FLANNERY re 1984 NO. 299 SP.

THE HIGH COURT

IN THE MATTER OF THE ESTATE OF CANON WILLIAM FLANNERY, DECEASED

PATRICIA LOUISA PYLE

PLAINTIFF

AND

MARY ELIZABETH SMYTH, ZOE MAHOOD McOSTRICH, HERBERT VERNON FLANNERY AND WILLIAM J. FLANNERY

DEFENDANTS

Judgment of Mr. Justice Barr delivered the 10th day of May 1985

Canon William Flannery (the testator) who died on 28th February, 1948, married Isabella Mary McNamara on 25th December 1895 and she died on 9th April, 1927. There were six children of that marriage all of whom are now deceased. Three of them married and had lawful issue. There are eight grandchildren of the testator by his first marriage, each of whom survived him and are still alive. They include William J. Flannery, the fourth defendant, and at the trial of the action I made an Order declaring that he shall represent all of the issue of the first marriage.

The testator married Martha Elizabeth Mahood on 3rd June, 1929 and there were four children of that marriage, i.e. the plaintiff and the first, second and third defendants.

The deceased died testate having made his last Will on 5th July, 1946, probate of which was granted on 24th April, 1948 to Martha E. Flannery, his second wife and William J. Flannery, a son by his first marriage and the father of the fourth named defendant.

The executors died on respectively 16th August, 1978 and 7th September, 1964 leaving part of the estate of the deceased unadministered. Letters of Administration of the unadministered personal estate of the deceased were granted to the plaintiff on 4th August, 1981.

The testator was the owner of a furnished dwelling-house known as No. 123, St. Helen's Road, Booterstown, Co. Dublin (the dwelling house) which he held on foot of a lease for 500 years from 20th March, 1933 at an annual rent of £8.

By his Will the testator devised and bequeathed the dwelling-house and the residue of his estate in the following words:-

> "I give, devise and bequeath unto my wife Martha E. Flannery my house, 123, St. Helen's Road, Booterstown and the furniture therein for her lifetime but subject to the following conditions: that my daughters Eileen and Winnie Flannery shall have the use of the room they are accustomed to occupy and the run of the house as at present during my wife's lifetime. My wish is that my wife with aid from my children shall keep the said house as a home for her and the children. Should however circumstances arise rendering its sale necessary I give her absolute freedom to do so, in the best interest of my children Mary Elizabeth, Zoe Mahood, Patricia Louisa and Herbert Vernon. Moreover if the proceeds of sale exceed the purchase price thereof £1,100 then if in my wife's absolute discretion she can do so, I will £100 to my daughter Eileen if then living and £50 to Winnie if surviving and said amounts to come out of the excess over purchase price aforesaid. Should the excess be inadequate then it shall be paid to each in proportion of 2/1. That is - Eileen's share to be double that of Winnie. And if hereafter I should become entitled to any

money or property, my wife shall be entitled thereto if living and failing her it shall pass to my children Mary Elizabeth, Zoe Mahood, Patricia Louisa and Herbert Vernon or the survivors of them in equal shares."

Martha E. Flannery was in beneficial occupation of the dwelling-house until her death intestate in 1978. The testator's daughters by his first marriage, Eileen and Winnie, who are referred to in the Will, continued to reside in the dwelling-house after their father died but some years later they took up permanent residence in England where each died unmarried and without issue.

In course of administration of the estate of the testator the dwelling-house was sold on 5th May, 1983 for the sum of £50,000. The total expenses of sale amounted to £2,986.05, thus leaving a net balance for distribution amounting to £47,013.95p. The question for determination is who is entitled to the net proceeds of sale of the dwelling-house in the events which have happened.

The testator made his Will without legal assistance. It is evident that he did not fully appreciate the legal implication of what he was doing as to disposal of his estate. In particular, it seems that he did not realise that in giving his wife a life interest in the dwelling-house he thereby conferred on her also a power to sell the property.

Consideration of the Will leads, inter alia, to the following conclusions which in my view are inescapable: first, the testator gave his wife a life interest in the dwelling-house subject to a continuing right of residence for his daughters, Eileen and Winnie, of the first marriage. Secondly, he expressed the wish that his wife would keep the dwelling-house as a house for herself and "the

children" (i.e. her children who were then infants and all residin with her) and that she would continue to do so with aid, if necessary, from the testator's children (being the children of either marriage depending on when such aid might be required). These wishes have no binding effect in law. Thirdly, he gave his wife an absolute power of sale over the dwelling-house which she had alieunde as an incidence of her life tenancy in the property. Fourthly, the residuary clause in the Will, "And if hereafter I shall become entitled to any money or property, my wife shall be entitled thereto if living and failing her it shall pass to my children Mary Elizabeth, Zoe Mahood, Patricia Louisa and Herbert Vernon or the survivors of them in equal shares" does not capture the residuary interest of the estate in the dwelling-house after t e life estate of the testator's second wife as that interest does not constitute after acquired property. Accordingly, there is a lacuna as to the devolution of the dwelling-house on termination o the widow's life interest. Although the testator may have intended that the children of the second marriage only would inherit the property on the death of their mother, I am not entitled to make that assumption and, as it were, "re-write" the Will to so provid. The words of the testament are clear and unambiguous. One is driven to the conclusion that, unfortunately, the testator does not appear to have realised when making his Will that he had failed t specify how he intended to dispose of his interest in the dwelling-house on termination of the life tenancy he had created in favour of his second wife. It follows that, the life tenant having died n possession, the net proceeds of sale of the dwelling-house devolve as on the intestacy of the deceased owner.

It has been argued that on the death of the life tenant the

dwelling-house reverted to the estate of the testator and thereupon was brought within the residuary bequest. I do not accept that construction of the Will. I am satisfied that the testator intended the residuary clause to include only assets which he might acquire after making his Will and, therefore, it does not capture the dwelling-house on its reversion to the estate upon the death of the life tenant.

The only other possible construction of the Will which has been referred to by Counsel is that the bequest of the dwelling-house made to the second wife was an absolute gift and not a life interest This construction has not been pursued with any enthusiasm as the facts of the case are broadly similar to those in Thompson's Estate, Herring -v- Barrow L.R.(1880)Ch. D. Vol. 14 page 263 where a contrary view was taken by the Court of Appeal in England. I am satisfied that the testator's second wife took only a life estate in the property.

I answer the relevant questions set out in paragraph 10 of the Indorsement of Claim on the Special Summons as follows:-

(a) There is an intestacy in respect of the property known as No. 123, St. Helen's Road, Booterstown in the County of Dublin following the death of the testator's second wife, Martha E. Flannery, to whom he bequeathed the property for her life.

(b) The date for ascertainment of the next-of-kin of the testator is the date of his death and not that of his second wife, the deceased life tenant. It is well settled since the rule in Gundry -v- Pinniger (1851) 14 B 94 that,in general, next-of-kin are to be ascertained at the death of the ancestor, whether the bequest is

immediate or preceded by a life interest. See Theobald on Wills 14th Edition page 418 and the authorities referred to therein at note 86.

(c) The usual steps should be taken by the plaintiff in course of administration to ascertain the next-of-kin of the testator. Should any particular difficulties arise then a further application should be made to the Court and I give the plaintiff liberty to apply in that regard.

Approved.

2nd May, 1985.