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Judgment: approved by the Court for handing down | *Delivered:* **02/05/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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11/085749

IN THE ESTATE OF AGNES MAUD LAVERTY (DECEASED)

THE SESSION AND COMMITTEE MOSSIDE PRESBYTERIAN CHURCH
Plaintiff;

-v-

LORNA WATTON
First Defendant;

MARGARET McCONAGHIE
Second Defendant;

THOMAS TAGGART & SONS, SOLICITORS, A FIRM
Third Defendant.

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DEENY J

Introduction

[1] These proceedings arise out of the Will of the late Agnes Maud Laverty. She was a single lady residing at 30 Colman Avenue, Liscolman, near Ballymoney, County Antrim. She resided there until her deteriorating health led to her admission to a nursing home from time to time and, finally, to the Causeway Hospital where she died on 25 March 2007.

[2] By her Will of 26 February 2007 she appointed the first and second defendants executrices of her estate. The Will was drafted by the third defendant. By a consent Order of 1 February 2012 of this court the proceedings against the third defendant were discontinued irrevocably, reserving costs to the trial judge in the main action. Certain obligations and rights of the parties were set out in a Schedule to that Order.

[3] As well as some pecuniary legacies the testatrix left her home at the above address to the first defendant and the residue of her estate, including the surrounding lands to the plaintiff. I had helpful written and oral submissions from Mr Peter Girvan for the plaintiff and Mr Mark McEwan for the first defendant. Ms Sheena Grattan for the second defendant and her solicitor were excused from the hearing at their request to minimise costs. Mr Lewis Richards of the former third defendant gave evidence at the hearing before me, on 4, 5 and 6 February 2014.

The facts

[4] A dispute has arisen between the parties as to the proper interpretation of Clause 4 of the agreement. Clause 1 appointed the executrices and Clause 2 left to them the distribution of the personal chattels of the testatrix in their discretion. Clause 3 left four pecuniary legacies. One of those was to the second defendant. Another was later revoked by a codicil and given to the church in whose cemetery the lady was to be buried. I set out Clauses 4 and 5 in full:

> "4. I leave, devise and bequeath my dwelling-house, yard and garden at 30 Colman Avenue, Liscolman, Ballymoney to the said Lorna Watton absolutely together with the following rights and easements necessary for the enjoyment thereof appurtenant thereto but subject to any rights required for the use of the lands adjoining the said dwelling.
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> 5. I leave, devise and bequeath all the rest, residue and remainder of my estate of whatsoever kind and wheresoever situate to the Session and Committee of Mosside Presbyterian Church absolutely and express it to be my wish that these monies shall be used for the upkeep and renewal of the church buildings and I direct that the receipt of the Treasurer for the time being shall be a sufficient discharge to my Executors (sic)."

[5] There is no dispute that the Will was made by the testatrix while still lucid and possessing testamentary capacity. It is not disputed that it was duly witnessed by an assistant solicitor and clerk from the office of the former third defendant. What has given rise to a now prolonged difficulty is what the "rights required for the use of the lands adjoining the said dwelling" amount to.

[6] The making of the Will has an unusual history. It is best to set out what happened as described in the solicitor's affidavit of 2 May 2012.

> "4. I was asked to call and see the Deceased at Leabank Nursing Home which I did and took

instructions for a revision of her Will I attended at the Home along with my wife Gwendoline on l9th February 2007 to have the amended Will executed. During the course of the same week I received further instructions to the effect that the Deceased was desirous of leaving her house to Miss Watton. Miss Watton was by this stage a frequent visitor to my office concerning the ongoing financial and welfare arrangements for the Deceased including execution of a Power of Attorney in her favour. I instructed my Secretary Irene Kinghan to make the stated revision to the Will and same was engrossed for execution. I did not have an opportunity to call with the deceased that week to have the amended Will executed. On 26th February 2007 I was out of the office but as I was mindful of the fact that the Deceased's health was not good I contacted Dorothy Coyles who is an experienced Clerk of my office by telephone and requested that she attend, together with Carrie Esler Assistant Solicitor, to have the amended Will executed. The significant changes were that the dwelling house was being left to Miss Watton whereas previously the entirety of the property was left to The Session and Committee of Mosside Presbyterian Church. In addition the pecuniary legacy of £20,000.00 to Miss Watton was revoked. The Will was duly approved and executed by the Deceased subject to a minor amendment in the spelling of a name.

5. I was familiar with the Deceased's house and lands having visited her there on more than one occasion and as all this property which had previously been a unit was now being split I was anxious to ensure that any rights and easements hitherto enjoyed by both the house and lands should be protected. This would have included water and sewage rights in respect of the house and access for the land. I note Clause 4 of the Will refers to 'the following rights and easements' although this should have read 'any rights and easements'. I am confident that the inclusion of this provision came from me the intention being to preserve the rights of both the beneficiary of the house and the beneficiary of the lands.

> 6. I attended on the Deceased in Causeway Hospital on 9th March 2007 as I had been notified that the Deceased wished to make a further amendment to her Will. On this occasion my Secretary Irene Kinghan accompanied me. The Deceased instructed me that she wished to revoke the legacy to Mrs Wilkinson and leave this amount to Billy Parish Church, Bushmills. On that date I discussed and confirmed the contents of the Will dated 26th February 2007. The change to the pecuniary legacy was dealt with by way of a simple handwritten codicil to the Will of 26th February 2007. This codicil was signed by the Deceased in the presence of Mrs Kinghan and myself on 9 March 2007 and in all other regards she affirmed the Will of 26th February 2007. Had the Deceased expressed any disquiet whatsoever I would have taken her further instructions regarding any amendments but this was not the case."

Mr Richards sought in oral evidence to say what he thought the testatrix meant but as he had not taken the instructions for the new will from her and his firm had no note of those instructions this was not of assistance to the court.

[7] The lands of the deceased were set out in various folios but the key folio for this case was Folio 20677 Part II County Antrim. No. 30 Colman Avenue, the property left to the first defendant, is a bungalow with outhouses and what has been described as a yard behind it and round to the side of it. Part of the legacy to Ms Watton includes Folio 22316 which is a small triangle of ground in the corner of the property surrounding No. 30.

[8] The plaintiff says, and called evidence to show that the conacre tenants of the fields behind and to the side of No. 30 throughout the later years of Ms Laverty's life and up to her death, entered those fields and accessed them through two pillars immediately adjacent to No. 30 on Coleman Avenue. The two pillars were about 3.6 metres apart and the tenants made their way around the outhouses and up to the back of the No. 30 property where there were two gates into two adjoining fields.

[9] For convenience, at the trial of the action, the most westerly of the fields behind No. 30 was labelled No. 1. That in the middle and on two sides of No. 30 was labelled No. 2. That slightly to the east of No. 30 was labelled No. 3. There were two more fields behind fields 1 and 2 which were labelled 4 and 5. North and east of No. 3 was a field which was referred to as Cochrane's field. In the event I concluded that the access to that field did not materially assist in interpreting Clause 4 of the Will.

[10] The fields to which I refer, and particularly fields 2 and 3 are, I find, "the lands adjoining the said dwelling" in Clause 4 of the Will.

[11] The plaintiff insists that it is entitled, pursuant to Clause 4 of the Will to the right of way through No. 30 as formally used by the Currys, the conacre tenants, until 2007 or indeed a little thereafter.

[12] Mr Richards, following the death of the testatrix, drew up a Deed of Assent for the plaintiff and the first defendant to sign. He arranged to meet her at No. 30 Coleman Avenue. Rather surprisingly, he did not give that deed to her prior to the meeting at that address in January 2008. On attending she was surprised to find, first of all, three men, later joined by a fourth man, from the plaintiff church body. She was sufficiently apprehensive to go into the house and ask her tenant, a lady doctor, whom she did not otherwise know, to come out with her. I fully accept her evidence in that regard and indeed generally. In fairness to Mr Richards the Deed of Assent he was proposing to both parties would have involved the plaintiff allowing her sight lines across the frontage of field 2 which had been left to the church. This would obviously be of assistance to her in the event of her wishing to develop or sell No. 30 as indeed she contemplated, at least at one stage. But the assent also required her to agree to the plaintiff preserving this quite broad right of way running through her property. She declined to sign the assent.

[13] The plaintiffs were sufficiently incensed by her refusal to ultimately bring these proceedings. The first relief sought is her removal as an executrix because of her conflict of interest, as the plaintiff says, between that role and her role as a beneficiary which, they said, affected her judgment in refusing to sign the assent. As I had occasion to say, on more than one occasion leading up to the trial, that seems to me quite a secondary situation to the proper interpretation of the clause. The only possible criticism that can be made of the lady is that she does not accept the plaintiff's interpretation of the clause.

[14] As a plan shown to the court demonstrates, development of the land would not be impossible with a similar broad right of way through the property but would be if this route was protected. However, in the changed circumstances since 2007, development is less likely. Use of the purported right of way as it now is does mean the passage of not only individuals, but livestock of one kind or another, and, on occasion, vehicles within a few feet of the existing dwelling house and then passing through a considerable part of the precincts of the property. The first defendant is perfectly entitled to take objection to that, subject of course to the proper interpretation of the Will. The intrusiveness or otherwise of a right of way can be a relevant factor. See Gale on Easements, 19th Edition, 3-109,110.

[15] It is of importance to note that the access sought by the plaintiff is not the only access to these fields. There are field gates into fields 1 and 2 from the public road. Although they may not both have been used recently there is no impediment in law to using them. Furthermore if one uses the field gate into field 2 one can then

pass into field 3 quite easily. The boundary between those two fields consists of a very small raised ditch with overgrown intermittent bushes and some strands of wire. At one point a wooden pallet is in position, perhaps used as a gate at some stage in the recent past.

The law

[16] In construing a Will the court will seek to ascertain the intention of the testator as expressed in the Will, in the light, where appropriate, of any extrinsic evidence admissible for the purpose of construction. The oft-cited dictum of Lord Simon L.C. in Perrin v Morgan [1943] A.C. 399 at 406 is as follows:

> "The fundamental rule in construing the language of a Will is to put on the words used the meaning which, having regard to the terms of the Will, the testator intended. The question is not, of course, what the testator meant to do when he made his Will, but what the written words he uses mean in a particular case – what are the 'expressed intentions' of the testator."

[17] The court does not re-write the Will. It interprets it and in doing so a presumption of first importance is that the court will give to the words in the Will their ordinary meaning. This is of particular relevance here to the word 'required' in Clause 4 of the Will relating to any right of way.

[18] The testatrix here has divided her property. In Wheeldon v Burrows (1897) Ch. 31 Thesiger LJ held as follows, at page 49:

> "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as to what I may call the general rule governing cases of this kind. The first of these rules is that, on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."

[19] In Phillips v Low [1892] 1 Ch. 47 Chitty J held, without referring to Wheeldon v Burrows, perhaps surprisingly, that the same principle applied to devises by Will

as well as to contemporaneous grants by deed. Mr Girvan relied on the following passage from the judgment at page 52:

> "In Barnes v Loach 4 Q.B.D. 494 it was decided that the easement of light passed with the house without express words, the ground of the decision as stated in the judgment of the court being, that if the owner of an estate has been in the habit of using quasi easements of an apparent and continuous character over the one part for the benefit of the other part of his property and aliens the quasi dominant part to one person, and the quasi servient to another, the respective alienees, in the absence of express stipulation, take the land burdened or benefited as the case may be, by the qualities which the previous owner had a right to attach to them."

But I note the following passage further on citing Pearson v Spencer [1863] 3 B&S 761:

> "In delivering the judgment of the Exchequer Chamber, Erle, J., stated that the judgment of the court below was upheld on the construction and effect of the Will taken in connection with the mode in which the premises were enjoyed at the time of the Will. He said that the case fell under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that part of it involves a necessary dependence, in order to its enjoyment in the state it was when devised, upon the adjoining tenement.
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> Upon the facts of the case, the courts held that the way passed under the Will. The ground of this decision applies to the present case. The house devised to the persons through whom the plaintiffs claim, contained windows so constructed as to involve a necessary dependence, in order to its enjoyment of light, upon the adjoining tenement. Light is an apparent continuous easement."

It can be seen therefore that different streams of authority point to the test being one of necessity for the reasonable enjoyment of the property. See also Briggs v Simmons [1890] O.J. 178. See also Theobald on Wills 16th Edition and Gale on Easements 19th Edition. See also Practitioners Guide to Wills 3rd Edition at 24.8.3.

[20] Sharkey v Secretary of State for the Environment [1991] 62 P.C.R. 126 is a case relating to compulsory purchase and therefore of limited application. But I note Roach J found that the word "required" in Section 112(1)(b) of the Town and Country Planning Act 1971 means that the land is needed for the accomplishment of one of the activities or purposes set out in this section. It is not enough that compulsory acquisition is desirable. I remind myself that the word used in Clause 4 here is "required". It is not "existing" or "customary" or "convenient". The court is obliged to address the plain and ordinary meaning of the word which in this context is obviously close to that of a necessity and certainly not less than necessity for reasonable enjoyment.

[21] Bee v Thompson [2010] Ch 4112 is authority justifying Mr Girvan's wise concession that the right of way his clients seek would, at its highest, be confined to agricultural use. Anything more would be excessive. However agricultural use includes substantial livestock and at times of the year vehicles and can constitute a significant impact on the adjoining dwelling. Mr McEwan for the first defendant points out that the right of way sought by the plaintiffs involves a quite narrow and awkward turn to gain access to the field at the rear of the house and that insistence upon it in his submission is somewhat irrational.

[22] Counsel for the plaintiff relies on the decision of Girvan J, as he then was, in Close v Cairns [1997] NIJB 70. Counsel helpfully obtained a map of the relevant folios to assist in following the judgment of the court relating to a putative right of way. I have come to the view that the Close case is not on all fours with the factual situation before me. It is right to say that the judge did find a right of way to a back field which was not completely landlocked because it could be reached across another field as here. He did find as a fact that that right of way had been in use as a quasi easement before the property was divided. However the case differs from the facts before me in that the right of way was along a designated lane between fields rather than as here. Furthermore the laneway was indisputably subject to another right of way going to a landlocked property at Folio 23133 further away from the public road. That folio had not been in the ownership of the predecessor in title of either party in Close v Cairns. Of most importance the right of way lane in question, although going reasonably close to the dwelling house at Folio 45302, is clearly of a very different character from the immediate proximity to be found here.

[23] I note that His Lordship cited with approval a decision of Farwell J in Todrick v Western National Omnibus Company Limited [1934] Ch. 190. In that decision Farwell J held that:

> "In judging whether there is an excessive user of the right regard must be had to the circumstances of the case, the situation of the parties and the situation of the land."

While that relates to excessive user it does seem to me that in general principles the court must in interpreting this agreement look at the factual context or matrix in which it is placed.

Conclusions

[24] I have had the benefit in this case not only of maps and photographs but oral evidence from a number of witnesses as to the reasonable enjoyment of these lands. I have had the benefit of considering the demeanour of those witnesses. I have come to the conclusion that Clause 4 of the Will does not accord to the plaintiff a right to proceed across the first defendant's land. There is no physical requirement for the plaintiff to use that path or usage, although it was used by the conacre tenants before. In the ordinary meaning of the word "required" it is not required here, because the plaintiff has an equally good access to field 2 close by and from that an easy access to field 3.

[25] To approach the matter in the alternative way it is not necessary for the reasonable enjoyment of the fields left to the plaintiff to require the first defendant to submit to an agricultural user through her own property and so close to her own dwelling house.

[26] It is interesting and relevant to note that the plaintiff has continued to let these lands. This has now continued for nearly seven years but they have not felt obliged themselves to give up the letting of field 3 or fields 4 and 5. To get to fields 4 and 5 it is necessary to cross field 2. That is to the same effect as crossing to field 3. The evidence before me did not persuade me of any necessity of this kind to go through No. 30. It included evidence of the poor state of the hedgerow between fields 2 and 3. Indeed the evidence was that without wire running through that hedgerow animals could pass freely from field 2 to field 3.

[27] The first defendant's case here is strengthened by the fact that the right of way sought by the plaintiff is not the most sensible right of way along the eastern strip of the first defendant's property from the road to field 3 and field 2. That would have required the opening of a new gateway on the public road, which, I was told, the planning authorities would not accept. It was commendable of those concerned to seek a compromise along those lines. Given that that is not available, however, the plaintiff is in my view not left with any right to traverse the first defendant's property. It is not a right required or necessary for the use of or reasonable enjoyment of the lands adjoining the dwelling at 30 Colman Avenue. I therefore find in favour of the first defendant in this issue. I also, inevitably therefore, find in favour of her on her right to remain an executrix of the estate.