THE HIGH COURT

[2023] IEHC 475

[2022/211SP]

IN THE MATTER OF THE ESTATE OF MARY ANN HORAN (OTHERWISE MAUREEN HORAN) LATE OF 15 RAMOR PARK, BLANCHARDSTOWN IN THE COUNTY OF DUBLIN DECEASED

BETWEEN

SHANE MACNAMARA

PLAINTIFF

AND

DERMOT HORAN, JOSEPHINE HORAN, YVONNE HORAN AND STEPHEN HORAN

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 24th day of July, 2023

Introduction

1. This is an application for the construction of a will. The deceased (Mrs. Mary Ann Horan) executed a will on 16th June, 2006. The deceased died on 19th April, 2018, a widow, leaving four children i.e. Dermot Horan, Josephine Horan, Yvonne Horan and Stephen Horan - the defendants in these proceedings.

2. In her will, the deceased appointed her son Mr. Dermot Horan as her executor and trustee. All four defendants are beneficiaries of the will of the deceased.

3. In the light of certain difficulties which arose, the fourth defendant - another son of the deceased - made an application to court pursuant to s. 27 (4) of the Succession Act, 1965

that, in the special circumstances of this case, the right of Mr. Dermot Horan to act as executor of the deceased's estate should be superseded. The court granted this application and on 13th March, 2020 the court ordered that the plaintiff would be at liberty to apply for a grant of letters of administration with will annexed, of the estate of the deceased.

4. The plaintiff is a practising solicitor and partner in the firm of John O'Connor Solicitors.

5. A grant of letters of administration with will annexed issued from the principal probate registry, Dublin on 22nd September, 2021, and the plaintiff was duly constituted as administrator of the estate of the deceased. The net value of the deceased's estate was returned in the sum of €6.233 million approximately.

6. On 23rd May, 2022, the High Court (Ms. Justice O'Regan) ordered that the plaintiff in his capacity as administrator could institute a construction summons to determine the proper interpretation of clauses 3 and 4 of the deceased's will.

7. Various affidavits were sworn in these proceedings by the plaintiff, the first defendant, and some of the other defendants.

8. In summary, it is clear from these affidavits, and the legal submissions, that the plaintiff and the second, third and fourth defendants all advocate for one interpretation of the will and Mr. Dermot Horan, the first named defendant, advocates for a different interpretation of the will. In the circumstances, and, in the absence of a consensus among the defendant beneficiaries, the plaintiff brought this construction suit in order that the court could determine the proper interpretation of the will.

The terms of the will

9. The relevant terms of the will are set out below.

"I, Maureen (otherwise Mary Ann) Horan of 15 Ramor Park, Blanchardstown in the County of Dublin HERBY REVOKE all former Wills and Testamentary dispositions of any kind heretofore made by me and DECLARE this to be my last Will and Testament.

2. <u>SPECIFIC BEQUESTS</u>

2.1 I GIVE DEVISE AND BEQUEATH all my interest in Westwood International Transport Limited to my said son Dermot Horan.

2.2 I GIVE DEVISE AND BEQUEATH my dwellinghouse and contents at 15 Ramor Park, Blanchardstown to my said son Dermot Horan.

<u>3. TRUST OF FONTHILL PREMISES</u>

3.1 I GIVE DEVISE AND BEQUEATH all my leasehold interest in 40 Fonthill Industrial Park, being the property described in Folio DN94944L to my Trustee to hold in trust for sale giving my Trustee the following powers and directions:

3.2 To pay the net income arising from the property after deduction of all outgoings and taxes to the beneficiaries hereinafter specified <u>and to postpone the sale for ten years from the date of my demise</u>.

3.3 The Beneficiaries shall mean my sons Dermot Horan and Stephen Horan and my daughters Josephine Horan and Yvonne Reynolds.

3.4 Subject to the provision as to postponement at Clause 3.2 above, I direct that the proceeds of sale will be divided among my beneficiaries in the following shares.

3.4.1 As to ¼ (one quarter) for my son Dermot for his own use and benefit absolutely provided that if he shall predecease me or die simultaeously with me then his share shall accrue and be added to the other shares of my Residuary Estate and be held in the same proportions and upon Trusts and subject to the powers and provisions as those affecting such other shares.

3.4.2 As to ¼ for my son Stephen for his own use and benefit absolutely provided that if he shall predecease me or die simultaneously with me, my Trustee shall hold his share upon trust to provide for and on their attaining 25 years of age to be divided among his children in equal shares.

3.4.3 As to ¼ (one quarter) for my daughter Josephine Horan for her own use and benefit absolutely.

3.4.4 As to ¼ (one quarter) for my daughter Yvonne Reynolds for her own use and benefit absolutely provided that if she predecease me or die simultaneously with me then her shares shall accrue and on their attaining 25 years of age to be held in trust by my trustee to provide for and be divided among her children in equal shares.

4. <u>RESIDUARY BEQUEST</u>.

Subject to payment of my debts, funeral and testamentary expenses, I give devise and bequeath all the rest residue and remainder of my property of whatever kind and wheresoever situate not hereby or by any Codicil hereto specifically disposed of, to my Trustee upon trust, to sell call in and convert the same into money <u>and to distribute as herein before provided for in relation to the trust for sale at clause 3</u>.

IN WITNESS WHEREOF I have hereunto set my hand this 16th day of June. Two Thousand and Six.

Maureen (Mary Ann) Horan (Emphasis added).

<u>The questions arising from the will</u>

10. Broadly speaking, there were three groups of questions which arose in the interpretation of the will.

11. The first set of questions arose out of clause 3.2 of the will. These were: Did the will mean that the valuable property at Fonthill Industrial Estate was:

(a) To be sold <u>within</u> ten years of the death of the testator or

(b) To be sold ten years after the death of the testator or

(c) Was to be held in trust in perpetuity or as long as the trustee decided.

12. The second set of questions also arose out of clause 3.2 of the will. These were:

(a) Did the will mean that the rental income which was received quarterly was to be paid out to the beneficiaries as and when it was received or

(b) Was the rent to be retained in the trust and only distributed at the discretion of the trustee.

13. The third set of questions related to clause 4 – the Residuary Bequest. These questions were:

(a) Whether the residuary bequests were to be paid out immediately;

(b) Whether the residuary bequests were subject to a ten year trust similar to that of the Fonthill property;

(c) Whether the residuary bequests were subject to a trust in perpetuity.

14. Before considering these questions, it is necessary to set out the legal principles governing the interpretation of wills and also to set out the affidavit evidence before the court, the oral evidence of Mr. Colm Murphy, (the solicitor who drew up the will), and the oral evidence of Mr. Dermot Horan, the first defendant.

Legal principles applicable to the interpretation of wills

15. The relevant principles for the interpretation of wills were set out by McGovern J. in *Corrigan v. Corrigan* [2007] IEHC 367 as follows:

"(i) The Court will strive as far as it can to give effect to the intention of the testator insofar as this can be ascertained from the will. In limited circumstances the Court is permitted to rectify a will to save it from bad drafting. See Curtin v. O'Mahony [1991] 2 IR 566.

(ii) The Court considers the will by placing itself in the position of the testator sitting in his armchair shortly before his death to see what he was setting out to achieve.

(iii) As a general rule the court will give legal or technical words used in a will their legal or technical meaning.

(iv) The guidelines suggested by Lowry L.C.J. in Heron v. Ulster Bank Limited [1974] N.I. 44 at 52 were approved and adopted by Carroll J. in Howell v. Howell [1992] 1 I.R. 290. These are as follows:

1. *Read the immediate relevant portion of the will as a piece of English and decide, if possible, what it means.*
2. *Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole, or alternatively, whether an ambiguity in the immediately relevant portion can be resolved.*
3. *If ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.*
4. *One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumption against intestacy and in favour of equality.*
5. *Then see whether any rule of law prevents a particular interpretation from being adopted.*
6. *Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other Courts and judges on similar words, rarely as binding precedents, since it has*

been well said that 'no will has a twin brother' (per Werner J. in Matter of King [1910] 200 N.Y. 189, 192) but more often as examples, sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar context."

16. I have had regard to these principles in considering the interpretation of the will in this case.

The evidence of Mr. Colm Murphy

17. Section 90 of the Succession Act, 1965 provides that:

"Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will."

18. Counsel for the plaintiff submitted that, on the facts of this case, evidence from the solicitor who drew up the will should be heard and admitted to show the intention of the testator and to assist in the construction of, or explain any contradiction in, the will in this case. All parties agreed to this and in the circumstances I permitted Mr. Colm Murphy to give evidence on this matter.

19. Mr. Colm Murphy was a practicing solicitor with the firm of Colm Murphy & Co. Solicitors. He was a solicitor in private practice for a long number of years. However for a short period of time from June 2006 to December 2009 Mr. Murphy was in a partnership with Mr. Evans.

20. Mr. Murphy gave evidence about how he came to draw up the will in this case. In his affidavit evidence he stated that the deceased made her last will and testament on 16th June, 2006 and that he was informed that, at the time of her death on 19th April, 2018, she had not revoked or altered her will. Mr. Murphy said he never acted for the testator before.

21. Mr. Murphy said that the deceased gave him instructions for her will over the phone on 19th May, 2006. Mr. Murphy took an attendance note and a contemporaneous note of what

she said. The notes were exhibited to his affidavit and Mr. Murphy in his oral evidence went through the contemporaneous note and attendance on a line by line basis and explained what was meant therein.

22. Mr. Murphy also gave evidence about the instructions which he received from the deceased. It was clear, he said, that

(a) she wanted to leave her house at 15 Ramor Park to her son Dermot and

(b) she wanted to leave her shares in the company, Westwood International Transport Ltd, also to her son Dermot.

23. It was also clear, he said, that her instructions were that she wanted to leave the industrial premises in Fonthill in trust for her four children, the four defendants in these proceedings. It appears that this property was purchased in or about 2003 for the sum of €3.4 million. It also appears that the said premises generated a rent of €220,000 a year approximately.

24. Mr. Murphy gave important evidence that one of the significant issues in this case is that the deceased wanted to ensure that the property at Fonthill was kept in a trust for a period of ten years in order to avail of a rollover relief for capital gains tax purposes. Mr. Murphy said that the deceased telephoned an accountant for tax advice on this issue and received tax advice to the effect that if it were in a trust for ten years, that she could avail of a rollover relief.

25. Mr. Murphy's evidence was that the intention of the deceased was to defer the sale of Fonthill for a period of ten years to ensure that she was able to obtain the rollover relief.

26. Mr. Murphy also gave evidence that the trust he created was not a discretionary trust because he would have used a completely different document if the testator wished to create a discretionary trust. He said that the testator wished to keep everything as simple as possible.

27. Mr. Murphy then drew up a draft of the will and wrote to the deceased on 8th June, 2006 enclosing a draft of her will. Subsequently it was arranged that the deceased would come to his solicitor's office on 16th June, 2006 to review the will and to sign it.

28. Mr. Murphy's evidence was that on 16th June, 2006 the deceased and Mr. Dermot Horan came to his office. Mr. Murphy said his invariable practice was not to discuss a will in front of any beneficiaries and in the circumstances he asked Mr. Horan to leave the office. Thus any further instructions or discussions which took place were between Mr. Murphy and the deceased alone.

29. There were one or two small changes between the draft will sent to the deceased on 8th June, 2006 and the will as signed. These were as follows:

1. The draft will of 8th June, 2006 (section 2 thereof) headed "Specific bequests" deals with the two bequests to Dermot Horan and also deals with the property at Fonthill Industrial Park whereas in the final will, (the will which was signed on the 16th June, 2006), the specific bequests to Mr. Dermot Horan were specifically numbered at paragraph 2.1 and 2.2 and the trust of Fonthill premises was created as a new paragraph 3. This is significant because of a subsequent amendment to the will.
2. The 8th June draft will added the words "and directions" at the end of paragraph 3.1.
3. Most importantly, clause 3.2 in the 16th June will as signed, added the words "*and to postpone the sale for ten years from the date of my demise".* These words were added, according to Mr. Murphy, at the request of the testator to ensure that she and her estate could avail of the rollover tax relief by keeping the property from being sold for a period of ten years.

4. The will of 16th June, 2006 as signed, states in paragraph 4 "*and to distribute as herein before provided for in relation to the trust for sale at clause 3"* whereas the earlier will states "*and to distribute as here before provided for in relation to the trust for sale at clause (2) (c)"*. There was in fact no clause (2) (c) in the earlier will. Mr. Murphy however gave evidence that this was intended to refer to clause 3.4 - i.e. that it was meant to refer to the division among the beneficiaries in the percentages set out at paragraph 3.4. I accept his evidence on this matter.

30. Mr. Murphy gave evidence that, to the best of his recollection, the deceased gave these final instructions at the final meeting between the deceased and Mr. Murphy on 16th June, 2006. Mr. Murphy also noted that there were no words of postponement in relation to the residuary bequest.

31. Mr. Horan put it to Mr. Murphy in cross examination that the telephone call did not take place. Mr. Murphy however was clear in his evidence that it did and that he had a contemporaneous note of same. I accept the evidence of Mr. Murphy in its entirety who, in my view, was a credible and truthful witness.

32. Mr. Murphy also gave evidence, in response to questions from Mr. Horan on a number of extraneous matters, that he and his then law partner concluded that Mr. Dermot Horan had a propensity for litigation and for instructing a number of firms of solicitors and they decided not to get involved with Mr. Horan on any issues on which he sought their advice.

Evidence of Mr. Dermot Horan

33. Mr. Dermot Horan, the first named defendant represented himself. He cross examined Mr. Colm Murphy the solicitor who drew up the will. In the course of this cross examination, it was clear that he had a different interpretation of certain factual events about which Mr. Murphy had given evidence. In the circumstances Mr. Horan had to give evidence himself on

these and other matters. Mr. Horan then swore the oath and gave evidence about these matters. He gave evidence about his mother's intention and various other matters. He was also subjected to cross examination by counsel for the plaintiff.

34. In my view, Mr. Dermot Horan was not a credible witness. All, or almost all, of his evidence was irrelevant and was directed to issues which were not relevant to the questions I had to decide (i.e. how to construe the will). Much of his evidence traversed disputes between himself and other family members (most, if not all of which appear to be caused by him), whilst decrying the fact that there were disputes between himself and other family members.

35. He said that, he doubted whether his mother had a conversation with Mr. Murphy, her solicitor, despite the fact Mr. Murphy gave evidence that it happened and has contemporaneous notes of the conversation. I do not accept Mr. Horan's evidence on this matter.

36. Mr. Dermot Horan accepted that, although he accompanied his mother to Mr. Colm Murphy solicitor to draw up her will, Mr. Murphy asked him to leave the room and to "take a walk" whilst Mr. Murphy took instructions from his mother and drafted the will according to her instructions. Mr. Dermot Horan therefore is not in a position to controvert the direct evidence given by Mr. Murphy about the instructions given to him by the deceased testator, which instructions are captured in a contemporaneous note of those instructions.

37. He also gave evidence that he and his mother had decided that they wanted to create a trust in relation to the family property. Again and again he prefaced his remarks about his mother's intentions in relation to the terms of her will by stating that "he and his mother" had the intention that certain things should be done.

38. I formed the distinct impression that Mr. Dermot Horan was not only seeking to control his mother's assets whilst she was still alive, but also to influence her in the way in

which she left these assets in her will and also to interpret the will in a manner which gave him the greatest control over those assets.

39. It is of note that in the specific bequests left to him for his sole use, he received the mother's home at Ramor Park, Blanchardstown with a valuation of €460,000 and he was also given the entire shareholding of the company Westwood International Transport Ltd with a value of €496,000 approximately. In the circumstances Mr. Dermot Horan was left a sum of almost €1 million entirely for his own use by his mother.

40. Despite this, Mr. Dermot Horan was seeking an interpretation of the will which is not only a strained interpretation of the will but which would have the distinct benefit that the property at Fonthill could not be sold in perpetuity and that the residual bequests which consist of cash in a bank account of approximately €2 million could also not be distributed because it would be subject to a trust in perpetuity. As he is the trustee this would give him ultimate control over both of these assets in perpetuity.

41. However it is clear – as is set out below -

(a) that the wording of the will does not extend to such an interpretation;

(b) that the intention of the testator was not that this should happen and

(c) that the intention of the testator was that Mr. Dermot Horan would receive the company and the family home and that the rest of the assets would be divided four ways. (Clearly Mr. Dermot Horan will also benefit in the amount of 25% of the property in Fonthill and the residuary estate).

42. Mr. Dermot Horan's evidence was that he was of the view that the property in Fonthill should not be sold i.e. that it should be subject to a trust in perpetuity so that all the family would benefit from it. That might be his wish but these are not the words in the will nor does it appear to have been the intention of the testator.

43. However it is also of note that the fourth named defendant in this matter brought an application to replace Mr. Dermot Horan as the executor of the will and this application was granted by the High Court. Mr. Shane McNamara was named as administrator and executor of the will. It is clear that all of the necessary trust and confidence in Mr. Dermot Horan on the part of his siblings has completely broken down.

44. Indeed Mr. Stephen Horan, the fourth named defendant, swore an affidavit in reply to the affidavit of Mr. Dermot Horan on 20th March, 2023 in which he said:

> *"I and my sisters were saddened to read our brother Dermot's affidavit which raises real concerns for us about his current mental health state and functioning given the vitriolic paranoid ramblings contained within it. Although our brother's mental health difficulties (albeit undiagnosed as far as we know) have long been a source of concern for me and my sisters and indeed were a huge source of worry for our late mother, we think that the stress of the current proceedings has exacerbated these difficulties and he had become even more mentally unwell. I and my sisters are of the view that Dermot would not be a fit trustee due to these difficulties even aside from the serious matters which are currently being explored in the plenary proceedings."*

45. I also note that in or about April/June 2015, the deceased was diagnosed with dementia and an application was made to have her made a ward of court by Mr. Stephen Horan, the fourth named defendant in these proceedings on 2nd June, 2015. The High Court made an order on 31st August, 2015 declaring Mary Ann (Maureen) Horan a ward of court. Despite the medical evidence before the court at that time, Mr. Dermot Horan insisted that his mother was not suffering from dementia, and indeed in his evidence before me also contested that his mother had dementia. Mr. Dermot Horan has no medical qualifications whatsoever and his denial that his mother had dementia, despite all the medical evidence to the contrary, is quite extraordinary in the circumstances.

46. There is however another issue which is of relevance not only to this application but also to any other applications that might be made in these or in related proceedings and which, in my view, should be recorded in this judgment. Mr. Shane MacNamara, the plaintiff in these proceedings, states in his replying affidavit, sworn on the 16th March, 2023, at para. 6 as follows:

> *"I say that the allegations made by the first defendant as to supposed failure by me to protect the assets of the deceased in the sixth (unnumbered) paragraph of this affidavit is wholly untrue and that it has been a primary focus of mine in discharging my responsibilities as court appointed administrator to protect such assets. This exercise has included an investigation into unauthorised withdrawals amounting to €232,449 from the deceased's bank account by the first named defendant in the period from April 2015 to April 2016. These unauthorised withdrawals are now the subject of separate proceedings against the first named defendant".*

47. I was informed during the hearing that the plaintiff has issued plenary proceedings against the first defendant in respect of these monies. The plaintiff has issued a plenary summons and statement of claim; a defence has not yet been filed. The plaintiff has issued a motion for judgment in default of defence which is currently before the High Court.

48. Whilst these are matters for the other proceedings (and not a matter for the construction summons which I have to deal with) it is nevertheless noteworthy what Mr. Dermot Horan said in his evidence in relation to these matters. He was cross examined on these issues and he admitted in his evidence that the relevant account was initially in his mother's name; that he was added as another name on the account; that he withdrew sums of money from the said account between April 2015 and April 2016; that these withdrawals took place around the same time that his mother was diagnosed as having dementia and being made a ward of court; that he used approximately €40,000 of these monies to pay an

individual (€800 per week) to look after company premises; that he spent approximately another €10,000 to erect or repair a fence on company property and other matters. This evidence of Mr. Dermot Horan raises the question of whether he improperly withdrew monies from his mother's account whilst she was suffering from dementia and/or was a ward of court, whether he withdrew such sums of money without her consent or the consent of the court (if such consent were required) and that he used these monies for the benefit of the company in circumstances where he subsequently became the sole shareholder of the company, (the shares in the company having been left to him by his mother).

49. The full consequences and legal implications of this evidence are a matter for the separate High Court proceedings being brought by the administrator in this matter and these matters will be decided in those proceedings. However they are relevant to the credibility and veracity of Mr. Dermot Horan as a witness before me and are also relevant to the weight which I would give to his evidence.

50. Mr. Horan also gave evidence about an issue in which he said land owned by his mother was the subject of an alleged fraudulent transfer in or about 2000. His evidence and submissions on this issue were that his mother had not signed a contract transferring the said land, that her signature was a forgery and that these lands should never have been transferred. Be that as it may, that transaction occurred over 23 years ago and it does not appear that Mr. Dermot Horan or any other party has ever taken any proceedings in relation to that issue. Indeed none of his siblings or the plaintiff believe that there is any merit or substance in Mr. Horan's submissions/evidence on these matters.

The answers to questions arising from the will

51. Having considered the terms of the will, the affidavit evidence, the oral evidence and the legal submissions in relation to the questions which arise on the proper interpretation of

this will, I am of the view that these questions should be answered in the manner set out below.

In relation to the sale of the property at Fonthill

52. The first question is whether the property at Fonthill is only to be sold ten years after the date of death of the testator.

53. The second question is whether the trustee can sell the property within a period of ten years i.e. at any time from death of the testator until a period of ten years has elapsed.

54. The third question is do sections 3.1 and 3.2 of the will create a trust in perpetuity i.e. that the property is never to be sold or is only to be sold at some time in the future at the trustee's absolute discretion.

55. In relation to the first question, all parties are agreed that the Fonthill property is not to be sold for a period of ten years. Thus all parties agree that this is the correct interpretation of this clause.

56. In relation to the second question , all parties are also agreed that the trustee does not have the power to sell the property within a ten year period.

57. In relation to the third question, the parties disagree. The plaintiff and the second, third and fourth defendants submit that the clear wording of the will means that the property is to be sold at the end of the ten year period i.e. as soon as possible thereafter. Mr. Dermot Horan however submits that the intention of the testator was that the property was to be held in trust in perpetuity, that it was never to be sold, or if it was to be sold, it was to be sold in many years' time and at the sole discretion of the trustee (i.e. him).

58. I am of the view that the proper interpretation of Clause 3 is that the Fonthill premises is to be held in trust by the trustee and that it is not to be sold for a period of ten years but it is to be sold at the expiration of a period of ten years from the date of death of the testator and as soon as possible thereafter.

59. I have come to this conclusion for the following reasons:

1. Clause 3.1 provides that the testator gives, devises and bequeaths her leasehold property in 40 Fonthill Industrial Park to her trustee to hold in trust for sale;
2. Clause 3.2 provides that the trustee is "*To pay the net income arising from the property after deduction of all outgoings and taxes to the beneficiaries hereinafter specified and to postpone the sale for ten years from the date of my demise";*
3. The use of the words *"to postpone the sale for ten years from the date of my demise"* means, and clearly was intended to mean, that the sale would be postponed for a period of ten years certain or ten years from the date of her demise. These are the clear and obvious words of the will as written;
4. There was evidence given by Mr. Colm Murphy that this ten year period was put in for a specific reason by the deceased, based on tax advice she received from her accountant, that if it were delayed for ten years she and her estate could avail of rollover tax relief;
5. There are no words which provide that the trustee is to hold the property in trust for perpetuity; likewise there are no words which allow postponement of the sale for fifteen or twenty years or as long as the trustee wishes;
6. The interpretation advocated by Mr. Dermot Horan would mean that the capital value of the Fonthill property would never be realised and the beneficiaries therefore would never receive their share of the capital value of the asset; this flies in the face of the intention of the testator as derived from a consideration of the will as a whole;

7. The testator granted specific bequests of the family home and the company to Mr. Dermot Horan immediately and without a trust; whilst there was a tax reason why the testator would want to postpone the sale of Fonthill for a period of ten years, there is no reason as to why she would want to immediately make specific bequests to Mr. Dermot Horan giving him the capital value of those assets and yet not also bequeath to her other children the benefit of a capital value of an asset upon sale.

60. In conclusion, I am of the view that Mr. Dermot Horan's arguments as to the interpretation of the will as creating a trust in perpetuity in relation to the Fonthill property are utterly without merit.They are based on his view of what he would like to happen and his desire to control all his mother's estate to the detriment of his siblings rather than anything grounded in the intention of the testator or the express words of the will.

The quarterly rental income from the Fonthill premises

61. There are two questions which arise in relation to this matter. The first question is whether clause 3.2 requires the trustee to pay out the rent received from the tenant in Fonthill to the beneficiaries as soon as it is received.

62. The second related question is whether the trustee does not have to pay this rent out on a quarterly or annual basis but can postpone the payment out of this rental income and accumulate rental income within the trust fund.

63. However there is agreement of all parties that the answer to this question is that the wording of the will and the intention of the testator was that the trustee should pay the net rental income to the beneficiaries as it is received i.e. on a quarterly basis.

64. Thus the answer to this question is that the intention of the testator and the wording of the will does not permit the trustee to accumulate income within the trust or to postpone the payment out of rental income to all the beneficiaries.

65. The answer therefore to this question is that intention of the testator and the wording of the will requires the executor and/or trustee to pay out the net income arising from the lease of Fonthill premises to the beneficiaries as it is received – i.e. on a quarterly basis.

The interpretation of the residuary bequest

66. The terms of the residuary bequest are set out above. It provides that the testator bequeaths all the residue and remainder of her property to her trustee upon trust to sell, call in and convert the same into money and to distribute as hereinbefore provided for in relation to the trust for sale at clause 3.

67. There are four questions in relation to the interpretation of this residuary bequest.

68. The first question is whether the terms of the will require the residuary estate to be distributed immediately by the trustee. The residuary estate is held mainly in cash and comprises a significant sum of money. The position of the plaintiff and of the second, third and fourth defendants is that the clear intention of the testator and the meaning of the will is that the executor should distribute the residuary estate to all of the beneficiaries immediately along the lines set out at clause 3.4.

69. However Mr. Dermot Horan adopts a position which is that the residuary bequest also creates a trust in perpetuity and that only the interest earned on the monies in various bank accounts should be paid out to the beneficiaries on a quarterly or annual basis.

70. I am of the view that the interpretation urged on the court by the plaintiff and the other defendants is the correct interpretation for the following reasons:

(1.) The clear wording of clause 4 is to give all the rest of the testator's property to her trustee upon trust to sell and convert the same into money and to distribute as hereinbefore provided in relation to the trust for sale at clause 3;

(2.) There are no words of "postponement" or "accumulation" or any words which evince an intention on the part of the testator that all the rest residue and

remainder of her property of whatever kind are to be kept in trust for a period of up to ten years or any period greater than ten years;

(3.) In the circumstances given that there are no words of postponement, it is clear that the testator intended that the residuary bequests would be distributed as soon as possible in the normal way.

(4.) The last two lines of clause 4 state *"and to distribute as hereinbefore provided for in relation to the trust for sale at clause 3"* create an ambiguity. While clause 3.2 refers to a postponement of the sale of the property for a period of ten years , clause 3.4 refers to the division among the testator's beneficiaries in the shares set out at clause 3.4.1 to clause 3.4.4. The ambiguity therefore which arises is what is meant by clause 3 in the residuary bequest. Does it refer to clause 3.2 or 3.4?

(5.) However Mr. Colm Murphy has given clear and uncontroverted evidence - which I accept - that this was meant to refer to clause 3.4 (i.e. to the proceeds of sale being divided among the beneficiaries in the shares set out at clause 3.4.)

(6.) In my view, this evidence accords with common sense and the overall intention of the testator. It is clear that the testator had given the family home and the valuable business to her eldest son Mr. Dermot Horan. It is also clear that the property at Fonthill was to be retained for ten years; however the remainder of her estate was to be converted into money and distributed to her children in equal shares as set out at clause 3.4 of the will. In those circumstances the words *"and to distribute as hereinbefore provided"* in relation to the trust for sale at clause 3 must be taken to refer to clause 3.4 .

71. I am satisfied that the interpretation urged on the court by Mr. Dermot Horan that the trustee is not to distribute the residuary bequest until a period of ten years has passed or that

the trustee is to keep the said residuary bequest on trust in perpetuity is utterly without merit. It is, in my view, clearly an attempt by Mr. Horan to seek to control the entirety of the assets and to prevent them being distributed to his siblings.

72. I am also satisfied that the question of paying the net interest income earned on the residuary estate on an ongoing basis therefore does not arise.

73. I have also been referred to Theobald on Wills (18th ed. at p. 32 para. 28-003) where the learned author states as follows:

> *"For both real estate and personal estate, the court leans in favour of early vesting but obviously not earlier than the date of the death of the testator."*

74. In my view, this leaning in favour of early vesting is also of relevance to the facts of this case. I am satisfied that the testator intended that the residuary bequest should vest as early as possible - particularly in circumstances where there are no words postponing the vesting of the residuary bequest.

75. I am also satisfied that the "leaning in favour of early vesting" also applies to clause 3.2 and although the sale of the Fonthill property is postponed for a period of ten years it should not be postponed for any period beyond the ten years and should be sold as soon as possible thereafter.

76. In my view, therefore, the residuary estate clause, on its proper interpretation, directs the trustee to distribute the residuary estate immediately to all the beneficiaries in the percentages set out at clause 3.4 of the will.

Conclusion

77. I would therefore conclude that the will, when properly construed, means, and was intended to mean:

(i) That the property at Fonthill is to be sold when a period of ten years from the death of the testator has elapsed and it is to be sold as soon as possible thereafter;

(ii) The rental income from Fonthill is to be distributed as and when it is received i.e. quarterly;

(iii) The residuary bequests are to be paid out immediately.