Deceased`s Will declared void for uncertainty.

Brian Morgan, Partner in Morgan McManus Solicitors, practising in the Republic of Ireland and Northern Ireland, explains the importance of certainty of terms in the making of a Will and consequently the importance of obtaining legal advice when that Will. Sometimes a "home-made Will" is a very expensive exercise.

1. The making of a last Will and testament is one of the most important tasks most people face and unfortunately it is one often approached in haste and without due consideration for its effect. A primary purpose of a Will is to make a definitive statement regarding the disposition of a person's assets on the event of their death. A properly drawn up Will, prepared with the benefit of legal advice provided by a solicitor, should ensure that the testator's wishes for the disposition of their estate will be fully complied with.

2. Where, however, there is any doubt as to the correct interpretation or construction of a Will, the Court is charged with the task of determining the deceased's wishes insofar as it is possible so to do. This case concerns the construction of a Will and the approach of the court when confronted with such situations of uncertainty.

So stated Mr Justice Gilligan of the High Court in a Judgment delivered on the 1st December 2011 in respect of a Will made on the 21st February 2001 by the late Dr. John O`Donohue in a case titled ***JOSEPHINE (OTHERWISE JOSIE) O'DONOHUE Plaintiff –v- PETER O`DONOHUE Defendant, IN THE MATTER OF THE ESTATE OF JOHN O'DONOHUE, LATE OF GLENTRASNA, CAMUS, CONNEMARA, IN THE COUNTY OF GALWAY, AUTHOR, DECEASED and AND IN THE MATTER OF QUESTIONS ARISING IN THE ADMINISTRATION OF THE ESTATE OF THE SAID JOHN O'DONOHUE DECEASED*** [2011] IEHC 511

Background Facts

Dr. John O'Donohue (the "Testator") was born on the 2nd day of January, 1956. He was ordained a priest on the 6th day of June, 1979, and later gained considerable acclaim as an author and broadcaster. He died testate on the 4th day of January, 2008, a bachelor without issue. He was survived by his mother, Mrs. Josephine (otherwise Josie) O'Donohue (the plaintiff), his brothers, Patrick, and Peter O'Donohue (the defendant) and his sister, Mary O'Donohue. The testator was also survived by two nieces and two nephews who were the children of his brothers.

The Testator's Will (the "Will" or the "2001 will") was in the following terms:

> "Last will [&] Testament of John O'Donohue
>
> Made on night of Feb 21st before Australian Tour.
>
> I leave all my worldly possessions to Josie O'Donohue, my mother, to be divided equally & fairly among my family with special care [&] extra help to be given to Mary O'Donohue, my sister.

> Also gifts of money to be given to Olivia [&] family, & Marian O'Beirn.
>
> Smaller gifts to Downey, Ethel, Sheila [&] Pat O'Brien, Laurie Johnson, Ellen Wingard, Deirdre O'Donohue –
>
> Executor of will: Martin Downey [&] Johnny Casey –
>
> Signed: John O'Donohue
>
> Witness: Josie O'Donohue.
>
> Witness: Pat O'Donohue"

The Will was holographic and was prepared without the benefit of legal advice. The named executors subsequently renounced their rights to probate of the Will in early 2009. The plaintiff, as the testator's statutory next of kin, was thereafter appointed as the administratrix. She had previously sworn an affidavit averring to the fact that the "Australian Tour" referred to in the Will took place in 2001 and a copy of the Testator's passport was exhibited in corroboration. The Testator had previously executed a Will dated the 19th day of February, 1998 (the "1998 Will"), which was prepared with the benefit of legal advice. Nevertheless the Probate Office was satisfied that letters of administration be extracted in respect of the 2001 Will and it was admitted to probate on the 11th day of December, 2009. The Inland Revenue Affidavit certified the net value of the estate at a sum in excess of €2M.

Procedure

These proceedings were commenced by the plaintiff, Mrs. Josie O'Donohue, as personal representative of the deceased seeking the court's assistance to determine a number of matters regarding the true construction of the Will. The defendant, Mr. Peter O'Donohue, was named as the defendant, on the grounds that he was one of the persons whose rights or interests were sought to be affected by the proceedings.

Submissions of the Parties

An issue arose with regard to the revocation of the testator`s previous 1988 Will bearing in mind that the 2001 Will did not contain an express Revocation Clause but the Judge was satisfied the previous Will had been validly revoked. The real issue for consideration by the Court was whether the terms of the Will were sufficiently clear so as to ensure the validity of the Will.

As regards the structure of the Will, it was submitted on the plaintiff`s behalf that three groups were created who were potentially to benefit from the estate namely: (1) "my family"; (2) gifts of money to Olivia and family and Marion O'Beirn; and (3) smaller gifts to Downey, Ethel, Sheila, Pat O'Brien, Laurie Johnson, Ellen Wingard and Deirdre O'Donohue.

In summary, it was submitted that where the construction of a Will is doubtful, there was a presumption against intestacy, provided that on a fair construction there was no ground for a contrary conclusion and that the Will must be incapable of clear meaning. The plaintiff accepted that there was some uncertainty regarding the delimitation of the term "family" which word was used twice in the Will. It was also accepted that there was an arguable case of uncertainty in relation to the objects and quantum of the gift to the second and third groups. However it was submitted that the court should have regard to

the affidavit evidence which averred that the Testator's reference to "my family" was referring to his mother and siblings. It was also urged that the court have regard to the terms of the 1998 Will, which was exhibited on affidavit, insofar as it aided in identifying any of the ambiguous objects under the Will.

The plaintiff pointed to a second difficulty on the face of the Will which was the contradiction between dividing the estate "equally and fairly" among the Testator's family but with "special care and extra help" to be given to his sister. The submission was canvassed that in order to apply the presumption against intestacy, the court is entitled to omit words which would cause the Will to be declared void for uncertainty. The basis of this proposition was the decision in *Robinson v. Waddelow* 8 Sim. 134 (1836), which was said to vest in the court the jurisdiction to reject the words "with special care and extra help to be given to Mary O'Donohue, my sister".

The plaintiff submitted that, with the omission of those words, the most reasonable construction of the Will would be to understand it as creating a hybrid form of trust which contains elements of a fixed trust as well as a discretionary trust, of which the plaintiff was to be the trustee. Counsel for the plaintiff was unable, however, to point the court to any authority for the proposition that a "hybrid trust" could be found as a matter of law. The plaintiff nevertheless described this trust in terms whereby the gifts to the Testator's family are part of a fixed trust from which each is entitled to a quarter share in the residue of the estate.

Matters were further complicated by the fact that both the plaintiff and Mr. Patrick O'Donohue witnessed the Will, thus invalidating any benefit to them under this Will. It was acknowledged that Section 90 of the 1965 Act prevented both of them from benefiting under the Will and created a situation of partial intestacy. This half share of the residual estate held as tenants in common therefore fell to the statutory next of kin, who in accordance with s. 68 of the 1965 Act, was the plaintiff. The gifts to the second and third groups formed, it was submitted, part of a discretionary trust over which the trustee had discretion as to quantum subject to the condition that the third group receive smaller sums than the second group. It was submitted that the court was not therefore required nor was it entitled to determine the amounts to be bequeathed to the second and third groups.

However the plaintiff did contend that were the court to find the gifts to the second and third groups void for uncertainty then the fixed trust would remain unaffected. On the other hand, were the court to find that the gift to the first group was void for uncertainty it was argued that the entire Will must fall as to find otherwise would be to hold that the Testator intended to benefit his friends only to the exclusion of his own family, which it was contended would be a perverse result.

The Court`s Decision

Mr Justice Gilligan referred to the case of *In re Curtin Deceased* [1991] 2 I.R. 562, where at 573, O'Flaherty J. in the Supreme Court, held that:

"The first duty of a court in construing a will is to give effect to the intention of the testator."

The court's consideration of the Will was therefore subject to the principal duty that it must seek to give effect to the testator's intention.

Construction of a Will

The Judge stated that guidance, on the construction of a will generally, comes from the judgment of Carroll J. in *Howell v. Howell* [1992] 1 I.R. 290 in which she expressly approved the statement of Lowry LCJ in the Northern Irish case of *Heron v. Ulster Bank Ltd* [1974] N.I. 44, at 52, regarding the procedure to be adopted in construing a Will the Judge stated could be distilled into the following steps:

Firstly, consider the relevant portion of the will as a piece of English in an effort to extract its meaning. Secondly, seek to compare that portion with other sections from the will in order to seek confirmation of the apparent meaning of that portion. If any ambiguity or contradiction remains then it is useful to consider the overall scheme or framework of the will for the purposes of discerning what the testator was trying to achieve by its terms. Thirdly, where any doubt remains, the court must then determine whether any modification is required to resolve that ambiguity or so as to provide harmonious sense to the meaning of the will. Fourthly, the court should examine whether the rules of construction or the provisions of the relevant legislation provide authority for the court to make the necessary modifications. Fifthly, consideration must be given to any rules of law which would prevent the particular course of action proposed to save a will. Finally, although “no will has a twin brother” the court may have regard for precedent as a guide to how judicial minds have interpreted words in similar contexts.

The Judge stated the above approach provided a useful template as to how the court should address the interpretation of a Will and he then considered each of the steps by reference to the facts of the present case.

The plain meaning

The Judge was satisfied to adopt counsel for the plaintiff’s suggestion that the Will may be regarding in three parts. On a plain reading, in the first part, the Testator gave all of his possessions to his mother with the direction that she divide them equally and fairly among his family but that something extra is to be given to his sister. The second portion directed that monetary gifts be given to Olivia and her family as well as to Marian O’Beirn. Finally, the third portion directs that smaller gifts are to be given to seven identifiable individuals.

However, as a piece of English, the Will was unclear on its face and raised a number of questions. How was the court to interpret the apparently contradictory intention that the estate was to be divided equally among the Testator’s family but that his sister was to receive extra care and help? Further, if the Testator’s entire estate was to be divided equally and fairly among his family, from where were the gifts to the second and third groups to be sourced? If the court were to accept that the gifts to the second and third group were to derive from the Testator’s estate, how were they to be quantified? These questions, the Judge commented, went to the heart of the issue and presented a significant stumbling block to ascertaining the Testator’s intention.

The only fact that was undoubtedly clear was that the Testator did intend that a group of people were to benefit from his Will. That group was readily distinguishable and were it necessary, the court would have little hesitation in identifying the individuals concerned on the basis of the extrinsic evidence put before the court. However, what was significantly less clear was the manner in which the Testator intended his estate to be divided between those people.

The scheme and material parts of the Will

When comparing the second and third portion of the Will, it appeared to be clear that the Testator intended the third group to benefit in the same manner as the second group,

that is to say from a monetary gift, but at different levels. Taking into account the brevity of the Will, the court did not have before it other material from within the four corners of the Will from which to seek to identify the intention of the Testator through a comparison.

A consideration of the scheme of the Will was itself unhelpful. The approach suggested by the plaintiff was that the court should, in effect, start reading the Will from the bottom up. This would mean that the gifts to the second and third groups should be made first, leaving the remainder to be divided among the family members within the first group. Such an approach or "scheme" was not clear, the Judge stated, from the face of the Will. In fact the opposite was arguably more apparent in that it was difficult to infer any scheme from the Will in which at the outset it was provided that one group was to benefit from the entirety of the estate. Furthermore, it was difficult to envisage a situation in which a Testator would seek to benefit his friends before his family. In the circumstances, the court was not assisted by the scheme of the Will in attempting to come to a view on the Testator's intention.

Modification of the will

The Judge asked whether the terms of the Will suggested the need for modification in order to resolve any uncertainty or ambiguity. If one was to adopt the plaintiff's suggestion as the most appropriate statement of the Testator's intention, namely the hybrid trust model proposed, it was suggested that the words "with special care and extra help to be given to Mary O'Donohue, my sister" be removed to allow for the more reasonable construction that a fixed trust was intended in respect of the first group, giving the following modified version:

"I leave all my worldly possessions to Josie O'Donohue, my mother, to be divided equally & fairly among my family [] after gifts of money to be given to Olivia [&] family, & Marian O'Beirn with Smaller gifts to Downey, Ethel, Sheila [&] Pat O'Brien, Laurie Johnson, Ellen Wingard, Deirdre O'Donohue"

Aids to construction

Noting the court's duty in seeking to identify the Testator's intention from his Will is weighted by the presumption against intestacy and in particular Section 90 of the 1965 Act provides that "*Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a Will*", the Judge commented that, while the extrinsic evidence put before the court was of assistance in identifying the intended beneficiaries under the Will, no evidence was put before the court which provided any clarity as to how they were to benefit, save to the extent that it was common case that the Testator's family should benefit first. There was however a very real sense that even this small and apparently innocuous piece of evidence only served to confuse matters further. If the Testator's family were to benefit first then it would be difficult to see how the gifts to the second and third groups could be given any real meaning. Alternatively if the Testator's family were to benefit the most from the Will then the difficulty remained that a comparator or superlative was only as good as the basis of comparison provided and there was none in the circumstances that prevailed here.

Moving then to s.99 of the 1965 Act, described in some academic commentaries as the "golden rule" of construction, which provides that: "*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*" the Judge noted that the Will did not immediately suggest any interpretation which would allow the

various bequests to be operative and consideration must be given to whether the modifications proposed were permissible as a matter of law.

Rules which barred the particular course of action

Mr Justice Gilligan stated that O'Flaherty J. *In re Curtin Deceased* [1991] 2 I.R., 562 at P. 573 sounded a note of caution when approaching the task of modifying a Will, stating that: "*A judge is to tread cautiously so as not to offend against the judicial inheritance which is that one is entitled to construe a will but not to make one*." In that case O'Flaherty J. was satisfied to insert a "simple clause" as it would "supply a proper sense" to the Will. However in this case, having considering the terms of the Will at length and listened to the submissions of the parties Mr Justice Gilligan came to the conclusion that there was no such simple insertion or removal that he could make to the terms of the Testator's will which would supply the proper sense intended by the Testator. To accede to the proposal outlined above would be to do more than insert a simple clause and instead would see this court attempting to remake the Testator's will, which is a function that he stated he could not presume to exercise.

Furthermore, the Judge was uneasy with the proposition advocated by the plaintiff that the court may presume that there was an intention to create a "hybrid trust". This suggestion was, however, unsupported by any authority. Furthermore, although the court was mindful of the presumption against intestacy, that presumption does not extend to the creation of new concepts as and when the need arises.

Having found himself in the circumstances unable to decipher the exact meaning of the Will, he rejected the proposition submitted by the plaintiff as to the intention of the Testator.

Previous case law

The Judge turned, as a last resort, to previous case law in an effort to seek guidance noting that in the case of *Peck v. Halsey* [1726] 2 P W.M.S. 388, a bequest of "some of my best linen" was held to be void for uncertainty and that in the later case of *Jubber v. Jubber* 9 Sim 503 (1839), a provision in a Will which directed that "a handsome gratuity to be given" was held to be void for uncertainty. Neither of these cases provided assistance to the court in trying to rescue the intention of the Testator and in fact they provided persuasive authority to the contrary in respect of the second and third groups.

The Judge`s Decision

The Judge concluded that the Testator had unfortunately provided an illustration of exactly how a person should not make a Will. While there could be little doubt but that the Testator was a man of considerable learning, the fact that he did not benefit from legal advice or assistance was evident from the Will he drew up. Not only was it deficient in terms of the lack of certainty as to his intention but moreover he unwittingly made the classic error of having two of the intended beneficiaries act as witnesses to his signature, thereby depriving both as a matter of law from benefiting under the terms of the Will.

Accordingly, it was with regret that the Judge held that, although the Will before the Court was valid as it satisfied the requirements of s. 78 of the 1965 Succession Act, and also revoked the prior will of 1998, the terms of the Will rendered it void for uncertainty. The entirety of the Testator's estate consequently fell into intestacy and the statutory rules applied thereby bringing about a situation, pursuant to s. 68 of the 1965 Act, that the deceased's mother took the entire estate.

Conclusion

The testator had previously taken legal advice with regard to his previous Will made in 1988 which could have been deemed to have been valid but for the fact that the 2001 Will, although declared valid due to uncertainty, was deemed to have validly revoked the 1988 Will. The result was that neither the terms of the 1988 or the 2001 Wills, and consequently the wishes of the deceased, could be effected.

More importantly, had the testator made a legally effective 2001 Will and been properly advised as to the most tax efficient manner in which to deal with his €2m estate it was likely that an extensive Inheritance Tax liability could have been avoided. While not noted by Mr Justice Gilligan in this case, the consequence of deciding that half of the testator`s estate was to be taken by his mother meant that there would be 25% Inheritence Tax payable on that balance of the estate which have exceed the mother`s threshold (relevant at that time) of €43,400.00.

While there may be occasions on which it may not be practical to seek legal advice before making a Will one of the reasons why some persons choose to make their own Will (commonly known as “a home-made Will”) is to save the legal costs of making a Will through the services of a solicitor. While one is not saying that the late Dr O`Donohue avoided taking legal advice for this reason this case is surely a salutary lesson to all persons contemplating making Wills that what might seem like a saving in legal costs could turn out to be expensive cost to the intended beneficiaries.

This comment does not take account of the fact also that, in being obliged to take a case before the High Court on the validity of the Will, extensive legal costs payable to both the legal teams of the of both the Plaintiff and the Defendant were incurred, thus reducing further the net benefit to the estate.

Brian Morgan
Morgan McManus Solicitors
Web : www.morganmcmanus.com
Email : bmorgan@morganmcmanus.ie