

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 60

EDI-EP158-21

JUDGMENT IN THE COMMISSARY COURT

in the

APPLICATION UNDER THE REQUIREMENTS OF WRITING (SCOTLAND) ACT 1995
AND FOR CONFIRMATION

by

CHRISTINA CUMMINS, MEADOWVALE, CARRIGMORE, DOON, COUNTY LIMERICK,
REPUBLIC OF IRELAND, EXECUTRIX IN THE ESTATE OF MARY DOWNEY.

and

BRIDGET TIERNEY, MOUNT PLEASANT, BLUEBALL, TULLAMORE, COUNTY OFFALY,
REPUBLIC OF IRELAND, EXECUTRIX IN THE ESTATE OF MARY DOWNEY

Applicants

Applicants: Rattray; Brodies LLP

The Issue

The Testatrix

[1] Mary Downey (Miss Downey) was born in the Republic of Ireland on 10 August 1926, to Irish parents. Her domicile of origin was Irish. She came to Scotland as an adult and qualified as a teacher. She spent her career teaching in Glasgow. Miss Downey's principal residence was in Glasgow from early adulthood until 2017. Miss Downey acquired a domicile of choice in Scotland. In 2017, she moved to Acorn Lodge Nursing Home, Ballykelly, Cashel, County Tipperary, Ireland, so that she could be closer to her family in the later stages of her life. Miss Downey died at Cashel, County Tipperary,

Republic of Ireland on 14 September 2019. She was 93 years old. Miss Downey was domiciled in the Republic of Ireland at the time of her death.

The Will and the Informal Writing

[2] On 12 December 2012, in Glasgow, witnessed by her solicitor, Mr Alasdair Fleming, Miss Downey executed a will, in accordance with the statutory solemnities of the Requirements of Writing (Scotland) Act 1995 [the Act]. Accordingly, the will is a valid and probative document under Scots law. Shortly after she died, a copy of this will was found by her niece, Tina Cummins (an applicant and executrix nominate), among Miss Downey's personal papers in the original A4 size envelope it was sent in, by her solicitor. The envelope is franked "Glasgow 13.12.12". On the back of the envelope, Miss Downey appears to have written some words under a heading which reads "JANUARY 2015" and subscribed. The applicants, who are two of her nieces, now petition the court, for confirmation in their office *quae* executrixes nominate and for certification under Section 4(1)(a) of the Act that the Informal Writing on the back of the envelope was executed by Miss Downey with testamentary intent and is, consequently, to be considered as an adjunct or codicil to her will (s1(2)(c) of the Act). Through a process of argument, inference and construction I was invited to conclude that, as from January 2015, Miss Downey's settled testamentary intention, as evidenced by the discovery, significance and meaning of the informal wording on the back of the envelope containing her solemnly executed will, was to alter two of the bequests contained in the original will. One of those alterations disinherits Mr Patrick Downey Jr the other disinherits his father [Miss Downey's brother] Mr Patrick Downey Sen (now deceased).

The interested parties

[3] The application was brought by the executrixes nominated in the will. I was not prepared to hear the application *ex parte* only and ordered intimation on all the beneficiaries under the will, who live in Ireland, for their interest. A covid-19 compliant Webex hearing was convened, when I heard argument from the applicants' agent. Prior to that hearing Mr Patrick Downey Jr, a beneficiary under the will who stands to be disinherited should the application be granted, intimated to the court that he did not have the funds to instruct lawyers to oppose the application but wanted to attend the virtual hearing. None of the other beneficiaries intimated they opposed the application. Agents for the applicants lodged in process a series of e-mails between Mr Downey Jr and themselves, which set out the basis of his opposition to this application. At the Webex hearing, Mr Downey Jr joined via the internet. He informed me he was at home in the company of other members of the wider Downey family. He told me he is 59 years old and works as an Assistant Principal at a secondary school. I informed him he was free to listen to the argument but told him was not a party to the proceedings. I am aware of his opposition to the grant of this application. He explained that he was the nephew of Miss Downey whom he described as Maureen Downey, which he said, is how she is referred to within the family. From the way he described Miss Downey as "pernickety" and "someone who left nothing to chance", I formed the impression she was a person who was fastidious, punctilious and professional in every aspect of her life. I found his intervention interesting by way of general family background but I did not rely on anything he said, to any extent, in reaching my decision. I decided the application on the basis of the law, settled canons of construction and logic.

The Informal Writing

[4] In the written submission I received there is a description of the Informal Writings on the A4 envelope, which is accurate save for one matter. The description is as follows:

“.....the Informal Writing is handwritten on the front of an A4 envelope, which contained a photocopy of the 2012 Will at the time of its discovery. Miss Downey has written the date of the 2012 Will – that is to say, ‘12/12/12’ – and this is circled, following which the reader's attention is drawn to a note underneath the envelope's window, which says: “*** (i.e. three asterisks) Back of this envelope”.

6.2 On the reverse side of the envelope, the reader's attention is again attracted by “***” (i.e. to three asterisks), following which two numbers ‘6.16 + 6.18’ are circled. There is then a date – ‘January 2015’ – positioned to the right of this, and underneath this is the underlined word ‘Alterations’.

6.3 To the right-hand side of this, the words ‘brother Pat's 4’ are circled and, after this, the words ‘to STEPHEN (nephew)’ are found. Just underneath this, the words ‘nephew Patrick's 4’ are circled and, after this, the words ‘to PAUL (nephew)’ are found.

6.4 Following this and underneath these words, is Miss Downey's signature, with the word ‘Signed’ to the left-hand side and ‘January 2015’ repeated and situated to the right-hand side of the signature.”

This description omits to mention that on the front of the envelope to the left of the date “12/12/12” framed in a small square box appears the letter “W”.

[5] The applicants acknowledge in their submission that it is “not clear” *ex facie* of the Informal Writing that it conveys testamentary intent on the part of Miss Downey and under reference to *Wilson v Hovell* (1924 S.C. 1) and *Maclaren's Trustees v Mitchell and Brattan* (1959 S.C. 183) state that extrinsic evidence may be led to determine a person's true intention where there is doubt whether a person intended a document to have testamentary effect. Such extrinsic evidence, it was argued, can be led whether such doubt arises *ex facie* of the document itself or whether the ambiguity is extrinsic to the document. I do not doubt that extrinsic evidence is admissible and relevant in such cases.

Conflict of laws

[6] Nothing turns on this point. Miss Downey returned to Ireland in 2017. Her Irish domicile revived. She was domiciled in Ireland at the time of her death. The applicants sought the opinion of Irish counsel who confirmed that, Miss Downey's testamentary documents are valid under Irish law on the basis that the documents are valid testamentary documents in terms of Scots law, being the law of Miss Downey's domicile at the time she signed the documents.

The formal validity of the Informal Writing under Scots law

[7] Nothing turns on this point. For the Informal Writing to be a valid testamentary document in terms of Scots law, it must be "formally" valid. In submissions, the applicants stated that the 2012 will does not contain an Informal Writings clause, which is true. However, since the Informal Writing was signed in January 2015, its formal validity must be looked at under the 1995 Act, on its own merits. It was submitted that the lack of an Informal Writings clause is no longer of relevance to the formal validity of an Informal Writing (Alan Barr, *Drafting Wills in Scotland*, 2nd Ed, Bloomsbury Professional, paras 2.62, 2.63 and 3.31). I agree. This Informal Writing was written by the testatrix and subscribed by her, accordingly, it meets the requirements of the Act as a testamentary writing, if it represents the testamentary intent of the writer.

The essential validity of the Informal Writing under Scots law

[8] The applicants submitted that there are two requirements which must be met for an Informal Writing to be essentially valid. These are: (i) the testatrix must have had the necessary mental capacity to understand the changes that were being made by way of the

Informal Writing and (ii) the testatrix must have intended the Informal Writing to have testamentary effect after death. I agree.

Miss Downey's mental capacity

[9] With regard to the first requirement, the applicants stated that Miss Downey had the necessary mental capacity when she signed the Informal Writing in 2015. Miss Downey did not suffer from any medical conditions which would have adversely affected her mental capacity. Miss Downey had full mental capacity until very shortly before her death. This was confirmed by Mr Patrick Downey Jnr who acknowledged, before me, that Miss Downey enjoyed astute mental acuity throughout her life. Accordingly, by all accounts, she was *compos mentis* in 2015 and beyond.

The essential validity of the Informal Writing under Scots law and Miss Downey's testamentary intent.

[10] By way of introduction, the applicants referred me to *Gray's Executors v Muir (Manson's Executor)* [2017] CSOH 25 and *Marley v Rawlings* [2015] AC 129 where the approach to the interpretation of wills was explained thus:

"[w]hether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context.....[w]hen interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions".

[11] Thereafter the applicants point to four "relevant circumstances" which when considered together in the context of the wording used in the Informal Writing demonstrate,

it is argued, that the testamentary intention of Miss Downey was to alter her 2012 will. The relevant circumstances are:

1. The storage of the Informal Writing.
2. The form of the Informal Writing.
3. The signature of the Informal Writing.
4. Correspondence and telephone communications with her solicitor in December 2014.

Discussion and Analysis

The storage and form of the Informal Writing

[12] I will deal with storage and form together as they are closely linked. The applicants argued that an important factor, in the context in which the Informal Writing should be construed related to the undisputed fact, before me, based on the affidavit of her niece and executrix nominate Mrs Cummins that in Miss Downey's room at Acorn Lodge Nursing Home, the deceased stored her personal papers within a locked suitcase with a belt fastened around it. Shortly prior to Miss Downey's death on 14 September 2019, Mrs Cummins (with the approval of the staff at Acorn Lodge Nursing Home) removed the suitcase to secure Miss Downey's personal papers. On or around 17 October 2019, Mrs Cummins reviewed the contents of the suitcase and discovered the Informal Writing which was stored in a black coloured plastic pocket. The Informal Writing was written on an envelope which contained a photocopy of the 2012 Will at the time of its discovery. It was argued that

“....the Informal Writing was securely stored by Miss Downey with her personal papers, having been signed by Miss Downey in January 2015 in Glasgow before she moved to Cashel in 2017. Miss Downey also went to the trouble of ensuring the Informal Writing was among the personal papers she took with her when she moved from Glasgow to Cashel.” [emphasis added].

The applicants argue that

“...the crucial extrinsic evidence relating to the Informal Writing is that it is written on an envelope that, when discovered among Miss Downey's papers, contained a copy of the 2012 Will”.

Further, so the argument goes

“.... it is submitted that the case law referred to above allows the Informal Writing to be read together with the 2012 Will, at which point it is submitted its purpose is clear. Miss Downey wished to remove her nephew, Patrick Downey Jnr, as a beneficiary and pass the benefit to her other nephew, Paul Downey. Further, she wished the shares of her estate originally due to her predeceasing brother to pass to another nephew, Stephen Downey.”

[13] The crux of this form of reasoning is to be found at para 8.4 of the applicants written submissions where this argument is submitted:

“The facts known or assumed by the parties are that Miss Downey wrote out and signed the Informal Writing on an A4 envelope containing the photocopy of the 2012 Will, as this was the way in which it was discovered. Given that the Informal Writing was discovered written on and executed on the A4 envelope containing the photocopy of the 2012 Will, it is also submitted that it is a reasonable and common-sense approach to use the available extrinsic evidence not only to confirm that this is the state in which the document was discovered but also in interpreting the meaning of the Informal Writing. If the Informal Writing is not considered in this way, then it is submitted that there would be an omission to consider the relevant context and that the Informal Writing would be considered in a vacuum.”

[14] To my mind this reasoning is fallacious. Everything that can be said of the Informal Writing applies *mutatis mutandis* to her copy of the 2012 will, which was inside the A4 envelope. There is no evidence Miss Downey went “to the trouble of ensuring” that the Informal Writing was taken to Cashel from Glasgow unless one assumes that she did. Clearly, she kept her 2012 will in the locked suitcase. If one assumes Miss Downey intended to disinherit her late brother and his son then the meaning of the informal writing is obvious. That logical fallacy (*petitio principii*) is, in my opinion an easy mistake to make in a case like this. However, it puts the “Informal Writing” cart before the “testamentary intent” horses.

[15] If one doesn't assume a testamentary intent, does the Informal Writing demonstrate such an intent? The applicants concede in their submission that the Informal Writing, ".....read by itself, its meaning and purpose is unclear" (para 8.2). I agree with that conclusion about the Informal Writing when examined in isolation. On its own, it could equally amount to an unfulfilled reflection or a consideration to alter the will as distinct from a settled testamentary intention so to do. It is not unknown for people to think about altering their wills and then do nothing to carry the thought into effect. The fact that the Informal Writing was on an envelope, which contained the 2012 will, in a locked suitcase, secured by a belt, transported from Glasgow to Cashel has a superficial attraction, if one assumes testamentary intent but without that assumption these factors all apply equally to the 2012 will, which one would expect the deceased to take with her to Ireland, probably in its original white A4 envelope, where she kept it, with the letter "W" written enclosed in a box [possibly for ease of reference] on the outside, near the date it was signed "12/12/12". So, I attach no weight to the provenance, storage and discovery of the Informal Writing and the extraneous factors relied on by the applicants do not assist me in the exegesis of the meaning and legal significance of the words on the envelope. Equally, for the same reason I do not consider the form of the Informal Writing, written on the envelope containing the 2012 will on its own, or, together with the other factors referred to in the application, demonstrated, on balance, a testamentary intent to alter the 2012 will on the part of the testatrix.

The signature of the Informal Writing

[16] The applicants submitted that Miss Downey would not have signed her full given name had she not intended the Informal Writing to be a document having testamentary

effect after her death. The addition of the word "Signed" by Miss Downey's signature lends weight to the argument that Miss Downey intended the document to alter the distribution of her estate. Had Miss Downey not intended the document to have testamentary effect, she might have signed off using the less formal "Maureen", as she was widely known in the family. The applicants referred to *Russell's Executor v Duke and Others* (1946 SLT 242) Lord Keith stated that prefacing a signature with the word "signed", where used by a testator, "is evidence of an intention to indicate that this was not merely his name on the back of the envelope as a docquet or heading for some purpose, but was intended to be a subscription of the writing that appears on the other side". This adminicle of evidence struck me as having some force. However, I was troubled by the fact that Miss Downey erroneously referred to the clause in her will governing the bequest to her brother as "6.16" in the Informal Writing and not "6.1.6" as in the will. Also, the bequest to Mr Patrick Downey Jr is described as "6.18" on the Informal Writing and not "6.1.7" as in the will. These errors went uncorrected for nearly 5 years before her death. Albeit small details I considered them troubling in the context of a suggested intention to alter a testamentary writing which enjoyed the status of a probative writ, executed according to the statutory solemnities. Why these errors had gone undisturbed for so long, if there was a settled testamentary intention to alter the will, remains a mystery. On the other hand, the 2012 Will is clear and unambiguous. It speaks for itself. I tried not to attach undue significance to this aspect of the case but try, as I did, I found it a troubling inconsistency, more so but not solely because the deceased was described, by Mr Patrick Downey Jr, as "pernickety" and someone "who left nothing to chance".

Correspondence and telephone communications with her solicitor in December 2014

[17] I was informed that Miss Downey sent a letter, dated 10 December 2014, to Alasdair R Fleming, the solicitor who prepared the 2012 Will. The letter was received on 15 December 2014. Mr Fleming spoke to Miss Downey on the telephone about the letter on 17 December 2014. Copies of Miss Downey's letter and the note of her telephone call with Mr Fleming are lodged in process. Miss Downey's letter sets out her thoughts on the tasks which each of her executrixes would be responsible for, in the administration of her affairs, after her death. The last paragraph of Miss Downey's letter states "Please do not alter my will". It was submitted the letter addressed a narrow aspect of Miss Downey's will – that is to say, her view about the role of her executrixes. It was submitted that these words did not indicate that Miss Downey, in a general sense, did not wish to alter her will. It was submitted that it was relevant to consider this correspondence and the words used by Miss Downey, as they occurred shortly before the date the Informal Writing was signed by her. It was submitted that if Miss Downey had not intended the Informal Writing to alter the 2012 Will then she would most likely have made the same annotation on the Informal Writing.

[18] The letter from Miss Downey seems to me to be written in a very strong hand. She had good handwriting. The letter was clear, rational and well-articulated. This is all in keeping with my impression of the woman she was, even, at her then advanced age. She instructed her solicitors not to alter her will, which I read as, for the purposes of the division of labour between the nieces, after her death. On a plain reading it seemed to me that she did not think there was any point in a formal codicil for a limited purpose. She instructed the solicitors just to keep the letter with the file. Beyond that, I don't think it is prudent or advisable to stray. I do not think one can extrapolate from the letter to the Informal Writing

in the way suggested, that Miss Downey would most likely have made the same annotation on the Informal Writing if she had not intended that to alter the 2012 will. That seems to me to assume the Informal Writing was intended to alter the will and further is no more than speculation as to what the testatrix may or may not have done or wished.

[19] To begin with I was troubled by the fact that, if alteration of the will was intended in January 2015, then why was a letter not despatched to agents to convey that intention? On reflection, I concluded that even analysing the known facts, in this way, simply results in speculation. Accordingly, when weighed in the balance and analysed, I did not consider it legitimate or helpful to extrapolate from the letter of 10 December 2014 to any conclusion about the testamentary intent of the deceased in January 2015.

Conclusion

[20] To begin with, I am of the view that the 2012 will is a probative deed subscribed in accordance with the Scottish statutory solemnities. Accordingly, it enjoys a legal status, which deserves respect and while its terms are not insurmountable, it cannot be brushed aside or altered, easily. There is a persuasive burden of proof on a party seeking to prove alteration to such a testamentary deed. The intention of the writer of the Informal Writing is not clear from the words used. There is, to use contractual language, no operative clause, which clearly and succinctly informs the reader what the writer's intention is and what is to be done (unless one assumes testamentary intent when it is obvious what the Informal Writing means). Put another way, testamentary language is not used. The closest the Informal Writing comes to the use of testamentary language is the use of the word "alterations". In my opinion, the Informal Writing could be in contemplation of "alterations" as much as in implementation of them arising from a settled testamentary

intent. The absence of testamentary language, of course, is not fatal to an Informal Writing, provided the true intention can be discerned from the writing *Colvin v Hutchison* ((1885)

12 R. 947 per LP Inglis:

“I do not think it matters how inelegant, or how imperfect grammatically a testator's language may be, if it can fairly be construed to mean that he bequeaths certain sums of money to certain individuals, sufficiently designed in the writing itself.”

There's the rub, to my mind. The evidence from what's written, where it's written and where it's found individually and collectively fail to persuade me on a balance of probabilities that the deceased intended to alter her 2012 will which is a clear and probative testamentary writing. I may add that private clients pay good money to lawyers for wills to ensure that their testamentary intentions are carried into effect and litigation proof. It would be a rum do, if having gone to all the trouble and expense of creating a will, it could easily be disturbed in the absence of the testatrix.

[21] The applicants also founded on *Maclaren's Trustees v Mitchell and Brattan* 1959 SC 183 where a document was retained by the deceased in her dressing table with her personal papers and not sent to her solicitor. It was argued by the applicants that the court held that fact was important in determining that the document in question was a testamentary writing. However, the facts in that case are materially different from the facts I am dealing with and can be distinguished on that basis, It is worth looking closely at what was left by the testatrix in this case. The judgment states the following:

“After the death of the testatrix there was found in the drawer of her dressing table at her house, Burrogate, Aberlady, a document holograph of the testatrix which was executed by her in the circumstances afterwards referred to and which was in the following terms:—“To Mr Rutherford, W.S.,

I want to add some additional clauses to my will.

1. The house in Cramond Rd. Barnton to Mrs Mitchell, Davidson's Mains (Forthview, Main Street) so that Mrs Brattan can live with her.

2. My car to Miss B. Hemingway, 2 Ards Place, Aberlady.
3. My pearl necklace and ear-rings to my great niece Sally Ritchie, Johannesburg.
5. Diamond and sapphire brooch to Marguerite Roberts.
6. Gold half-hunter watch to great nephew Alisdair Ritchie, Johannesburg.
7. Gold wrist watch and all my clothes to Mrs Brattan.
8. Peridot and pearl brooch to Dr Marjorie Keith, Mortonhall Rd.
9. My sister Jessie to have any furniture she may require for her own house.
10. Mrs Brattan to have any furniture she may want after that. Mrs Brattan has promised to keep my cats Dinah and Dickon.
12. Remaining furniture to be sold.
13. Mink cape to Mrs Considine.

G. D. MacLaren.

Witness I.G. Thompson. Witness J.C.G.
Mercer."

The document was in a sealed envelope and addressed to "A. Rutherford, Esq., W.S."

[22] As is obvious this letter is addressed to Mrs MacLaren's WS solicitor. It is signed by her and witnessed by two others (the legal requirement for a testamentary writing at that time). Critically, in my view, it uses testamentary language which explains clearly the writer's intention, namely "I want to add some additional clauses to my will". It is hardly surprising that the court found this document to have testamentary effect given the form it is written in taken together with its clear and unambiguous terms having being found in a drawer in a bedroom after the testatrix's death.

[23] Miss Downey's annotation, jotting or memo on the back of an envelope does not correspond to the letter left by Mrs MacLaren. Of course, that would not necessarily be fatal, if testamentary intent could be deduced. However, there are errors in the notation which taken with the flawed logic relating to the provenance of the Informal Writing fail to satisfy me that the suggestion that Miss Downey's settled testamentary intent was to alter her 2012 will, is proved, on a balance of probabilities. In my opinion, the evidence and arguments relied on in the application fail to satisfy the legal burden required to alter a probative testamentary deed, duly executed by the testatrix.

[24] I shall refuse the application under the Act and grant confirmation to the applicants conform to the terms of the 2012 will.

Thomas Welsh QC

Sheriff Court

Edinburgh

15 October 2021.