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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**20/04/2021**

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 PATRICIA MILLIKEN

AND IN THE MATTER OF ARTICLE 29 OF THE WILLS AND ADMINISTRATION PROCEEDINGS (NORTHERN IRELAND) ORDER 1994

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BETWEEN:

LISA NELSON AS PERSONAL REPRESENTATIVE OF PATRICIA MILLIKEN (DECEASED)

Plaintiff;

and

ROSEMARY McDERMOTT AND BARRY NELSON

Defendants.

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Ms Sheena Grattan (instructed by John Boston & Son) for the Plaintiff

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McBRIDE J

Application

[1] By summons dated 21 August 2020 the plaintiff as executrix of the Will of Patricia Milliken (Deceased) ("the testatrix") seeks:

(i) A determination that on the proper construction of the testatrix's Will and in the events which have happened the dwelling house situate at 19 Ardgreenan Gardens, Belfast ("the house") passes to the plaintiff absolutely and/or an order that the Will of the testatrix be rectified under Article 29 of the Wills and Administration Proceedings (NI) Order 1994 by amending the last paragraph of the Will to include the words underlined as follows:

> "Should however my said sister predecease me or not so survive me by 30 days that I GIVE DEVISE AND BEQUEATH ALL the rest residue and remainder of my estate unto my nieces Lisa Fleming and Rosemary McDermott and my nephew Barry Nelson in equal shares absolutely."

[2] Ms Grattan of counsel appeared on behalf of the plaintiff. The defendants, who are the only beneficiaries under the Will, were represented by Stephen Perrott & Co Solicitors. The defendants did not agree to the distribution which the plaintiff submitted flowed from the proper construction of the Will. After proceedings were issued however the defendants' solicitors by letter dated 3 December 2020 advised as follows:

> "Our clients withdraw their dispute with regards to the interpretation of the deceased's Will and consent to the proposed rectification."

[4] No one appeared at the hearing on behalf of the defendants.

[5] I am grateful to Ms Grattan for her comprehensive and ably crafted submissions which were of much assistance to the court.

Background

[6] The testatrix died on 9 June 2019 leaving a Will dated 27 June 1997, probate in respect of which was granted to the plaintiff, who is a niece of the testatrix. The defendants are a niece and nephew of the testatrix.

[7] The deceased's Will was drafted by Caroline Boston, solicitor of John Boston & Co Solicitors. By her Will the testatrix appointed the plaintiff as her sole executrix. The relevant part of the Will provides as follows:

> "I appoint my niece Lisa Fleming … to be the sole executrix of this my Will … I GIVE, DEVISE AND BEQUEATH my dwelling house at 19 Ardgreenan Gardens, Belfast unto my sister Valerie Wilhelmina Wade for her life and after her death to my said niece Lisa Fleming. All the rest, residue and remainder of my estate I give, devise and bequeath unto my said sister Valerie Wilhelmina Wade should she survive me by 30 days.
>
> Should however my said sister predecease me or not so survive me by 30 days then I give, devise and bequeath all my estate unto my nieces Lisa Fleming and Rosemary

> McDermott and my nephew Barry Nelson in equal shares absolutely."

[8] In the events which have happened the testator was predeceased by her sister Valerie Wilhelmina Wade who died on 14 December 2017.

[9] The estate is a relatively modest estate consisting of the house which is valued at £140,000 less a very small mortgage. Otherwise the residuary estate consists of approximately £42,000.

Issue for determination

[10] The question for the court is whether the plaintiff takes an absolute interest in the house or whether the house falls within the final clause of the Will and is to be distributed equally between the plaintiff and the defendants.

[11] As the plaintiff now relies on rectification only, it is unnecessary for the court to determine whether the issue raised in the originating summons is one of interpretation or of rectification. The court therefore proceeds on the basis that the plaintiff fails on the interpretation argument.

Consideration

[12] Rectification is a form of relief which involves "correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect the [parties'] true agreement" – *Agip SpA v Navigazione Alta Italia SpA (the Nia Genova and the Nia Superba)* [1984] 1 LR Rep 353 at 359.

[13] Under Article 29 of the Wills and Administration Proceedings (NI) Order 1994 the court has been granted a statutory power to rectify a Will.

[14] Article 29 which is headed "Rectification of Wills" provides as follows:

> "(i) If a court is satisfied that a Will is so expressed that it fails to carry out the testator's 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."

[15] The ambit and meaning of Article 29 has been considered in a number of cases in this jurisdiction namely *Re Heak* [2001] Ch 14, *Brown v Alexander* [2004] NICh 5 and *Quinn & Donnelly v Hanna* [2017] NI Masters 6. The equivalent English

provision has also been the subject of a number of High Court decisions and a decision of the Supreme Court in *Marley v Rawlings* [2015] AC 129.

[16] In *Re Segelman (Deceased)* [1996] Ch 171, at page 180 paragraph (d), [which comments were expressly approved by Girvan J in *Re Heak*], Chadwick J said of the equivalent English provision, that it requires the court to examine three questions:

> "First, what were the testator's intentions with regard to the disposition in respect of which rectification is sought? Secondly, whether the Will is so expressed that it fails to carry out those intentions. Thirdly, whether the Will is expressed as it is in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given instructions in connection with this Will to understand those instructions."

[17] The burden of proof in respect of all of these three matters rests upon the plaintiff. The standard of proof is the balance of probabilities.

Question 1 – The Testator's Intentions

[18] In order to answer this question the court must admit extrinsic evidence of the testator's intentions with regard to the relevant dispositions. See *Re Segelman Deceased* at paragraph 180 E.

[19] The only evidence of the testator's intentions in the present case consisted of the grounding affidavit of the plaintiff sworn on 17 August 2020 and an affidavit sworn by Ms Boston, solicitor, on 8 March 2021 which was augmented by Ms Boston's oral evidence.

[20] In her grounding affidavit the plaintiff at paragraph 6 referred to the close relationship she enjoyed with the testatrix. She stated as follows:

> "I was particularly close to the testatrix as we spent considerable time together when I was a child. I lived with her from 1979, when my father died, until I got married in 1990. In fact, I considered the testatrix to be a mother to me – for example, she attended all the parent evenings at the school and was the one who encouraged me with my studying. The testatrix even paid for my wedding. When my children arrived the testatrix was a fantastic help and support. The testatrix was always there for me helping me with the children at all times particularly when I had four small children under the age of 5 years old. We saw at least 3 times per week and spoke on the telephone every day. The testatrix kept my

> children overnight and some weekends and the children would have taken turns to stay with her over the summer holidays. She treated them like her grandchildren paying for school trips and caring for them. In later years I was able to give the testatrix support in return and when she came out of hospital for what was to be her last Christmas she moved in with me. In contrast the testatrix had little or no contact with the defendants."

[21] Ms Boston in her affidavit evidence, her statement and oral evidence stated that it was her clear understanding that the testatrix's intention was to leave the house to the plaintiff after her sister's death. Although Ms Boston could not recollect at this remove a detailed conversation with the testatrix she stated that she was confident that this was the testator's intention and this was confirmed in the way in which the Will had been drafted by her. The earlier clause in the Will as drafted showed that the testator intended the plaintiff to be the absolute owner of the home after her sister died. If this had not been the testatrix's intention Ms Boston indicated that this earlier clause in the Will would have been drafted very differently and that it would have stated that after her sister's death the house was then to be left equally between the plaintiff and the two defendants. Ms Boston also gave evidence that the Will followed her normal drafting practice whereby she firstly dealt with the appointment of executors and payment of debts and funeral expenses; secondly dealt with specific bequests and thirdly and finally dealt with the residuary estate. In this case she had followed this structure but had inadvertently omitted to insert the words "rest, residue and remainder" before the word estate in the last clause of the will. She submitted that this was a clerical error on her part as the last clause was always the residuary clause.

[22] Unfortunately, Ms Boston did not keep any notes of the testatrix's instructions or an attendance note. As a result she found it difficult to recollect precise details of any conversations she had with the testatrix. Although the absence of attendance notes does not mean the court is unable to make a conclusion about the testatrix's intention (See *Re Heak (deceased)* [2002] NIJB 20 per Girvan J at page 21 D and 23 E), the court reminds practitioners of the importance of making detailed attendance notes. They not only assist solicitors as an aid memoire and the court in forming a view about a testator's instructions and intentions but in many cases they may obviate the need for proceedings to be issued.

[23] On the basis of the uncontroverted evidence of the plaintiff and the affidavit and oral evidence of Ms Boston I am satisfied that it was the testatrix's intention to leave the house to the plaintiff absolutely after the death of her sister and that it was her intention that the residue of the estate was to be divided equally between the plaintiff and the two defendants.

Question 2 – Did the Will as so expressed fail to carry out the testatrix's intentions

[24] The defendants have consented to rectification and the plaintiff has elected to proceed on this ground in light of the overriding objective. Accordingly, it is conceded by all parties that the Will as so expressed failed to carry out the testatrix's intentions. On the basis of all the evidence I am satisfied that, in failing to insert the words "rest, residue and remainder", the solicitor failed to give effect to the testatrix's true intentions.

Question 3 – Was the Will expressed as it was in consequence of a clerical error?

[25] The case law in respect of what sort of error constitutes a clerical error has been helpfully summarised by David Hodge QC, Rectification: The Modern Law on Practice Governing Claims for Rectification and Mistake (2nd Edition, 2016 Sweet & Maxwell).

[26] He summarises the existing position as follows at paragraph 8.48:

> "The expression 'clerical error' is not one with a precise or well-established, let alone a technical, meaning. A clerical error occurs when someone, who may be the testator himself or his solicitor or a clerk or typist introduces words into (or omits words from) a Will without intending to do so, or without applying his mind to their significance or effect. A mistake arising out of office work of a relatively routine nature, such as wrongly preparing, filing, sending or organising the execution of a document, can also properly be called 'a clerical error.'"

[27] In *Marley v Rawlings* Lord Neuberger at paragraphs 75 and 76 dealt with the meaning of what constituted a 'clerical error' as follows:

> "75. I accept that the expression "clerical error" can have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. However, the expression is not one with a precise or well-established, let alone a technical, meaning. The expression also can carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document (save, possibly, to the extent that the activity involves some special expertise). Those are activities which are properly be described as "clerical", and a mistake in connection with those activities, such as wrongly filing a document or putting

> the wrong document in an envelope, can properly be called 'a clerical error.'
>
> 76. For present purposes, of course, "clerical error" is an expression which has to be interpreted in its context, and, in particular on the assumption that section 20 is intended to represent a rational and coherent basis for rectifying wills. While I appreciate that there is an argument for saying that it does nothing to discourage carelessness, it seems to me that the expression "clerical error" in section 20(1)(a) [the English equivalent of Article 29] should be given a wide, rather than a narrow, meaning."

[28] In both *Heak* and *Brown* the High Court of Justice in Northern Ireland has held that 'clerical error' includes material which has been omitted or included inadvertently.

[29] I am satisfied that the omission of the words relating to residuary estate arose from inadvertence on the part of Ms Boston. I accept that the structure of the Will is such that Ms Boston dealt with the specific legacy of the house in the early part of the Will and the last clause was therefore intended to deal with the residuary estate. When setting out the last clause however Ms Boston inadvertently referred to estate rather than the residuary estate. I am satisfied that such an error constitutes a clerical error for the purposes of Article 29.

Conclusion

[30] I am satisfied that all three tests under Article 29 are met in the present case. Article 29 is drafted in discretionary terms in that it "may" order that the Will shall be rectified. The extent and nature of the statutory discretion, if any, has not been the subject of direct judicial consideration, so far as I could ascertain, although there have been some obiter dicta in respect of it. I consider that Article 29 gives a discretion to the court not to order rectification. In my judgment the extent and exercise of the statutory discretion is the same as the court's discretion to grant or refuse rectification under its inherent equitable jurisdiction. On that basis I consider that there are no grounds upon which I ought to exercise my discretion not to rectify the Will. Accordingly, I accede to the application to rectify the Will. I order that the terms of the Will be rectified in accordance with the draft order annexed.

Costs

[31] The plaintiff is not seeking costs to be borne by the testatrix estate. In addition, the plaintiff is not seeking costs from the defendant. In the circumstances I make no order as to costs.