Mac Combhaill

1984/551 sp.

THE HIGH COURT

IN THE MATTER OF THE WILL OF FLORENCE DOYLE, DECEASED

BETWEEN:

FIONN MacCUMBHAILL

Plaintiff

and

MARTHA DALY, KATHLEEN HARTIGAN,
BRENDAN HOULIHAN AND
FRANCIS DOYLE

Defendants

Judgment of Mr. Justice Costello delivered the 11th March, 1985.

The homemade Will which I am now required to construe began by a bequest of a life interest in the testatrix's dwelling to her brother with a remainder interest to three nephews, followed by bequests of what was termed "pecuniary legacies" to fourteen named individuals, then a specific bequest of furniture and effects in her dwelling to eight named persons, and then by four legacies which she called "charitable legacies". The Will contained no residuary clause in so many words but it ended with a clause which reads as follows:-

> "The pecuniary legacies bequeathed by this Will shall in the event of a deficiency or enlargements in my estate abate or increase inter se."

This is the clause which has given rise to these proceedings. It will be noted that it refers to the "pecuniary legacies bequeathed by this Will" and, for reasons which will appear clearer later, I should quote the clause dealing with "pecuniary legacies" in full. It reads as follows:-

> "I give and Bequeath the following pecuniary legacies free of Legacy Duty or Capital Taxes
>
> (a) To my brother Francis Doyle, my five thousand pounds (£5,000) holding of 7% National Loan 1987/92
>
> (b) To my sister, Sister M. Florentine St. Louis Convent Middleton Co. Armagh the sum of two thousand pounds (£2,000)
>
> (c) To my brother John Doyle the sum of one hundred pounds (£100)
>
> (d) To my nephew Liam Brendan Doyle £1,000 so that he may provide Insurance for the House III Philipsburgh Avenue, Dublin 3 during my brother Francis' lifetime. One thousand pounds.
>
> (e) To my niece Mary Florence Doyle the sum of one thousand pounds (£1,000)
>
> (f) To my grand nephew Brian Mescal the sum of five hundred pounds (£500)

(g) To my grant niece Natalie Doyle the sum of five hundred pounds (£500)

(h) To my grand niece Cecilia Doyle the sum of five hundred pounds (£500)

(i) To my grand niece Elisabeth Doyle the sum of five hundred pounds (£500)

(j) To my grand niece Jenifer Doyle the sum of five hundred pounds (£500)

(k) To my sister Agnes Doyle the sum of fifty pounds (£50)

(l) To my sister Martha Daly the sum of one hundred pounds (£100)

(m) To my friend Kathleen Hartigan Enafort Park Dublin the sum of five hundred pounds (£500)

(n) To Ms. Kathleen Hunt, 30 Clontarf Road, Dublin the sum of five hundred pounds (£500)."

There are certain points about this clause which should be immediately noted. The testatrix made bequests to two brothers and three sisters but in very different amounts (her brother Francis, to whom she had earlier bequeathed a life interest in her dwelling-house and the residue of her furniture was given a considerable holding of government stock, whilst her sister, Sister Florentine, was bequeathed a sum of £2,000 but another brother and two other sisters received only nominal amounts). Secondly, the bequest of £1,000 to her nephew, Liam Brendan Doyle, contained an indication of the purpose for which it was made - she provided that the sum had been bequeathed "so that he may provide insurance" for the dwelling-house bequeathed to her brother during his lifetime. Thirdly, although the bequest at (a) in the clause was, in fact, a bequest of a specific legacy of holding of government stock, it was included in the clause designated as "pecuniary legacies". As it is

clear that the testatrix had employed her own dictionary I am satisfied that apart, from any extrinsic evidence, the testatrix in referring to "pecuniary legacies" in the final clause of her Will was in fact referring to all the legacies (a) to (n) in the "pecuniary legacies" clause. This, however, is only one of the problems of construction which arises for consideration from the last clause in the Will and I must now turn to consider it in a little more detail.

The last clause directed that in certain circumstances the fourteen pecuniary legacies would "abate inter se" and in other circumstances they would "increase inter se". They would abate "in the event of a deficiency of my estate", but they would increase "in the event ... of enlargements in my estate". It is by no means clear, even construing this clause by reference to the Will as a whole, what the testatrix exactly intended by it. As the questions posed in the Summons suggest, "enlargements", "in her estate" could be construed as meaning an "enlargement" occurring between the date of the Will and the date of death or it could refer to "enlargements" occurring between the date of death and the date of distribution. The word "enlargements" used in the plural in the Will is an obscure word in the context and the Summons raises the question whether or not it should be construed as meaning "surplus". Furthermore, when the testatrix referred to "enlargements" "in my estate" it is not clear whether she was referring to "enlargments" that might occur in the whole of her assets or merely in that part available to pay pecuniary legacies.

In the light of the problems of construction which have been raised, Counsel for the executor submitted that I was entitled to obtain extrinsic evidence referring me to Section 90 of the Succession Act 1965 which reads:-

> "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."

This section was considered by the Supreme Court in Roe .v. Law (1978) I.R. 55. In that case Kenny, J. in the High Court had refused to admit extrinsic evidence on the ground that the words used in the Will were clear and unambiguous. The Supreme Court held he was correct. In the course of his Judgment Henchy, J. stated

> "To sum up; S.90 allows extrinsic evidence of the testator's intention to be used by a court of construction only when there is a legitimate dispute as to the meaning or effect of the language used in the Will. In such a case for example (e.g. In re Julian) it allows the extrinsic evidence to be drawn on so as to give the unclear or contradictory words in the Will a meaning which accords with the testator's intention as thus ascertained. The section does not empower the court to rewrite the Will in whole or in part ... S.90 may be used for the purpose of giving the language of the Will the meaning and effect which extrinsic evidence shows the testator intended it to have."

The clause for construction in this case is far from clear and applying the principles in Roe .v. Law it seems to me that I have jurisdiction to hear extrinsic evidence under S.90, that is evidence which is relevant to ascertain the testatrix's intentions. This would in my view include evidence as to declarations made by her at the time the Will was being drafted. With the aid of the extrinsic evidence which I have received I believe that I am able to give to the language of the Will the meaning which the

testator intended it to have.

The Plaintiff, Mr. Mac Cumhaill, was a lifelong friend of the deceased and knew her extremely well. He is a civil servant and was obviously someone in whom the deceased placed her trust. When she made her Will (on the 18th of January 1982), she was then an elderly lady in her mid 80's. She had never married but had led an active life having been the manageress of a well known hotel and later of a well known yacht-club in the Howth area, before her retirement. After her retirement, she ran a guest-house in her own home. At the time she made her Will she may not have been physically very strong but she was mentally fully alert. In the year prior to its execution the Plaintiff had suggested that it would be advisable for her to make a Will on at least three or four occasions. He had suggested to her the name of a Solicitor who could help her, but unwisely she declined this advice and instead dictated her Will to the Plaintiff on two succeeding evenings. The Plaintiff wrote it down and had it typed up using a printed form of Will. She took the typed copy to the branch of the Trustee Savings Bank in Fairview, where it was duly executed and witnessed. The circumstances in which the Will was dictated to the Plaintiff are of importance. It was done in her bedroom and as she was doing it she had beside her a tin box in which she had a number of documents and a large notebook. The Plaintiff did not see what was in the notebook, but he has been able to identify it and it was produced at the hearing. It contained a neat handwritten draft of the Will which she dictated to the Plaintiff. It was not a complete

draft, however, as it did not contain the final clause with which this case is concerned. It is clear, however, that she had given considerable thought to the preparation of her Will and took a great deal of care as to the different legacies incorporated in it. In addition to the notebook, the testatrix had with her the type written copy of another Will. The Plaintiff was able to identify this document and it was produced at the hearing. It is clear that she had used this document as a precedent when preparing her own Will. It contained a clause which began, "I give and bequeath the following pecuniary legacies" and another which began, "I give and bequeath the following charitable legacies" and it is a reasonable inference that the Plaintiff copied these words for the purposes of her own draft. In addition the Will contained a residuary clause (which the testatrix did not copy) but it contained the clause following:

> "The pecuniary legacies bequeathed by this my Will shall, in the event of a deficiency in my estate, abate rateably inter se but there shall be no abatement in respect of charitable and specific legacies bequeathed under this my Will."

It is highly unlikely that the deceased had any legal knowledge on the law relating to the abatement of legacies, and it is a reasonable assumption that she adapted this clause for her own purposes when dictating the final clause in her Will to the Plaintiff.

In addition to these documents, the testatrix had with her in her tin box a bank book relating to her account in the Trustee Savings Bank and a Building Society Book

relating to her account with the First National Building Society. The Plaintiff was able to identify these documents but did not see their contents. It is clear, however, that the testatrix must have consulted them at the time she was drafting her Will. The relevance of this conclusion is this. The deceased died on the 28th of September 1982, only nine months after her Will had been executed. At the time of her death she owned a dwelling-house worth £35,000, and in addition to the 7% National Loan, which she had specifically bequeathed to her brother, government securities worth £2,728. She had four accounts in the Trustee Savings Bank, amounting to £23,831.15, and in the First National Building Society a sum of £24,810.81. She had saving certificates to the value of £514.50, and a sum of £1,204.63 in a Post Office savings account and £1,601.92 in savings bonds. Apart from her house and furniture, therefore, the deceased's estate at the time of her death was valued in the region of £53,000 approximately. Counsel have agreed that this was the approximate value of her liquid assets at the time she made her Will. It is highly probable, therefore, that the testatrix not only knew how much she had in the Trustee Savings Bank and the First National Building Society, amounting at the time of the execution of the Will to a sum in the region of £48,000, but also the value of her other assets. Even if she had no accurate knowledge of what she was then worth, she would, I am sure, have been well aware that the total of the "pecuniary legacies" (£12,750) and the total of the "charitable legacies" (£2,500), were well below the assets which she had then available for distribution.

I now come to a highly significant piece of evidence. Having dictated the final clause to the Plaintiff she then discussed it with him. She referred to the persons to whom she had given pecuniary legacies and explained to the Plaintiff why she had distinguished between them in the amount of the bequests she had given, pointing to the fact that she had already given money or lent money to some of them as an explanation for the distinctions she was making in the Will. She then said "if there is any money left over" then she wanted her family and friends "to benefit pro rata". Having explained that this was her intention, she then referred to the clause and asked the Plaintiff "would that mean that they would benefit pro rata", to which the Plaintiff answered "yes".

Obviously, in every case a Court must scrutinise extrinsic evidence with very great care, but in this case this task is an easy one because I have the benefit of the evidence of a witness who is completely independent and unbiased and whose powers of recollection are obviously good. The effect of this extrinsic evidence establishes, to my mind, what the testatrix intended by the last clause of her Will. She must have been aware that it was probable that on her death there would be, as she herself said, "money left over", that is that there would be assets available for distribution after paying debts, funeral expenses and the pecuniary and charitable legacies in her Will. She wanted to make provision for this eventuality by means of this clause. But is is clear that whilst wishing to benefit the members

of her family and friends mentioned in the "pecuniary legacies" clause, she did not want to leave the "money left over" in equal shares to them. They were to get this money "rateably", that is in the same proportion as their legacies bore to the total amount of the pecuniary legacies. If this then was her intention, is there any reason why I should not give effect to it?. I can find none - indeed not to do so would be to act contrary to the Court's duty to construe the Will so as to give effect to the intention of the testatrix. In doing so I do not think I am writing a new Will for the testatrix nor am I acting contrary to any express words contained in it. I am construing ambiguous words so as to give effect to what relevant and admissible evidence establishes was the testatrix's intention when using them.

Rather than answer the specific questions raised at (1) to (7) I would propose to answer question (8) in the Endorsement of Claim as follows:

> "The said clause is to be construed as requiring the executor to distribute the residue of the assets remaining after payment of debts, funeral and testamentary expenses and the legacies referred to in the Will amongst the persons referred to in subparagraphs (a) to (n) of the clause referring to "pecuniary legacies" in the same proportion as their legacies bear to the sum of £12,750, being the total of the legacies therein given."

This answer pre-supposes answers to a number of other questions, some of which are referred to in paragraph (9) of the Endorsement of Claim. The legacy at (a) to her brother Francis was a specific legacy of a specified amount of government stock. But it was included in the clause referring to "pecuniary legacies", and I am satisfied that she intended

her brother Francis to benefit from the final clause in her Will. Furthermore, it seems to me to be reasonable to assume that her intention was that this legacy was to be valued at a sum of £5,000 for the purpose of a rateable distribution under the final clause. Secondly, the bequest at (d) to her nephew Liam Brendan Doyle of £1,000 was, as I have already pointed out, expressed to be for the purpose of enabling him to provide insurance for the house during her brother's life interest in it. But this newphew was one of those who were given a remainder interest in the dwelling-house, and this fact, together with the extrinsic evidence to which I have referred, would indicate that this nephew, too, would benefit from the final clause in her Will. Thirdly, the extrinsic evidence supports the construction to which the contents of the Will itself gives rise, namely, that the beneficiaries under the last clause were those mentioned in the clause dealing with "pecuniary legacies", and excluded the beneficiaries under the clause dealing with "charitable bequests". In the light of these conclusions, I consider that question (9) should be answered as follows:

9 (1) Yes.

9 (2) No.

9 (3) Yes.

Question (10) does not require an answer in view of my answer to question (8).

Approved

29.5.85