

THE HIGH COURT

[2011 No. 752SP]

IN THE MATTER OF THE SUCCESSION ACT 1965

AND

IN THE MATTER OF THE ESTATE OF THE LATE EDWARD J. RAFTER, DECEASED

BETWEEN

MARK THORNTON

PLAINTIFF

AND

BY ORDER MICHAEL TIMLIN

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 13th day of June, 2012.

The proceedings

1. In these proceedings, which were initiated by special summons which issued on 11th November, 2011, the plaintiff, who is a personal representative of Edward Rafter (the Testator), seeks orders from the Court determining the true construction of a provision in the will of the Testator. The Testator died on 27th June, 2006 at the age of eighty two having never married. He died without issue. He made his last will and testament (the Will) on 10th August, 1983. Probate of the Will was granted on 16th November, 2009 to the plaintiff, the surviving executor named therein. Before dealing with procedural matters, it is appropriate to outline the provisions of the Will to put in context the provision which has necessitated the initiation of these proceedings.

The provisions of the Will

2. The person appointed co-executor with the plaintiff in the Will, who did not survive the Testator, was Reverend Canon Martin MacManus of Bonniconlon, Ballina, County Mayo. Having directed his executors to pay his debts, funeral and testamentary expenses, the Testator made the following bequests:

- (a) a bequest of certain shares to the trustees of Bonniconlon GAA Club "to be used for the benefit of the Club";
- (b) the sum of IR£500 to the Committee in charge of Killaser Community Centre to be used for charitable purposes;
- (c) the sum of IR£500 "to Mayo County Council (Ballina area) workers", being the bequest which has given rise to these proceedings;
- (d) the sum of IR£500 to "the Association for the Blind, Hatch Street Dublin", to which bequest there was added the rider: "I forget the precise name of the organisation";
- (e) the sum of IR£200 to the Wireless for the Blind Association;
- (f) the sum of IR£500 to Divine Word Missionaries for charitable purposes;
- (g) the sum of IR£500 to the Parish Priest for the time being in Knock for charitable purposes;
- (h) the sum of IR£500 to the Parish Priest for the time being in charge of the Church on Croke (*sic*) Patrick for charitable purposes;
- (i) the sum of IR£1,000 to the Bursar in St. Murdach's (*sic*) College Ballina "for a trust to be used to help a pupil most in need of financial help and assistance";
- (j) the sum of IR£1,000 to the Vocational Educational Committee for County Mayo on trust to help a pupil in Ballina Vocational School who is in need of financial help and assistance; and
- (k) the sum of IR£500 to "the Boy Scouts Organisation in Ballina".

The residuary clause in the Will was in the following terms:

"All the rest residue and remainder of assets are to be realised and invested in Prize Bonds and all of the beneficiaries in my Will are to benefit equally from them."

3. At the commencement of the Will the Testator was described as late of an address in Ballina and as "County Council Employee".

4. According to the grant of probate, an Inland Revenue Affidavit had been delivered, which showed that the net value of the estate amounted to €368,213.21. The Court was informed that the residue for distribution will be approximately €250,000.

Procedural matters

5. In the special summons, in which the Manager of Mayo County Council was originally named as defendant, the plaintiff seeks an

order determining the true construction of the bequest to "Mayo County Council (Ballina area) workers", and, in particular, the identification of the beneficiaries of the bequest. The plaintiff also seeks such necessary ancillary orders as may appear to the Court to be just and equitable having regard to the provisions of the Succession Act 1965 (the Act of 1965) and to all of the circumstances of the case.

6. The special summons was grounded on a short affidavit of verification of the type appropriate to a probate action, which was sworn by the plaintiff. It was also grounded on affidavits sworn by -

(a) Michael Timlin, a former work colleague of the Testator as an employee of Mayo County Council; and

(b) John Brogan, an employee of Mayo County Council, whose late father had been a work colleague of the Testator, and who was a godson of the Testator.

7. In response to the special summons, Kieran Joyce, the Acting Senior Staff Officer of Mayo County Council, swore an affidavit in which he set out the following facts:

(a) that the Testator had been employed by Mayo County Council as a "Ganger" working as a member of the Council's outdoor staff in Ballina, County Mayo from 19th September, 1945 until he retired on 2nd February, 1990; and

(b) that Mayo County Council does not use the term used by the Testator in his Will, that is to say, "Mayo County Council (Ballina area) workers".

Mr. Joyce exhibited two lists of staff employed by Mayo County Council, namely:

(i) A list of staff employed in the Ballina area at the date of the death of the Testator, 27th June, 2006, distinguishing "Outdoor" employees, "Indoor" employees and "Professional/Technical" employees. In the "Outdoor" category there were in excess of seventy workers listed, including, obviously, clerical and administrative workers.

(ii) A list of staff employed in the Ballina area as at 18th January, 2012, which list included clerical/administrative staff, outdoor staff and professional/technical staff. That list also included in excess of seventy outdoor staff, including a number of female staff, whom I assume perform clerical functions.

8. By order of the Court, Mr. Timlin, being a former co-worker of the Testator, has been substituted as defendant for the Manager of Mayo County Council.

9. In his capacity as defendant, Mr. Timlin swore a supplemental affidavit on 20th April, 2012. At the hearing of the action on 23rd May, 2012, Mr. Timlin gave oral testimony. Before considering Mr. Timlin's evidence, I propose outlining what I consider to be the relevant provisions of the Act of 1965 which govern the approach the Court must adopt to construction of the provision in the Testator's Will which the Court has been asked to construe and the consequences of a particular construction and the relevant legal principles.

Relevant provisions of the Act of 1965 and legal principles

10. Section 89 provides as follows:

"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."

The words to which emphasis has been added in the above quotation were not in the corresponding section of the Wills Act 1837, s. 24. There is a marginal note in the Act of 1965 opposite s. 89 to the following effect:

"Will to speak from death of testator.

[1837] (c. 26) s. 24 extended so as to overrule Wild's case (1599) ...]".

While it is unnecessary to address the intricacies of Wild's case here, it is important to emphasise that, unlike the application of s. 24 of the Wills Act 1837 in the United Kingdom, where it applies with regard to the subject-matter of a gift but does not in any way affect the construction of a will with regard to the object of a gift (*per Theobald on Wills*, 16th Ed., 2001 at para. 18 - 09), s. 89, because of the words to which emphasis has been added, does affect the construction of a will with regard to the object of the gift.

11. Section 90 provides:

"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 main focus of both counsel for the plaintiff and counsel for the defendant in their helpful written and oral submissions was on s. 90. The basis on which the Court can admit extrinsic evidence under s. 90 is succinctly summarised in the following passage from the judgment of Keane J., as he then was, with whom the other Judges of the Supreme Court concurred, in *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596 (at p. 611):

"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."

12. Section 91 provides as follows:

"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."

13. Section 99 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."

14. The primary duty of the Court in construing a will is to ascertain and give effect to the intention of the testator. In recent years the High Court in this jurisdiction has adopted the guidance on the construction of wills generally given by Lowry LCJ in *Heron v. Ulster Bank Ltd.* [1974] N.J. 44, as appears from *Howell v. Howell* [1992] 1 I.R. 290 (Carroll J.), *Corrigan v. Corrigan* [2007] IEHC 367 (McGovern J.), and, most recently, *O'Donohue v. O'Donohue* [2011] IEHC 511 (Gilligan J.). Lowry LJ stated as follows:

"I consider that, having read the whole 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 at the other material parts of the will and see whether they tend to confirm the apparently 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 immediately relevant portion can be resolved.
3. If the ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.
4. One may at this stage have resort to 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 from being adopted.
6. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other courts and judges on similar words, rarely as binding precedents since it has been well said that 'no will has a twin brother'"

The evidence

15. Apart from the affidavit evidence of Mr. Joyce, which I have outlined above, the Court has the evidence, both oral and on affidavit, of Mr. Timlin, and the affidavit evidence of Mr. Brogan.

16. Mr. Timlin has made it clear that he never spoke to the Testator in relation to the Testator's intentions or wishes. However, he was a co-worker of the Testator from 1969 until the Testator's retirement in 1990. He continued to work for Mayo County Council until his own retirement in February 2012. He described the work carried out by him and his co-workers- repairing roads, water mains and building walls. They worked in groups, usually in the same area and with the same people. Mr. Timlin, in his supplemental affidavit sworn on 20th April, 2012, identified the persons, including himself, with whom the Testator had most contact over a long period of time and whom, in his opinion, would have been included in the bequest in issue. It is clear that four of the individuals were outdoor workers and two performed clerical functions. Whether the seventh person worked outdoors or performed other functions is not quite clear. Of the seven, one retired in 1983, one retired in 1992, one retired in 2000, one retired in 2002 or 2003 and two, including Mr. Timlin, retired in 2012. It is not clear when the seventh, a woman who worked as an assistant in the office, retired. However, she does not appear on Mr. Joyce's list of staff as at 27th June, 2006 and, therefore, I infer that she had retired before the Testator's death. In his oral evidence Mr. Timlin added another person to the list. The evidence is that he worked with Mayo County Council until 1982, so that he had left before the Testator had made his Will.

17. Mr. Brogan in his affidavit averred that many of the work colleagues of the Testator are now deceased and he confirmed that the seven persons named by Mr. Timlin were "still living former work colleagues" of the Testator. One of the seven persons named has died since the date of swearing of that affidavit.

18. What is absent in this case is any admissible extrinsic evidence of whom the Testator himself intended to benefit by the bequest to "Mayo County Council (Ballina area) workers". There is no evidence of the circumstances in which the Testator executed the Will, save such intrinsic evidence as is afforded by the Will itself. The Will was produced in manuscript. The two witnesses are described as: "Solicitor Galway"; and "c/o Regional Hosp. Galway". Although this is not in evidence before the Court, the Court was informed that when the Will was made, the Testator was a patient in what was then known as the Regional Hospital in Galway and that the solicitor who witnessed the Will and who, presumably, advised the Testator, is no longer practising as a solicitor.

Application of the law to the facts

19. To reiterate, the problem which the Court has to address is who did the Testator intend should benefit from the bequest "to Mayo County Council (Ballina area) workers", or, to put it another way, who are the objects of that bequest and, what, if any, entitlement do the objects have to benefit under the residuary clause in the Will.

20. In my view, the starting point in addressing that problem is that on a plain reading of the bequest in issue, whether on its own or in the context of the Will as a whole, no intention contrary to the application of s. 89 of the Act of 1965 is discernible. Therefore, s. 89 applies. Accordingly, the Will speaks from the death of the Testator as to identifying the beneficiary or beneficiaries. Therefore, the question for the Court it is whether it is possible to identify who or what constitutes "Mayo County Council (Ballina area) workers" as at 27th June, 2006 as intended by the Testator.

21. All of the other bequests in the Will are made to organisations, associations, office holders and, indeed, in one case to a public body, and they are all given for charitable purposes, or otherwise benevolent purposes. It is clear on the evidence that the term "Mayo County Council (Ballina area) workers" is not a term which is used by Mayo County Council. There is no evidence that there was any organisation or association or other body of such workers. Therefore, it is necessary to consider whether it is possible to identify a cadre or class of, or individual, workers whom the Testator intended to benefit.

22. It is not possible to identify the workers whom the Testator intended to benefit, either from the plain meaning of the bequest on its own or in the context of the Will as a whole. The problem is one of lack of clarity rather than ambiguity. In my view, s. 90 does not assist because, as I have indicated earlier, there is no admissible extrinsic evidence as to whom the Testator intended to benefit. There is evidence as to the identity of the Mayo County Council workers who were working in the Ballina area on 27th June, 2006. However, I do not think that it would be proper to conclude that it was the intention of the Testator that the seventy plus workers employed by Mayo County Council on, or in connection with, outdoor work in the Ballina area sixteen years after his retirement should benefit under the bequest or under the residuary clause in the Will. The only other evidence before the Court is evidence as to the

identity of co-workers who were particularly friendly with the Testator during his lifetime. However, in my view, that evidence is not admissible under s. 90 to inform the Court in determining who should benefit under the clause in issue, because, in my view, it does not fulfil the second condition laid down by the Supreme Court in *O'Connell v. Bank of Ireland*, in that it does not show what the intention of the Testator was in the particular context. It merely reflects the opinion and belief of the witnesses. Apart from that, there is nothing in the bequest on its own, or in the context of the Will as a whole, to indicate that what the Testator intended was that work colleagues with whom he was friendly and who were kind and generous to him should benefit under the bequest. To construe the Will on that basis would, in effect, be rewriting the Will. Unfortunately, I must conclude that the bequest is void for uncertainty.

23. Accordingly, I have come to the conclusion that the pecuniary bequest of IR£500 "to Mayo County Council (Ballina area) workers" does not admit of any interpretation which would preserve it by virtue of the operation of s. 99 of the Act of 1965. Therefore, by virtue of the operation of s. 91 of the Act of 1965 that bequest is included in the residuary clause in the Will. It follows from the conclusion that the pecuniary bequest is void for uncertainty that the beneficiaries of the residuary estate do not include "Mayo County Council (Ballina area) workers" as named in the pecuniary bequest.

24. Finally, I think it is apt to note that in *O'Connell v. Bank of Ireland* (at p. 615) Keane J. drew attention to the fact that the Supreme Court had then recently drawn attention in *E.B. v. S.S.* [1998] 2 ILRM 141 to the importance of notice being given by parties to proceedings to the Attorney General, as protector of charities, where the interests of charities may be affected by the outcome of proceedings. In this case, most, if not all, of the beneficiaries under the residuary clause are charities. On reflection, when it made the order substituting Mr. Timlin as defendant, the Court should have directed that, before the matter was listed for hearing, notice be given to the Attorney General, because clearly if the clause in the Will in issue was found to be valid and implementable, the aggregate of the shares of the named charities of the residuary estate would be diminished by approximately €25,000. However, I think it appropriate to adopt the pragmatic position adopted by the Supreme Court in *O'Connell v. Bank of Ireland* and conclude that no useful purpose would be served at this stage by adjourning the matter so that notice should be given to the Attorney General. However, the foregoing observations are intended as a reminder not only to future litigants, but also to myself!