

Neutral Citation No: [2021] NICH 16

Ref: HUM11592

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

Delivered: 27/08/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF THE ESTATE OF MARY ALICE SMYTH, DECEASED

AND IN THE MATTER OF AN APPLICATION BY JAMES TERENCE  
JOHNSTON AS EXECUTOR OF THE WILL OF MARY ALICE SMYTH,  
DECEASED

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Louise Maguire (instructed by James T. Johnston & Co.) for the plaintiff

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**HUMPHREYS J**

**Introduction**

[1] The plaintiff brings this application in his capacity as executor of the estate of Mary Alice Smyth, who died on 20 February 2017, leaving a Will dated 27 November 1990 ('the Will'). Grant of probate was extracted on 6 April 2018.

[2] The application is brought by originating summons under Order 85 rule 2 of the Rules of the Court of Judicature (NI) 1980 which allows the court to determine any question which may arise in the administration of the estate of a deceased person, including an action to interpret a Will.

**The Will**

[3] The Will makes a number of specific bequests and then, at clause 5, directs that the residue be divided as follows:

*"Thereafter my Executors are to sell and call in and convert all of my estate into cash and from same to pay all my debts, funeral and testamentary expenses and all Capital Transfer Taxes (if any) levied on my estate and thereafter to distribute the net balance between my sister Susan Berry and my brothers*

*Phil Smith and John Smith and Patrick Smith or the survivor  
or survivors of each of them in equal shares"*

[4] There is a spelling mistake in the Will in that the family name is 'Smyth' rather than 'Smith'.

[5] The deceased had four siblings, namely those individuals in clause 5 of the Will. Each of them predeceased her in December 2016, January 2007, November 2006 and March 1999 respectively.

[6] The late Susan Berry was herself predeceased by her husband and her daughter.

[7] The late Phillip Smyth is survived by four children, namely Annamay Rodgers, Gabrielle Carter, Phillip Smyth and Martin Smyth. His spouse predeceased the deceased.

[8] The late John Smyth is survived by six children, namely Peter Smyth, Sean Smyth, Marie Mallon, Vera Smyth, Roseanna Flynn and Margaret Moreno. His spouse also predeceased the deceased.

[9] The late Patrick Smyth is survived by his wife Kathleen Smyth and five children, namely Phillip Smyth, Anita Fossey, Patricia Smyth, Patrick Smyth and Michael Smyth.

### **The Issue for Construction**

[10] The question for determination in this application is what is meant by the phrase "*the survivor or survivors of each of them*" in clause 5 of the Will. There are three competing interpretations:

- (i) The term 'survivor' only relates to the named individuals;
- (ii) The term 'survivor' includes any surviving spouse of the named individuals;  
or
- (iii) The term 'survivor' includes any surviving issue of the named individuals.

[11] If interpretation (i) were to apply, there are no survivors amongst the named siblings and therefore the gift would fail.

### **The Legal Principles**

[12] In *Perrin v Morgan* [1943] AC 399, as approved by Horner J in *Duffin v McElhill* [2016] NICH. 5t, Lord Simon described the exercise thus:

*“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 the particular, what are the ‘expressed intentions of the testator.’”*

[13] In general, words in a Will are to be given their ordinary and natural meaning. Lord Lowry’s guidance in *Heron v Ulster Bank* [1974] NI 44 remains valuable:

*“I consider that, having first read the whole Will, one may with advantage adopt the following procedure:*

- 1. Read the immediately 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 is 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 presumptions 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 and similar words, rarely is binding precedents, since it has been well said that ‘no Will has a twin brother’ but more often as examples (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts.”*

### **The Meaning of ‘Survivor’**

[14] In *Re Douglas’ Will Trusts* [1959] 1 WLR 1212, the testator had provided:

*“I direct my trustees to pay the income from my residual estate to my said wife for her use during her life provided she so long remain my widow and from and after her decease or second marriage whichever shall first happen then I give my estate and effects to my sisters or the survivors or survivor of them...”*

[15] The named sisters all survived the testator but predeceased the widow (who did not remarry). Lord Evershed MR, delivering the judgment of the Court of Appeal, held that since no sister survived the widow, the gift failed and the property in question had to be distributed as upon an intestacy.

[16] In *Re James’s Will Trusts* [1962] Ch. 226 Buckley J construed the words ‘*my surviving children*’ in line with their natural meaning so that only a child who was living at and after the death of a child of the testator could qualify to benefit under the will.

[17] In *Re McFadden, Wright v Dowds* [1963] NZLR 289, a testator gave his residuary estate to trustees to divide it in equal shares between four named siblings. He also directed:

*“If any brother or sister of mine shall die in my lifetime leaving no issue then my surviving brother and sisters shall take in equal shares the share which my deceased brother or sister would have taken had he or she survived me.”*

[18] The testator was survived by two of his named sisters and also two sisters who were not named as beneficiaries. Perry J held that the ‘*surviving brothers and sisters*’ were limited to those named in the will.

[19] The learned editors of *Williams on Wills*, 10<sup>th</sup> Edition, at 67.4 state:

*“In a set of dispositions in favour of several persons and their children and issue, the words may be used in a sense in which the element of survivorship involves not a survivorship between the named persons, but the subsistence of a line of children or issue or of vested estates or interests or the words may be used as meaning ‘others’. Such words may receive one of these constructions where the context requires it, but not otherwise”*

## **Consideration**

[20] The natural and ordinary meaning of a ‘survivor’ of a list of named individuals is someone who remains alive at the occurrence of a particular event. The ‘survivors’ of a plane crash means those individuals who remain alive after the accident, it does not refer to the families of the deceased. Similarly, the survivors of

a list of named beneficiaries means those who are alive at the date of the testator's death.

[21] An examination of the rest of the deceased's Will does not give rise to any need for modification of the plain meaning of the words used. There is nothing in the remaining terms of the Will to indicate that the testator intended to benefit either the spouse or the issue of the named individuals in the event that any of them predeceased her. Had this been the intention of the deceased, it would have been a straightforward exercise to craft a suitable clause in the Will.

[22] In light of the authorities referred to, and the first principles applicable to the construction of wills, I have concluded that in clause 5 of the Will, the phrase '*survivor or survivors of each of them*' refers only to the named individuals.

[23] As a result, the gift fails and gives rise to a partial intestacy of the residuary estate.

[24] It was entirely proper for the executor to have brought these proceedings to have the issue of the proper interpretation of the Will determined. I therefore order that the executor is entitled to his costs from the estate of the deceased on the usual indemnity basis.