Neutral Citation: [2014] IEHC 407

THE HIGH COURT

[2013 No. 502 SP]

IN THE MATTER OF THE WILL OF ELIZABETH (O/WISE BETSY) MULLEN DECEASED LATE OF FAHY, CLIFDEN, COUNTY GALWAY

BETWEEN

JAMES MULLEN JUNIOR

PLAINTIFF

AND

JAMES MULLEN

DEFENDANT

JUDGMENT of Mr. Justice Cregan delivered on the 31st day of July 2014

Introduction

1. This is an application about the interpretation of the terms of a will. The will was made by Mrs. Elizabeth Mullen, deceased, of Fahy, Clifden, County Galway. Mrs. Mullen died on 24th May, 2012 having executed her last will and testament on 19th July, 2004.

2. In her will Mrs Mullen left various bequests to her sons and daughters but she also bequeathed a small plot of land of not more than half an acre to her grandson, James Mullen Jnr., the plaintiff in these proceedings.

3. Mrs. Mullen died on 24th May, 2012 without having altered or revoked her last will. In her will she appointed the defendant James Mullen, her son, to be her executor. There is however a dispute between the plaintiff and the executor of the will as to the meaning of the bequest to James Mullen Jnr. James Mullen Jnr., claims that he is entitled to the bequest; the defendant on behalf of the estate claims that the bequest has lapsed and/or has failed.

The terms of the will

4. I set out below the terms of the will in full. It is dated 19th July, 2004 and it provides as follows :

> *This is the last will and testament of me, Elizabeth Mullen (otherwise Betsy Mullen) of Fahy, Clifden, County Galway. I revoke all former wills and testamentary dispositions heretofore made by me*
>
> *I appoint my son James Mullen to be executor of this my will subject to the payment of my lawful debts funeral and testamentary expenses.*
>
> *I give devise and bequeath as follows:*
>
> *My house and garden at Fahy, Clifden to my three daughters,*
>
> *Lily Kane of Dawros Letterfrack*
>
> *Rita McNamara of Tullyvoheen, Clifden*
>
> *And Margaret Pride of Letternoosh, Clifden*
>
> *In equal shares.*
>
> *The field opposite my house at Fahy, Clifden as to one half thereto to my son, Marty Mullen and as to the other half thereof to my son Thomas. They are each to have the half nearest to their respective houses.*
>
> *To my executor and son James Mullen the land upon which his house stands at Fahy, Clifden together with the well and water supply servicing same which comes from adjoining lands and also I give devise and bequeath to him the lands running to the sea which he presently occupies.*
>
> *I also give devise and bequeath to my son, James Mullen the site of the house my late husband James Mullen senior was born in which is situated at Fahy, Clifden and is half way between the Low Road and the Sky Road.*
>
> *I also give, devise and bequeath to James Mullen Junior., son of my son John, a small plot or piece of land of not more than half an acre to make up the site of his proposed new house should he require same.*
>
> *All the rest, residue and remainder of my property of every nature and kind wheresoever situate I give devise and bequeath to my three sons John, Marty and Thomas in equal shares.*
>
> *I direct that my executor appoint the firm of Black and Co. Solicitors of 28 South Frederick Street, Dublin 2 to act in the administration of my estate and that they be paid their proper professional fees and expenses for so doing.*
>
> *In witness whereof I have herewith signed this my last will and testament this 19th day of July, 2004.*
>
> *Elizabeth Mullen (Betsy)*
>
> *Signed by the testatrix.*

5. The relevant bequest which is at issue in these proceedings is as follows:

> "I also give devise and bequeath to James Mullen Junior, son of my son John, a small plot or piece of land of not more than half an acre to make up the site of his proposed new house should he require same."

Relevant factual background.
6. The parties are agreed that there are certain factual matters which are relevant in order to put the will into some form of factual context.

7. I set out below therefore a summary of the relevant background to the making of the will.

> 1. The plaintiff James Mullen Jnr. had been left certain lands by his father which adjoined the testatrix's lands.
>
> 2. He then set about applying for planning permission to build his own home on this site. He obtained planning permission. In or about June 2005 he commenced construction of his dwelling house on these lands and he substantially completed the construction and moved into the house with his wife on or about 30th July, 2006.
>
> 3. The plaintiff, in his affidavit, states that it was difficult to secure planning permission in the area but, as his brother had already constructed his house adjacent to the plaintiff's lands, he was able to use his brother's access road which greatly strengthened his application for planning permission.
>
> 4. It appears that the site on which the plaintiff built his house was a difficult site on a sloping road and blasting was required to clear the stone from the hillside and also to create a level space.
>
> 5. In or about March 2010 the plaintiff sought the testatrix's permission to use a portion of her lands (which adjoined his dwelling house) as a garden. The plaintiff at this stage had a number of small children and wished to obtain a garden for them to play in.
>
> 7. The plaintiff also states in his grounding affidavit that from May 2010 until the testatrix's death on 24th May, 2012 that he, the plaintiff, occupied this portion of the testatrix's land for use as a garden with her knowledge, consent and indeed encouragement. He avers that he placed swings on the land for use by his children and that the testatrix on her many visits to his house also discussed with the plaintiff the use to which he could put the lands and encouraged him to plant vegetables on the lands, to keep chickens on the lands and also to allow his children to play there.

8. The defendant in these proceedings has sworn a replying affidavit. There are certain paragraphs in the affidavit which relate to details about the testatrix's late husband and various conversations which may or may not have been had with him and what his intentions may or may not have been. These matters however are not relevant in any way to the matter which I have got to decide, namely the interpretation of the testatrix's will. The testatrix's husband died before her and in his will he left all his land and properties to her to bequeath as she wished.

9. The defendant, in essence, says that the plaintiff had an offer (at the time he was building his house) from his grandfather (the testatrix's husband) "of a few feet of land to help him build his house should he need it". However he did not avail of the offer to make up the site of his proposed new house and this is proof that he does not need it now. The defendant also states that he is of the view the plaintiff has an adequate area within his site to create a garden.

10. The plaintiff filed a replying affidavit as did his mother Kathy Mullen. A further affidavit was also sworn by Gerard Black, the testatrix's solicitor about the circumstances in which the testator made her will.

The Legal Principles Applicable to this Application

The Relevant Statutory Provisions
11. Section 89 of the 1965 Succession Act 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."*

21. 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."*

22. Section 91 provides:

> *"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.*

…

23. 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."*

Case Law
12. Laffoy J. *In Re Rafter* [2012] IEHC 239 considered to how the court seeks to construe a will and to give effect to the intention of the testator and referred to the principles set out by Lowry LCJ in *Heron v. Ulster Bank Limited* as follows at para. 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 LJC 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' ...."*

13. These principles were accepted by both parties as being the relevant legal principles. I turn now to consider the application of these principles in this case.

Application of Principles

The First principle: Consider the immediately relevant portion of the will

14. The disputed bequest is very simply worded. It states:-

> "I also give devise and bequeath to James Mullen Jr., son of my son, John, a small plot or piece of land of not more than half an acre to make up the site of his proposed new house should he require same." (Emphasis added)

15. In my view, the words of the testatrix are clear. The clear intention of the testatrix was that she wanted to bequeath a small piece of land to her grandson. This piece of land was not to exceed half an acre. It was to be available to him if he should require it. The purpose of the bequest was to permit him "to make up the site".

16. It is the words which are underlined above which, according to the defendant, mean that the bequest fails. The defendant's argument in this regard is, that at the time the testatrix made her will, she knew that the plaintiff was building his own house. She had in mind, therefore, that she would leave him up to half an acre of land to make up a site for his proposed new house should he require same. The defendant submits that because the "proposed new house" has now been built, it therefore follows that the gift lapses. It is also submitted by the defendant that as the plaintiff has built his house it is clear that he does not require the relevant half acre.

17. In this regard, the defendant submits that the phrase "should he require same" is a phrase which must be given an objective meaning because of the use of the word "require".

18. However the words "should he require same" constitute a subordinate clause. It is a conditional subordinate clause. The subject of the subordinate clause is "he" (i.e. James Mullen Jr.); the verb is "require" and the object of the clause is "same" (i.e. a small plot or piece of land of not more than half an acre"). It follows, therefore, because "he" is the subject of the clause that it is the plaintiff - and the plaintiff alone - who is the person who decides whether he "requires" any of the land. In other words, it is the plaintiff's subjective assessment of whether he requires the land which enables the condition to be fulfilled.

19. Thus, in my view, there is no basis for the defendant's argument that the word "require" implies an objective test. The error in this part of the defendant's argument is to place too much emphasis on the verb "require" and to place no emphasis whatsoever on the subject of the clause.

20. But in order to take the defendant's submission, at its height, I turn to consider firstly whether on a subjective assessment, the plaintiff "requires" the said plot and secondly, to consider whether on an objective assessment, the plaintiff requires the said plot.

21. However this in turn necessitates a consideration of the meaning of the word "require". There was some debate about the exact definition of the meaning of the word "require". The Oxford English definition of the word "require" is:-

> *"1. Need something for a purpose.*
>
> *2. Instruct or expect someone to do something.*
>
> *3. Make compulsory: the minimum required by law.*

Origin Latin requirere."

22. Thus, the Oxford English definition of "require" is "to need something for a purpose". The question then becomes does the plaintiff "need" this half acre of land "for a purpose" either subjectively or objectively.

23. I turn first to consider whether the plaintiff, subjectively, needs the said plot. At para. 8 of his affidavit he says as follows:

> *"I say that in or about March 2010 I sought the testatrix's permission to use a portion of her lands which adjoined my dwelling house as a garden. I say that my site is a particularly difficult one being very steep at the front and rear of my dwelling house and it was not possible to build up the site in order to create a garden area. Therefore I required the use of the testatrix's land in order to create a garden for my use and the use of my young family."*

24. Moreover, the plaintiff has averred on affidavit on a number of occasions that he "required" the use of the lands in question in order to create a garden for his own use and the use of his young children; when he learned he was a beneficiary under the will, he confirmed to the executor that he did require the said lands; and he says at para. 11 that he has repeatedly asserted that he requires the said lands. It is clear therefore, on a subjective assessment, the plaintiff considers that he requires this plot.

25. It is also clear, in my view, from the evidence that, viewed objectively the plaintiff does indeed need this parcel of land for a purpose. That purpose is to provide a garden in which his young children can play. The plot in question is a small garden adjoining the house. The court has seen photographs of the house from all angles. The court has also had the benefit of the plaintiff's direct evidence, when he was cross examined, and also his affidavit evidence. It is quite clear from the affidavit and oral evidence that the site is a difficult site and that there is no area suitable on the site for a garden for his children. That is why in 2010, he asked his grandmother, the testatrix, whether he could use some part of her land to create a garden for his children. The evidence is that she willingly consented, supported and encouraged her grandson in using her land as a garden for his children.

29. Indeed the plaintiff in an affidavit states that although he moved into his house in 2006, it still looked like a building site at that time and that he did not complete all the works associated with his house until 2011. He also says that in 2011, he was constructing a boundary wall around his house and he left a gap of approximately 16ft at the boundary wall adjacent to his grandmother's land so that his children could access the land.

30. He also states at para. 18 of his affidavit:-

> *"I say that I have a small decked area built into a cliff at one gable end of my house and the other gable end (where the vegetable garden was located) is now the entrance to our house. I said that there is a 40ft drop in front of our house and it would, therefore, be completely unsafe for children to play there. I say that the other areas proposed by the defendant are unsuitable as they are located some distance and/or are not visible from my house and would therefore be unsuitable for use as a play area for small children. My septic tank and puro flow treatment module are situated to the front of my house at the lower level. I say that the only area in the vicinity of my house that is suitable as a play area are the testatrix's land which we have been using as a garden and play area for my small children. I say that is why I requested my grandmother's permission to use her lands as a garden."*

31. The plaintiff was also cross examined by counsel for the defendant. It was specifically put to him that the reason his grandmother had framed her bequest in that way (i.e. by the use of the phrase "to make up the site") was because she was concerned about access to the site. The plaintiff however disagreed and said that there was no problem with access to the site. As there was no contrary evidence, I find as a fact that there was in fact no difficulty with access to the site. Moreover there was no evidence whatsoever that the testatrix ever thought there was a difficulty with access to the site.

32. The Plaintiff in cross examination also stated, in response to a question, that he did not have enough space in his site to have a garden. The plaintiff also gave evidence that there was no part of his current site on which he could put a garden. I therefore also find, as a fact, that there is no part of the plaintiff's site on which it is suitable for him to create a garden.

33. Therefore, I find, as a fact, having listened to his evidence in cross examination that the plaintiff does indeed objectively "require" the relevant parcel of land "for a purpose" namely to provide a garden for his children and that there is no other area suitable on his land which could provide an alternative space for a garden.

34. There was also a dispute between the parties as to the meaning of the phrase "to make up the site". The plaintiff submitted that this should not be construed as an entitlement to lands - only if they were required for the construction of the plaintiff's house. The plaintiff submitted that a site consisted of more than a footprint of the dwelling house constructed on it. It might include an access road or driveway, an area for a septic tank and also a garden. The plaintiff also submitted that the phrase "to make up the site" should be construed as including lands required to service the house, (i.e. lands specifically utilised for the provision of a safe and suitable area on which a garden could be provided for the use and enjoyment of the plaintiff's children and for the use and enjoyment of the plaintiff and his family in the normal conduct of family life).

35. The defendant, by contrast, sought to contend that the phrase "to make up the site" of his proposed new house referred to the fact if the plaintiff's 1.2 acre site proved unviable for planning purposes, that the testatrix was making available to him additional adjacent land for building purposes. He says that at the time the testatrix made her will, the plaintiff was in the process of obtaining planning permission and that the plaintiff intended to build a house on the said land.

36. However, in my view, the defendant's submissions are not well founded. On the facts of this case – and each case involving a will is applicable only to the facts of a specific case – this site was clearly always a difficult site. It did not cease to be a difficult site once the house was built on it. It was a difficult site to build the house on initially but it remains a difficult site because it is built into the rock on the hillside and also because it slopes very steeply at the front. It is clear, therefore, that there is no suitable space on the site for a garden. I am of the view, therefore, the intention of the testatrix was at all times that she intended to bequeath to her grandson, "a small plot of land up to half an acre should he require same to make up his site". Given that the plaintiff used it as a garden with her consent for the last two years of her life, she clearly knew that the plaintiff needed this parcel of land to make up his site and to provide it with a garden.

37. It follows that his existing site is deficient in some respect (i.e. it is without a garden). To that extent, therefore, the plaintiff requires the additional land "to make up the site" of his proposed new house.

38. The defendant also seeks to argue that, because of the phrase, "his proposed new house", and because the house has been built, the gift has lapsed. However, in my view, that submission also is not sustainable. The phrase "his proposed new house" was used by the testatrix because at the time she made her will the house had not yet been completed. It was at that stage "proposed". The plaintiff gave evidence that the house was built in 2005 and that he and his wife moved into it in 2006. The plaintiff also gave evidence however that it was a building site for a number of years and indeed it only seems to have been completed in or about 2010. It then became the plaintiff's new house. The fact that the house has been built does not invalidate the gift. Given that the will speaks from death, the testatrix must be taken to be referring to the plaintiff's "new house".

39. It is at this point that the relevance of s. 89 of the Succession Act becomes apparent (i.e. that the will speaks from death). The testatrix saw that the plaintiff's house had been built between 2005 and her death in 2012, nevertheless the testatrix never sought to revoke or amend her will in any way. Moreover, when asked by the plaintiff, the testatrix readily assented to giving consent to the plaintiff to permit him to use that part of her lands adjoining his lands as a garden for his children. It is clear, therefore, at the death of the testator, she was in full knowledge of all the material facts in relation to this matter and she did not seek to amend or revoke her will in any way.

40. However even if it were not for this issue of the will speaking from death, given that the court must strive to give effect to the intention of the testator, I have no doubt that the intention of the testator was, at all times (i.e. at the time of the making of her will and thereafter up until the date of her death), to make a bequest to her grandson of up to half an acre should he require it to make up the site.

The Second and Third Principles: Look at the other material parts of the will/the scheme of the will.
40. The plaintiff also submits that the court should have regard to other provisions in the will and/or the general scheme of the will and that they support the conclusion set out above. The plaintiff makes the following arguments:-

> (i.) The plaintiff submits that when one looks at the scheme of the will, the testatrix was concerned to perfect the title of de facto gifts she had made during her lifetime. The defendant had built a house on lands which he did not own and he occupied lands which he did not own. The testatrix devised these lands to him by her will. In a similar manner, the plaintiff used a garden on lands which he did not own, but he did so with her consent. Therefore the testatrix was essentially seeking to perfect the title of a gift she had made to her grandson in her will. I find this argument persuasive.
>
> (ii.) In addition the testatrix gave land to her sons Marty and Thomas in such a way as to enlarge the sites of their respective houses. The plaintiff submits, therefore, that the testatrix was of the view that a house should have some surrounding land. The plaintiff submits that this re-enforces the interpretation advanced by the plaintiff. The testatrix lived beside the plaintiff and was aware of the difficulties of the site and how he had no garden. I also find this submission persuasive.
>
> (iii.) The plaintiff also submits that the testatrix knew there was a difficulty with the plaintiff's site and sought to gift him land to assist him. She had not known exactly what was required; she left it up to him to decide what he required up, to a maximum of half an acre. She wished to leave the balance of those lands to the defendant, her son. In structuring matters in this way, the plaintiff submits, the testatrix was trying to be fair to her son and to her grandson. I find this submission persuasive also.

The Fourth principle: Consider any applicable Rules of Constructions
41. I note that s.99 of the Succession Act provides as follows:

42. "*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*."

43. In my view the intention of the testator is clear from the words of the will. However insofar as there is any doubt in the matter, and in particular insofar as the defendant sought to lay considerable emphasis on the ambiguity of the phrases, "proposed new house" and "to make up the site" the consequence of the defendant's interpretation is that the bequest would not be operative. In those circumstances, even if the bequest did admit of more than one interpretation, I am of the view, applying the statutory principle, that the interpretation according to which the bequest would be operative should be preferred. I would therefore conclude that the statutory presumption in favour of the validity of the bequest applies in this case.

The Fifth and Sixth Principles: These are not necessary to consider in this case.
44. ***EXTRINSIC EVIDENCE***. It is also clear under s.90 of the Succession Act 1965 that extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of the will.

45. The scope and application of s.90 has been considered by the Supreme Court in *Rowe v. Law* [1978] I.R. 55 and *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596 where the court construed the provision as permitting extrinsic evidence of intention only if there is an ambiguity in the will which cannot be resolved by construing the will.

46. Laffoy J. in *In Re Rafter* [2012] IEHC 239, in commenting on the extent of s. 90, stated as follows at para. 11 of her judgment:-

> *"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.'"*

47. In this case insofar as there may an ambiguity in the will, then I can have regard to extrinsic evidence. In my view all the extrinsic evidence in this case, which assists in the construction of the will or which shows the intention of the testator, points to the conclusion that the testatrix intended to devise the small parcel of land (being her garden) to her grandson. This is so because:

> a. She lived beside her grandson, his wife and their small children and was aware of his family circumstances.
>
> b. She was aware of the difficulty of the site and the fact that there was no suitable area on the site for the plaintiff to have a garden.
>
> c. She gave full consent to the plaintiff to use that part of her land which he did use as a garden for his children. She completely encouraged him in this regard.
>
> d. She did this in the full knowledge from 2005 until 2012 when she died that the plaintiff's house had been built and was

being occupied. She also did so in the full knowledge that the house lacked a garden and that with young children the plaintiff needed a garden for the children to play in safely and without any serious risk that they might suffer an accident.

48. There is also an affidavit of Kathy Mullen who is the mother of the plaintiff. In her affidavit, she states as follows:-

> *"I say that in or about July/August 2004, whilst visiting the testatrix she told me that she made her will and that she had left her house to her three daughters and a garden to my son James, the plaintiff herein."*

49. She also stated at para. 6:-

> *"I say that in or about August 2011, when I was cooking her evening meal the testatrix told me that she was very grateful to me and wanted to give me something but I said don't be silly. I said that the testatrix then said to me 'you know I've looked after Digger' and she laughed because she knew I didn't like my son's nickname. I said to her 'oh you are very good'. I knew what she meant as she had mentioned it once previously."*

50. This appears to provide some evidence that the testator intended the bequest still to be operative in 2011.

Conclusion

50. I would therefore conclude that the bequest to the plaintiff is valid under the will, that the testatrix did intend to confer on the plaintiff the right to select a plot of land of up to half an acre from her lands immediately adjoining those of the plaintiff and that the plaintiff is entitled to a declaration in those terms.