THE HIGH COURT

[2015 No. 8764 P.]

BETWEEN

STEPHEN LEOPOLD

PLAINTIFF

AND
NOEL MALONE

DEFENDANT

Judgment of Ms. Justice Pilkington delivered on the 30th day of November 2018,

1. This matter came before the court on 24th October, 2018 and initially involved consideration of two matters;

(a) Whether a will was duly executed pursuant to the provisions of s. 78 of the Succession Act, 1965 and

(b) A possible construction issue with regard to certain aspects of the deceased's will and codicil, for the reasons more particularly set out and described below. As this matter was ultimately resolved between the parties I propose dealing with it in summary fashion only.

Background

2. The deceased died on 24th February, 2013. She was 81 years old and died testate without parent, spouse or issue surviving. On 26th November, 2013 a grant of probate issued in respect of her estate to Noel Malone one of the executor's named in her last will and testament dated 20th July, 2004 with one codicil annexed dated 27th August, 2010.

3. The question of due execution arises in respect of her testamentary document dated 20th July, 2004 (hereinafter "the July 2004 will"). This will was subsequently amended by codicil dated 27th August, 2010 (hereinafter "the August 2010 codicil"). The deceased had previously executed a testamentary document dated 3rd June, 1988.

4. The deceased's estate is a relatively modest one having a net value of some €200,000. Whilst the issue in respect of the July 2004 will is a net one, I am nonetheless setting out this testamentary document in some detail. Pursuant to its terms the deceased, after the standard revocation clause:

(a) Appointed Simon Quick solicitor, Noel Malone solicitor, Elizabeth Barrett and June Stewart as her executors and trustees.

(b) Bequeathed the sum of €1,250.00 "to my friend Simon C.K. Quick,"

(c) Bequeathed to her friend Noel Malone the sum of €1,250.00,

(d) Bequeathed to her friend Elizabeth Barrett a sum of €1,250.00,

(e) Bequeathed the sum of €2,000.00 to the trustees of the Alexandra Guild.

(f) All of the rest residue and remainder of her property she divided with a moiety to the President of the Society of St. Vincent de Paul and thereafter:

"the second moiety thereof to the Secretary of the A.G.A.A. of 1 Derry Street, London, W85 HY to be applied by the association for the charitable objects of association as the association may in its absolute discretion decide and the receipt by which such secretary/treasurer shall be sufficient discharge to my executors."

5. The will, after the formal attestation clause, was witnessed by Simon C.K. Quick solicitor and Marie Hatton.

Pleadings

6. The Plenary Summons was issued on 30th October, 2015, a Statement of Claim on 23rd February, 2017, the Defence and Counterclaim on 2nd June, 2017 and a Notice of Trial dated 20th June, 2017. I also note the notice and replies to particulars together with the respective affidavit of scripts sworn by the defendant on 6th February, 2016, and the plaintiff on 24th March, 2017.

7. By Order of Abbott J. on 6th November, 2017, the court, on consent, directed that the following issues be determined by a judge sitting alone: -

(i) whether the testamentary document dated 20th July, 2004, was executed in accordance with the formalities required by s. 78 of the Succession Act 1965;

(ii) whether the testamentary document dated 27th August, 2010, is a valid codicil to the testamentary document dated 20th July, 2004, (in the event that the testamentary document dated 20th July, 2004 is invalid) to testamentary document dated 3rd June, 1988; and

(iii) in the event that the reply to (i) above is in the affirmative, whether that the bequest to "A.G.A.A." appearing in the testamentary document dated 20th July, 2004, may be construed as a bequest to the charitable body currently named "Turn 2 US" having its registered office at 200 Sheppard's Bush Road, Hammersmith, W67 ML, or fails for uncertainty.

8. I also note citations to see proceedings were sought in respect of the trustees of the Alexandra Guild, Trevor Leopold, Diane Oliver and the trustees of the Methodist Church in Ireland. By Order of the Master of the High Court on 2nd May, 2018, leave was granted pursuant to RSC O. 15, r. 12 and O. 79, r. 50 that citations to see proceedings be issued and those citations issued thereafter.

9. I further note the notification on the Charity's Regulatory Authority ("CRA") both in this jurisdiction and in the UK by virtue of the terms of the residuary clause to the deceased's July 2014 will.

Due execution of the July, 2004 will

10. On the 10th July, 2014 Ms. Hatton swore an affidavit in respect of the July 2004 will. It is short and clear in its terms. She states as follows:

> "I confirm that the will bears my signature as witness. I clearly recall the circumstances under which I signed my name at her home. Dorothy Leopold told me that she was anxious to sort out her affairs and requested that I sign my name on a legal document. I signed the document as requested and wrote my address. To the best of my recollection Dorothy Leopold did not sign this document in my presence. There was definitely no other person present other than myself and Dorothy Leopold when I signed my name as witness. There was no solicitor or any other person present".

11. Ms. Hatton gave evidence which I shall deal with below but it did not deviate in any material sense from the matters deposed to within this affidavit.

12. In her evidence, in summary, Ms. Hatton stated:

> "(a) She had been a member of the St. Vincent de Paul for many years and in that context had visited the deceased for some nine and half years and thereafter she had visited her to enquire after her welfare and as a matter of friendship. She estimated she would have visited her once every couple of months and had long conversations with the deceased.
>
> (b) Ms. Hatton confirmed that in respect of the July 2014 will that her name, address and occupation which appeared on the right hand side of the page was all in her own handwriting.
>
> (c) She indicated that her visit had concluded quickly as she was anxious to get home in order to cook the family meal.
>
> (d) She recollects being asked to sign a document by the deceased but did not then know that it was a will. She had no recollection of there being any "writing" in that portion of the document she was asked to sign. Specifically, she appears to have no recollection of either a typed attestation clause nor the signatures of any other parties appearing on the document when she signed.
>
> (e) As Ms. Hatton described it the deceased simply drew back a portion of the page and asked that she sign that portion of the page in the manner that is set out above and she did so by signing her name, address and occupation.
>
> (f) Ms. Hatton was adamant in her evidence that at no point during that meeting at the house of Ms. Leopold (she having travelled to Ms. Leopold's house at her specific request) did she meet Mr. Simon Quick; indeed throughout her visit, save for the deceased, no other person was present before, during or after her execution of this will.
>
> (g) Ms. Hatton could not recollect signing any other document in any circumstances for the deceased and was only reminded of the events when she was approached at some time after the deceased's death asking about her signature in respect of the July 2004 document which she then learnt was the deceased's will.
>
> (h) Ms. Hatton is 81 years of age, not a beneficiary under the will and had simply been a friend and sometime caller to Ms. Leopold in her capacity as a member of the St. Vincent de Paul down the years.

13. The other witness to the deceased's will was Mr. Simon Quick. He gave evidence of being a retired solicitor who was well known to the deceased down the years (together with his partner in the law firm Mr. Noel Malone). He had acted for the deceased in the 1980s on a number of small matters. He has lengthy experience in probate matters. His colleague in the office had dealt with Ms. Leopold's previous testamentary document on the 3rd June, 1988.

14. With regard to the testamentary document and surrounding circumstances of July 2004 his evidence was to the following effect:

> (a) On the 14th January, 2004 Mr. Malone had received a handwritten note from the deceased setting out matters she wished to be included within her will. The note by its content makes it clear that the parties knew each other and there are warm greetings within it. More importantly it enclosed a typed list of people whom the deceased indicated she wished to benefit. For present purposes the item headed:
>
> > "Elizabeth Finn Trust,
> >
> > 1 Derry Street,
> >
> > London W85HY
> >
> > Claire Barnett,
> >
> > Caseworker"
>
> I also note the that the two solicitors Mr. Malone and Mr. Quick are also mentioned as potential beneficiaries within this typed note.
>
> (b) Mr. Malone replied on the 26th April, 2014 indicating that clearer instructions would be required and asks that he contact her with a view to discussing these matters. That is followed by an internal memorandum from Mr. Malone to Mr. Quick on 12th May, 2004 indicating that the deceased is virtually incapacitated and that he would like to discuss her situation.
>
> (c) There is then a letter from Mr. Quick to Ms. Leopold of 28th May, 2014 indicating that Mr. Malone is on holiday and asked if the deceased would telephone the writer to fix an appointment for Mr. Quick to drop down and see her.
>
> (d) It was Mr. Quick's evidence that he lived close by to Ms. Leopold and accordingly could easily travel to visit her in person.
>
> (e) The next item of correspondence is dated 8th July, 2004 again from Mr. Quick to Ms. Leopold referring to a recent

meeting with her and stating that he has now drafted and engrossed the new will. He again asks that she telephone to arrange an appointment so he can drop down to her home in the near future.

(f) Whilst this correspondence is clear in its terms unfortunately there are no notes whatsoever of the meeting referred to in the letter of 8th July, 2004; the evidence of Mr Quick was that the purpose of that meeting was to enable him to take the deceased's instructions. Nor is there any solicitor's attendance note with regard to his attendance upon the deceased for the purposes of the execution of her July 2004 will.

(g) At the meeting of 8th July Mr. Quick said that there was a substantial discussion regarding the appointment of executors, the persons whom she wished to benefit with regard to pecuniary legacies and the charities to whom she wished to devise the balance of her estate. She suggested the St. Vincent de Paul and thereafter they discussed that the balance of the monies would go to a charity and this is where matters become a little confusing. The name of the charity clearly set out on the face of the July 2004 will is that of the A.G.A.A. It appears that that is entirely in error and that it should have been D.G.A.A. as opposed to the A.G.A.A. In any event that parties now agree that the organisation in question was the Elizabeth Finn Trust which is now called the Elizabeth Finn Care – Turn2Us.

(h) As I understood Mr. Quick's evidence he suggested that the inaccuracy (if I might describe it as such) of the description 'A.G.A.A' may have arose arising from either his error in not taking the instruction correctly, noting it down incorrectly or subsequently dictating it incorrectly.

(i) Mr. Quick gave evidence that, prior to his attendance upon the deceased on 20th July, 2014, when telephoning her to arrange that meeting he had asked her to have two persons other than the deceased and himself present for the purposes of acting as witnesses of the will.

(j) When Mr. Quick arrived Ms. Hatton was present and he met her. But as she was the only individual present he left the deceased property for some five minutes and went to neighbouring houses to see if any other person would be available to act as a witness. Apparently one person was unwilling and the other property that he tried was unresponsive.

(k) He then returned to the deceased's house. His evidence thereafter was that he read the will over to the deceased (in the presence of Ms. Hatton). He satisfied himself that the deceased understood and was satisfied with the contents of the will and that the deceased then signed and dated the will and thereafter each of the witnesses (being himself and Ms. Hatton) then witnessed the wills with their name, address and occupation all being present together at the same time.

(l) Mr. Quick's evidence was that he was quite certain that when he returned to the property after his unsuccessful attempt to procure a second independent witness that the July 2004 document had not been executed by the deceased nor signed by Ms. Hatton in that intervening period.

(m) In summary Mr. Quick's evidence was that the execution of the July 2004 will was entirely in accordance with the requirements of s. 78 of the Succession Act, 1965 with which he expressed himself entirely cognisant and familiar.

(n) Mr. Quick also accepted that in acting as a witness to the will that he was ensuring that the pecuniary bequest to him would (pursuant to s. 82 of the 1965 Act) be null and void and form part of the estate's residue. He stated that neither he nor Mr Malone wished to be beneficiaries, did not intend to take the benefit but did not wish to disoblige the deceased.

15. Thereafter, Mr. Quick's evidence was that he returned to his office with the original duly executed will which he then entered in his wills safe.

16. Mr. Quick was as positive in his evidence that he had met Ms. Hatton on 20th July as Ms. Hatton was in her evidence that she had not met Mr. Quick.

17. The next item is the execution of a codicil to her July 2004 will and that is dated 27th August, 2010.

18. There is a comprehensive attendance note of 14th July, 2010 by Mr. Quick in this regard. It makes clear that the purpose of his visit (he again attended the deceased at her premises at her request) was both to execute a codicil to her will but also the execution of an enduring power of attorney.

19. The instructions and terms of the August 2010 codicil were relatively straightforward; two modest pecuniary bequests to the named persons appearing within clause 1 of her codicil and directions as to her burial and certain other matters with regard to tombstone engraving.

20. Mr. Quick states that in respect of the deceased's due execution of this document that it was witnessed again by himself and by one Pamela Doyle, whom I understand was the daughter of carer in the house at the time. Again the names of the witnesses appear with their address and occupation given thereunder. Again the name of Mr Quick is on the left hand side of the document, the signature of Ms Doyle , with accompanying name, address and occupation on the right.

21. Mr. Quick in his evidence before the court stated that he did not show or furnish the deceased with a copy of her July 2004 will prior to her execution of this codicil. The error/omission is that the reference to the deceased's will (to which this codicil – described as a "first codicil") is said to relate is a will dated "20th day of April, 2007".

22. The deceased executed no testamentary document on the 20th day of April, 2007 – the incorrect date in fact appears on three occasions in a relatively short codicil and is acknowledged by Mr. Quick as an error and one he cannot explain.

23. It appears that based upon Mr. Quick's evidence that, in respect of the execution of the will and the codicil, his practice was to attend personally upon the deceased at her residence with a duly engrossed testamentary document. The date "20th day of April, 2007" is also typewritten on this document and accordingly it appears that the error was inserted prior to Mr. Quick's attendance upon the deceased for the purposes of the execution of this codicil. It is agreed by all that the previous will is that of July 2004 and no other.

Due Execution of a Will

24. Section 78 and the requirements for due execution are well known and of long standing. They significantly predate the Succession

Act 1965. In any event, s. 78(2) of the 1965 Act states as follows: -

> "Such signature shall be made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the signature of the testator in the presence of the testator, but no form of attestation shall be necessary nor shall it be necessary for the witnesses to sign in the presence of each other."

25. Accordingly, the position is: -

> (a) a testator must either make or acknowledge his or her signature in the presence of at least two witnesses who are present at the same time;
>
> (b) where a testator signs or acknowledges his or her signature in the presence of the witnesses, they need not see the signature or know that he or she is signing a will provided that they see the active signing, where the testator acknowledges his or her signature, the witnesses must have had an opportunity of seeing it, even if they did not avail of the opportunity;
>
> (c) the witnesses must sign the will to bear witness to the execution of the will by the testator; and
>
> (See generally *Spierin; Succession Law 1965 and related Legislation: A Commentary, 4th ed*. at paras. 555-558)

26. The operative part of s. 78 on the facts of this case is self-evidently the requirement that the witness's signature shall be made or acknowledged by the testator in the presence of each of two or more witnesses present at the same time. The evidence in this case is stark; Ms. Hatton says that when she signed as witness no one was present other than the testator. Mr. Quick is equally clear that when he signed as witness that he did so in the presence of Ms. Hatton and the testator. Clearly, one is mistaken because both version of events are utterly incompatible, one with the other.

27. Counsel for the plaintiff pointed to what were described as "shortcomings" by Mr. Quick as the solicitor attending upon the deceased in or about the drafting and execution of the July 2004 will and the August 2010 codicil. It was then suggested that these matters would be a potential factor in determining whether overall due care and attention was taken by Mr. Quick in or about the execution of the deceased's last will and testament.

28. I note the shortcomings. In particular, on the facts of this case, it is extremely regrettable that there is no contemporaneous or indeed any file or attendance notes from Mr. Quick in his initial attendance upon the deceased on 8th July, 2014 or, of greater importance and significance, upon her for the execution of the will on 20th July, 2014.

29. Nevertheless, in my view, these are separate and distinct matters. One could easily conceive of a scenario where the will is immaculately drafted and yet fails for want of due execution and equally the reverse where a will is, for some reason, improperly or inaccurately drafted but nevertheless no issue arises as to its due execution. Accordingly, the question of due execution is a discrete one and I propose to consider it in such terms.

30. Counsel for the plaintiff asserted that Ms. Hatton was merely obliging the deceased in a gesture of friendship in her request to act as a witness, had no incentive in the evidence that she gave and gave her evidence honestly and without hesitation. I entirely accept that submission.

31. Equally, I found Mr. Quick to give straightforward answers to the questions asked in examination and cross examination and whilst he is now a retired solicitor with some health issues was nevertheless in a position to give cogent evidence throughout.

32. The July 2004 will contains a proper attestation clause. The codicil of August 2010 also contains an attestation clause save that the date set out within it of 20th April, 2007 is incorrect. However the challenge is to the July 2004 will. On its face, therefore, the testamentary document (with codicil annexed thereto) appears to suggest that everything is regular on its face. To that extent, the presumption that everything was properly done (*omnia praesumuntur rite esse acta*) arises. However, that is merely a presumption of due execution arising from what appears on the face of the testamentary document before the court. Self-evidently, however, the application of such a presumption will be wholly dependent upon the circumstances of the case. Ms. Hatton could not recollect whether there was any typing or typed words above where she signed her name and if there was, gave evidence that she did not advert to them or read them. Strictly speaking, however, Ms Hatton, in appending her signature to the testamentary document, was signing not only as a witness but also confirming the matters set out in the attestation clause (of which she appears to be unaware and did not consider).

33. The original will when produced in court disclosed the signature of the testatrix was in a different coloured ink to that of the two witnesses and whilst the ink colour is the same for the two witnesses it seemed in my view that each of the witnesses appeared to have used a different pen for that purpose.

34. As the testamentary document was typed there was no suggestion that the attestation clause was added at a later time so I must assume that Ms. Hatton signed her name as witness below the typed attestation clause as it appears within the July 2004 will.

35. The attestation clause to the July 2004 will is as follows:

> "SIGNED - by the said testatrix as and for her last will and testament in the presence of us who at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses. This will having been printed on the front side only of the foregoing two pages of size A4 paper".

36. The courts in this jurisdiction has considered the applicability of the presumption *omnia praesumuntur rite esse acta*. In my view the best exposition of the applicability of the presumption is set out in a judgment of Davitt J. in the case of In the Goods of McLean [1950] 1 I.R. 180 when he asserts:

> "If I am correct so far, and if the maxim, *omnia praesumuntur rite esse acta*, is merely the expression in a short form of the application in a particular manner of the general principle of the balance of probability, then it seems to me that whenever there is a question as to due execution there is always room for the application of the principle, whether the process be described in Latin or in English. What I have been leading up to is this: if both the attesting witnesses gave evidence negativing due execution and their evidence is accepted by the court as convincing, and, therefore, true and

> accurate, then there is an end of the matter and the will must be condemned; but until the Court *does* reach that degree of conviction there is room for the principle. There is never any difficulty about accepting the evidence of witnesses who appear in every way to be truthful, whose recollection appears to be trustworthy, who are not contradicted by any other testimony, and whose evidence is entirely consistent with the probabilities of the case. Where, however, their evidence is quite inconsistent with the probabilities, then it is not to be so readily accepted. It is well to remember that human testimony is always fallible, and there maybe cases where the inferences to be drawn from facts clearly established maybe strong enough to overbear the direct evidence of truthful and apparently reliable witnesses. It seems to me that, in will suits, as in other cases, and with respect to the issue of due execution as with respect to any other issue of fact, the direct evidence of witnesses which conflicts with the probabilities of the case must be weighed with the greatest care and circumspection before it is accepted as effective proof".

37. On the balance of probabilities, I accept that the attestation clause was on the testamentary document of July 2014 when Ms. Hatton attested the testatrix's signature. Likewise, it was there when Mr. Quick attested the testatrix's signature.

38. There is a clear conflict of evidence. Quite simply one of the attesting witnesses to the July 2014 will must be incorrect or mistaken.

39. In such circumstances I am applying the presumption of due execution. Where there is a direct contradiction in respect of each attesting witnesses as to the manner in which this testamentary document was witnessed then in my view, on the balance of probability, I must assume that this will was executed pursuant to its terms. Each signed as witnesses after the attestation clause. Accordingly, in applying the presumption I therefore find that the testamentary document of July 2014 was duly executed in accordance with the provisions of Succession Act, 1965.

40. I note that the presumption has been more recently considered in the Court of Appeal decision in England and Wales of *Re Sherrington* [2005] EWCA Civ 236 but, in my view, the judgment of Peter Gibson L.J. is entirely in accordance with the quotation from the judgment of Davitt J. above.

41. The issue of construction of the July 2004 will and the August 2010 codicil has happily been resolved between by agreement of the parties so I simply confirm that the initials A.G.A.A. with the address at 1 Derry Street, London, W85 HY does not exist but the entity at that address was D.G.A.A. being the initials of "Distressed Gentle Folks Aid Association" as it was formerly known and formerly of that same address. In or around the date of the deceased's July 2004 will, the entity D.G.A.A. was known as Elizabeth Finn Trust and thereafter Elizabeth Finn Care and came under the name Turn2Us. Whilst the parties differed somewhat as to applicability of the so called "armchair principle" or simply an application of s. 90 of the Succession Act, 1965 Act is not, in my view, a matter that now arises in the events that have happened. I also accept that the proper date to be inserted into the codicil is that of 20th July, 2004.

42. Accordingly, in determining the issues that have been tried at the hearing of this action, pursuant to the order of Abbott J. on 6th November, 2017 I find:

> (1) That the testamentary document dated 20th July, 2014 was executed in accordance with the formalities required by s. 78 of the Succession Act, 1965.
>
> (2) That the testamentary document dated 27th August, 2010 is a valid codicil to the testamentary document dated 20th July, 2014.
>
> (3) As the reply to (1) is in the affirmative that the request to "A.G.A.A." appearing in the testamentary document dated 20th July, 2004 may be construed as a bequest to the charitably body currently named "Turn 2 US" having its registered office at 200 Sheppard's Bush Road, Hammersmith, W6 7NL."