FLYNN
GIBB v Fl

1981 NO. 116, SP
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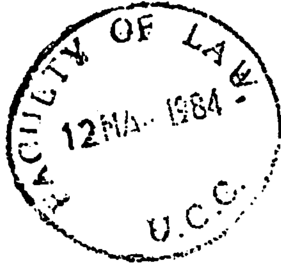
IN THE MATTER OF JOHANNA FLYNN DECEASED

MATTHEW GIBB AND ANOTHER



-v-

JAMES FLYNN AND OTHERS

Judgment of Mr. Justice Barron delivered the 21st day of DECEMBER 1983.

By her Will dated the 22nd August, 1977 the testatrix devised free from estate duty to her half brother the first-named defendant absolutely "her freehold land amounting to approximately 6 acres at Balheary, Swords, County Dublin, Eire." She further provided that estate duty should be payable out of her residuary estate. The testatrix died on the 18th September, 1979. Since in or about the year 1954 she had owned approximately 13 acres of land at Roscall, County Dublin which was situate approximately three miles from Balheary. She had never at any time owned any lands at Balheary nor any other lands in Ireland. Both at the date of the making of her Will and at the date of her death, estate duty so far as it was material had been replaced by inheritance tax. Two questions arise for determination. They are:

(1) Whether the lands as Roscall pass under the devise of the lands at Balheary; and

(2) If they do, whether the inheritance tax payable in respect of the lands so devised is payable by the devisee or out of the residue.

An immediate issue arises as to the extent to which extrinsic evidence is admissible to determine these questions. It has been submitted that the admission of such evidence is authorised by Section 90 of the Succession Act 1965 to assist in resolving the problems which have arisen in the present case. Upon the first question there is extrinsic evidence which I accept that the deceased intended the first named defendant to take her lands in County Dublin. As I can resolve this question without this evidence I do not propose to give any weight to it. Upon the second question the only evidence was directed to explaining why the testatrix had included references to estate duty in her 1973 Will. However, as the 1973 will contained a material proviso which did not appear in the 1977 will, this evidence, even if admissible to construe the 1973 will, would have been of no assistence to construe the 1977 will. For these reasons, and because there is no extrinsic evidence to the contrary, for the purposes of this case it is not necessary to consider the effect of the section.

The evidence in relation to the first question shows that the testatrix's brother John and his wife Ellen had farmed a residential holding at Balheary, Swords, which was the property of Ellen. John added to this holding by buying approximately 13 acres of land at Roscall, Ballyboughal, which was approximately three miles away. Following the purchase of this land, it was farmed as a unit with his wife's lands. The testatrix had stayed from time to time with her brother and his wife at Balheary. On his death in 1953, John left his lands at Roscall to his three sisters including the testatrix, who bought out the interests of her two sisters. From then until her death these lands were managed for her by agents and let on conacre lettings. The lettings for the last four years prior to her death have been adduced in evidence. They show that the lands comprised 8 Irish acres and were let at a rate per Irish acre.

From the time that the testatrix became entitled to these lands she made a total of eight Wills including her last Will dated the 22nd August, 1977. At the time of making of each of these Wills the testatrix was resident in London. The first six Wills were prepared for her by her Dublin Solicitors. The framework of each of these Wills is the same. Each contains the appointment of her Solicitor as

her executor followed by a gift of land in County Dublin followed by various pecuniary legacies and finally followed by a residuary bequest. In each of these six Wills, there is a gift of land in County Dublin described as "my land containing 13 acres approximately at Roscale, Ballyboughal, County Dublin." In 1973 and 1977 the testatrix's Wills were prepared for her by her English Solicitors. The general framewor of these Wills is similar to that of the six Irish Wills. In each of these Wills there is a gift of land in County Dublin described as "my freehold land amounting to approximately 6 acres at Balheary, Swords, County Dublin." Her English Solicitor gave evidence to the effect that this description of the land was supplied by the testatrix herself. This is corroborated by a note in the handwriting of the deceased written not later than 1973 in which she describes the lands as being at Balheary.

The testatrix appointed her English Solicitors her executors under her 1973 Will. Following the execution of this Will her Solicitors in London wrote to her Solicitors in Dublin to notify them that the testatrix had recently executed a new Will which amongst other things had devised an area of some six or seven acres of land owned by her at Balheary, Swords, County Dublin. In the same letter, they asked th

Dublin Solicitors to let them have the deeds. The Dublin Solicitors replied by letter dated the 20th November, 1973 to the effect that the title deeds were lodged with the Bank. This letter described the lands as being the lands at Roscall near Swords, County Dublin and enclosed a photocopy of the conveyance to the testatrix. Neither Solicitor appeared to notice the discrepancy in the description of the lands and both appear to have been of the belief that they were referring to the same lands.

This evidence does not explain why the testatrix thought that she had only 6 acres of freehold land at Balheary instead of 13 acres at Roscall although it does give an explanation for her belief that her lands were at Balheary. Nevertheless, once it is clear that she only had one holding of lands and that she had had it for over 20 years, and had correctly described it in 6 Wills, it would be perverse to hold that she intended to dispose of some other holding of land by her last two Wills. The proper construction of the specific devise is that it passes the lands at Roscall.

The evidence in relation to the second question is wholly negative. There is no evidence that the testatrix knew that estate duty had ceased to be payable nor is there any evidence that she knew

that inheritance tax had been imposed or the basis upon which it was chargeable. It is argued that since there is a clear gift of estate duty, this must be intended to be a gift of the duty which took its place. If this argument is to succeed, it must be because such a construction must be implied.

Section 65 of Capital Acquisitions Tax Act 1976 was enacted to deal with the problems which might arise by reason of references whether in Wills or other documents to duties no longer payable as a result of the imposition of inheritance tax. This section is as follows:-

"In so far as a provision in a document refers (in whatever terms) to any death duty to arise on any death occurring on or after the first day of April, 1975 it shall have effect as far as may be as if the reference included a reference to inheritance tax -

(a) If that document was executed prior to the passing of this Act and the reference is to legacy duty and succession duty or either of them;

(b) If that document was so executed, and the reference is to estate duty, and it may reasonably be inferred from all the circumstances (including any similarity of

the incidence of inheritance tax to that of estate duty) that the inclusion of the reference to inheritance tax would be just;

(c) whether the document was executed prior to or after the passing of this Act, if the reference is to death duties, without referring to any particular death duty."

This section in effect indicates those situations in which either a reference to inheritance tax must be included or should be included. Having regard to paragraph (b), it is clear that a reference to inheritance tax should only be included in addition to estate duty where it would be just. Since paragraph (c) expressly excludes the case where there is a reference to estate duty, it must be inferred that the Legislature would have regarded such an inclusion as being unjust. That is the case here. Accordingly, a reference to Inheritance Tax cannot be included in the will on the authority of the section. Nor for the same reasons can Inheritance Tax be substituted for estate duty as a matter of construction.

Henry Barron

21/12/83