Neutral Citation Number: [2008] IEHC 134

THE HIGH COURT

2007 No. 486 SP

IN THE MATTER OF THE ESTATE OF OWEN MC GUINNESS (DECEASED) AND IN THE MATTER OF THE SUCCESSION ACTS

BETWEEN

ELLEN MC GUINNESS

PLAINTIFF

AND

MICHAEL SHERRY AND TEDDY GILLANDERS

DEFENDANTS

AND

GERALDINE FINN

NOTICE PARTY

Judgment of Mr. Justice John MacMenamin delivered on the 8th day of May, 2008

1. This matter comes before the Court by way of an application seeking directions as to the precise meaning and import of the bequest contained in the last Will and Testament of Eoin McGuinness, deceased (hereinafter referred to as "the deceased"), which said bequest is identified in the special summons issued by the plaintiff herein on 6th July, 2007. The notice party has been joined to these proceedings by order made by the Court on 31st March, 2008, for the purposes of, *inter alia*, providing the Court with the necessary legitimus contradictor in circumstances where the stated position of the executors of the estate of the deceased is that they intend to adopt a neutral status in respect of the contention being made by the plaintiff in regard to the request, the subject matter of the application.

Background

2. The plaintiff in these proceedings is the widow of the deceased, late of Tully House, Tully, in the County of Monaghan, who died on 13th May, 2002. At the time of his death he was 88 years. His wife was considerably younger, in her late 60s. The defendants are the executors of the estate of the deceased and the notice party is the daughter of the plaintiff and the deceased. The issue is to be heard on affidavit and it is accepted that extrinsic evidence is not to be admitted in dealing with the interpretation of the Will.

The Will

3. In the application, the plaintiff seeks directions as to the type of interest conferred upon her by her late husband's Will. The deceased, in his last Will and Testament dated 1st May, 2002, made the following devises:

> "I give and devise to my wife, Ellen, my dwelling house (including front street, gardens, garage, planting, old orchard, yard, rear sheds, cattle crush and farm buildings) with right to enjoy existing services with right of access thereto and therefrom at all times on foot and with vehicles. I give and devise the remainder of my real property to my five children, namely, Charles, Sean, Geraldine, Elizabeth and Teresa, *and to my wife, Ellen, jointly, subject to and charged with payment of the sum of €100,000 in favour of my wife, Ellen, payable within one year following the date of my death, and subject to the right of Ellen to have use and occupation of my said real property for the term of her life, free of charge.*" (Emphasis added). The emphasized portion gives rise to the issue.

4. The first portion of the devise relating to the dwelling house is relatively straightforward. It provides clearly that the plaintiff is entitled to the whole interest in that part of the property. Steps have been taken to comply with the devise in the recent past. The fundamental issue facing the Court is as to the remainder of the real property as referred to in the second devise. The plaintiff contends that she has the benefit, not only of the joint interest, along with her five children, but in addition that she is entitled by virtue of the devise of the "use and occupation" of the property for her lifetime for a life tenancy in the said property.

5. It is acknowledged that such a claim has consequences for the nature of the joint ownership granted for the first part of that devise.

Life 'state or right of residence'

6. Section 2 (5) of the Settled Land Act 1882 defines a tenant for life as follows:

> "The person who is, for the time being under settlement, beneficially entitled to possession of settled land for his life, is for the purposes of this Act, the tenant for life of that land and the tenant for life under that settlement."

7. On the other hand, s. 81 of the Registration of Title Act 1964 defines a right of residence as follows:

> "A right of residence in or on registered lands, whether a general right of residence of the land or an exclusive right of residence in or on part of the land shall be deemed to be personal to the person beneficially entitled thereto and to be a right in the nature of a lien for money's worth in or over the land and shall not operate to create any equitable estate in the land."

8. The plaintiff submits that what is being conferred upon the plaintiff arising from the second devise is not simply a right of residence. The plaintiff had already been given the dwelling house and farm buildings under the Will, thereby providing for her residence. What is at issue is interpretation of the devise the plaintiff's right to the "use and occupation" of the remaining lands. Does the said devise afford the plaintiff a right of exclusion of the other joint owners insofar as the vesting of property in six joint owners would have entitled all of them to the use and occupation of the lands in common with the other owners? In those circumstances, it is submitted by counsel for the plaintiff that the use by the deceased of the expression "use and occupation" of the land must be taken to mean an *additional* right enjoyed by the plaintiff to the exclusion of other parties.

9. In the process of interpretation, I propose to adopt the principles as set out in the decision of Carroll J. in the case of *Howell v. Howell* [1992] I.R. at p. 290, that is:

> (i) Read the immediately relevant portion of the Will as a piece of English and decide, if possible, what it means.
>
> (ii) 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.

(iii) If ambiguity persists, having regard to the scheme of the Will, I consider what the testator was trying to do.

(iv) Then, have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumptions against intestacy and in favour of equality.

(v) Then see whether any rule of law prevents a particular interpretation from being adopted.

(vi) Finally, once the dispute of passage has been exhaustively studied, one may get help from the opinions of other courts and judges on similar works rarely as binding precedents, but more often as examples of how judicial minds, nurtured in the same discipline, have interpreted words in similar contexts. In adopting this test, Carroll J. was approving the Northern Ireland decision of *Herron v. Ulster Bank* [1974] N.I. 44, a decision of Lowry L.C.J.

Steps taken by the executors

10. Prior to embarking on the process of interpretation, it is well to set out certain material which is sworn in the affidavit of Terry Gillanders, one of the two executors. Mr. Gillanders sets out the difficulties which were encountered by the executors arising from the difficulties in interpreting the Will. These included issues as to how the interests of the beneficiaries should be registered, be it as joint tenants or tenants in common; whether or not the charge for use and occupation free of charge amounted to a life tenancy and how such charge could be secured, and whether such matters could be resolved by agreement of the beneficiaries, or failing that, by directions of the Court.

11. A common letter was sent to the beneficiaries on 31st October, 2007, advising them of possible options. A number of the beneficiaries have responded, but not all. I do not think it is appropriate to deal with the views of any particular beneficiary as no extrinsic material is to be relied on in the process of interpretation of the Will. The question is one of simple interpretation

(i) Read the immediately relevant portion of the Will as a piece of English and decide, if possible, what it means'.

12. It is unnecessary for the moment to refer to sub-clause A. For this exercise, the main focus must be on sub-clause B. The intent of the testator was that the remainder of the real property should be devised to the testator's children and to his wife jointly. However, this is subject to two provisos. The first was that there was to be created a charge in the sum of €100,000 in favour of Ellen McGuinness (the testator's wife, some twenty years his junior), payable within one year by the children. The second proviso was that the devise was "subject to the right of my Ellen to have use and occupation of my said real property for the term of her life, free of charge." Sub-clause C provides that subject to payments of debts, funeral and testamentary expenses, the remainder of the testator's property was devised to Ellen, absolutely.

13. On behalf of the defendant, it is submitted that the difficulty is not in interpreting the expression "the right to use and occupy", but rather than the bequest in favour of the plaintiff of an undivided one-sixth share in the remainder of the testator's real property, carries with it an entitlement to have the use and occupation of that property free of charge and a clause in the testator's Will which reads "and subject to the right of my Ellen to have use and occupation of my said property for the term of her life, free of charge" adds nothing to this bequest. It is said to be otiose. The defendant submits simply the plaintiff, in asserting her case, is effectively seeking to "amend" the Will so as to confer on Ellen McGuinness *exclusive* use and occupation of the property.

14. The real question to be decided is whether the testator intended to grant his wife something over and above the rights which are devised to his children in the lands. Analysing clause B as a piece of English in accordance with authority, there are number of pointers which are helpful. In the first instance, the devise to the children was *subject to* the payment of the sum €100,000 within one year. Clearly this was something over and above the right of the children, Charles, Sean, Geraldine, Elizabeth and Teresa.

15. One looks, then, to the second part of the specific devise. The question to be asked here is whether it is again the intent of the testator to grant 'his Ellen' something over and above the devise to the other children. I conclude that this was the testator's intention. Just as he wished to give his wife, Ellen, something over and above the devise to the children by reason of the charge, I conclude that he also wished to give something additional over and above the other beneficiaries, that is to say the use and occupation of the real property. Looked at another way, he wanted his wife, Ellen McGuinness, to remain on in the house and lands for her lifetime with the security of the additional charge of €100,000 payable by the children. What was granted to Ellen McGuinness was not simply a right of residence. This had already been granted in the dwelling house and farm buildings under the Will. This provided for her residence. As an aid, it might (if permissible) be useful to consider what the effect of the alternative interpretation urged would be. The consequence would be that while Ellen McGuinness would be entitled to reside in the house, her right to the other real property would not be an exclusive one and would be subject to the rights of joint owners, that is to say, her children, in that real property, and to take such steps as they, as joint owners, might be entitled to avail of. That was the intent of the testator. Such an interpretation might well have consequences including as to the use of the lands surrounding the dwelling house which are the real property in question.

16. But the true test is the Will itself. I consider that the only interpretation of the clause which by use of the terms "subject to" give super-added rights to the wife. They are to give her exclusive possession for her lifetime. To interpret the Will as giving the plaintiff no more than a one-sixth interest in the subject property, would, effectively, be to render the expression " as subject to the right of my Ellen to have use and occupation of my said property for the term of her life free of charge" inoperative.

17. While the devise may have been difficult to interpret, any question can be resolved in this way. Clearly, the intent of the testator was, in fact, to give his wife Ellen more than a one-sixth interest in the subject property and this is not only emphasized by the charge, but re-emphasized by the concluding part of the devise. It is unnecessary to go further than the second principle in *Howell v. Howell*.

18. To place an interpretation on the devise which might tend to undermine the integrity of the entire holding, that is to say the house and farm, would surely be to negate a proper interpretation of what was the testator's intent.

19. Jarman on Wills (7th Edition) sets out a summary of several rules of construction. One of these is rule XVI. It provides that words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected and that other can be ascertained; and they are, in all cases, to receive a construction which will give every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy.

20. Rule XIX provides that words and limitations may be transposed, supplied or rejected where warranted, by the immediate context

or the general scheme of the Will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in obvious to the plain and obvious sense of the language of the Instrument.

21. It may be that the interpretation which I conclude is a true one may have the effect of rendering some parts of the devise surplusage. But that is far from saying that it renders any of the expressions contained in the devise inoperative. That is not the effect of the interpretation. Moreover, for the reasons I have outlined, I am not persuaded the interpretation in question is predicated on a "conjectural hypothesis" in opposition to a plain and obvious interpretation. The interpretation, in fact, is reasonable. There is no plain and obvious language to the contrary effect in the devise.

(ii) 'Look to other material parts of the Will and see whether they tend to confirm the plain meaning of the immediately relevant portion or whether they suggest a need for modification . . .'

22. The matter is further clarified (if necessary) by the second principle. The more general provisions of the Will, if anything, support the conclusion which I have reached. In the first place, the remainder of the Will, is, in general, well drafted. There are specific requests to two of the testator's daughters, Teresa and Geraldine. These are both in the sum of €6,000. Thus, the interests of those two daughters are more specifically dealt with over and above other beneficiaries. In the concluding portion of the Will, there are two other specific requests to two nephews, Patrick and Larry Sherry. Thus, in four separate areas, where the testator wished to make specific provision, he does so. His intent to ensure that his wife's security properly protected for her lifetime is reinforced by the final bequest, that is to say the remainder of the testator's property, to his wife, Ellen, absolutely.

23. I consider that the devise with which we are concerned permits of the supplying of a word in circumstances outlined by Jarman at p.556, that is to say:

> "Where it is clear on the fact of a Will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words he has omitted, those words may be supplied in order to affect the intention, as collected from the context."

24. I consider that the remainder of the devise as to use and occupation for the term of Ellen's life, free of charge, can only be effected by the construction of the devise with the insertion of the word 'exclusive'. I do not consider that such an interpretation involves the re-writing of the Will. It is simply to remove a possible ambiguity. I will hear counsel on the form of the order.