with s. 38 Charities Act 2009 the Charities Regulator has been notified of the present proceedings and awaits a determination in relation to the charitable status of the bequest.

17. In an affidavit as sworn on the 22nd day of March, 2016, the defendant avers that he considers that the residuary gift of the will was a trust over which he was appointed trustee. He made an inheritance tax return in respect of the residuary estate and at all times he intended to distribute the residuary estate to charities and not to benefit from it himself either directly or indirectly. No proceedings were in being when he made the return to the Revenue Commissioners.

18. It is accepted by the parties that the provisions of the residuary clause do not create a gift in favour of the executor and the issue then is whether a trust is created and further whether it fails for uncertainty because it amounts to a non-charitable purpose trust with no objects provided for.

19. As set out by Delany in *Equity and the Law of Trusts in Ireland* (6th Ed., 2016), for a trust to be valid it must be capable of control and execution by the court and the objects of the trust must be defined with a sufficient degree of certainty if the court is to administer the estate in accordance with the testator's intentions.

20. Keane in *Equity and the Law of Trusts in the Republic of Ireland* (2nd Ed., 2011) states;

"Trusts for purposes rather than human beings are rarely valid. They are regarded as difficult, perhaps impossible to enforce, uncertain in their ambit and generally beyond the capacity of the Court to control".

21. It is contended on the defendant's behalf that it is possible to interpret the clause as including objects which could be deemed to include charitable and non-charitable objects relying on s. 49(1) Charities Act 1961.

22. The law confers a number of advantages on the charitable trust. It is the Charities Regulator who is charged with the responsibility of enforcing charitable trusts even when the nature of the charitable objects are not expressly delimited. In practice a charitable trust may be perpetual and is not subject to inalienability. It is significant that charitable trusts enjoy a number of fiscal immunities and where a charitable trust may otherwise fail it may be possible to apply the Cy-Près jurisdiction.

23. The legal reality of the situation is that if the residual clause could be deemed to include both charitable and non-charitable objects then its terms will be given effect so as to exclude the non-charitable objects and the purpose accordingly would be treated as charitable and would then be a trust created for a charitable purpose and the trust would be saved to allow for that purpose. The issue that arises is can the residuary clause be deemed to include a charitable purpose?

24. Insofar as the court is dealing only with the residuary clause I turn to s. 90 of the Succession Act 1965. The intention of the testator is required because if the purpose was charitable the residuary clause will be saved for charitable purposes and the admission of extrinsic evidence will assist in the construction of the clause.

25. The trust itself on its face if it is for a non-charitable purpose would result in the residuary clause being interpreted as a trust without objects and would fail. However, if extrinsic evidence is received it must meet the double requirement of showing the intention of the testator and assisting in the construction of the residuary clause.

26. The position in regards to the Courts jurisdiction to admit extrinsic evidence under s. 90 of the Succession Act 1965 is contained in a compendious abstract of the Supreme Court judgment of Henchy J. in *Rowe v. Law* [1978] 1 I.R. 55 at p. 72:-

"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.

Section 90 is no less tainted with repugnancy if it is treated as making extrinsic evidence admissible merely because it satisfies requirement (b), that is to say, if it assists in the construction of, or if it explains a contradiction in, a will. Since the function of a court in construing a will or in finding an explanation of a contradiction in it necessarily involves a search for the intention of the testator, it would have been unnecessary for the section to include requirement (b) if requirement (a) on its own were sufficient to allow the admission of extrinsic evidence.

The plain fact is that the grant of an unlimited and undefined jurisdiction to admit extrinsic evidence to show the

testator's intention would be so large in its scope and so untoward in its potential consequences that it would exceed the spirit and purpose of the Act. The necessary delimitation of the jurisdiction to admit such evidence is effected by the second limb of the section: "and to assist in the construction of, or to explain any contradiction in, a will." The conjunctive and cumulative "and" is to be contrasted with the disjunctive and alternative "or." It connotes a duality of purpose as a condition for the admission under the section of extrinsic evidence. The necessary conditions are: to show the intention of the testator *and* to assist in the construction of, or to explain a contradiction in, the will. If either condition is not satisfied, the section does not allow the evidence to be admitted."

27. The Supreme Court in *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596 unanimously confirmed the principles as set out in *Rowe v. Law*. Keane J. held extrinsic evidence:-

"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 conjunction "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."

28. In view of the foregoing and having regard to the continued citation and approval of the above in recent Irish jurisprudence, as is clear from *Black v. Ann Sullivan Centre Ltd & Ors* [2016] IEHC 695 and *Stanley deceased & Trustee Act 1893 Stanley & Anor* [2016] IEHC 8, this Court considers that the residuary clause must satisfy both conditions for the section to allow extrinsic evidence to be admitted.

29. I also refer to the well established procedure for the construction of a will as per Carroll J. in *Howell v. Howell* [1992] 1 I.R. 290 at 292-293 and reaffirm *O'Donohue v O'Donohue* [2011] IEHC 511 at para 27. On the face of the will uncertainty arises as to the purpose for which the trust was designed. With regard to s. 49 Charities Act 1961 two possible interpretations arise. I am satisfied that the residual clause causes a difficulty which calls for elucidation.

30. I take the view that it is important to consider in the particular circumstances of this case not so much the armchair principle but the fact that the deceased retained a solicitor and gave instructions and drew up a valid will, his signature being witnessed by two legal secretaries in the solicitors' office and the defendant being appointed by the deceased as his sole executor. It was the deceased's expressed desire that his estate would pass pursuant to his last will and testament and not by way of intestacy. It also in this context has to be borne in mind that the deceased made an extensive bequest to the plaintiff and other members of his family and thus provided for them as he considered appropriate. Clearly it follows from the legal position which arises that if the residuary clause fails *inter alia* the plaintiff insofar as he is concerned will benefit significantly from the deceased's estate which on the face of the will does not appear to have been his intention.

31. The testamentary disposition of the deceased should not be disturbed by this Court unless necessitated by a patent ambiguity on the face of the will. Even then extrinsic evidence must satisfy the double requirement as outlined in s. 90 Succession Act 1965 to show the intention of the testator *and* to assist in the construction of or explain any contradiction in a will. To allow otherwise would have the effect of usurping the statutory formalities required for a valid will as laid down by s. 78 Succession Act 1965.

32. In my view, the admission of extrinsic evidence herein is not for a purpose to contradict what the testator has actually indicated in his will but to clarify his intention. Furthermore, the residuary clause insofar as the charitable aspect is concerned admits of two interpretations one being charitable and the other non-charitable.

33. In my view, in this instance the court requires assistance to show the intention of the testator and to assist in the construction of the residuary clause.

34. It is of significance that the deceased attended with the defendant a number of times and intended to draw up a valid will.

35. In respect of the residuary clause it is clear from the defendant's attendance of the 19th April, 2013 upon the deceased that he was anxious that the monies arising in the residuary clause would not be confined to charitable purposes as he felt that there were a number of uses to which the residue could be put but which would not automatically or necessarily be of a charitable nature.

36. In a letter of the 24th of April, 2013 from the defendant to the deceased it is specifically pointed out to the deceased that he had bequeathed the residue of his estate to his executor to distribute as the executor saw fit and that on his instructions the defendant had not specifically stipulated that the monies should be for charitable purposes as this may restrict the application of the residual monies.

37. On the 2nd of May, 2013 in a further attendance by the defendant upon the deceased the deceased again indicated that he did not wish the residuary of his estate to be restricted by leaving it simply to charitable bodies but that he felt that if there were persons or organisations deserving of a bequest, the defendant in his capacity as executor should feel free to do as he considered appropriate. In this same attendance, the bequests to the plaintiff, his wife son and daughter were all confirmed.

38. I am satisfied on the balance of probabilities that the intention of the testator was that the residuary of his estate was to be used for charitable and non-charitable purposes and thus it was the deceased's intention that charitable and non-charitable uses were the objects of the residuary clause.

39. Having regard to the attendances it is clear the testator intended the residuary bequest not to be exclusively charitable, and by implication that the bequest was at least partially charitable. It is apparent that there is a general intention to give the substance of which is charitable. By way of letter dated 15th May, 2015 the defendant describes the deceased's general testamentary wish to be:-

"...that the money be applied towards good causes and this would be [the executor's] intention in distributing the same when the time comes."

I refer to Sheridan in *Trusts for Non Charitable Purposes* (1953) 17 Conv 46:-

"distributors of largesse...generally give because they want to and not because giving can be accomplished with legal ease".

In this regard I refer to the attendance by the defendant upon the deceased of the 2 May, 2013 outlining the deceased's preference for the residual clause to remain the same. The defendant noted:-

"He [the deceased] feels that everyone else has been looked after sufficiently."

40. Thus I come to the conclusion that this is an appropriate case where extrinsic evidence should be admitted to show the intention of the testator and to assist in the construction of the will and it is appropriate that s. 49(1) of the Charities Act 1961 does apply and as the objects of the trust can be deemed to include both charitable and non-charitable purposes accordingly the non-charitable purposes fall away and the residuary clause can be applied for charitable purposes.

41. Accordingly, it follows that I answer the questions posed as follows:

- (a) No.
- (b) Yes.
- (c) Residuary to be distributed for charitable purposes.
- (d) No.
- (e) No.

Thus the plaintiff's request for an order pursuant to O 3 (4) of the Rules of the Superior Courts directing the defendant to distribute to the plaintiff a fuller share in the estate of the deceased is to be refused.

42. I will hear the submissions of Counsel as to the form of the order to be drawn up.