

**Neutral Citation No: [2017] NIMaster 6**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

**Ref: [2017]NIMaster6**

**Delivered: 06/10/17**

No

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

AIDAN QUINN AND JOHN DONNELLY

Plaintiffs:

and

KEVIN HANNA AS NEXT FRIEND OF ANASTASIA DONNELLY

Defendant:

MASTER HARDSTAFF

Mr Gibson, BL Bar Library appearing unattended 6 October 2017.

1. This is an application seeking that the court order the rectification of the Will of Anastasia Donnelly. The relevant parties are on notice of this application.
2. Upon hearing counsel and reading the papers supporting this application.
3. The court is satisfied that a manifest error has occurred in the drafting and execution of the last will of Anastasia Donnelly made on 22 July 2011 a copy of which is exhibited to the affidavit of Aidan Quinn, solicitor in this application.
4. The clause numbered "1" contained in the said Will reads "I devise and bequeath all of my property both real and personal of whatsoever nature and wheresoever situate to my wife Anastasia Donnelly but in the event that she shall predecease me ....".

5. It is readily apparent that the meaningful intent of these words is an absurdity; in as much a testatrix cannot and will not leave her Estate to herself.
6. It is clear that both Anastasia Donnelly and her husband Michael Donnelly intended to make like Wills on or about 22 July 2011. The execution of the documents, which purported to reflect their intentions was carried out in the presence of identifiable attesting witnesses.
7. In Mr Quinn's affidavit supporting this application at paragraph 5 thereof he avers that "as advised Michael and Anastasia attended at my office on 22 July 2011 to execute new Wills. My practice is to advise clients that they can either keep their Wills or destroy them, my preference being to destroy them which they did by tearing them up in the office. The new Wills were effectively mutual Wills and both were drafted at the same time, but I mistakenly cut and pasted the contents of paragraph 1 of Michael Donnelly's Will into paragraph 1 of Anastasia's Will".
8. The court upon the reading of Michael Donnelly's copy Will exhibited in this application notes that at clause "1" thereof, and using the same wording as in the Will of Anastasia Donnelly, he left his estate initially to Anastasia Donnelly his wife contingent upon her surviving him by at least 30 days.
9. It is clear to the court that Anastasia Donnelly intended to leave her estate initially to Michael Donnelly her husband, subject to the same survival contingency.
10. Now Anastasia Donnelly is alive. The error would therefore ordinarily be rectified by Mr Quinn bringing the error to the attention of Anastasia Donnelly and preparing a properly worded document for her to execute.
11. However, as Mr Quinn sets out in paragraph 8 of his affidavit, he is unfortunately advised that Anastasia Donnelly is no longer mentally capable of providing the necessary consent to any considerations in regard to rectification. He exhibits to his affidavit a medical report from a Dr Nugent. In particular Dr Nugent states "I do not feel that Ms Donnelly retains sufficient capacity to have reliable or meaningful comprehension of legal or administrative matters. I note that she has in addition, had several assessments by the psychiatric team at the Southern Trust. I note in her medical record that at 17 September 2013 she was diagnosed as not having capacity by a consultant psychiatrist".

12. Mr Quinn has therefore issued a summons moved by Mr Gibson BL seeking the following relief:-

(1) That the Will of Anastasia Donnelly be rectified by the deletion of paragraph 1 of the said Will dated 22 July 2011 pursuant to Article 29(1) of the Wills and Administration Proceedings (NI) Order 1994;

(2) In the alternative an order that the Will be rectified pursuant to the Inherent Jurisdiction of this honourable court to rectify written documents; and

(3) Such further or other equitable relief as this court deems fit.

13. The summons has been served on Kevin Hanna as next friend of Anastasia Donnelly. Mr Hanna has not attended the hearing but counsel informs me that he has intimated his consent to the relief sought. Additionally the application has also been brought to the attention of the Office of Care and Protection which has raised no objection but has merely suggested that in the event of the application not being successful that the office would consider the making of a statutory Will.

14. The court notes that Article 29(1) of the Wills and Administration Proceedings (NI) Order 1994 proscribes the circumstances and manner in which the said Order permits the rectification of erroneous testamentary documents "if a court is satisfied that a Will is so expressed that it fails to carry out the testators intentions, in consequence (a) of a clerical error; or (b) of a failure to understand his instructions, it may order that the Will shall be rectified so as to carry out his intentions. An application for an order under this Article shall not, except with the permission of the court, be made at the end of the period of 6 months from the date on which representation in respect to the Estate of the deceased is first taken out".

15. In the court's view a difficulty arises with the statutory provisions as set out above in the particular circumstances of this case. Anastasia Donnelly is still alive. It is clear to the court that the plain meaning of the statutory provision is that an application for rectification with the Court's leave can only be brought within 6 months of a grant of representation being issued. It is quite clear therefore that the statutory provision envisages and seemingly requires that the testator or testatrix be dead.

16. The court's view in this regard is further bolstered by the court's clear understanding that a Will "speaks upon death"; the effect of the Will's

wording can only come into being following the demise of the testator or testatrix.

17. Therefore it seems that the aforesaid statutory provision for rectification cannot safely be relied upon in this instant.
18. Mr Gibson BL however urges the court, in his very helpful written submissions, to take the view that the court has an inherent jurisdiction to rectify written documents, including Wills. He brings to the court's attention the obiter of Lord Neuberger in Marley v Rollins & Anor [2014] 1 All ER reports page 807 and in particular paragraphs 27 and 28 thereof. At paragraph 28 Lord Neuberger states "as at present advised, I would nonetheless have been minded to hold that it was, as a matter of common law, open to a judge to rectify a Will in the same way as in any other document, no convincing reason for the absence of such a power has been advanced. However, it is unnecessary to consider that point further as Parliament has legislated on the topic ...".
19. Mr Gibson BL points to a leading commentator on these matters, Mr David Hodge QC in his work "Rectification, the Modern Law and Practice governing claims for Rectification of Mistake". At paragraph 8.34 thereof, referring to Lord Neuberger he states: "That this careful formulation leaves open a back door for holding in, appropriate future cases that the judicial power to rectify Wills actually exceeds that envisaged by Parliament".
20. I am satisfied that this court has such an inherent jurisdiction. However, the issue remains can I exercise that jurisdiction whilst the testatrix is alive.
21. Upon consideration of all of the circumstances which arise in this case a number of options present themselves. Firstly, the court could simply adjourn this application until Anastasia Donnelly dies. The statutory provisions would then come into play. Alternatively the court could take the view that a statutory Will should be prepared. It seems to me that the creation of a statutory Will would necessarily involve the creation of a testamentary document which could only be in the terms of the existing Will with the rectification envisaged. Whilst the process of the creation of a statutory Will is not overly complex it involves broader considerations than those narrow issues which arise in rectification. It involves an overall assessment of the patient's circumstances. It is also a relatively expensive exercise. Therefore it does not appeal to me as a straightforward and effective way to exercise the interests of justice in favour of this vulnerable testatrix. Equally it seems to me that to simply wait for Mrs Donnelly to die is to render her testamentary position entirely unsatisfactory.

Such a step presumes that someone will take it upon themselves to go through this process in the future. At present the evidence is fresh from those involved. Notice parties are readily identifiable and minded to cooperate.

22. There is a further relevant consideration. Anastasia Donnelly's husband Michael passed away on 12 June 2012. No Grant of Probate has yet been extracted in respect of his Will. One might momentarily therefore be tempted to consider that the issue of rectification has become redundant.
23. How as previously stated Anastasia Donnelly's Will provides the same contingency as to the gift to her husband namely that the donee of the gift must survive her by at least 30 days.
24. In the event of that contingency failing, the existing Will provides two further contingent gifts in respect of specific lands of the testatrix and also the residue of the estate. It is likely that if rectification is not ordered, or a statutory Will is not made, then those further gifts are likely to fail as the contingency upon which they are premised will have failed. The out working of that will be that an intestacy will arise. That is manifestly not what Anastasia Donnelly intended.
25. Mr Gibson BL urges the court to be bold and progressive in its approach. Flattering blandishments aside, nonetheless this court looks to the interests of justice and in particular it seeks to protect the vulnerable and incapable. It is quite clear that when she had capacity Anastasia Donnelly intended that a Will exist to reflect all of the eventualities which would arise upon her death in a manner which mirrored her husband's intentions.
26. There can be no meaningful difference between the creation of a statutory will in this instance and the rectification sought. The Court should act in consideration of the overriding objective to see the interests of justice prevail. It should act in an effective manner taking the most pragmatic solution, provided of course that to do so does not offend any necessary and relevant legal principles. I therefore will order in this case that the Will of Anastasia Donnelly dated 22 July 2011 be rectified as follows:- At clause number 1 thereof it shall read "I devise and bequeath all of my property both real and personal whatsoever nature and wheresoever situate to my husband Michael Donnelly but in the event that he should predecease me or die within 30 days of the date of my death, then I direct that this clause shall not take effect and that this Will shall be construed and take effect as if the said clause 1 had been wholly omitted from it and that the following clauses of this Will shall have effect...".

27. The only other matter which arises is the costs of this application which necessarily must be borne by Mr Quinn. I do not overly criticise Mr Quinn. Indeed Mr. Quinn has acted quite properly and expeditiously in bringing this application. It is to his very considerable credit that he has done so. In today's world when relying upon word processing of documents which includes facilities such as "cutting and pasting" errors such as identified in this case can arise. That however makes it all the more important that solicitors very carefully read the documentation which they are inviting their clients to sign to ensure that they have fully complied with their clients instructions and that the documentation can be safely relied upon to ensure that its purposes and intention are fulfilled.