THE HIGH COURT

[2023] IEHC 383

Record No. 2022/104 SP

IN THE MATTER OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF THE ESTATE OF WILLIAM JOHN MURPHY,

OTHERWISE SEÁN MURPHY, DECEASED

BETWEEN

ADRIENNE GOODWIN, PATRICIA KENNEDY AND MARTIN KENNEDY

PLAINTIFFS

AND

BRENDAN MARY MURPHY

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Stack delivered on the 3rd day of July, 2023.

Introduction

1. These proceedings come before the court by way of special summons issued to construe the Will dated 4 October 2019, of the late William John (otherwise Seán) Murphy ("the Deceased"), late of Coolcarrigan, Coill Dubh, Naas, County Kildare.

2. The Deceased died on 14 November, 2021, without having altered or revoked the said Will. He died a bachelor, never having married or entered civil partnership, and without issue or a surviving parent. As it is submitted by the plaintiffs that the entire Will may be void for

uncertainty, it is appropriate to point out that, on an intestacy, his estate would be divided in four equal shares as follows:

i. one share for each of his three surviving siblings: Brendan Murphy (the defendant and Executor named in the Will, hereinafter "the Executor"), Teresa Goodwin, and Kathleen Kennedy;

ii. the remaining share to be divided equally between his nephew and niece, Derek Murphy and Amanda Murphy, as children of his predeceased brother, Dominick, who would take their father's share *per stirpes*.

3. The Deceased also had a predeceased sister, Imelda, but as she died leaving no surviving children, this does not affect the distribution on intestacy. Similarly, although the Deceased was survived by a number of nieces and nephews who are named as beneficiaries at clause 14 of the Will, none of these has an entitlement to a share on intestacy.

4. The Executor has sworn a replying affidavit in which he confirms that the Estate of the Deceased comprises real property (a house and surrounding lands) worth approximately €335,000.00, and some moneys held in the credit union in the amount of €23,298.84. However, as that account was subject to a nomination in favour of the Executor, the amount for distribution under the Will is only the sum of €298.00.

5. There is no dispute as to the valid execution of the Will and it is admitted that it was executed in accordance with the provisions of the Succession Act, 1965 ("the 1965 Act"). However, the Will was drawn by the Deceased's niece, Fiona Murphy, from a template which she downloaded from the internet. Unfortunately, that template is not particularly well drafted and this has given rise to difficulties in interpretation of the Will. However, I am of the view that the Will can be interpreted and is not void for uncertainty at any point. I do not accept that all of the suggested difficulties regarding its interpretation even arise.

6. Having said that, there is no doubt that use of the standard form will has given rise to difficulties of interpretation and that, even in the absence of these proceedings, the Executor would most likely have needed to bring a construction summons before proceeding to distribute the estate. The use of the internet-sourced template will has, therefore, significantly reduced the assets available for distribution to the beneficiaries under the Will.

7. There are of course plenty of examples in the law reports of wills drafted by solicitors which give rise to significant difficulties of interpretation, with similar adverse consequences for those entitled to inherit. Even so, it must inevitably be the case that such difficulties are much more likely to arise in the case of a homemade will. I would therefore stress that the public should ensure that they not only make a will but that they take professional advice in so doing, in order to ensure that their intentions are carried out after their death, and they should also update it from time to time over the years to take account of changes in assets, the identity of family members, and other circumstances.

8. For example, there must be significant doubts about the enforceability of this so called *"no contest provision"* in clause 15, given a spouse's entitlement to a legal right share pursuant to s. 111 of the 1965 Act, the equivalent right of a civil partner pursuant to s. 111A, as well as the rights of a child of a deceased or a qualified cohabitant of the deceased to apply for *"proper provision"* under s. 117 of the 1965 Act or s. 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010, respectively, regardless of whether they are named as beneficiaries in the Will. Although I have not found it necessary to decide the point, I think any such clause might well be void as being contrary to the Succession Act, 1965 and/or public policy in circumstances where unworthiness to succeed is specifically dealt with in Part X of the 1965 Act and where the Oireachtas has specifically provided for certain classes of person to claim more than has been left to them under a will.

9. The problem is that a person who is not legally advised might well assume that clause 15 of the template will was enforceable and, rather than take advice from a solicitor as to possible challenges on death, might be under the impression that clause 15 would be effective to prevent any such challenges. That assumption is incorrect and might lead to a subsequent successful application for a legal right share or provision out of the estate which might defeat the intention of the testator in other ways, such as by defeating a residuary gift which a testator might have thought valuable, as well as leading to litigation and the consequent dissipation of the assets of the estate on litigation costs.

10. Before turning to the issues of interpretation which fall for determination in this case, it is convenient first to set out the evidence led *de bene esse* as to the Deceased's intentions in drawing up the Will.

Evidence of Deceased's intention

11. With the consent of both parties, I heard *viva voce* evidence from Fiona Murphy in the course of the application, leaving over the question of the admissibility of that evidence. I consider below the extent to which that evidence is admissible and what, if any, effect it has on the interpretation of the Will.

12. That evidence was to the effect that the Deceased had wanted to make a will and Ms. Murphy had asked him to go to a solicitor, but he refused. Ms. Murphy was of the view that the reason was simply that the Deceased was very private. Accordingly, at his request for assistance in drawing up the Will, she googled something along the lines of "homemade wills" and saw a company who provided online templates for wills. She said she subscribed to the website and had to pay for what she regarded as their expertise, but could not now find the website, although she was clear that it was not an American website.

13. Having found the online template, she filled it in in accordance with the Deceased's instructions as to how he wished his assets to be distributed on his death. These were, first, that Ms. Murphy was to have the Deceased's house and adjoining lands, which were adjacent to the land where she herself had lived for over 20 years and which, as is apparent from the values referred to above, constitute the primary asset in the estate.

14. Ms. Murphy gave evidence as to how the Deceased arrived at this intention. The logic of leaving it to Ms. Murphy and her family was that the Deceased's father was a blacksmith and the Deceased was fond of Ms. Murphy's daughter's horse, Benji. The land consisted of three fields and some of it – as I understand it, the greater part of the lands - was leased, but some of it was cordoned off for Ms. Murphy's daughter, Mollie, to ride her horse. Indeed, the Deceased had said that he was going to stop leasing the lands so that Mollie could use all of them for her horse. A second consideration was that the Deceased wanted to ensure the land would remain within the Murphy family, and, as Ms. Murphy had not married, the land would remain in the Murphy family name. In fact, Ms. Murphy said that the Deceased's original intention was to leave the house and lands to her father, the Executor, but he had told the Deceased he didn't want it, and that intention became replaced with an intention to leave it to Ms. Murphy and, if she predeceased him, to her daughter, Mollie

15. The Deceased also instructed that any money that the Deceased had in the credit union was to be used for his funeral and was then to go to Ms. Murphy's siblings and cousins as ultimately named in clause 14, which is set out in full below.

16. Having filled it in and printed it out in the form ultimately executed, Ms. Murphy brought the Will to the Deceased. He took it from her and reviewed it over a few days. Despite the fact that he had worked as a labourer and was not educated, she said he was very interested in history, an avid reader, and well able to read the Will.

17. In any event, after a few days, the Deceased told Ms. Murphy that he was happy with the Will. She then got two of her sister's friends, who were acquainted with the Deceased, to witness the Will and this was done in the Deceased's house at a time that Ms. Murphy was not present.

18. At a later time, Ms. Murphy asked the Deceased to go to a solicitor and to draft a will with the benefit of legal advice but he refused. She was of the opinion that this was because he was a very private man.

Relevant provisions of the Will

19. The structure of the Will is that after preliminary declarations revoking any prior wills and codicils and declaring that the Deceased was not married and did not have living children, there is a section headed "*Executor*" which provides for the appointment of a power of an executor or executors. No issue arises as to the appointment of the defendant as sole executor in this case and, therefore, it is not necessary to discuss further the first six clauses of the Will.

20. The next section is headed: *"Disposition of Estate"* and comprises five clauses as follows:

"Specific bequests

> *7. To receive a specific bequest under this Will a beneficiary must survive me for thirty (30) days. Any item that fails to pass to a beneficiary will return to my estate to be included in the residue of my estate. All property given under this Will is subject to any encumbrances or liens attached to the property. My specific bequests are as follows:*

Distribution of Residue

8. To receive any gift or property under this Will a beneficiary must survive me for thirty (30) days. Beneficiaries of my estate residue will receive a share all of my property and assets not specifically bequeathed or otherwise required for the payment of any debts owed, including but not limited to, expenses associated with the probate of my Will, the payment of taxes, funeral expenses or any other expense arising from the administration of my Will. The entire estate residue is to be divided between my designated beneficiaries with the beneficiaries receiving a share of the entire estate residue. All property given under this Will is subject to any encumbrances or liens attached to the property. [Emphasis added.]

9. I direct my Executor to distribute the residue of my estate as follows ('Share Allocation'):

(a) All the residue of my estate to Fiona Patricia Murphy of Corduff, Kildare, for their own use absolutely.

Wipeout Provision

10. I HEREBY DIRECT that the residue of my estate or the amount remaining thereof to be divided into one hundred (100) equal shares and to pay and transfer such shares as follows:

(a) 100 shares to Mollie Kate Leacy-Murphy of Corduff, Kildare, for their own use absolutely, if they are still alive.

Individuals Omitted From Bequests

11. If I have omitted property in this Will to one or more of my heirs as named above or have provided some with zero shares of a bequest, the failure to do so is intentional."

11. Following on from this is another section headed: "GENERAL PROVISION". This provides as follows:

*"**Pet Caretaker***

[Clauses 12 and 13.]

Additional provisions

14. Once my funeral expenses are paid in full any monies I want divided between my other nieces and nephews.

Namely

Derek Murphy

Amanda Murphy

Adrienne Goodwin

Patricia Kennedy

Martin Kennedy

Maria Dunne

William Murphy

Martin Murphy

Catherine Murphy

No contest provision

15. If any beneficiary under this Will contests in any court any of the provisions of this Will, then each and all such persons shall not be entitled to any devises, legacies, bequests, or benefits under this Will or any codicil hereto, and such interests or share in my estate shall be disposed of if that contesting beneficiary had not survived me."

12. The plaintiffs, who are three of the beneficiaries named at clause 14, contend that the Will is hopelessly confusing and contradictory and is void in whole or in part, and seeks its interpretation. It should be noted that the other individuals named in clause 14 have not sought to challenge the Will in any way.

13. As a preliminary point, I should say that I think it is likely that clause 15 of the Will is void as being contrary to public policy as Part X of the 1965 Act deals with unworthiness to succeed and appears to have been intended by the Oireachtas to be a comprehensive statement of the circumstances in which a named beneficiary can lose a share in an estate to which they are entitled under the will of a deceased. In particular, Part X demonstrates an intention on the part of the Oireachtas to protect the rights afforded to spouses, civil partners, and children, as already referred to above. Although on the facts of this case there are no such persons, the 1965 Act appears to provide for a comprehensive statutory code as to when the freedom of the testator can be overridden.

14. In addition, where the Act or the general law confers a right to challenge a will – for example, on the basis that the will was not executed in conformity with the Act or that the testator did not have capacity to make a will – that right could not, in my opinion, be abrogated by a provision such as this.

15. However, in this case, as there appears to be nothing available for distribution pursuant to clause 14, the question does not fall for determination and I express no concluded view on it.

Issues for determination

16. Although the plaintiffs in their special summons do not identify specific questions of interpretation to be answered, they make four fundamental points. Firstly, they say that there are various difficulties with the wording, drafting, and possibly the layout of the Will which renders it ambiguous. Secondly, they say that the bequest in clause 14 is unclear in that *"any moneys"* is ambiguous and requires interpretation. Thirdly, they say that clause 14 is a residuary gift, as are clauses 9 and 10 and that, as all three clauses name different residuary legatees, the Will is hopelessly contradictory and therefore void for uncertainty. Fourthly, the plaintiffs claim that clauses 9 and 10 are contradictory such that it is not possible to say who is the residuary legatee in this case. As a result, they say that both clauses are void for uncertainty. This would have the effect of leaving the principal asset in the estate for distribution to the persons entitled on intestacy.

17. Before turning to deal with each of these three submissions in turn, I note that it is now well established that a construction of a will is governed by the principles set out by Lowry L.C. J. in the Northern Irish case of *Heron v. Ulster Bank Ltd.* [1974] N.I. 44, at p. 52. These were applied by Carroll J. in *Howell v. Howell* [1992] 1 IR 290, have since provided guidance for the courts in this jurisdiction in questions of interpretation of wills, and have been conveniently distilled by Gilligan J. in *O'Donohue v. O'Donohue* [2011] IEHC 511, at para. 27, as follows:

> *" 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."

18. I will consider the four broad submissions of the plaintiffs by reference to those principles.

1. General criticisms

19. A number of subsidiary points are made under this heading but I am satisfied that none of them have any substance.

20. For example, clause 7 purports to set out specific requests for named beneficiaries and, as is obvious above, ends with the sentence *"my specific bequests are as follows:"* thereafter, no one is named.

21. It is abundantly clear from the Will itself and the fact that the Will was completed with a template sourced on the internet that it was decided not to leave any specific bequests, other than that in clause 14. It is manifest that not all of the template was filled in and the fact that clause 7 was simply left blank does not create any ambiguity. The Deceased's intention was clear: he left no specific bequests under clause 7, though he later did so in clause 14.

22. It should be noted that evidence about the *factum*, that is the making, of a Will has always been admissible at common law: see Barron J. in *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596, at 600. There is no dispute, therefore, that the evidence that the Will was derived from a template downloaded from the internet is admissible.

23. In my view, no uncertainty is created by the fact that clause 7 is not filled in. The action of the Deceased in executing the Will where this field or clause was not filled in simply means that he did not intend to leave any specific bequests.

24. Clause 8 makes clear that the Will purports to deal with all of the property of the Deceased, both real and personal, which has not been bequeathed in clause 7. In fact, in this case, clause 14 provides for the Deceased's *"moneys"*. From the wording of clause 8 underlined above, I think it is perfectly clear that everything the Deceased owned at the date of death, other than the *"moneys"* to which clause 14 applied, was to pass under clause 9. I do not think there is any ambiguity about that and the only issue is the interpretation of *"moneys"* in clause 14, and I consider this below.

25. Similarly the use of the plural "*their*" at clause 9.a. of the Will, even though only one individual, Ms. Murphy, is named, does not create any ambiguity. Traditionally, the use of the word *"their"* might be regarded as grammatically incorrect where only one person is named, but it has clearly been used in this instance because the template will was drafted to cover a situation where more than one person is named in clause 9, and it does not create any uncertainty.

26. Although the *"Wipeout Provision",* clause 10, gave rise to the most difficult issue which had to be determined, and I deal with this below, a much less troubling point was made as a result of Ms. Murphy's evidence that she understood to refer to percentages whereas the clause refers to *"[100] equal shares"*. It was suggested that these were not one and the same thing and that, therefore, the clause was ambiguous.

27. In my view, the clause is very obviously designed to provide for division of the residue of the estate according to percentages. There is no contradiction between percentages and 100 equal shares. The fact that in this case only one person, the Deceased's grandniece, Mollie, is nominated to receive the entire 100 of the available 100 shares does not create any ambiguity. It was submitted that Ms. Murphy's understanding that this provided for percentages and that her daughter was to get 100% was wrong, but I am satisfied that Ms. Murphy's understanding is in fact a correct and sensible reading of clause 10.

28. In any event, any evidence of Ms. Murphy as to her own understanding of what the Will meant is not admissible. As discussed further below, only evidence of the intention of the Deceased himself is admissible under s. 90, and then only in the circumstances provided or in that provision. Ms. Murphy's own views as to the proper interpretation of the Will, as expressed in the witness box, are inadmissible and I am not taking them into account.

29. I am satisfied that these general criticisms of the Will do not contain any point of substance and they flow directly from the fact that the will was drafted from a template will which had been downloaded from the internet.

30. The fact that a *pro forma* will was used has resulted in certain blank spaces occurring in the Will and in the plural being used in anticipation of the Deceased naming a number of people when in fact he only named one. However, no ambiguity arises from any of this. I am satisfied that these general criticisms do not, on their one or together with the other submissions discussed below, result in any ambiguity or contradictions in the Will.

2. Bequest of "any moneys" in clause 14

31. The second principal argument of the plaintiffs was that clause 14, which refers to *"any moneys"*, is ambiguous as this phrase was capable of several meanings. At para. 19 of the

grounding affidavit, the third plaintiff says that this expression *"may conceivably extend to any or all cash or other liquid proceeds of sale, by the person or representative, or realty and non-monetary chattels, or ... it may extend only to cash and its equivalents standing in the Deceased's accounts at the date of his death or at the date whereon the estate expenses are discharged."*

32. I do not see any ambiguity in this, or at least not one which cannot be resolved by a court in the usual way.

33. There has been significant caselaw in this jurisdiction and in England and Wales, both prior to and since independence, regarding the correct interpretation of the word *"money"* in a will. Nineteenth century authority was to the effect that it could only mean cash in hand or choses in action, such as money in a drawing account in a bank. This strict interpretation frequently defeated the testator's intention and was relaxed in this jurisdiction by Meredith J. in *In re Jennings* [1930] I.R. 196. A similar view was subsequently taken in *Perrin v. Morgan* [1943] A.C. 39 in which it was held that it was appropriate to interpret the phrase *"all moneys of which I die possessed of"* as including approximately £33,000 of investments together with £1,000 of cash.

34. These cases were not in fact cited to me and, therefore, I will not discuss them further. However, it appears from that caselaw that a will can be construed according to the usual principles of interpretation so as to ascribe a meaning to the word in the context of the particular will, that is, in accordance with the intention of the testator in the particular case.

35. Any ambiguity in the meaning of the phrase *"any moneys"* can, in my view, be resolved in this case in accordance with the usual principles of interpretation, that is, the principles in *Heron*. Even if one regards the phrase itself as ambiguous, the scheme of the will is clear when read in light of the assets of the testator at the date of the will, and indeed of death.

36. On the facts of this case, the only funds in issue are the very small balance in the credit union. The only possible issue would relate to the ownership of an insurance policy worth approximately €2,500. However, neither party raised any issue in relation to that policy. Apart from that insurance policy, the only other asset in the estate was the house and land, which is real property and not money, albeit that it may have value in monetary terms.

37. In my view, it is clear in this case, that *"any moneys"* should refer to the sum of €298.00 standing to the credit of the Deceased in the credit union. Had the Deceased won the Lotto two weeks before he died and lodged the cheque to that, or indeed another account, then the beneficiaries named in clause 14 would divide what was left of the lottery winnings, along with the other €298 in the credit union between them, after funeral expenses had been discharged. That, of course, did not happen and clause 14 refers to the balance standing to the credit of the Deceased in the credit union on the date of his death.

3. Whether clause 14 is a residuary clause

38. The plaintiffs suggested that clause 14 was in the nature of a residuary clause, which, taken together with the undoubted inclusion of two other residuary clauses at clauses 9 and 10, created an insuperable contradiction in the Will as all three clauses named different persons as residuary legatees. It was therefore contended that the Will should be declared void for uncertainty.

39. I do not see any grounds for suggesting that clause 14 is in the nature of a residuary clause. There is some discussion of this issue in the case of *Howell v. Howell*, where Carroll J. had to interpret a bequest in a will for the purpose of ascertaining whether it purported to create a residuary bequest. The relevant provision in the will was as follows:

> *"I give devise and bequeath my farm of land in the townlands of Drumpeak and Corinshigo together with the furniture and machinery thereon to my brother Joseph. I give devise and bequeath all my stock and any other assets I may have to my brother Richard."*

Joseph predeceased the testator and the question was whether his brother Richard was a residual legatee by reason of inclusion of the phrase *"any other assets"* in the bequest to him. There were other surviving siblings who would succeed by way of a partial intestacy in the absence of a residual gift.

40. Carroll J. held, looking at the plain meaning of the will and its scheme, that the intention was to divide the assets between the two brothers, without any provision being made for what would occur if one of them predeceased the testator, which was in fact what had occurred. It is notable that she came to this conclusion notwithstanding the use of the phrase *"and any other asset"* because, reading that phrase in the context of the paragraph in which it was situate, it meant *"any assets other than the farm, furniture, machinery and stock already mentioned"* (see p. 293 of the judgment).

41. It is noteworthy that Carroll J. cited the case of *In Re Atkinson: Matheson v. Pollock* [1942] I.R. 268 where, in a homemade will, the testatrix had used the word *"residue"*. The word *"residue"* is not used in clause 14, nor is there any similar word such as *"rest"* or *"remainder"*. Nor does it refer to anything along the lines of *"all my property"*, or other similar phrases which are typically used in residuary gifts in wills.

42. By contrast clauses 9 and 10 quite clearly refer to the *"residue of my estate"* and therefore purport to be residuary gifts, which clause 14 does not.

43. In my view, there is no ambiguity about the effect of clause 14 which is to bequeath to the nine nieces and nephews named therein any cash or monies standing to the credit of the Deceased in any bank account on the date of his death, after funeral expenses have been paid.

That was the sum of €298, which will obviously have been dissipated by payment of the funeral expenses. Unfortunately, on the facts of this case, the persons named in clause 14 will not receive any benefit under the Will.

44. I should add that there was some debate at hearing about the meaning of the phrase "*estate*" or *"estate residue"* or *"residue of my estate"*, and a suggestion that there was some contradiction between clauses 9 and 10 on the one hand and clause 14 on the other. However, I do not find any such contradiction. I think it is clear from clause 8 that the *"estate residue"* (which must mean one and the same thing *as "the residue of my estate"*) is defined as meaning all of the Deceased's property and assets not specifically bequeathed or otherwise required for the payment of any debts owed, including but not limited to, expenses associated with probate of the Will, payment of taxes, funeral expenses or any other expenses resulting from the registration of the Will.

45. The result is that anything not included in the phrase *"my moneys"* in clause 14 is distributed in accordance with the residuary gift in the Will. Identifying that residuary gift requires the resolution of an apparent contradiction between clauses 9 and 10, which I deal with below, but as clause 14 is not a residuary gift, it is irrelevant to that discussion.

46. As I am of the view that clause 14 is clearly not a residuary gift and, furthermore, that there is no basis for extending the phrase *"any moneys"* to include the house and land owned by the Deceased on the date of his death, the house and lands fall to be distributed by reference to either clause 9 or clause 10, or, if the apparent contradiction between them cannot by resolved, they fall to be distributed by way of a partial intestacy, and I now turn to that issue.

4. Conflict between clause 9 and 10

47. This is the issue which has given me most concern as clause 9 quite evidently purports to create a residuary gift in favour of Ms. Murphy. At the same time, clause 10 quite clearly leaves 100% of the residue of the Deceased's estate to Ms. Murphy's daughter, Mollie. The plaintiffs submit that the Will is wholly contradictory and that both of these clauses are void for uncertainty. If that were the case, there would be a partial intestacy with the house and lands falling to the persons entitled on intestacy.

48. The only reference in the Will which assists in resolving these apparently contradictory clauses is the heading to clause 10: *"Wipeout Provision".*

49. As a preliminary point, it should be noted that this is not a term known to law in Ireland or insofar as I am aware England and Wales. Counsel for the plaintiffs suggested that it might be of American origin, but no more detailed submission was made. A general search for *"wipeout"* on the current online version of Halsbury's Laws of England yields no results nor does it appear to be used in any of the leading textbooks on the law of succession or of wills, either in Ireland or in England or Wales. It does not appear to have been used as a term of art on any case concerning wills, nor does it appear in the wills and probate related divisions of *Laffoy's Irish Conveyancing Precedents*, Issue 67, (Bloomsbury Professional Ltd., 2017). Certainly, counsel were not in a position to identify any authorities or legal materials where this phrase was used.

50. However, there is no requirement that the words used in a will should be legal terms of art: see Brady, *Succession Law in Ireland* (Dublin, 1989) at para. 5.4.4. A testator can use any words he or she wishes, the only issue for a court being whether the will is capable of interpretation in accordance with the usual principles.

51. As both clauses 9 and 10 quite obviously are directed to the "*residue*" of the Deceased's estate, it appears that the apparent contradiction in providing that the residue go to two different people should be resolved, if at all possible, by seeking to interpret the phrase *"Wipeout Provision".* Although this template can apparently be sourced quite easily on the internet, unfortunately no evidence was tendered as to whether any explanation came with the various clauses to be completed by the Deceased. There may have been an explanation of this term to guide anyone filling in the template. In my view, that might well have been pertinent evidence as to the intention of the Deceased in completing the Will and might have been admissible pursuant to s. 90 of the 1965 Act, as Ms. Murphy was seeking to complete the template so as to reflect the Deceased's intentions.

52. In any event, the Will falls to be interpreted, if possible, without resort to extrinsic evidence and it is appropriate first to attempt to construe it by reference to the principles in *Heron v. Ulster Bank Ltd,* as distilled by Gilligan J. in *O'Donohue v. O'Donohue.* The first principle is to look at the phrase *"wipeout clause"* as a piece of English, that is, to give those words their natural and ordinary meaning.

53. No dictionary meanings of the word *"wipeout"* were offered at hearing but the most recent online version of the Oxford English Dictionary gives as the primary and secondary meanings of this word interpretations relevant to the world of radio and surfing, respectively. Obviously, neither of these could be relevant to the ascertainment of the intention of the Deceased in giving instructions for the drafting of this Will.

54. The third meaning given is *"Destruction, annihilation; a killing; a crushing defeat; an overwhelming experience"*. The word is said to be slang of American origin and various colloquial uses dating from 1968 to 1984 are given. (It appears that the entry has not been updated for some time as this meaning also appears also in the hard copy Oxford English Dictionary, Vol. XX, 2nd ed., 1991 reprint, to which I have access.)

55. Similarly, in *The Concise Oxford Dictionary*, 10th ed. (revised), (Oxford University Press, 2001), *"wipe-out"* is defined as an informal noun, meaning: *"1. An instance of complete destruction. 2 a fall from a surfboard. 3 the obliteration of one radio signal by another."* Clearly, only the first of these could be relevant.

56. I should add that my own understanding of the word *"wipeout"* is that it means that something, or perhaps more accurately a number of things, have been erased or obliterated, which is close to but perhaps not exactly the same as the first meaning given in the dictionaries referred to above.

57. If one then seeks to interpret clauses 9 and 10 in a meaningful way, particularly given that both clauses purport to deal with the residue, then it seems to me that clause 10, which provides for what is to happen in the case of *"Wipeout"*, is to take effect if the person or persons named in clause 9 dies. I don't think one would normally use the word *"wipeout"* when referring to people, but if it was used in that context, I think it has to refer to death and I think it would most likely be used in reference to a group of some sort, such as a local population who had all died in a natural disaster.

58. I am somewhat reluctant, however, where I have not been supplied with any modern dictionary definitions of this word, to reach a view as to the correct interpretation of this phrase by reference to the first principle in *Heron.*

59. The second principle in *Heron*, as illustrated by Carroll J.'s approach in *Howell v. Howell*, is of more assistance. Considering the overall scheme of the Will, it is crucial to acknowledge Mollie's relationship as Fiona's daughter, which signifies the intention for the residue to pass to Ms. Murphy or her family. It is noteworthy that Mollie is the grandniece of the Deceased and it follows naturally that Mollie would inherit only if her mother predeceases her. As long as her mother was alive, the Deceased could reasonably expect Ms. Murphy to care for her own daughter.

60. I am conscious that in seeking to interpret the Will, s. 99 of the 1965 Act, provides:

> *"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*."

61. This provision has been utilised on a number of occasions in relatively recent times in order to give effect to a will which presents difficulties of interpretation: see for example *Mullen v. Mullen* [2014] IEHC 407, at paras. 28 to 33, where a bequest of *"a small plot or piece of land of not more than half an acre to make up the site of [the Testator's grandson's] proposed new house should he require same"* was interpreted as referring to part of the testator's garden, which her grandson had used with her permission for a number of years prior to her death in order to let his children play.

62. The evidence in that case was that the site upon which the testatrix's grandson had built his house was a difficult site which required to be built up even for the construction of the house and did not permit the creation of a garden. In those circumstances, Cregan J. applied s. 99 to interpret the will and render the bequest operative.

63. Here, the problem is not so much an ambiguity in clauses 9 and 10, which are each perfectly clear when read individually, but an apparent contradiction between them which can only be resolved by interpretation of the phrase *"Wipeout Provision".* Looking at the scheme of what the Deceased was seeking to do in the Will, it seems to me clause 10 is directed to what is to occur if clause 9 as to the residue of the estate fails by reason of the death of Fiona Murphy. By including this clause, the Deceased was avoiding the possibility of intestacy.

64. If I am wrong in that, then the meaning of *"Wipeout Provision"* is not sufficiently clear having regard to the *Heron* principles, as in my view the subsequent principles do not, in this particular case, give much assistance. I would therefore need to consider whether the evidence

of Ms. Murphy is admissible pursuant to s. 90 of the 1965 Act to prove the intention of the Deceased in respect of which she gave clear evidence as set out above.

Whether the viva voce *evidence is admissible*

65. I should say at the outset that some of the *viva voce* evidence seems to me to be clearly admissible pursuant to the *"armchair principle"*, as explained by James L.J. in *Boyes v. Cook* (1880) 14 Ch. D. 53, at p. 56, where he stated:

> *"You may place yourself, so to speak, in [the testator's] armchair and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention."*

That passage was approved by the Supreme Court (*per* Keane J.) in *O'Connell v. Bank of Ireland* at p. 609.

66. In this case, there was evidence was that the Deceased's house and lands were adjacent to Ms. Murphy's house, that Ms. Murphy's daughter used part of the land to ride her horse, Benji, and that Ms. Murphy saw the Deceased nearly every day and that they had a close relationship, and that evidence seems to be admissible by reference to the *"armchair principle"*.

67. However, Ms. Murphy also gave evidence as to the Deceased's intentions in that she gave clear evidence as to his instructions to her when she drew up the Will, that is when she completed the template downloaded from the internet. Evidence of the intention of a testator is admissible in accordance with s. 90 of the 1965 Act, as interpreted by the majority of the Supreme Court (Henchy and Griffin JJ.) in *Rowe v. Law* [1978] I.R. 55, in which Henchy J. stated (at p. 73-4):

> *"[Section] 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 … 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. Such a power would be repugnant to the will-making requirements of s. 78 and would need to be clearly and expressly conferred. The Court must take the will as it has been admitted to probate. If it is clear, unambiguous, and without contradiction, then s. 90 has no application. If otherwise, then 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. But s. 90 may not be sued for the purpose of rejecting and supplanting the language used in the will."*

68. That interpretation of s. 90 was upheld by a unanimous Supreme Court (*per* Keane J.) in *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596, [1998] IESC 3 and it is therefore clear that one must interpret the Will and, if is not ambiguous or contradictory, extrinsic evidence is not admissible. Even then, the extrinsic evidence to be admitted must relate to the intention of the testator and not the opinions and beliefs of others. This was clearly stated both in *Rowe v. Law* (*per* Henchy J. at p. 72) and in *O'Connell v. Bank of Ireland* (*per* Keane J. at p. 611), and Laffoy J. in *Thornton v. Timlin* [2012] IEHC 239 applied it (at para. 22) so as to exclude the opinions of others as to what was meant by an ambiguous phrase in a will, even though they had knowledge of the background to the drafting of the will which might, in the ordinary way, be thought to be of assistance. It is only what is understood by the testator that is admissible, albeit that that evidence will, of necessity, be given by others.

69. In this case, while the plaintiffs object to the admissibility of Ms. Murphy's evidence, they also submit that the Will is ambiguous and indeed contradictory, such that it or at least critical clauses in it such as 9, 10 and 14, are void. However, if the Will is indeed ambiguous and contradictory, then any available evidence as to the Deceased's intention is admissible.

70. In this respect, it seems to me that the evidence of Ms. Murphy, who drew up the Will in the same way as a solicitor taking instructions, primarily consisted of evidence of the Deceased's instructions as to what he wanted included in the Will. Although under cross examination she also stated her own opinions and beliefs as to what the Will meant, and that portion of her evidence is not admissible, she nevertheless gave very clear evidence of the Deceased's intentions. That evidence was to the effect that the Deceased had stated to her that the house and lands were to go to her, and, if she predeceased him, he wanted the house and lands to go to her daughter, Mollie.

71. In my view, the evidence of Ms. Murphy, insofar as it consisted of evidence of the Deceased's instructions to Ms. Murphy as to what he wanted to the Will to say, are evidence of his intention and the two-fold test for admissibility in *Rowe v. Law* is satisfied and is clearly admissible.

72. Therefore, if I am wrong in my interpretation of clauses 9 and 10, and in particular of the phrase *"Wipeout Provision"*, by reference to the principles in *Heron*, it is nevertheless the case that the admissible extrinsic evidence establishes that the Deceased's intention was that, in the event of Ms. Murphy predeceasing him, the house and lands were to go to Mollie. This evidence does not contradict the Will as the phrase *"wipeout"* is capable of interpretation as a reference to what was to occur if Ms. Murphy had died. The word might be more properly understood to refer to a group of people but I do not think that in interpreting it as referring to the death of Ms. Murphy alone results in an interpretation which contradicts the clear terms of the Will, which would not be permissible.

73. It was submitted that the court should be sceptical of the evidence of Ms. Murphy in circumstances where she not only drew up the Will but was the principal beneficiary. I do not agree. There would certainly be many occasions where such a circumstance would excite suspicion, particularly if the making of the Will were kept secret by the beneficiary in question until after death or if the beneficiary exercised some dominion or control over the Deceased.

74. But there is nothing of that nature here. Ms. Murphy urged the Deceased to go to a solicitor and only drew up the Will on his instructions when he refused. Not only that, but after doing it up, perhaps because of doubts as to her ability to ensure the Will would be sufficiently well drafted to give effect to the Deceased's intentions, Ms. Murphy urged the Deceased to go to a solicitor to draw up another will. The Deceased again refused.

75. Furthermore, the witnesses whom she arranged to attend at the execution of the Will (at which, notably, she did not attend herself) were friends of Ms. Murphy's sister. There is no evidence to the effect, nor did I understand it to be suggested in cross examination, that Ms. Murphy kept the making of the Will secret from persons who might benefit on intestacy (such as her sister) or indeed under different testamentary provisions. Ms. Murphy seemed to me to be a perfectly credible witness and she was not challenged on her *bona fides* in cross examination.

76. It is therefore my view that her evidence as to the Deceased's instructions would be admissible, if required, to construe the Will and would support the construction I have reached from the terms of the Will itself. However, it has not been necessary for me to rely on that evidence as I think the terms of the Will are, in this particular case, sufficiently clear.

77. I therefore find that the correct meaning of Clause 9 is that it is a gift to Ms. Murphy of everything other than the monies the subject of the specific bequest in Clause 14 and that clause 10 was intended to apply only if Ms. Murphy had died before the Deceased. As she is alive and well, clause 10 has no effect.

Conclusion

65. The special summons does not set out any questions for the court to answer, but I am satisfied that no intestacy, total or partial, arises by reason of the drafting of the Will, and that the correct interpretation of the Will is as follows:

1. Any moneys standing to the credit of the Deceased in the credit union account on the date of his death should, after the payment of funeral expenses, be distributed among the beneficiaries named in clause 14 of the Will.;
2. The residue of the estate passes to Ms. Fiona Murphy pursuant to the residuary gift in clause 9 of the Will;
3. Clause 10 has no effect.

78. The Executor has posed 22 separate questions of interpretation in his replying affidavit but I believe that the above should be sufficient to allow him to proceed to distribute the estate. However, I will hear counsel on the for mention date as to whether the Order should record specific answers to all or any of those questions.

79. I would like to repeat my warning at the outset of the judgment: the downloading of wills from the internet is an extremely unsafe method to provide for what is happens to one's estate on death. In this particular case, it was possible, without doing any violence to the language of the Will, to resolve the apparent conflict between clauses 9 and 10. However, in another case, it might not be possible to do this. The template might have been filled out in a different way, or there might be no extrinsic evidence available to allow a court to give effect to the intention of the testator. In this case, Ms. Murphy was involved in helping the Deceased draft the Will, but in another case, a testator might simply fill it in himself or herself and execute it without discussing his or her intentions with anyone. In those circumstances, it might not in fact be possible to give a sensible interpretation to a will drawn up using this template or a

court might end up interpreting the will other than in accordance with the intentions of the testator. I would therefore reiterate that the public should seek the advice of a solicitor when drawing up a will.