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Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **04/10/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

IN THE ESTATE OF JS (DECEASED)

BETWEEN:

THE OFFICIAL SOLICITOR AS CONTROLLER AD INTERIM FOR NS (A PATIENT)

Plaintiff;

-and-

MS

Defendant.

_____

McBRIDE J

Introduction

[1] This case involves a consideration of whether, and if so, in what circumstances a right of residence, granted in a will can be terminated when the will has made no express provision for termination. Research has shown that one in ten wills in rural areas in Northern Ireland contain a right of residence and therefore the determination of this question has important implications for testators, donees of such rights and legal practitioners involved in drafting wills.

Background

[2] NS, a patient is the widow of JS deceased ("the deceased"). MS, the defendant is the son of NS and the deceased. The deceased's will, dated 9 May 2005 provided, inter alia, as follows:

> "I leave, devise and bequeath to my lawful son, MS, free of all inheritance tax and other tax or duty liable on my death, my dwelling house and premises known as ["the property"] in the City of Belfast or any other dwelling house and premises in lieu thereof which shall be my principal residence at my death subject to a right of residence for my said wife during her life or until his death or remarriage, my said wife paying all ground rent and other outgoings payable in respect of the said dwelling house and premises in keeping the same in reasonable repair and insured in the full value thereof."

[3] The property is a dwelling house situate in Belfast.

[4] The deceased died on 27 September 2009 and a grant of probate issued to NS on 16 February 2010.

[5] On 1 March 2010 NS made an Assent of the property to her son, MS subject to her right of residence.

[6] In early 2016 NS attended James Pringle, solicitor. By letter dated 10 October 2016 Mr Pringle set out NS's instructions to him as of 30 March 2016 as follows:-

> "1. That she was not living in the property.
>
> 2. That the property is habitable.
>
> 3. That she did not intend returning to the property.
>
> 4. That the property was in reasonable repair."

[7] Based on her instructions he prepared a Deed of Surrender of Life Interest and Release ("Deed of Release"). In accordance with this Deed of Release NS agreed to surrender her right of residence in consideration of MS releasing her from all demands for payment of ground rent and other outgoings in respect of the property including maintenance, repair and insurance. MS refused to sign the Deed of Release and consequently the Deed of Release remained unsigned by either party.

[8] On 21 September 2016 the Official Solicitor was appointed controller ad interim. In this capacity Ms Coll wrote to MS indicating, in terms, that she would sign the Deed of Release on behalf of the patient if MS would agree to release NS from payment of the outgoings in respect of the property.

[9] MS refused to agree to do this and as a result the Official Solicitor obtained authority from the High Court to make an application to the court on behalf of the patient.

History of Proceedings

[10] By originating summons dated 16 November 2016 the Official Solicitor, acting on behalf of NS applied under the Rules of the Court of Judicature (NI) 1980 Order 85 Rule 2 for the following relief:-

> "(i) A determination that on its proper construction the right of residence conferred upon the patient by the will of the above named deceased has terminated on the basis either that the patient has ceased to reside in the said dwelling house or that the patient is mentally or physically incapable of exercising the said right or for any other reason.
>
> (ii) A determination that on the proper construction of the said will, all duties, responsibilities, obligations and other burdens of the patient in respect of the said dwelling house cease at the same time as all benefits to enjoy the said dwelling house cease.
>
> (iii) A determination that in the events which have happened the patient has terminated her right of residence in the said dwelling house and that all duties, responsibilities, obligations and other burdens of the patient in respect of the dwelling house have ceased."

[11] When the case was originally listed for hearing on 28 April 2017 the defendant neither appeared nor was represented. The court heard submissions from counsel on behalf of the patient. During the course of counsel's submissions, with judicial encouragement, counsel indicated that she would not pursue the relief sought at grounds (i) and (iii) of the originating summons if relief was granted on foot of ground (ii). This approach was taken as the court was reluctant to make a determination of the application based on grounds (i) and (iii) as there is very limited jurisprudence on these issues; the court did not have the benefit of full legal argument by both parties and the determination of these questions would affect a large number of persons including professional advisors, given the large number of rights of residence which exist in this jurisdiction. As I formed the view determination of ground (ii) would dispose of the case, I did not make any determination in respect of grounds (i) and (iii).

[12] After consideration of the evidence and counsel's submissions I made the following declaration on 28 April 2017:-

> "…the patient is no longer exercising the right of residence conferred by the will of the above named deceased … and
>
> (2) … on the proper construction of Clause 2 of the said will, all duties, responsibilities, obligations and other burdens placed on the patient in respect of the said property apply only when the patient is exercising the right of residence conferred by the said will."

[13] This order was stayed until 15 May 2017 to allow the defendant an opportunity to make representations to the court. On 15 May 2017 the defendant appeared, handed in a number of documents and made a number of submissions to the court. After considering all the supplemental materials and submissions made by the defendant, I delivered judgment on 23 May 2017 and confirmed the order I had made on 28 April 2017.

[14] On 6 June 2017 the defendant filed a Notice of Appeal on the ground, "I disagree with the declaration made on 23 May 2017".

[15] On 25 October 2017 the Court of Appeal remitted the appeal to this court in exercise of its powers under section 38 of the Judicature (Northern Ireland) Act 1978, so that this court could determine the following questions:-

(i) Whether, on its proper construction the right of residence conferred upon the patient by the will of the above named deceased has terminated on the basis either that the patient has ceased to reside in the said dwelling house or that the patient is mentally or physically incapable of exercising the said right or for any other reason.

(ii) Whether in the events which have happened the patient has terminated her right of residence in the said dwelling house and that all duties, responsibilities and obligations and other burdens of the patient in respect of the dwelling house have ceased.

(iii) In the event the court considered the patient's interest in the house has terminated, the court should make specific findings in relation to any period during which the patient did exercise the right of residence and the date of termination.

[16] In determining these questions the Court of Appeal indicated that this court should make findings of fact in respect of:-

(a) NS's historical connection with and use of the dwelling, and

(b) The matters recorded at paragraphs [19] and [20] of the judgment delivered by this court on 23 May 2017.

The Court of Appeal also directed that this court should give consideration to requiring MS to present sworn testimony and to directing a transcript of his presentation to the court on 15 May 2017. The Court of Appeal further recognised that the evidence available to this court would include reports in respect of the patient's capacity and prognosis for her diagnosed condition of dementia.

[17] The Court of Appeal further stated that MS's appeal to the Court of Appeal has not been determined on its merits and remains alive and will be determined on a suitable future date, following the promulgation of the further order and judgment of this court.

[18] In collateral litigation a Health and Social Care Trust ("the Trust") sought a declaration in the High Court that the Trust should be authorised to designate a suitable place of residence for MS. This application was heard by Keegan J who delivered judgments on 14 October 2016 and 10 February 2017. She granted the declaration sought subject to annual review. The matter has been reviewed most recently by Mr Justice O'Hara on 20 February 2018. On that date he extended the declaration and ordered that the court should continue to review the case on an annual basis.

[19] At the hearing before the Court of Appeal, the court invited the Attorney General for Northern Ireland to act as amicus curiae. The Attorney General has agreed to continue to act in this capacity before this court and was represented by Mr Colmer of counsel. The defendant continued to act as a litigant in person. The patient was represented by Mr Brett Lockhart QC and Ms Sheena Grattan of counsel on behalf of the Official Solicitor.

[20] I am grateful to counsel for both the Attorney General and the Official Solicitor who each conducted extensive research in this area of law and presented their submissions in very carefully crafted skeleton arguments and by way of oral argument which proved to be of invaluable assistance to the court.

[21] This judgment has been anonymised in line with the form of anonymisation used in previous judgments made in respect of these parties both in the Family Division and the Chancery Division. Nothing should be published which would identify NS or of any other person which would lead to the identification of the patient.

Evidence previously before the court

[22] The court had the benefit of evidence which was previously before the court as well as new evidence. The evidence which was previously before the court consisted of:-

(a) An affidavit sworn by Ms Coll on 15 November 2016 in which she averred at paragraphs [6] and [7] as follows:

> "[6] … Shortly after the death of the testator, the patient returned to her residence at Flat 10, where she has held a tenancy since 7 January 1991. She has never resided in the property since 2009.
>
> [7] The defendant resides at L Street, Belfast and all correspondence from court is issued to that address. To the best of my knowledge she does not live at [the property]. The property remains unfurnished with electricity supply, however all other amenities appear to be disconnected. We are unaware who is settling electricity or other utility bills. There is no evidence that anyone is permanently residing in the property. The property is clean, with no apparent maintenance issues, save the replacement of a window. A panel in the lounge front window has been shattered by a stone and this has now been secured with wooden batons and wooden panel, awaiting an estimate to replace. Both front and back doors have the locks changed in order to secure the property. The property and its contents have been insured by the Official Solicitor's Office on behalf of the patient with the invoice being settled from the patient's monies held in court. The property was last inspected on Thursday 10 November 2016."

(b) A report by Dr Barbara English, Consultant Psychiatrist (Psychiatry of Old Age) dated 28 January 2017 in which she concluded, after interviewing the patient and reviewing the medical notes and records, as follows:

"Considering the balance of probabilities and for the reasons outlined above my opinion is that at the time of assessment:

(a) NS is suffering from a mental disorder/mental illness within the terms of Part VIII of the Mental Health (Northern Ireland) Order 1986, namely dementia, and demonstrated the lack of awareness of the extent of her property and affairs. She therefore lacked the capacity to manage her property and affairs as a result. Her mental illness is a chronic and progressive one. I would therefore not expect her to regain capacity to manage her property and affairs.

(b) By reason of her mental illness NS was unable to understand and retain the information regarding the terms of her late husband's will and is therefore unable to give instruction to a solicitor regarding proceedings in this matter, or to understand/appreciate the consequences of any action by the court in this matter.

(c) NS had no recollection of ever having resided at [the property] and demonstrated no specific recollection of the property. Given a lack of attachment to the property, her inability to retain information on the right of residence and chronic and progressive nature of the mental illness with which she has been diagnosed, it is highly unlikely that NS could now or in the future exercise the existing right of residence."

(c) Financial information in respect of NS's assets and liabilities.

(d) Judgments of Keegan J dated 10 February 2017 and 14 October 2016.

New Evidence

[23] At the remitted hearing I heard oral evidence from Dr Barbara English, Consultant Psychiatrist, Mr Kirkham-Moore, Mr Robert Rice, and Mr O'Neill.

[24] Dr Barbara English prepared two reports dated 28 January 2017 and 12 April 2018 at the request of the Official Solicitor. In her oral evidence she adopted the conclusions reached in these reports. The conclusions reached in her report dated 12 April 2018 were as follows:

> "Considering the balance of probabilities and for the reasons outlined above my opinion is that at the time of assessment:
>
> (a) NS was suffering from mental disorder/mental illness within the terms of Part VIII of the Mental Health (Northern Ireland) Order 1986 namely dementia. Her mental illness is a chronic and progressive one.
>
> (b) By reason of her mental illness NS was unable to understand or retain the information regarding the terms of her late husband's Will (even consistently demonstrate an appreciation of the fact of his death) and is therefore unable to give instruction to a solicitor regarding proceedings in this matter, or to understand/appreciate the consequences of any action by the court in this matter.
>
> (c) Given her current level of support and supervision needs, the chronic and progressive nature of both the mental illness from which she suffers and her chronic obstructive pulmonary disease, it is my opinion that NS could not now or in the future exercise the existing right of residence."

[25] Before reaching these conclusions Dr English explained that she had interviewed NS on three occasions, namely 21 January 2017, 5 April 2018 and 12 April 2018. When she last saw NS on 12 April 2018 she noted that she was disorientated in time and space; had difficulty with autobiographical memory; lacked ability to retain information, and had no memory or understanding of the fact she had a right of residence. Dr English considered that NS was suffering from dementia, probably Alzheimer's, which is a progressive and chronic illness. Her

diagnosis was based on a perusal of NS's medical notes and records including results of tests which had been undertaken by Dr McPherson and NS's clinical presentation at interview with Dr English. Dr English considered that NS's condition had deteriorated and categorised her dementia as being moderately severe.

[26] In her oral evidence Dr English stated as follows:

> "NS is now aged 85. With her dementia and chronic falls risk, and COPD she will continue to require 24 hour support, supervision and nursing care for life and is therefore unable to take up the right of residence in [the property]. That will not change."

[27] She stated that she had come to this conclusion on the basis of the following matters:-

(i) NS's mental health meant she was unable to protect herself from common dangers. For example, she was at risk of falls as she forgot to use her rollator. NS therefore required 24 hour supervised care.

(ii) NS suffered COPD which required management at a nursing level in an environment where nursing staff could monitor her Oxygen levels.

(iii) The property was not suitable for her needs and could not be adapted to meet her needs.

[28] In light of these factors Dr English considered that the totality of NS's needs could not be provided outside a hospital or nursing unit. Consequently her view was that NS lacked the ability to ever exercise her right of residence at the property.

[29] In cross-examination the defendant put the following points to Dr English:-

(i) That she was not independent as she worked for the Trust.

(ii) That she had relied on the reports of others rather than conducting her own assessments.

(iii) That NS had fallen in hospital and the nursing home and therefore was at no greater risk in the property.

(iv) That NS did not have dementia. Her medication which included Haloperidol, which is used to treat agitation and distress, was proof that she only suffered from depression.

(iv) That NS's expressed wish was to live at the property.

(vi) The property was suitable to meet NS's needs as there was an oxygen machine present there and the defendant could put a bed in the kitchen so that NS did not have to use the stairs.

[30] Dr English in response stated that she was independent of the Trust and I note she signed the expert's declaration. She accepted that she had taken into account the content of other professionals' reports including the reports by Dr McPherson and Ms Toal, occupational therapist, but stated she had brought her own professional judgment to determine the questions whether NS suffered from dementia, whether NS lacked capacity and whether NS was able either now or at any time in the future to reside in the property. She questioned the suitability of the property to meet NS's needs given her physical and mental health and in particular she questioned the suitability of putting a bed in the kitchen. She accepted that Haloperidol was prescribed for depression, but stated that patients could have a dual diagnosis for both dementia and depression. She was satisfied that NS suffered from dementia. She further confirmed that although NS sometimes expressed a wish to live at home she was an unreliable historian as to her wishes due to the fact she suffered from dementia.

[31] The Official Solicitor called Mr Kirkham-Moore, a housing officer with Radius Housing. According to his records NS was the sole tenant of Flat 10 and she had been a tenant of this property from 7 January 1991. He then referred the court to correspondence which included an application by NS to purchase Flat 10 dated 6 December 2004. In cross-examination the defendant put to Mr Kirkham-Moore that the application to buy had not been properly processed.

[32] The Official Solicitor also called Mr Robert Rice who is the husband of NS's daughter M. They married in or around 1981. He explained that as a result of a stroke his wife was unable to attend court to give evidence but confirmed he had known NS for 40 years. He gave evidence that NS had lived at the property until 1991 when she left and took up occupation of Flat 10. Just prior to moving to Flat 10 he recounted that there had been a violent incident in the property when one of NS's sons, J had violently attacked the deceased and the defendant MS and his brother K. As a result of the attack K sustained serious psychological problems which ultimately culminated in his death by suicide in 1992. After that incident NS moved out of the home and went to live at Flat 10. The deceased remained living at the property with K.

[33] After NS moved to Flat 10 Mr Rice recalled how she visited the property a number of times per week to wash clothes, clean and check food supplies. To the best of his knowledge she did not stay overnight at the property. He further related that in 2008 she returned to live on a full time basis at the property to provide care for the deceased. She remained living at the property until her husband's death on

27 September 2009. After the deceased's funeral NS returned to live full time at Flat 10. Mr Rice stated that she occasionally went to the property to collect mail, but otherwise the property remained unoccupied. He stated that the property was in a "bad state".

[34] Under cross-examination the defendant put to Mr Rice that after the death of her husband NS only lived at Flat 10 at weekends; that all her personal belongings remained at the property and that she continued to pay the bills and claimed rates relief in respect of the property. He further put to him that all her mail was sent to the property. Mr Rice was very clear in his response that NS lived full time at Flat 10 as he regularly visited NS and she was always present at Flat 10 both at week-ends and during the week. Flat 10 was fully furnished and all her personal effects were at Flat 10. He further stated that he had attended at the property and it showed no signs of being occupied.

Evidence on behalf of MS

[35] In accordance with the direction of the Court of Appeal MS received a copy of the court transcript of 15 May 2017 and I gave the defendant the opportunity to give sworn oral evidence. He declined to do so. I warned him of the possible implications of his failure to give evidence. I then rose to allow him time to reflect on whether he wished to give evidence. When the hearing resumed he again indicated that he did not wish to give sworn evidence.

[36] Although the defendant did not give evidence he made oral and written submissions to the court. The court also acceded to his request to make further oral submissions in response to closing written submissions filed by the Official Solicitor and the Attorney General. In the course of his submissions MS made a number of factual statements. In particular he stated that NS had not given up her right of residence as her furniture and personal items including clothing remained in the property. She claimed rates rebate for the property and all her mail was sent to this address. He further stated that NS had capacity and did not suffer from dementia but rather was an alcoholic. She had expressed her wish to live in the property in letter dated 11 May 2017 and the court should respect this. He further stated NS had given him power of attorney; he could therefore decide where she lived; Keegan J had erred in requiring her to live elsewhere; and the Official Solicitor, Mr Rice and Mr Pringle had all lied to the court. I have decided not to take MS's unsworn statements of fact into account as the defendant was present in court and without giving any reason chose not to give evidence. He was warned of the consequences of failing to give evidence and notwithstanding that warning he maintained his stance.

[37] MS called one witness, Mr O'N, his brother. He was home on leave from California where he now lived. He stated that he left Northern Ireland in 1973 and only returned to this jurisdiction 2 to 3 times per year to visit his family. He gave evidence that until 1991, when he returned home on leave he stayed with NS at the

property. Since 1991 he stayed with NS at Flat 10. He stated that he had visited NS in the residential home a few days prior to the hearing and she had told him that she wanted to be buried from the property. He denied that NS suffered from dementia and stated that she was an alcoholic.

Documentary evidence submitted by MS

[38] MS submitted a large volume of documents to the court. Many of these had been submitted previously. None of these documents was formally proved. The only documents which appeared to be relevant to the issues in dispute were:-

- document dated 22 January 2016 which states as follows: "I, NS, I'm giving my [property] over to my son MS dated 22 January 2016";
- letter to the High Court dated 27 November 2016 purportedly signed by NS in which she states "I NS have told my solicitors Tughans a long time ago now – that I was paying for the repairs at [the property]… I again request that I NS pay for all the repairs at [the property] as agreed with my son and myself".
- document allegedly signed by NS dated 11 May 2017 which states "I do not wish to give up right of residence in [the property] and I wish to pay for all the repairs on[the property]";

New Documentary Evidence submitted on behalf of the Official Solicitor

[39] Mr Lockhart QC for the Official Solicitor, at the close of the plaintiff's case filed reports from Ms King dated 21 December 2017, Dr McPherson dated 22 December 2012 Ms Toal, occupational therapist dated 9 January 2007. It was only at the end of the plaintiff's case that he indicated to the court that he was not calling these persons to give oral evidence.

[40] Mr Lockhart submitted that the evidence of Ms Toal and Dr McPherson had been placed before this court under the provisions of the Civil Evidence (Northern Ireland) Order 1997 ("the 1997 Order") and submitted that this court should give significant weight to this evidence as it had already been heard, tested and accepted by Keegan J.

[41] Keegan J when determining the question whether it was in NS's best interests to reside in the property heard evidence from a number of witnesses including Dr McPherson and Ms Toal. She made some findings about their evidence and concluded that it was not in NS's best interests to return to the property.

[42] In accordance with Article 3 of the 1997 Order, hearsay evidence is admissible in civil proceedings. Under Article 4 where a party to civil proceedings adduces hearsay evidence of a statement made by a person but does not call that person as a witness any other party to the proceedings may, with the leave of the court, call the maker of the statement as a witness for the purposes of cross examination. Article 5

sets out a number of considerations relevant to weighing hearsay evidence and provides as follows:-

> "(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any …
>
> (2) …in particular, to whether the party to whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, the sufficiency of the notice given.
>
> (3) Regard may also be had, in particular, to the following-
>
> (a) Whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
>
> (b) Whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) Whether the evidence involves multiple hearsay;
>
> (d) Whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) Whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) Whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[43] In assessing the weight to be given to the reports filed by Dr McPherson and Ms Toal I have had regard to the following matters:-

- The reports were only submitted to the court during the course of the hearing;

- It was only at the close of the plaintiff's case that it became clear that the makers of the reports would not be called to give oral evidence;
- MS was not given any or any sufficient notice of the plaintiff's intention to adduce hearsay evidence;
- No reason was given why the makers of the statements were not being called to give oral evidence;
- The reports submitted had been prepared for the hearing before Keegan J and not for the purposes of the hearing before this court;
- The reports did not specifically address the questions this court has to determine; and
- The court did not have the opportunity to see and hear the witnesses give evidence in chief and under cross examination.

[44] In light of the factors outlined above I consider that no weight should be attached to the reports of Ms Toal or Dr McPherson and accordingly I have not taken their reports into account in my consideration.

Submissions by the parties

[45] Mr Lockhart QC on behalf of the Official Solicitor submitted that the right of residence had been terminated through non-use and/or NS's inability to exercise the right by reasons of mental and physical infirmity. He submitted that in line with the judgment of Girvan J in *Jones v Jones* [2000] NICh 49, the court could imply a term into the deceased's will that the right ceased when the donee was no longer able to exercise it by reason of ill health as it cannot have been the intention of the deceased to render the property inalienable. In the alternative he submitted that the right was abandoned as a result of non-user and referred to the limited jurisprudence which exists in respect of this issue. Although the Official Solicitor initially submitted that the right had been disclaimed by non-user *ab initio* this ground was not pursued in the closing submissions.

[46] Mr Lockhart QC referred to the evidence before the court and submitted that as the right of residence had never been exercised by NS it had been abandoned. He further submitted that the medical evidence of Dr English demonstrated that NS was incapable of ever exercising the right. In such circumstances he submitted the court could imply a term into the will that the right of residence ceased. This was on the basis that it is an essential characteristic of a standard right of residence that the right only endures for so long as it is capable of being exercised and consequently it must have been the intention of the deceased that it terminated in such circumstances. He therefore submitted that the court should make the declarations sought.

[47] Mr Colmer on behalf of the Attorney General submitted that in principle a right of residence granted by a will could be terminated even though the will made no express provision for termination. This arose because a right of residence was a

contractual licence and consequently the court could imply terms including a term that it terminated in certain circumstances. In addition he submitted that there was jurisprudence establishing that a right of residence could be lost through abandonment and could also be lost through release/disclaimer/renunciation *ab initio*. In light of the evidence before the court he submitted that the court may consider that the evidence showed NS regarded and treated Flat 10 as her home and her failure to ever exercise the right established renunciation and or abandonment of the right. In the alternative he submitted that as the medical evidence established there was no prospect of her ever returning to the property the court may consider that the right of residence was terminated by necessary implication.

[48] In his written and oral submissions MS made similar arguments to those he had previously made before this court. He submitted as follows:-

(a) NS had capacity and the court should act in accordance with her wishes, in particular her wishes expressed in the letter dated 11 May 2017;

(b) NS had never given up her interest in the property. NS continued to reside in the premises as evidenced by the fact her furniture and clothes remained there; she claimed rates rebate in respect of the payment of rates for the property and she continued to have her mail sent to the property;

(c) NS wished to keep open to her the option of returning to the property in the future;

(d) NS had given him power of attorney and he could decide where she should live. He indicated he intended to allow her to reside in the property as this was her wish and he further submitted that the property was suitable for her needs; and

(e) There was no law in Northern Ireland to force someone to live in a nursing home and accordingly Keegan J had erred in her findings in this regard.

Consideration

A. Question for determination

[49] The question for determination is whether the right of residence granted to NS in the deceased's will has been terminated.

B. The relevant law relating to Rights of Residence

[50] Rights of residence are very common throughout the island of Ireland. Johnston J in *National Bank v Keegan* [1931] IR 344 observed:

> "The people of Ireland have had a very keen, not to say punctilious, regard for family obligations and ties and it is well known that such rights exist very extensively throughout the whole of Ireland."

[51] Notwithstanding the frequency with which such rights arise there is a dearth of both academic commentary and jurisprudence in respect of their precise legal nature and the rights which they create. The researches of counsel have produced only a handful of cases which consider the question whether a right of residence can be terminated. Similarly Professor Brian Harvey in his seminal article "Rights of Residence – The Anatomy of Hermaphrodite" 1970 NILQ Vol 21 (Winter 1970) page 389 to 424 and Albert Power's, "Intangible Property in Ireland", Chapter 19 entitled "Rights of Residence", are both silent on this question.

[52] Consequently, before the court can determine the questions before it, it is necessary to first analyse the nature of a right of residence as this will inform the court as to the extent of the rights it creates.

[53] The first comprehensive analysis in Northern Ireland of the legal nature of rights of residence and the extent of the rights thereby created or reserved was conducted by Girvan J in *Jones v Jones* [2000] NICH 49. In *Jones* the plaintiff's late husband reserved a right of residence to himself and the plaintiff when he transferred the family farm to their son. At the time of the transfer the plaintiff and her husband resided in the farm house and their son resided in separate premises. After her husband's death the plaintiff continued to reside alone in the premises. Later her health deteriorated and she was admitted to hospital. Upon her discharge home the defendant and his wife moved into the farm house so they could provide care to the plaintiff. Subsequently the defendant's wife suffered a nervous breakdown as a result of her caring responsibilities and after a family meeting it was agreed that the plaintiff should move to a nursing home for respite care. The defendant and his wife continued to reside in the farm house. After a period of time the plaintiff indicated that she wished to return to live in the farm house to the exclusion of the defendant and his wife and on the basis that she was entitled to permit third parties to live in the house so that they could provide her with the care she needed. The defendant refused to give her the key to the home. The court had to determine whether the plaintiff on foot of her right of residence was entitled to live exclusively in the premises and whether she was entitled to allow third parties to reside with her. After an extensive and comprehensive review of the leading authorities Girvan J held that upon a proper analysis a right of residence was a

species of licence and specifically held that it was a form of contractual licence. In determining what rights the right of residence conferred Girvan J held at pages 17 - 19 as follows:-

> "Being in the nature of a contractual licence it is a matter of construction of the agreement set in its proper context as to what contractual rights it conferred on the plaintiff and the deceased. Although the plaintiff was not a party to the contract it was clearly intended to benefit her and she can rely upon it in reliance on the Law Reform (Husband and Wife) Act (Northern Ireland) 1964.
> …
>
> The nature and extent of the right must depend on and be interpreted in light of the factual context and in the light of the whole agreement
> …
>
> A contractual licence may in appropriate circumstances attract implied terms. Terms can be read into a contract by implication from the parties' conduct and expectations and courts are generally willing to imply such terms as are required to make the contract workable or to give it business efficacy."

[54] Applying these principles the court held that the plaintiff was entitled to reside in the farm house to the exclusion of the defendant and his wife. This interpretation was based upon the construction of the express terms of the agreement in light of the circumstances which existed when the agreement was entered into. The court concluded that the agreement envisaged that the plaintiff and her husband would reside in the house on their own. This interpretation was further supported by the factual context which existed at the time the agreement was entered into, namely that the plaintiff and her husband resided exclusively in the premises and the defendant lived elsewhere. The court implied a further term that the plaintiff would be entitled to permit third parties to stay overnight to provide care and assistance if that was necessary to enable her to enjoy the right of residence.

[55] Professor Harvey in his seminal article on rights of residence, after conducting a comprehensive review and analysis of all the relevant jurisprudence concluded at page 413:-

> "The most satisfactory theory is that the right of residence most usually confers upon the beneficiary no more than a species of licence to occupy. "

In line with *Jones* and the views expressed by Professor Harvey I am satisfied that a right of residence is upon a proper analysis a contractual licence. Accordingly the court may in the absence of express terms imply terms and in certain circumstances may imply a term that the right has terminated.

[56] The question which then arises is, "In what circumstances does the court imply terms?" The Supreme Court in *Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another [2015]UKSC 72* clarified the law relating to when the court can imply terms into a contract. Lord Neuberger with whom Lord Sumption and Lord Hodge agreed, reaffirmed the traditional tests set out by Lord Simon in *BP Refinery (Westerport) Pty Ltd v President Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR *20* at page 26 when he said,

> "For a term to be implied, the following conditions (which may overlap) must be satisfied; (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it ("business efficacy test"); (3) it must be so obvious that 'it goes without saying' ("Officious bystander test"); (4) it must be capable of clear expression; and (5) it must not contradict any express term of the contract."

[57] Lord Neuberger at paragraph [21] then added a number of comments on the summary given by Lord Simon. In particular he commented that:-

(a) The implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was rather that of notional reasonable people in the position of the parties at the time they were contracting.

(b) A term should not be implied merely because it appears fair or because one considers that the parties would have agreed it if it had been suggested to them.

(c) Business efficacy test means that the term can only be implied if, without the term, the contract would lack commercial or practical coherence.

(d) The tests of business efficacy and the officious bystander can be alternatives.

(e) The question whether a term is implied is to be judged at the date the contract is made.

[58] In paragraph [31] he referred to the test set out by Lord Hoffmann for implying terms in *AG for Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at paragraph 21 that:

> "there is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"
>
> as
>
> "characteristically inspired discussion rather than authoritative guidance on the law of implied terms"

[59] At paragraphs [22]-[32] Lord Neuberger emphasised that the process of implication involves a rather different exercise to that of construction. This is essentially because construction involves resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. In contrast the implication of contract terms involves the interpolation of terms to deal with matters for which, *ex hypothesi* the parties themselves have made no provision. In terms of sequencing he stated that the court should first interpret the express terms of a contract and then decide whether it is necessary to imply any further terms.

[60] If the court is satisfied that it can and should imply a term that the right of residence terminates in circumstances where for example the donee is incapable of exercising the right by reasons of ill health, it must determine whether the right has in fact terminated. In determining whether it has terminated on this ground the court must have evidence before it which establishes on the balance of probabilities that:-

(a) the donee is not presently capable of exercising the right by reason of ill health, and

(b) the donee will never be able, by reason of ill health to exercise the right, for the remainder of his or her life. I consider this second limb is necessary as a right of residence is a right for life. As Lavan J observed in *Johnston v Horace* [1993] 1 LRM, "a roof over one's head is one of the most basic requirements for a human being and testators in granting such rights are generally seeking to provide that security is available to the donee for the rest of his or her life."

[61] I am further satisfied that as the general law of contract applies to a right of residence such a right is capable of being frustrated. It will therefore terminate when the donee is either unable or unwilling to perform his or her part of the contract, that is, to exercise the right of residence.

[62] Prior to *Jones,* some of the existing jurisprudence indicated that the rights created by a right of residence depended upon whether the right of residence was a 'specific' or a 'general' right of residence and whether it was granted in respect of registered or unregistered land. In light of the approach taken in *Jones* and Professor Harvey's analysis, that a right of residence is a form of contractual licence, the general law of contract is applicable and consequently, the rights created by a right of residence in a will or other instrument will depend upon its express and implied terms. It is therefore no longer necessary or appropriate to categorise rights of residence as general or exclusive to ascertain what rights they create.

[63] Counsel for the Official Solicitor and counsel for the Attorney General further submitted that a right of residence can also be terminated by renunciation/disclaimer *ab inito* and or by abandonment. In support of their submissions they referred the court to some academic authority and the cases of *Cook (Executors of Watkins, deceased) v Inland Revenue Commissioners* [2002] STC (SCD) 318, *Bergliter v Cohen and Others* [2006] EWHC 123, *Hurley v Hurley* [1947] ALR 340 High Court (Australia), *Johnston v Horace* [1993] 1 LRM and *Pagano v Ruello* [2001] NSWSC 63.

Renunciation/Disclaimer/Release

[64] Counsel for the Attorney General submitted that as a right of residence is a form of contractual licence the general law of contract applied and therefore like other contracts it can be terminated by renunciation.

[65] According to Chitty, On Contracts, at paragraph 24-018, renunciation of a contract occurs when:-

> "… one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear an unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express

> refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions."

[66] Further, when a right is granted by will, like any other testamentary gift it is capable of disclaimer through conduct. In *Cook* the Special Commissioner had to determine whether the failure by a very elderly widower to ever take up an occupancy right constituted a disclaimer by conduct of an interest in possession, for inheritance tax purposes. The Special Commissioner accepted in principle, that a right of occupancy was capable of being disclaimed by conduct and further held that the burden of proof was on the executors to prove disclaimer. In rejecting the HMRC argument that there had been such a disclaimer he stated that such a disclaimer would not readily be presumed and held at paragraph [17] that the elderly widower had done "nothing to show clearly that he never intended to occupy the property. The evidence in favour of disclaimer by conduct is not strong enough to displace the presumption that the legacy (being advantageous) would be accepted."

[67] I am satisfied that a right of residence can in principle be renounced, disclaimed or released *ab initio*. This is because it is a contract and therefore in accordance with the general law of contract it is capable of being renounced. Further if the right is granted by will it can be disclaimed or released like any other testamentary gift.

[68] The right can be renounced expressly or by conduct. It must however always be freely renounced. To renounce a right of residence by conduct the donee must never exercise the right and the donee's conduct must demonstrate that he or she never intends to exercise the right. This is the test set out in *Cook*. I consider this is the correct test because a right of residence by its nature is a right for life. Therefore to renounce such a right it must be shown that the donee is renouncing the right not just for a period of time but for the remainder of his or her life.

[69] The conduct required to meet this standard will depend on all the circumstances of the particular case but I consider, in line with *Cook*, that in the absence of express wording there needs to be strong evidence of renunciation. Mere failure to exercise the right is not sufficient to amount to a disclaimer. There must in addition be conduct which unambiguously shows that the donee never intends to ever exercise the right of residence.

[70] *Bergliter* is an illustration of a case in which the court held that a right of occupancy had been renounced by conduct. The court had to construe a will and determine whether it granted to the applicant a right to occupy the property in question. The court held that on its true construction the will did not grant the applicant a right to occupy the property in question. The court however then went

on to consider the question whether, if contrary to its conclusion on construction, the right to occupy was precluded by reason of the applicant's acquiescence, waiver or election. The court found that the applicant never claimed the right to occupy the premises; never occupied the premises; allowed third parties to occupy the premises and did not oppose a sale of the premises by the executors. In light of these facts the court was satisfied that the right to occupy had terminated due to the applicant's failure to exercise it. In the alternative the court held that the applicant's conduct amounted to a waiver of the right.

[71] The facts in this case illustrate the type of circumstances in which the court may find that a right of residence has been renounced. In *Bergliter* the facts clearly showed that the donee never exercised the right and his actions, especially his action in permitting sale of the property showed that he never intended to exercise the right at any time in the future.

Termination by abandonment

[72] The most apposite and analogous cases in which the question of abandonment were considered were the decisions in *Hurley v Hurley* and *Johnston v Horace.* In *Hurley* the testator by will bequeathed a house to his nephew subject to a right of residence to his niece. The niece who lived with the testator during her lifetime continued to live in the house for 15 months after his death. She then bought a house elsewhere and resided at that property ever since. The court held that she had abandoned her right of residence. Rich J held at page 291 as follows:-

> "I think it should be implied that the benefits specified in the will are to continue until the niece abandons her residence in the dwelling house when her rights would cease. This does not mean that she had always to be physically present at this house. It merely means that she must continue to treat it as her usual dwelling place. It is consistent with absence from the place itself, provided that the absences are of a temporary nature such as characterised absences of an ordinary householder from his place of residence … Giving this construction to the will, the question of fact which emerges is whether the plaintiff did not abandon her residence. On this question the evidence admits of only one conclusion. The plaintiff left the dwelling house in question … bought herself a house in Killarney, where she resided with her mother and sister onto their respective deaths, and is still living there … She did not choose to avail herself of the right of personal residence."

[73] In *Johnston v Horace* the testator granted a right of residence to his wife and daughter. The right was registered as a burden on the property. The defendant who inherited the property commenced a campaign of oppressive and bullying behaviour towards his mother culminating in her abandoning the premises against her will and moving to live with her daughter. The mother and daughter then sought an injunction to restrain the defendant preventing them exercising their right of residence. The defendant filed a counterclaim seeking the declaration that the plaintiffs had abandoned their rights of residence. The court held that a right of residence can be abandoned but on the facts held that it had not been abandoned in this case.

[74] In the course of his judgment Lavan J summarised the principles of abandonment as follows at pages 600 and 601:

> "The right is not abandoned by an absence of a day, or a week, or indeed a number of years. The right cannot be varied to suit the will of the owner. Its nature and content must be viewed by the court from the right granted in the ensuing conduct of all concerned, including the common recognition of the right and the common use that right has conferred upon the plaintiff and other members of the family since the day of the deceased testator.
>
> The right may voluntarily be abandoned expressly and freely, or indeed by effluxion of time. However, a court would have to require strong cogent evidence from a party seeking to defeat such a right, whilst the right remains a burden on a folio and in the absence of express agreement oral or written to disclose an intention to abandon."

[75] In accordance with this line of authority I accept in principle that a right of residence can be abandoned. This is because I consider abandonment is simply another example of the court implying a term. This was acknowledged by Rich J, when he stated that "it should be <u>implied</u> that the benefits in the will are to continue until the niece abandons her residence."

[76] As appears from *Johnston* abandonment can be done expressly by a declaration orally or in writing. In addition a right can be abandoned by conduct. Any abandonment however must be freely entered into and the court will be scrupulous to ensure that all actions which could constitute abandonment are voluntary acts. In cases involving elderly, child or vulnerable donees, the court will be especially careful to ensure that there has been no unconscionable behaviour or other abuse which has led the donee not to exercise the right of residence. As

abandonment is based on voluntary actions I consider that all involuntary acts, whether arising, for example from duress or incapacity, do not constitute acts of abandonment.

[77] For a right of residence to be abandoned by conduct two elements must be proved, namely (a) actual physical abandonment, that is the donee ceases to reside and (b) an intention to abandon.

[78] In determining whether a person has ceased to reside the court will have to have regard to the quality and quantity of the residence by the donee. In *Hurley* the court held that 'ceasing to reside' is not established by mere temporary absences. Such temporary absences can arise for example for the purposes of education, work and or medical treatment or recuperation. Therefore a donee may cease to reside at a property for a period of time without this amounting to abandonment.

[79] In *Pagano v Ruello* the Supreme Court of New South Wales had to consider whether a person had ceased to reside in a property in circumstances where the person lived 6 days per week in another property and only stayed 1 night per week in the subject property. In determining whether she had ceased to reside Simos J stated as follows at paragraph [16]:

> "… According to the ordinary and natural meaning of the word the defendant has ceased for some time to reside in the subject property, notwithstanding that she has been paying certain outgoings in respect of the property, the accounts for which have been addressed to her at the subject property.
>
> [17] … By no stretch of the imagination could it be said that the defendant resides in the subject property, nor has she for some considerable time."

[80] In addition to physical abandonment there must also be evidence demonstrating an intention to abandon. As the right is a right to reside for life, the intention to abandon the right must of necessity be an intention never to exercise the right during the remainder of the donee's life. Consequently the intention has a present and future aspect to it.

[81] In relation to the evidence required to evince such an intention I accept that effluxion of time can be sufficient but it would need to be for a very lengthy period of time such that it shows the donee never intends to occupy the premises again.

[82] In summary therefore I accept that a right of residence can be terminated by the court implying such a term; by the donee renouncing/disclaiming /releasing the right *ab initio* and by the donee abandoning the right. There may, no doubt be other

methods by which the right may be terminated, in the absence of an express clause. These have not formed part of the consideration by this court and therefore the list I have set out herein, is of necessity, non-exhaustive.

Conclusion

Are the issues res judicata?

[83] Mr Lockhart submitted that the issues this court had to determine were the same issues that Keegan J had already determined and therefore the doctrine of res judicata or issue estoppel applied.

[84] Mr Colmer on behalf of the Attorney General indicated that the court should exercise caution in applying the doctrine of res judicata as the issues before this court were not exactly the same as those before Keegan J.

[85] Keegan J held that NS lacked capacity and suffered from dementia. I consider that the doctrine of res judicata applies to these matters. Accordingly and as outlined in my earlier judgment I accepted and applied the findings made by Keegan J in respect of these matters.

[86] I am mindful however that the Court of Appeal indicated that this court would receive updated evidence in respect of the patient's capacity and the prognosis for her diagnosed condition of dementia. I have therefore received up-to-date evidence from Dr Barbara English and in all the circumstances I consider that, rather than relying on the decisions of Keegan J, I should make my own determination of NS's capacity and diagnosis based on the most up to date medical evidence before the court.

[87] In addition this court has to determine whether NS is capable either now or at any time in the future of residing in the property. This is a question which Keegan J did not have to determine. For this reason and also because the decision made by Keegan J is not a final decision, as it is subject to annual review, I consider that issue estoppel does not apply to this question. Accordingly I consider that this court is not bound by the findings of Keegan J.

My Findings of Fact

[88] I find that NS has never exercised the right of residence. This is based on the evidence of Mr Rice, Mr Kirkham Moore and Mr O'Neill. It is further supported by the available documentary evidence. I found Mr Rice to be an impressive witness who gave clear and compelling evidence about NS and where she resided notwithstanding the fact he was cross-examined in an irrelevant, belligerent and provocative manner by the defendant. Mr Rice had detailed knowledge of NS and was a frequent visitor to her home. On the basis of his evidence I accept that NS

lived at the property until 1991. Thereafter she moved to live permanently at Flat 10 which became her principal home. She returned to live on a full-time basis at the property in or around 2008 to nurse her sick husband. She remained living at the property until his death in 2009. Shortly after his death she returned to Flat 10 and has lived there full-time until she moved into residential care. I therefore find that NS never lived at the property after the date of her husband's funeral. MS gave unsworn evidence that she continued to reside in the property as she visited it, her clothes and furniture remained in the property, she paid bills in respect of the property and collected mail from the property. For the reasons set out earlier I have decided to place no weight on these unsworn statements. Even if I had accepted this evidence I find that the acts are not sufficient to amount to exercising the right of residence given the quality and frequency of the acts.

[89] Mr Rice's evidence was corroborated by the evidence of Mr Kirkham-Moore. He confirmed that NS took up occupation as the sole tenant of Flat 10 in 1991. She applied to purchase the flat which I find is supporting evidence that Flat 10 was her principal residence.

[90] Mr O'Neill's evidence provides further corroboration. He stated that when he came to this jurisdiction on home leave he stayed with NS at the property until 1991. After that date he stayed with her at Flat 10.

[91] I am further satisfied on the evidence of Mr Rice that the premises were unoccupied from 2009 and are now in a state of some disrepair.

[92] I further find that NS lacks capacity by reason of dementia. I accept the evidence of Dr Barbara English which was uncontroverted by any other medical expert. She gave her evidence in a very dispassionate and professional manner and adequately responded to the points put to her in cross examination by MS. I accept the three conclusions she reached. I consider that NS lacked capacity arising from dementia from at least the time when Dr English assessed her on 21 January 2017. Secondly, I accept that as a result of her dementia NS was unable to instruct a solicitor and thirdly I find, on the balance of probabilities that NS, by reason for her physical and mental ill-health is unable now or at any time in the future to exercise her right of residence in the property. This is particularly because dementia is a chronic and progressive illness.

[93] In relation to NS's intention I make the following findings. When her husband died she had capacity and extracted probate. In her capacity as executor she made an Assent of the property on 1 March 2010 to her son subject to her right of residence. I am satisfied that this demonstrates that she had no intention of renouncing disclaiming or releasing her right of residence at that time.

[94] In a letter dated 22 January 2016 NS indicated that she was giving the house to her son. In March 2016 she attended with Mr Pringle, solicitor and he stated that

she instructed him that she did not intend to return to the property. At that date however she was only prepared to release her right of residence upon a number of conditions including one that MS would pay the outgoings in respect of the property. When he failed to agree to these conditions the Deed of Release remained unexecuted. Consequently I find that notwithstanding the content of the letter dated 22 January 2016 NS had no intention of abandoning her right of residence as evinced by her subsequent action in not signing the Deed of Release.

[95] By June 2016 there were concerns regarding NS's capacity. When she was assessed by Dr English on 21 January 2017 she was satisfied that she lacked capacity. I therefore find that during the period when she had capacity NS never expressed any intention to abandon her right of residence and her actions during this period demonstrate that her intention was to retain her right.

[96] After 21 January 2017 I find that any wishes expressed by NS are not reliable in view of her diagnosis. For this reason I give no weight to the letter purportedly signed by her dated 11 May 2017.

[97] As a result of NS's incapacity others have made decisions on her behalf, including decisions relating to her residence. In particular her move to residential accommodation was as a result of a court order. Consequently I find that her continued failure to exercise the right of residence does not arise from a voluntary act by her. It arises as a result of incapacity.

Discussion

[98] The applicant did not seek to argue that the right had been renounced or otherwise disclaimed *ab initio*. I consider that this was a proper approach as NS signed the Assent subject to the right of residence and later she failed to sign a Deed of Release because MS would not agree to the conditions upon which she was prepared to release her right. In such circumstances I find that the right of residence was not disclaimed, released or renounced *ab initio.*

[99] The applicant submitted however that the right had been abandoned. I find that she voluntarily did not exercise the right from 2009 until 2017. From 2017 until the present date, her failure to exercise the right was due to a court order which was made on the basis of her incapacity and ill health.

[100] I accept there has been physical abandonment. Mere physical abandonment alone however is not sufficient as there must also be evidence of intention to abandon the right for the rest of her life. Such intention can be established by words and conduct. There is no evidence before the court, whether documentary or otherwise, which shows that NS expressly indicated her intention to abandon the right whilst she had capacity. Rather her actions in refusing to sign the Deed of Release in 2016 indicate that at that stage she had no intention of abandoning the

right of residence. In addition I do not find that the necessary intention to abandon has been established by effluxion of time as her continued failure to exercise the right is consequent upon a court order based upon her ill health, rather than a voluntary act on her part.

[101] Counsel for the Official Solicitor, in the alternative, submitted that the court should imply a term that the right had been terminated by reason of NS's inability to exercise the right.

[102] The deceased granted NS a right of residence in standard form. A typical standard form right of residence provides as follows;-

> "Subject to the right of residence on the farm as L. of my wife M for her lifetime and subject to her being maintained in the manner in which she has been accustomed."

Such a grant has been referred to as "…'an exclusively Irish phenomena' - a legal animal which has been shaped by the socio-economic context of 'a country of small farmers'." – Modern Studies in Property Law, Volume 2 – Conway & Grattan, chapter 11, page 203 "Northern Ireland – A forgotten Jurisdiction. Falling behind or forging ahead?"

[103] Irish testators have favoured this formula over the grant of a life estate because the value of the farm is not sufficient to give life interests to the widow and children and such a sharing arrangement is a compromise and recognises the tradition whereby the running of the farm is seen as a family "partnership". They do not want to give the donee a right to sell or mortgage the land. The grant of a right of residence is also a means to ensure the donee, usually a widow, has the security of a "roof over their head" for life whilst at the same time ensuring the transferee of the land, usually the son, obtains the land legally intact and is able to deal with it subject only to the right of residence.

[104] I am satisfied, given the nature of a standard right of residence and the reasons for its creation that it "goes without saying" that when a notional reasonable testator is making his will he intends that the right will terminate if the donee is no longer willing or capable of exercising the right, for example, by reason of ill health. This is because, once a donee is no longer able or willing to exercise the right, the reason for creating the right of residence (to provide a roof over the donee's head) either no longer exists as the donee already has the benefit of the security of a roof over her head by other means or the testator's purpose is frustrated as the donee is not capable of exercising the right. If a right of residence in such circumstances is not terminated it will remain as a burden on the land and the land either cannot be sold or mortgaged. As a result the owner of the land is unable to deal with the land whether by sale or mortgaging it to raise funds to carry out improvements or works

of repair. Such an outcome, I consider is the opposite of what an Irish testator intends to achieve when he grants a standard right of residence.

[105] I am therefore satisfied that the court should imply a term into a standard right of residence that it terminates when the donee is unable or willing to exercise it. The implication of such a term fulfils the requirements of the "officious bystander test" and otherwise fulfils all the conditions set out by Lord Simon in *BP Refinery*, as such a term is reasonable and equitable to both the donee and the owner of the land; it is capable of clear expression and does not contradict any express term in the will.

[106] I therefore imply a term into the deceased's will that NS's right of residence terminates if she is unable to exercise it by reason of ill health.

[107] The question which then arises is whether on the facts the right has been terminated. On the basis of my findings of fact the property has not been occupied by NS since 2009 and in light of the evidence of Dr Barbara English NS is not able now and never will be able to exercise the right of residence by reason of her physical and mental ill-health. Accordingly I find that the right of residence has terminated.

When did the right of residence terminate?

[108] I have accepted the evidence of Dr Barbara English that NS could not either now or in the future exercise her existing right of residence. This conclusion was based on an assessment carried out on 21 January 2017 and accordingly I consider that the necessary ingredients to terminate the right of residence existed as of 21 January 2017.

[109] Prior to this date all bills in respect of the property were paid on behalf of NS and therefore I consider there is no need for any consequential directions in this regard. In light of my determination the defendant holds the property freed from the burden of the right of residence, as from 21 January 2017.

Relief

[110] I make the following declarations:-

(i) On its proper construction the right of residence conferred upon NS by the will of the above named deceased terminated on the basis that NS is mentally and physically incapable of exercising the said right.

(ii) NS's right of residence terminated on 21 January 2017.

(iii) On the proper construction of the said will all duties, responsibilities, obligations and other burdens of NS in respect of the property ceased as of 21 January 2017.

Note to practitioners

[111] Finally I would reiterate the comments made by Lord Justice Girvan in *Jones v Jones* where he pointed out that those concerned in the drafting of instruments creating rights of residence should fully address their minds to the precise nature of the interest they wish to create. Many of these instruments are created without proper regard to all the circumstances which may arise in the future and what the testator wants to happen in such circumstances. It is therefore important that draftsmen address their mind to all of these matters so that confusion and difficulty is avoided for the parties in the future. Whilst the court has power to imply terms into rights of residence, the question of whether and if so what terms will be implied is ultimately only resolved by litigation which causes delay, expense and can increase family acrimony. It is preferable that draftsmen direct their mind to the issues which may arise and then set out expressly in the will or other instrument creating the right what the testator's intentions are in respect of those circumstances. This will require that rights of residence, of necessity now consist of more than a bald assertion that someone is entitled to reside at a property for their life. It will at the very least entail detailed provisions in respect of the circumstances in which the right will terminate. Other possible questions which may need to be addressed include; what is to happen if the house burns down during the life of the donee? are there circumstances where the testator wants to give to either the donee or the owner of the property the right to end the right of residence on the basis the donee is compensated in monies worth for the loss of the remaining right of residence, and if so the method to calculate the value of the remaining right of residence?