THE HIGH COURT
PROBATE

[2021] IEHC 117
[Record No. 20/9671]

IN THE MATTER OF THE ESTATE OF PATRICK JOHN MANNION LATE OF KILLORAN, BALLINASLOE, COUNTY GALWAY, DECEASED

AND IN THE MATTER OF AN APPLICATION BY VIRGINIA GUADIANO, OF 7870 TRIPLE OAKS DRIVE, SAN ANTONIO, TEXAS 78263, UNITED STATES OF AMERICA

JUDGMENT of Mr. Justice Allen delivered on the 22nd day of February, 2021

Introduction

1. The ingenuity of testators – I use the word in its loosest sense – when applying themselves to making their wills is often remarkable. In *Dixon v. Treasury Solicitor* [1905] P. 42 Gorell Barnes J. characterised what the testator in that case had done as "… *just one of those stupid acts without which this court might almost cease to exist*." That might be thought to have been a little harsh on the deceased but as I will explain, it was not at all intended to be gratuitously offensive either to the deceased in that case or to testators in general. Moreover, the same short sentence accurately conveys that the probate judges have long and varied experience of the eccentricity of testators, and of the resolution of problems thereby created.

2. On this application I have had, besides, the very valuable assistance of Mr. Hourican who prepared a written submission that was comprehensive as well as concise and who made a focussed oral presentation.

The facts

3. Patrick John Mannion, late of Killoran, Ballinasloe, County Galway, died on 3rd September, 2017, aged 82 years. He was a Roman Catholic priest, who died a bachelor without issue or parent surviving him, survived by two siblings and three children of a pre-deceased sibling.

4. Fr. Mannion was born in Ireland and was an Irish citizen. He served as a parish priest in San Antonio, Texas, between 1989 and 2007, when he returned to Ireland.

5. In about the middle of 1997 Fr. Mannion asked his friend Ms. Virginia Guadiano whether she would be willing to act as his executrix and (Ms. Guadiano having given her assent) shortly after handed to her, for safe keeping, an original form of will dated 11th June, 1997, together with a document called a "*Self-proving affidavit*". At the same time Fr. Mannion gave a copy of the will and affidavit to Ms. Guadiano's daughter, Ms. Maria Guadalupe (who informally is called Lupe) Beckett.

6. The 1997 will was slightly unusual. All the appearances are that Fr. Mannion prepared it himself. Ms. Guadiano, who knew him well, believes that this would have been his preference, to avoid the expense of an attorney. The will comprised five typed pages, each marked "*PAGE ONE [TWO, THREE, FOUR, FIVE] OF MY LAST WILL*", and on each of which Fr. Mannion signed his name. Peculiarly, the font on the third page is different to the font on the other four pages but that page is marked "*PAGE THREE OF MY LAST WILL*"

and the text continues the section and paragraph numbering on the previous page. The attestation clause on page four shows that it was signed by Fr. Mannion in the presence of Raul Hernandez and Juan Martinez, who signed as witnesses in his presence and in the presence of each other. The self-proving affidavit was an affidavit signed on the same day by Fr. Mannion and the two witnesses before Ms. Margarita Lozano, notary public.

7. The 1997 will provided that it had been drawn and executed in the State of Texas and that all questions concerning its validity and the meaning and intention of any of its terms should be determined in accordance with the laws of that State. The affidavit of Mr. Kyle Robbins, attorney at law, of Austin, Texas, shows that the requirements for due execution of testamentary documents in Texas are the same as those that apply in Ireland. Mr. Robbins also explains that under Texan law a self-proving affidavit is attached to a will after it has been executed as a formal confirmation that it was properly executed in accordance with law and allows the will to be proved there without, he says, testimony or evidence from the witnesses, but I think that he likely means without any other such evidence.

8. The due execution and witnessing of the will is confirmed by the affidavit of Mr. Raul Hernandez, who was shown a copy if it in about June, 2020 and remembered the circumstances in which the original had been signed and witnessed. The authenticity of the copy of the 1997 will was confirmed by the affidavit of Ms. Beckett who when she was given the copy saw the original and noticed at that time that the third page was in a different font and who confirmed the provenance of the copy exhibited by her mother.

9. The Hague Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions was transposed into Irish law by s. 102 of the Succession Act, 1965. This provides that a testamentary disposition is valid as to its form if it complies with the internal law of either the place where the testator made it or of a nationality possessed by the testator, either at the time when he made the disposition or at the time of his death, or of the place in which the testator had his domicile. I am satisfied that the 1997 will was duly executed in accordance with the requirements of both Texan law and Irish law and that the copy will now before the court is a true copy of the original.

10. In his will dated 11th June, 1997 Fr. Mannion made his intentions very clear. He left any motor vehicles he might own at the time of his death and his Kimball upright piano to the Presentation Sisters of the Blessed Virgin Mary at Bexar County, San Antonio, Texas. He gave his books to Ms. Guadiano. And he gave the remainder of his estate to the Missionaries of Charity at 335 East Street, Bronx, New York.

11. Fr. Mannion retired in 2007 and returned to Ireland. Before doing so he collected his original will from Ms. Guadiano, at which time he told her that he intended to replace her as executrix with his nephew, Mr. Michael Shields. He did not at that time recover from Ms. Beckett the copy he had given to her.

12. Mr. Shields had a close relationship with his uncle. He confirms that Fr. Mannion returned to Ireland in 2007 but it was not until April, 2014 that he was asked and agreed to act as

executor. Fr. Mannion then handed Mr. Shields a sealed envelope which he said contained his will and asked that the envelope not be opened until his death. The envelope is a reused manila envelope to which white adhesive tape has been stuck, upon which is printed, in large capital letters, "*LAST WILL, FR. J. J. MANNION*" and was sealed with white adhesive tape.

13. When, after his uncle's death, Mr. Shields opened the envelope he discovered that it contained two documents. The first document was a typed A4 page entitled "*When I die*" with a list of names and contact details. The other was what the applicant in her affidavit describes as a curious document and what her solicitor in his correspondence described as a confection. It is not absolutely clear when this document was created but since it was given to Mr. Shields in 2014 I will refer to it as the 2014 document.

14. The 2014 document is described in the grounding affidavit as a five page document but there are six sheets of paper, stapled together. The first five pages are each marked, as the pages in the 1997 will were marked, *"PAGE ONE [AND SO ON] OF MY LAST WILL"*. In common with the 1997 will, the first five pages of the 2014 document are signed at the end of each page by Fr. Mannion. Unlike the 1997 will, at the end of each of the first four pages of the 2014 document, beside Fr. Mannion's signature, are the initials "*JM*" and "*RH*". Mr. Juan Martinez has since died but Mr. Raul Hernandez has sworn that he does not believe that he initialled those pages and that he does not recognise the initials "*R.H.*" as his writing. The sixth page of the 2014 document is a photocopy of the self-proving affidavit dated 11th June, 1997.

15. The 2014 document follows the format of the 1997 will, being divided in the same sections and obviously based on the same template. The first three pages are photocopies, but they are not photocopies of the first three (or any) pages in the 1997 will. There is no evidence forthcoming as to what might have happened to the original three pages. The first and second pages are in the same font as each other, but a different font to the third page.

16. On the first page of the 2014 document (as he had on the first page of the 1997 will) Fr. Mannion describes himself as resident and domiciled in San Antonio, Bexar County, Texas, and as an ordained priest of the Archdiocese of San Antonio, Texas. There is a revocation clause. Mr. Michael Shields is appointed as executor with Mrs. Claire Shields O'Driscoll as successor or substitute.

17. The second page of the 2014 document has the same boilerplate directions to the executor as the 1997 will and goes on to give any motor vehicles, if any, that might be owned by Fr. Mannion at the date of his death and his upright piano to Mr. Shields; all of Fr. Mannion's books to anyone who wishes to have them; and (at the top of the third page) the remainder of his estate to the Missionaries of Charity at East 145 Street, Bronx, New York or in Ireland at Missionaries of Charity, 223 South Circular Road, Dublin 8.

18. The third page of the 2014 document has the same boilerplate *"Additional Powers and Guidance for my Executor"* as the 1997 will and is – surprisingly is the wrong word, I will say coincidentally – in the same font as the third page of the 1997 will.

19. The fourth page, which has the first part of the attestation, and which bears Fr. Mannion's signature, appears to be the original of what was the fourth page of the 1997 will and so to be his original signature, but the page has been embellished by the addition, beside Fr. Mannion's signature, of the initials "*J.M*." and "*R.H.".* This page on its face suggests that the document was executed on 11th June, 1997.

20. The fifth page of the 2014 document, which is the second part of the attestation, is a photocopy of what previously was the last page of the 1997 will. It has the signatures of the two witnesses but because it is a photocopy, it bears only copies of the signatures of the attesting witnesses.

21. The applicant suggests that *"the indications are*", and I accept that the irresistible inference from the plight and condition of the 2014 document is, that Fr. Mannion, having returned to Ireland, decided to change his will in the manner appearing in the first three pages of the 2014 document but rather than making a new will, he replaced the first three pages of his 1997 will by stapling them to the original penultimate page of his will and a photocopy of the last page and of the self-proving affidavit, in the hope that the whole would be carried by his original signature. I am satisfied that Mr. Shields received and kept safely the envelope given to him by Fr. Mannion and that it was Fr. Mannion who put the enclosed document together. I can only think that the initials of the witnesses were added at the end of each page in the belief that they might add verisimilitude what Fr. Mannion was trying to do.

22. Whatever Fr. Mannion may have hoped when he sealed the envelope which he gave to Mr. Shields in April, 2014 – and I will need to come back to that, for it is on his intention at that time that the case must turn – it was fairly obvious when the envelope was opened that it was not a valid will. It was, however, apparent that Fr. Mannion had made a will in Texas on 11th June, 1997. The papers now before the court do not disclose how he did it, but Mr. Shields tracked down Ms. Guadiano and, presumably through Ms. Guadiano, Ms. Beckett who still had the copy of the 1997 will which she had been given and the application now before the court is a motion on behalf of Ms. Guadiano, as executrix of the 1997 will, supported by Mr. Shields, for an order admitting that will to probate in the terms of the copy of the first three and the fifth pages of the copy that has come from Texas, and the original fourth page which was part of the mélange later created by Fr. Mannion, disregarding the initials later added to it.

23. In the meantime, I should have said, from an abundance of caution, extensive enquiries were made by Mr. Shields' and the applicant's solicitor with all of the solicitors in the locality where Fr. Mannion lived, with the diocesan offices of Galway and Clonfert, and by advertisement, to ascertain whether the deceased might have left any other testamentary documents. Given that Fr. Mannion had – I think that the best way of describing it is – put together two wills without legal assistance and entrusted the 2014 document as his

will to Mr. Shields, I am satisfied that any possibility that there may be any other testamentary document is extremely remote.

24. Fr. Mannion's estate comprised a motor car, a piano, and two bank deposits, one in Ireland and the other in Texas. Mr. Shields arranged for the car to be sold and has safely kept the proceeds for the benefit of the estate. It is unclear what became of Fr. Mannion's piano. I infer from the fact that it was described in the 2014 document simply as his upright piano that he may have left his Kimball piano behind in Texas. I am confident that whichever of the Presentation Sisters in Texas or his family in Ireland to whom it might have technically have devolved would be more than happy if it has found a good home.

The application

25. Fr. Mannion, as I have said, was survived by two siblings, and by three children of a predeceased sibling. All were given formal notice of the application. One only, Ms. Aine Cunningham, appeared. Ms. Cunningham was interested to follow the application and did, but she did not oppose it. As an afterthought, the papers were sent to the Charities Regulator and the Missionaries of Charity in South Circular Road but any interest on the part of the sisters in South Circular Road could only have been founded on the validity of the 2014 document, which was an impossibility.

26. The issue on this application is not whether the 2014 document was a valid testamentary document but whether the 1997 will was revoked.

Proper law

27. The 1997 will was made in Texas and provided that any question as to its validity was to be determined in accordance with Texan law but the question to be decided is not whether that will was valid – which when it was made it clearly was – but whether it was later validly revoked. Although the validity of that will is governed by Texan law, the question whether it was revoked is to be determined by the law of the testator's domicile. See: *Dicey, Collins & Morris, Conflict of Laws* (15th Ed.), para. 27R-086).

28. Fr. Mannion was born in Ireland and so had an Irish domicile of origin. If any question might have arisen that at any time during his time in Texas he might have acquired a domicile of choice there, it is clear that when he returned to Ireland in 2007 he did so with the intention of permanently residing here. While the evidence is not absolutely clear as to when the 2014 document was created, it is clear that Fr. Mannion recovered his 1997 will shortly before he left Texas and I find that whatever happened to it happened in Ireland. There being no immovable property, it does not immediately matter where what was done was done but rather the question is where Fr. Mannion was domiciled when he did what he did. I am satisfied that that was done was done after he had abandoned any domicile of choice that he might have acquired and resumed his domicile of origin. I am satisfied on the evidence that at the relevant time Fr. Mannion was domiciled in Ireland so that the question whether his will was revoked depends on Irish law.

Legal principles

29. Section 85(2) of the Succession Act, 1965 provides that:-

> *"… no will, or any part thereof, shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed, or by the burning, tearing, or destruction of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it."*

30. The 2014 document contained a revocation clause, but it was not a valid will duly executed and so there is no question that the 1997 will was revoked by the 2014 document. However, the evidence is that the original will came into the possession of Fr. Mannion in 2007 and it was not to be found after his death.

31. The applicable law in such circumstances was set out by Kenny J. in *In the Goods of Coster, deceased* (Unreported, Supreme Court, 19th January, 1979) as follows:-

> *"When a testatrix makes a will and retains the original or subsequently comes into possession of it and it cannot be found after her death and there is no evidence to show what has become of it, there is a presumption that she has destroyed it with the intention of revoking it. This presumption, which was applied in the ecclesiastical courts before 1857, is of ancient origin. It is however a presumption only and not an absolute rule so that it can be rebutted. Thus the occurrence of a fire at the testatrix's home or the character or the deceased's custody (see the judgment of Chief Justice Cockburn in Sudgen v. Lord St. Leonard (1976) 1 Prob. Div. 154 at p. 217) or the possibility of a disappointed beneficiary having removed the original will have to be taken into account as matters which may rebut the presumption."*

32. Kenny J. went on to quote what he said was the classic statement of the rule in the advice of the Privy Council in *Welch v. Phillips* (1836) 1 Moore's P.C. 229 which emphasised that the onus of proof in such circumstances was undoubtedly on the party propounding the will.

33. In this case, Mr. Hourican submits that the presumption of revocation can be displaced by the application of the legal doctrine of dependant relative revocation.

34. This doctrine is explained by the authors of a leading English textbook which in its 13th Edition is called *Parry and Kerridge: The Law of Succession* at para. 7-39 as follows:-

> *"Revocation of the whole or part of a will or codicil by destruction, or by another will or codicil, or by duly executed writing requires an intention to revoke. The testator's intention to revoke may be absolute or conditional. If it is absolute, revocation takes place immediately. If it is conditional revocation does not take place unless the condition is fulfilled. Often the condition makes revocation dependent upon the validity of another will or codicil and this conditional revocation has in the past been referred to as the doctrine of dependent relative revocation…*

Whether the testator's intention to revoke is conditional is a question of fact where revocation is by destruction, and evidence as to the testator's declarations of intention is therefore admissible."

35. It may better be explained by example. I referred earlier to the case of *Dixon v. Treasury Solicitor* [1905] P. 42. A man called James Alexander Shaw, who had no family, made a will on 7th July, 1894. In early February, 1904 he sent for his solicitor who brought with him the 1894 will. There and then, in the presence of his horrified solicitor, Mr. Shaw cut his signature from the will using a pair of scissors and erased parts of it, explaining that he wished to cancel the will as he intended to make a new one. The solicitor took instructions for the new will and prepared a draft, but the deceased died on 8th February, 1904 without having executed it. The executor, Mr. Dixon, propounded the will. The Treasury Solicitor, representing the interests of the Crown – who would have succeeded to the estate on intestacy – made the case that the will had been revoked by destruction. The case turned on the intention of the testator. Specifically, the question was whether the acts of revocation were accompanied by an intention to make a new will and so were conditional on a new will being executed. Gorrell Barnes J. left two questions to the jury, (1) whether the testator cut his signature off the will with the intention of revoking it, or (2) whether he had done so with the intention that the will should be revoked conditionally on his executing a fresh will. The short report of his charge to the jury makes it clear what the judge's view was and his dismissal of the testator's acts as foolish and commonplace appears to me to have been calculated to take the harm out of them. The jury answered the questions "*No*" and "*Yes*" and the judge pronounced for the will.

36. An interesting Irish example of the application of the doctrine is *In the Goods of Irvine* [1919] 2 I.R. 485. An application was made to the King's Bench Division of the High Court of Justice in Ireland for a grant in common form of what appeared to be the last will of the deceased dated 5th February, 1914. The document was a printed will form in which the blanks had been filled in in manuscript and on its face appeared to be valid, but the attesting witnesses disclosed that at the time of execution the document consisted only of the printed form. One of the printed clauses was a revocation clause so that the document as executed was if not "*another will or codicil duly executed*" then "*some other writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed*." The deceased had executed a will on 25th June, 1913. If that will was revoked by the 1914 document, he would have died intestate.

37. The issue identified by Kenny J. was whether the revocation contained in the paper executed by the deceased was an absolute revocation or a dependant relative revocation. He found that the attempted revocation in the 1914 document was merely the first act in his design to make a new will; that it was dependant and conditional on a new will being made; and that no new will had been made: and he refused probate.

38. An example of a case in which an argument of dependant relative revocation failed is *In the Goods of John Joseph Walsh, deceased* (1947) Ir. Jur. Rep. 44. The deceased in that case had made his will in November, 1944 and in the following June taken it away from

his solicitors expressing the intention of destroying it and making a new will. He later confided in a friend that he had destroyed his will and discussed making a new one. After his death on 1st June, 1946 an application by his niece for a grant of administration intestate was opposed by those who would have benefited from the will. Haugh J. distinguished *Dixon v. Treasury Solicitor* focussing in particular on the much longer gap in time between the destruction of the will and the death and on the fact that the testator in *Dixon* had given instructions for a new will, which the solicitor had drafted "*but when he came back with it he found his client dead."*

39. Another case in which reliance on the doctrine failed was *In the Goods of Coster, deceased,* to which I have referred. The deceased in that case made her will on 1st October, 1971 and left it with her solicitors but about two years later, on 18th October, 1973 called to collect it. She did not say why she wanted it. After she died on 16th October, 1976 the will was not to be found but what was found among her papers was an uncompleted printed Eason will form which somehow or other had been shown to have been purchased by her between 1st February, 1973 and 31st January, 1974. There was nothing else to rebut the presumption of revocation, so the question was whether the revocation by destruction had been conditional. The Supreme Court decided that it was not. Kenny J. approved of what he said was the pithy summing up of the rule by Lord Justice Roskill in *Re Jones*, deceased [1976] 1 All E.R. 593 at 603 (which like Coster and like this case, was one of mutilation):-

> *"… a mere intention to make a new will, however clearly shown, is not enough in itself, as the authorities show, to make the revocation conditional."*

40. Noting the judgment of Haugh J. in *In the Goods of John Joseph Walsh*, deceased Kenny J. found that the revocation by destruction was absolute and the Supreme Court declared that the deceased died intestate.

Decision

41. The principles of law are well settled. The 1997 will is shown to have come into Fr. Mannion's possession in 2007 and – save as to the fourth page – was not among his papers when he died. The other four pages are presumed to have been revoked. The question is whether the revocation was conditional on the validity of the 2014 document. That is a matter of the deceased's intention.

42. Fr. Mannion's declared intention when he recovered his will from Ms. Guadiano was to appoint a new executor as opposed to make a new will. I think that the intention evident from the 2014 document as to what he intended might become of his motor car and piano were ancillary to that object and dictated by his change of residence. The 2014 document shows that Fr. Mannion then had in mind the Missionaries of Charity in South Circular Road as well as the Bronx but that is not material. The fundamental premise of the doctrine of dependant relative revocation is that which might have been better should not be the enemy of the good.

43. There is no direct evidence as to when the 2014 document was created. The envelope was handed to Mr. Shields long after Fr. Mannion had declared to Ms. Guadiano his intention to appoint him as his executor, but I have the evidence of Ms. Guadiano that the 1997 will was given to her shortly after she had agreed to act as executrix and I have the evidence of Mr. Shields that the envelope containing the 2014 document was given to him immediately after he was asked and agreed to act. To do the same thing twice may not always amount to a pattern, but Fr. Mannion consistently entrusted the original of what he intended to be his wills to his executors. I think it unlikely that Fr. Mannion would have prepared the 2014 document and then kept it for any significant length of time before giving it to Mr. Shields.

44. I accept Mr. Hourican's submission that I can properly have regard to the fact that the original pages of the 1997 will are not only missing but were physically replaced by pages which Fr. Mannion appears to have believed would be entitled to probate. It is, I think, a matter of very considerable significance that page four of the 1997 will not only survived but was central in the manufacture of the 2014 document. Although I have no direct evidence of what happened I think that I am entitled to confidently infer that the deconstruction of the 1997 will and the construction of the 2014 document took place at the same time. Rather than saying that it would not make sense, I will say that I think it unlikely that Fr. Mannion might have destroyed all but the fourth page of the will and then set it aside for use at some indeterminate time in the future for incorporation in whatever alternative will he might decide to make. I am satisfied that the deconstruction of the will and the confection of the 2014 document were contemporaneous and that the two were wholly interrelated. Fr. Mannion went to a good deal of trouble to put the 2014 document together and clearly did not intend to die intestate. I am satisfied that I have sufficient evidence from which I am entitled to infer that Fr. Mannion's intention to revoke his will was dependant on the validity of what he intended would be its replacement.

45. For these reasons my conclusion is that the revocation by Fr. Mannion of his will dated 11th June, 1997 was conditional. The condition of the validity of what was intended to replace it was not fulfilled. No new will was made and the copies of the original pages, with the one original page, are entitled to probate.

46. There is a further element to the application. Ms. Guadiano in making this application has honoured her promise to her friend but declares that she is 87 years of age and not in particularly good health. The administration of the estate will later entail an application in Texas to secure the release to the estate of the bank deposit there in Fr. Mannion's name but will have to start with the extraction of the grant of probate in Ireland. Besides, she says, it was Fr. Mannion's wish that Mr. Shields would administer his estate. Ms. Guadiano asks, with the concurrence of Mr. Shields, for an order pursuant to s. 27(4) of the Succession Act, 1965 appointing him as administrator with will annexed.

47. As to the practicalities of the administration of the estate, I think that at this stage most of what needs to be done in Ireland probably has been done already. While I am entitled to look at the 2014 document as evidence of Fr. Mannion's intention as to the revocation

of his will I think that I would be on extremely thin ice jurisprudentially to have regard to it as his testamentary intention. Nevertheless, Mr. Shields has demonstrated his ability and energy and Ms. Guadiano, who could have simply renounced, has done as much and more as could reasonably have been expected of her. I am satisfied that there are sufficient special circumstances that make it is expedient to order that administration be granted to Mr. Shields.

48. If, in a roundabout way, Fr. Mannion's object that Mr. Shields should administer his estate has been achieved, his object in avoiding lawyers' fees has fairly spectacularly failed. The costs of this application must be borne by his estate.