In re The Estate Of The Late Bernard Casey, Deceased [2023] IEHC 643 - High Court - Stack J, 10 November 2023

Application pursuant to s.27(4) of the Succession Act 1965 by a brother to pass over his two sisters who were named as executrices and to appoint an independent solicitor to act as administrator. Estate valued at approximately €3,000,000. The grant did not issue during the executor's year and application brought shortly thereafter. The deceased suffered dementia and the applicant previously had objected to registration of power of attorney in favour of the respondents. The applicant based his application on three principal grounds: the delay in extracting the grant; failure to protect the assets of the estate; that the respondents were unfit persons given misappropriation funds when attorneys. The Court found that consideration correct legal test for what is required to pass over an executor pursuant to s. 27(4) does not differ in substance from circumstances in which a grant of probate will be revoked: special circumstances must be sufficiently serious in nature to justify departing from the testator's wishes. The Court was not satisfied that reliance on the "executor's year" justifies removal of the respondents as executrices, particularly as the estate was relatively complex and the executrices had been taking steps toward applying for the grant. There being no special circumstances, the application was refused.

The Court found, *inter alia*, at para 111: *"In fact, it is potentially an abuse of process to make generalised allegations of fraud on affidavit in this way without utilising the proper procedures – that is, a plenary hearing and possibly the discovery procedure – in order to substantiate them. Even then, they can only be made if there is a cogent basis for them."*

In re Mary Moore deceased [2023] IEHC 607 - High Court - Stack J, 1 November 2023

The deceased died intestate leaving her surviving 6 children. One of the children (Donal) took our a grant of letters of administration intestate without consulting with his siblings. He thereafter decided to issue proceedings against the estate which necessitated the revocation of the grant and the appointment of an independent administrator ad litem. A limited grant issued to the solicitor in 2018. He expected that two of Donal siblings would shortly thereafter apply for a full grant and relieve him of his role. They did not do so and he proceeded to engage in the defence of the proceedings while he could obtain instructions from the affected beneficiaries. However, those instructions dried up and he was left in his role without any means of advancing matters. He applied to the non-contentious Probate List for the revocation of the limited grant.

Stack J held that it was appropriate to revoke the Grant extracted by Mr O'Sullivan on foot of the order of 26 November, 2018. She held that his initial consent did not envisage that he would continue to act for several years, as he assumed a general grant would follow to relieve him of his position as administrator ad litem; furthermore, he has been placed in an impossible position by both sides of the family dispute. She made an order pursuant to s. 27(2) of the 1965 Act, revoking the Grant of 10 December, 2018. She noted that the purpose of giving liberty to an intended plaintiff's nominee to extract a Grant of Letters of Administration limited to "substantiating" proceedings is to provide that plaintiff with a defendant so that the intended action can be properly constituted and so that an order can be obtained which will bind the estate for all purposes thereafter. Given that the administrator is not vested with any assets of the estate and is not subject to the duties imposed on a general administrator, she did not think there was any obligation on such an administrator to actively defend proceedings, and the circumstances in which such administrators are usually

appointed is such that they simply would not have access to the instructions necessary to do so.

Stack J found, *inter alia*, at paras 65 to 68: *"In those circumstances, a grant limited for the purpose of "substantiating" certain proceedings simply provides to a plaintiff a defendant who may be sued such that any order obtained or the determination of any point arising in the action will bind the general administrator if and when he or she is appointed, but without imposing an obligation on the person appointed as limited administrator to take active steps in defence of the action. As a result, in order to satisfy a court that it is "necessary and expedient" that such an administrator be appointed, an applicant should be in a position to demonstrate that they took all reasonable steps to identify the persons entitled to extract a grant and gave them adequate time to do so.*

"There was therefore, no obligation on Mr. O'Sullivan to take active steps to defend the proceedings. I think when the purpose of these orders is reflected on, the inevitable conclusion is that the administrator so appointed is, in essence, a nominal defendant. He or she is appointed simply to allow the proceedings to be brought and for no other purpose.

"I think it follows from those issues that an administrator appointed to "substantiate" proceedings is not to be regarded as having authority to take active steps in the defence of the proceedings. As a result, I think it follows that Mr. O'Sullivan was not obliged to issue motions or to raise particulars. Whether he had authority to do so I think would turn on whether he had access to the funds of the estate in order to pay the costs associated with taking those steps. In this particular case, however, it is clear that those steps were taken at the insistence of the Beneficiaries. That I think introduces particular considerations surrounding the payment of those costs and expenses which means that Mr. O'Sullivan's position is not governed by the usual rules and it is unnecessary to consider further the entitlement of an administrator ad litem to recover any costs incurred.

"I would stress that Mr. O'Sullivan acted at all times at the behest of the Beneficiaries and indeed at their insistence. In no sense, therefore, could he be said to have acted improperly and this may be material to his entitlement to the costs of this application and to his remuneration."

Reidy v. Bank of Ireland [2023] IECA 212 - Court of Appeal - Whelan J, 8 August 2023

The appellant was the widowed mother of her son who was the registered owner of the lands in Folio XXX in 2006 under the terms of his late father's will, the latter having died in 2003. Registration was effected subject to rights of residence, maintenance and support in favour of the widow. The registered owner created a charge in favour of Bank of Ireland. The widow, on advice, chose not to elect to seek her legal right share. In her appeal, the widow (aged 98) sought to set aside part only of a High Court order declaring that a judgment obtained by the widow on 19 October 2016 does not attach to or form part of a burden for maintenance and support in favour of the widow registered on the Folio, declaring that the entire burden binds only part of the said Folio as comprises the dwelling house. In finding for the widow, Whelan J said *inter alia*:

"Likewise, in the instant case, the widow gave valuable consideration for the rights of residence maintenance and support by electing to take the limited interest under the Will thereby releasing one third of the estate which thereby vested in the executor [para 93].

"In the instant case, both distinct aspects of the lien are protected by statutory notice arising from the registration of the burden expressing both. The lien operates in equity, and accordingly, the remedies of equity are available to compel performance of the obligations thereunder as against the registered owner. The approach recommended by the Bank's expert of obtaining postponement or subordination of such a burden prior to advancing monies was prudent and represents what might have happened but did not occur. The Bank admits such a step was never engaged in prior to registration of its 2010 charge. Reliance upon the terms of a will for such purpose, even had it occurred, would have been foolhardy and of no avail, since as demonstrated above, it is the registration that is consequential in determining the nature, extent and priority of such rights. The Bank's failure to subordinate or postpone the widow's rights over the entire Folio cannot be retrospectively cured to the detriment of the widow [para 110].

"Equity operates so that he who obtains or procure possession of property pursuant to an agreement for payment of its value will not be allowed to keep it without payment. The value in the instant case required payment of maintenance and support. The widow did all she could to enforce it and satisfaction of the lien insofar as it has been conversion into a crystallised sum must, in accordance with equitable principles, rank ahead of a mortgagee who took with clear notice of her rights [para 113].

"The question is whether it is reasonable for the Bank to assert that the widow has in substance no equitable entitlement to resort to the land itself for satisfaction of the quantified and crystallised value of her unsatisfied right in respect of support and maintenance in the sum of €428,225, representing the value of the unperformed burden to October, 2016. In substance, having taken with notice of her prior burden, as I am satisfied the Bank did, and, as I find, her burden encumbered the entire Folio, the Bank has not identified any principle of law or equity to support its contention that enforcement of her right should rank after the Bank's charge. 148. Such a proposition would render the benefit for her right to maintenance and support specified in the burden nugatory, debasing to a nil value her rights to be supported and maintained. Such an approach is contrary to equitable principles and the public interest [para 172].

"I am satisfied that the word "therein" was intended to confine the benefit of the obligation to maintain and support the widow to be delimited and, in particular, that the obligation would not be enforceable in circumstances where the widow came to reside in a nursing home [para 158].

"I am satisfied that the High Court erred in the approach adopted to reach a conclusion that the rights of residence maintenance and support registered in favour of the widow in Part 3 of the Folio pertained to and bound only the part of the lands comprised of the dwelling house. This finding is incorrect and contrary to the clear tenor of the Folio and the burden registered at entry number 4 on Part 3. Such an approach could only be reached by, directly or indirectly, taking into account the terms of the Will which is clearly impermissible having regard to the statutory provision and for all the reasons deftly drawn together by Ms. Justice Baker in Tanager DAC v. Kane as outlined above. The entire system of registration of land in the State depends upon the conclusiveness of the Registrar" [para 167].

O'Sullivan v. O'Sullivan [2023] IEHC 485 - High Court - Roberts J., 31 July 2023

Prior proceedings had issued in respect of the estate of a deceased. By will the deceased bequeathed all his property to his children to be divided equally among them as tenants in common in equal shares and a protracted dispute arose. This dispute was settled and the costs thereof were agreed to be paid from the estate of the deceased and the settlement was made the subject of a Court order. It was agreed that the property would be sold. A third party offered €460,000.00 for the property. A dispute thereafter arose as to whether the settlement allowed three of the five children to require the executor to allow them to purchase the property and discharge only that sum which was additional to the value of their own shares. The executor noted that this would render the estate insolvent in that the legal costs previously incurred could not be met. The executor issued a special summons to determine if the costs could be discharged from the property. The Court noted that order for the costs of the first proceedings would have been meaningless if property were excluded from estate, given there would be not enough assets to pay costs of those proceedings. In determining an objection that it was not necessary to issue a special summons to deal with the costs issue and that the matter could have been brought before the Court under the "liberty to apply" clause of the agreement, the Court concluded that issuing of summons by plaintiff was correct step: it always would have been necessary for parties to set out positions on affidavit and there would have been legal costs no matter what. The Court ultimately ordered that the costs of the present proceedings be costs in the administration of the deceased's estate.

In re Horan; MacNamara v. Horan [2023] IEHC 475 - High Court - Cregan J, 24 July 2023

This case involved an application for the construction of a will to determine the proper interpretation of certain clauses regarding specific bequests, a trust of premises, and the distribution of the residuary estate. The court analyzed the wording of the will and concluded that the residuary bequests should be paid out immediately, the Fonthill property should be sold after a ten-year period, and the rental income should be distributed quarterly. In its analysis, the Court relied upon the principles for the interpretation of wills as were set out by McGovern J. in *Corrigan v. Corrigan* [2007] IEHC 367 as follows:

> *"(i) The Court will strive as far as it can to give effect to the intention of the testator insofar as this can be ascertained from the will.* In limited circumstances the Court is permitted to rectify a will to save it from bad drafting. See *Curtin v. O'Mahony* [1991] 2 IR 566.
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> *(ii) The Court considers the will by placing itself in the position of the testator sitting in his armchair shortly before his death to see what he was setting out to achieve*.
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> *(iii) As a general rule the court will give legal or technical words used in a will their legal or technical meaning*.
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> *(iv) The guidelines suggested by Lowry L.C.J. in Heron v. Ulster Bank Limited* [1974] N.I. 44 *at 52 were approved and adopted by Carroll J. in Howell v. Howell* [1992] 1 I.R. 290. *These are as follows:*
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> > *1. Read the immediate relevant portion of the will as a piece of English and decide, if possible, what it means*.

2. Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole, or alternatively, whether an ambiguity in the immediately relevant portion can be resolved.

3. If ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.

4. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumption against intestacy and in favour of equality.

5. Then see whether any rule of law prevents a particular interpretation from being adopted.

6. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other Courts and judges on similar words, rarely as binding precedents, since it has been well said that 'no will has a twin brother' (per Werner J. in Matter of King [1910] 200 N.Y. 189, 192) *but more often as examples, sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar context."*

Goodwin v. Murphy [2023] IEHC 383 - High Court - Stack J, 3 July 2023

High Court, in proceedings concerning the construction of a will: (a) determines that a will was valid and not void for uncertainty, notwithstanding that it had been based on a template downloaded from the internet and was not well drafted; and (b) that no intestacy, total or partial, arose by reason of the wording of the will.

Proceedings issued by way of special summons issued to construe a Will. The deceased died a bachelor without civil partner or parent or issue. He downloaded a template Will from the internet. There was a "no contest provision" about which the Court expressed significant doubts as to its enforceability. Oral evidence of the deceased's intention would have been admissible if it were not possible to construe the Will on its own terms. Bequest of "any moneys" in clause 14 of the Will did not amount to a residuary gift nor was there any basis for extending the phrase "any moneys" to include the house and land owned by the deceased on the date of his death: the house and lands fall to be distributed by reference to either clause 9 or clause 10. There was an alleged conflict between clause 9 and 10. Clause 9 seemed to leave the residue to a Ms Murphy. Clause 10 was titled "Wipeout Provision" and seemed to leave the residue to Ms Murphy's daughter. The Court decided these clauses were reconcilable as meaning that, in the event that the gift of residue to Ms Murphy failed, the gift would pass to her daughter. The Court was satisfied that no intestacy, total or partial, arose by reason of the drafting of the Will.

The Court went on to make the following admonition [para 90]: "*I would like to repeat my warning at the outset of the judgment: the downloading of wills from the internet is an extremely unsafe method to provide for what is happens to one's estate on death. In this particular case, it was possible, without doing any violence to the language of the Will, to resolve the apparent conflict between clauses 9 and 10. However, in another case, it might*

not be possible to do this. The template might have been filled out in a different way, or there might be no extrinsic evidence available to allow a court to give effect to the intention of the testator. In this case, Ms. Murphy was involved in helping the Deceased draft the Will, but in another case, a testator might simply fill it in himself or herself and execute it without discussing his or her intentions with anyone. In those circumstances, it might not in fact be possible to give a sensible interpretation to a will drawn up using this template or a court might end up interpreting the will other than in accordance with the intentions of the testator. I would therefore reiterate that the public should seek the advice of a solicitor when drawing up a will".

M.B. v. P.D. [2023] IEHC 561 - High Court - Phelan J, 13 June 2023

The case involved an appeal against the refusal in the Circuit Court to join a co-plaintiff in proceedings under section 117 of the Succession Act, 1965. The court was asked to determine whether the renunciation of a grant of representation suspends the running of time for making a claim under section 117. The court also examined whether a defendant can be estopped from relying on the time-bar under section 117(6) based on their conduct and representations. The Co-Plaintiff, seeking to be joined to proceedings after the expiry of 6 months from the issue of the grant of probate, averred that proceedings did not issue because it was represented by the Defendant that he had decided to renounce representation. In refusing to join the Co-Plaintiff, Phelan J found, *inter alia*:

"Before we get to a point where I must determine whether conduct on the part of the Defendant in writing in the terms in which he did could give rise to an estoppel took place, however, I must first consider whether there is a basis in law for the moving party's contention that renunciation of a grant of representation " stops the clock". I am satisfied that an intention to bring proceedings on behalf of the proposed Co-Plaintiff existed within six months of extract of the grant of representation in this case because it is referred to in correspondence. There is undoubtedly affidavit evidence before me to support a conclusion that proceedings did not issue in view of the communicated intention to renounce executorship. This appears to be because it was the Plaintiff and proposed Co-Plaintiff's solicitor's understanding that the fact of renunciation would suspend time. There is no evidence, however, that they were induced into believing this to be the case by the Defendant and this understanding of the law is unilateral [para 14].

"I know of no authority and none has been cited for what I consider to be the novel proposition that the renunciation of a grant of representation stops time running for the purpose of a s. 117 application. Given that even the moving party accepts that there is no authority which confirms this understanding, I find it surprising that steps were not taken to issue a protective writ to avoid any issue in this regard [para 15].

"I have considered the terms of Laffoy J.'s judgment in S.I. v. PR 1 and PR 2 [2013] IECH 407 and I am compelled to conclude that an argument that renunciation has suspensive effect finds no real support from the terms of the judgment and having regard to the express and unambiguous terms of s. 117 of the 1965 Act. Unlike the position in this case, in the S.I. case only a limited grant had been extracted and Laffoy J. concluded that s. 117(6) should be construed as referring to a full as opposed to partial grant of representation such that time did not commence running in that case. This is a very different proposition to the one contended for in these proceedings. Laffoy J. arrived at this conclusion having regard to the

purpose of requiring the extract of a grant of representation before time would run" [para 17].