[2020] IEHC 421

THE HIGH COURT

PROBATE

[Record No. 19/9819]

IN THE MATTER OF THE ESTATE OF MARY PHILOMENA MAUREEN MCENROE (OTHERWISE MAUREEN MCENROE) LATE OF 20 CYPRESS PARK, TEMPLEOGUE, DUBLIN 6W, RETIRED COMPANY SECRETARY, DECEASED

AND IN THE MATTER OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF AN APPLICATION BY EVELYN O'NEILL, A SISTER OF THE DECEASED, AND ONE OF THE RESIDUARY LEGATEES AND DEVISEES NAMED IN THE LAST WILL AND TESTAMENT OF THE DECEASED TO PROVE THE DECEASED'S LAST WILL AND TESTAMENT IN COMMON FORM OF LAW IN ITS CURRENT FORM AND CONDITION

JUDGMENT of Mr. Justice Allen delivered on the 21st day of August , 2020

1. Mary Philomena Maureen McEnroe, known as Maureen McEnroe, died on 8th May, 2017 at Kiltipper Woods Care Centre, Tallaght, County Dublin, aged 87 years, unmarried and without issue. She was survived by four siblings, one of whom has since died.

2. In the years prior to her death the deceased's health had been failing. When, in January or February, 2014 the deceased was admitted to hospital and it was clear that she would not be returning to live at her home in Templeogue, the deceased's sister, Sister Kathleen McEnroe, asked her niece, Mrs. Helen Hunter, to recover the deceased's important papers from her home. Mrs. Hunter was directed to a hidey-hole under the floor boards where, as expected, she found a biscuit tin containing some papers, including a form of will dated 11th May, 2005. Mrs. Hunter kept the document until about July, 2014 when she brought it – in the same plight and condition in which she had found it – to the offices of Joe Clancy Solicitors who were then in the process of registering an enduring power of attorney for the deceased.

3. The form of will is written in manuscript on a printed will form and the execution is witnessed by Hazel Lahart and Michael Lahart, who were friends and neighbours of the deceased at the time of execution. The deceased's sister, Mrs. Evelyn O'Neill, who is the applicant, can identify the handwriting and the signature as that of the deceased. Mr. Lahart predeceased the deceased and Mrs. Lahart is infirm but their son Brian Lahart can identify the signatures of the witnesses as those of his parents.

4. The document which is propounded as the will of the deceased is written on two sides of one sheet of paper. The difficulty is that it contains two obliterations and one interlineation which have not been executed and witnessed.

5. The difficulty with the interlineation can readily be dealt with. The deceased left the residue of her estate to the applicant and her (the applicant's) four daughters, adding, as the document was first written, "*This to thanks for all the meals cooked and all the house cleaning which they did for me. Pray hard for me now*." After the document was written the deceased added, between the words "*to*" and "*thanks*" a caret and the word "*say*", so that what now appears is *"This is to say thanks for all the meals etc."*

6. There is no evidence forthcoming as to whether the interlineation was made before or after the execution of the will. The presumption is that it was made after execution (*In the Goods of Adamson* (1875) L.R. 3 P. & D. 253) and s. 86 of the Succession Act, 1965 provides that any interlineation made in a will after execution shall not be valid or have any effect unless it is executed as is required for the execution of a will. The problem, such as it is, can be overcome by admitting the will to probate without the interlineation.

7. The obliterations are much more difficult. The application was first moved on the affidavits of Susan Hunter and Evelyn O'Neill. Mrs. O'Neill described, as is evident by looking at the document, that it has been obliterated in two places.

8. The first obliteration was of the name of the executor. While the name has been wholly obliterated to the naked eye, Mrs. O'Neill expressed the belief that the executor was – I think that she probably meant was likely to have been – Patrick, sometimes called Paddy, Welsh who was a valued colleague of the deceased who had died suddenly on 19th September, 2006. Mrs. O'Neill's surmise was that at some time following Mr. Welsh's death the deceased decided to obliterate his name and, she says, add a further executor but means, I think, insert the name of an alternative executor. To the left of the obliteration are the initials "*MMcE*" and to the right "*MMcEnroe*". Mrs. O'Neill thought that she could discern in the obliterated area the substitution of another name, perhaps that of one of her brothers or sisters all of whom had names which, in their shortened or familiar versions, might have been accommodated in the obliteration but in truth I think that Mrs. O'Neill's belief was based on surmise as to her sister's likely intention rather than anything that could be discerned from the document.

9. Mrs. O'Neill in her affidavit noted that "*the second obliteration is in respect of a deletion of a bequest in the main body of the will*." The will as written provided for two pecuniary legacies, followed by five devises of shares, followed by two further pecuniary legacies, followed by the line which has been obliterated, followed by the residuary bequest. The surmise that what was obliterated was a gift appears to me to be reasonable, but it is only surmise.

10. While the obliteration in the body of the will was noted in the grounding affidavit, I do not believe that it was recognised as potentially a real problem. The application was moved *ex parte* for an order admitting the will to probate in its current form and condition and granting Mrs. O'Neill liberty to apply for a grant of letters of administration with will annexed.

11. When the application first came before me on 9th December, 2019 it seemed to me that because of the obliterations the document produced was not the deceased's will, rather that the will which she had executed had later been altered. I wondered whether what had been obliterated to the naked eye might be revealed by a forensic examination and I then raised with counsel for the first time whether the application was one which I could properly deal with *ex parte*.

12. The applicant's solicitors had the document examined by Mr. Dave Madden, a forensic document examiner. Mr. Madden applied a number of forensic techniques. He scanned the document at a number of different resolutions and settings and tried infrared reflection and infrared luminescence in an attempt to differentiate between possible different inks but was unable to determine whether the alterations were made before or after execution or to identify the obliterated writing.

13. On 27th January, 2020 I heard further argument in the light of Mr. Madden's findings. I was asked, variously, to admit the will to proof in its unaltered form – of which there was no evidence – and to admit it to proof in the plight and condition in which it was found by Mrs. Hunter – which, it seemed to me, would have been to give effect to alterations which had been made to the will otherwise than in accordance with s. 86 of the Act of 1965. I raised again with counsel the question as to what would become of the estate if the will were not admitted to probate and adjourned the application to allow counsel to research the authorities and to file written legal submissions.

14. The application came back into the list on 22nd June, 2020 when the applicant was represented by Mr. Vinóg Faughnan S.C. as well as by Ms. Anne Marie Maher who had, in advance, filed detailed and very helpful written legal submissions. I again raised the question as to whether this was an application that could properly be dealt with ex parte. It was acknowledged that the obliterations gave rise to significant legal difficulty, but counsel had found an English case in which, it was said, a solution might be found if the court were persuaded to make what would be new law in Ireland. Asked by the court what the outcome would be if the court were not persuaded to admit the document to probate, Mr. Faughnan said that the applicant would appeal. On counsel's insistence I heard the application and reserved my judgment.

15. The premise of the application is that there is no question but that the document propounded is a valid will. The document is said to be in writing, to have been signed by the deceased, to have been witnessed, and to comply with the formal requirements of s. 78 of the Succession Act, 1965. I have no difficulty with the proposition that the will executed by the deceased on 11th May, 2005 was a valid will, but I remain of the view that the document now produced is not the document executed by the deceased because it has been obliterated in two places.

16. The net issue is said to be in what form the will should be admitted to probate. On the evidence (save as to the interlineation) the only form in which the document might be admitted to probate is in the plight and condition in which it was found by Mrs. Hunter which, on the evidence, is not the form in which it was executed.

17. In support of the application counsel refers to a passage from Professor Brady's work on *Succession Law in Ireland* which was published in 1995 and the authorities referred to by the learned and distinguished author. The passage relied on is para. 3.15, under the heading of unattested alterations and reads:-

"If unattested alterations were made in a will after execution or, if made before execution, but there is no evidence that they were so made, the will can take effect as if there were blanks in the spaces which contain the alterations if the original words cannot be read. Similarly, if words in a will are completely erased or obliterated and extrinsic evidence is not admissible, or otherwise available, the will can take effect as if there were blanks in the spaces which contained those words."

18. The authorities cited in support of this are In the Goods of Benn [1938] I.R. 313, In the Goods of Rudd [1945] I.R. 180 and In the Goods of Morrell (1935) 69 I.L.T.R. 79. Rudd and Morrell were cases concerned with legible alterations. Benn was a case in which obliterations had been made which were indecipherable and a grant issued which was blank in respect of them. Critically, they were all, in particular Benn, decided under s. 21 of the Wills Act, 1837. That provided:-

"No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end thereof or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." [Emphasis added.]

19. The Wills Act, 1837 was repealed in its entirety by the Succession Act, 1965. Alterations to wills after execution are now dealt with by s. 86 of the Act of 1965 which provides:-

"An obliteration, interlineation, or other alteration made in a will after execution shall not be valid or have any effect, unless such alteration is executed as is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the signature of each witness is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

20. The marginal note to s. 86 refers to s. 21 of the Wills Act, 1837 and with one exception s. 86 re-enacts in more modern language the substance of the repealed provision. The exception is that the proviso in respect of indecipherable obliterations – which I have underlined - was not carried forward. The passage in Brady relied on by the applicant is founded on the decision of the High Court in *In the Goods of Benn* [1938] I.R. 313, and *Benn* is founded on the words *"except so far as the words or effect of the will before such alteration shall not be apparent"* in s. 21 of the Act of 1837, which are not to be found in section 86. The note in McGuire, now Spierin, *The Succession Act, 1965 and Related Legislation, A Commentary* observes that the exception was not carried over but does not

suggest why it was not.   The authors do suggest, citing In the *Goods of Morton* (1887) 12 P.D. 141 – and I agree - that the absence of an express proviso was probably not intended to affect the partial revocation of a will under section 85.

21. The fifth edition of Spierin, at para. 622, reproduces the note at p. 209 of the second edition of McGuire:-

> *"Section 21 of the Wills Act 1837 excepted obliterations and other alterations from the requirement of execution 'so far as the words or effect of the will before such alteration shall not be apparent'.   This exception has not been carried over.   The obliteration or other alteration, if made after execution, will therefore have to be separately executed.   The absence of an express proviso, however, was probably not intended to affect the partial revocation of a will under s. 85.   Thus, if a testator were to erase or cut or tear out a gift he [the modern edition adds, or she] had made by will with the intention of revoking it, this would be effective to revoke the gift.   Where the act of the testator does not amount to a 'burning, tearing or destruction', though, the provisions of s. 86 must prevail.   Simply to obliterate the terms of a gift by pasting a slip of paper over them, or by covering the words with typewriter correcting fluid, would not amount to a valid revocation unless executed in accordance with s. 86."*

22. Mr. Faughnan, while drawing attention to *Cheese v. Lovejoy* (1877) 2 P.D. 251 which decided that merely to strike through words in a will does not amount to revocation since there is no burning, tearing or destruction, would argue that the obliterations amounted to "*destruction*" so as to revoke those words which were obliterated.   It is acknowledged that there is no Irish authority for that proposition, but reference is made to a decision of the English High Court in *In re Adams, deceased* [1990] Ch. 601.   In that case, which was an action *inter partes*, Mr. Francis Ferris Q.C., sitting as a deputy judge of the High Court, found that the obliteration with a ball point pen *animo revocandi* of the signatures of the testatrix and the attesting witnesses amounted to destruction within the meaning of s. 20 of the Wills Act, 1837.   The conclusion certainly appears to assist the applicant, but it is interesting to note that Mr. Ferris Q.C. got to the conclusion by reference to s. 21 of the Act of 1837 and specifically by adopting and applying the test which is applied in England for the purpose of determining whether there has been a partial revocation – which turns on the proviso *"except so far as the words or effect of the will before such alteration shall not be apparent*" which in this jurisdiction was left behind on 1st January, 1967.

23. A separate proposition was advanced that the obliterated gift – assuming that the obliterated line in the operative part of the will was a gift – might fail for uncertainty but the argument was not developed.

24. After careful reflection I find that I am reinforced in the view I first took of this application: which is that it is not one which I should adjudicate upon without notice to those whose rights may be affected by the orders which are sought.

25. It is acknowledged that the proviso to s. 21 of the Wills Act, 1837 which would have provided a ready answer by allowing the will to be admitted to probate as if the obliterations were blank is unavailable. Unless, then, the obliterations are taken to have amounted to destruction so as to have effected a partial revocation, the document propounded is not the entirety of the will and there is no evidence as to what has been obliterated. The argument advanced on behalf of the applicant is acknowledged to be novel and the English authority on which it is based is in turn based on legislative provisions which are not the same as ours.

26. The applicant has not engaged with the issue as to what will become of the estate if the court were not persuaded to admit the will to probate.

27. Emphasising that I am doing so because I have been pressed to decide the application without notice and that I am not pronouncing against the will, I refuse the application. There will be no order as to costs.