**THE HIGH COURT**

**2003 No. 522 SP**

**IN THE MATTER OF THE SUCCESSION ACT, 1965**
**AND IN THE MATTER OF THE ESTATE OF JOHN HICKEY DECEASED WHO DIED ON 30TH JANUARY, 1999**
**AND IN THE MATTER OF AN APPLICATION BY SINEAD DEVANE HICKEY IN RESPECT OF THE LAST WILL AND TESTAMENT OF JOHN HICKEY DECEASED, DATED 26TH MAY, 1998**

**BETWEEN/**

**SINEAD DEVANE HICKEY**

**PLAINTIFF**

**AND**
**BRIAN O'DWYER, GRAINNE O'DWYER, BREDA HAYES**
**AND NICOLE HICKEY**

**DEFENDANTS**

**Judgment of Miss Justice Laffoy delivered on 9th November, 2005.**

**Background**
1. Two separate and distinct issues are raised on the special summons in these proceedings.

2. The facts common to both issues are that they arise in relation to the estate of John Hickey (the testator) who died on 30th January, 1999. The testator was the husband of the plaintiff and the father of the fourth defendant, who was born on 5th December, 1990. The third defendant is the mother and, in effect, the next friend of the fourth defendant. The testator and the third defendant were not married. The testator made his last will and testament on 26th May, 1998, wherein he appointed the plaintiff to be his sole executrix and residuary legatee and devisee. She having renounced her right to probate, Letters of Administration with the testator's will annexed were granted to the first and second defendants on 15th July, 2003. The first and second defendants are party to these proceedings in their capacity as personal representatives of the testator.

**The first issue**
3. There were only two dispositive provisions in the will of the testator. The provision which gives rise to the first issue in these proceedings is Clause 4 wherein the testator devised and bequeathed the sum of IR£100,000 to the first, second and third defendants to be held by them in trust as thereinafter set out for his daughter, the fourth defendant, until she should reach the age of 25 years and then to his said daughter absolutely. The first, second and third defendants were appointed as trustees of that bequest and the trusts upon which they were to hold the sum of IR£100,000 were set out. The other dispositive provision was the devise and bequest of the residue to the plaintiff for her own use and benefit absolutely.

4. In 1993 the testator had taken out a policy of assurance on his life with Prudential Life of Ireland. On 21st June, 1993 he executed a document (the 1993 Trust) which, in effect, was a declaration of trust in a standard form, apparently, produced by the insurer. It was a special condition of the policy that it was issued pursuant to the 1993 Trust. In the 1993 Trust the testator declared that the trustee or trustees for the time being thereof should hold the policy and the full benefit thereof and all monies which might become payable thereunder (the trust fund) upon trust, if the benefit under the policy should become payable in consequence of the death of the testator, which happened, for the benefit of all or one or more of the class of persons named by relationship to the testator (which included the spouse and children of the testator) as the testator in his absolute discretion should "be (sic) deed or deeds revocable or irrevocable appoint". It is quite clear that the word "be" is a misprint for "by". It was expressly provided that no appointment should be made nor any power of revocation exercised after the death of the testator. It was provided that, in default of and subject to any such appointment, the trust fund should be held for the absolute benefit of the fourth defendant as to 100% of the trust fund.

5. The testator did not exercise the power of appointment over the trust fund conferred on him in the 1993 Trust during his lifetime by deed. Following his death, the proceeds of the policy, IR£223,350 (€283,595.99), were paid out by Prudential Life of Ireland to two trustees appointed by the court of the trust fund on behalf of the fourth defendant.

6. The first issue raised on the special summons concerns the entitlement to the fourth defendant to the proceeds of the policy and under the will of the testator and requires the court to answer the following questions:

> (a)(i) Did the testator by the bequest in his will in favour of the fourth defendant, exercise the power of appointment in relation to the proceeds of the policy?
>
> (a)(ii) What is the interest of the fourth defendant in the proceeds of the policy?
>
> (a)(iii) What is the interest of the plaintiff in the proceeds of the policy?
>
> (a)(iv) If the answer to question (i) is in the negative, was the bequest in the testator's will to set up a trust in favour of the fourth defendant in the amount of IR£100,000 intended to be in whole or in part satisfaction of the monies held upon trust for her pursuant to the terms of the trust funds?
>
> (a)(v) In the light of the answers to the above questions, in what manner are the proceeds of the policy to be distributed?

7. There is inherent in the first issue an acceptance by the plaintiff that the testator by his will gave a bequest of IR£100,000 in trust for the fourth defendant. No question as to the proper construction of the will arises. The case made is that by operation of the equitable doctrine of satisfaction the fourth defendant is not entitled to both the provision made in the 1993 Trust in relation to the trust fund and also the bequest.

8. In *Williams on Wills*, 8th Ed., 2002, the various situations in which the doctrine of satisfaction comes into play are identified as follows in para. 44.1.

> "Satisfaction is the donation of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee. It may occur (i) when a covenant to settle property is followed by a gift by will or settlement in favour of the person entitled beneficially under the covenant, (ii) when a testamentary disposition is

followed during the testator's lifetime by a legacy or settlement in favour of the devisee or legatee, and (iii) when a legacy is given to a creditor. In all these cases the question of satisfaction is one of the intention of the settlor or testator; and, if he expressly declares that the latter disposition is to be in satisfaction of the earlier obligation or disposition the matter will be governed by this expression of his intention and effect is given to the later disposition accordingly. In the absence of such expression, certain presumptions as to his intention are raised in equity, and evidence, intrinsic and, in certain cases, extrinsic, may be used to rebut or support such presumptions. … The three cases above are shortly described as (i) satisfaction of portions by legacies or subsequent portions; (ii) ademption of legacies by portions; and (iii) satisfaction of debts by legacies. In the first two cases the court leans in favour of satisfaction; in the third case it leans against it."

9. Counsel for the plaintiff submitted that circumstances which have arisen in this case fall within the first classification of the doctrine – satisfaction of a portion by a legacy. He acknowledged that the sequence here was that there was a portion followed by a legacy and, accordingly, when the portion was created there was no legacy to adeem. The species of the doctrine of satisfaction on which the plaintiff relies is an aspect of the so called "rule against double portions".

10. Counsel for the third and fourth defendants submitted that, as traditionally applied, the rule against double portions is discriminatory and is inconsistent with both the Constitution and the European Convention on Human Rights. The criticisms which may be made of the rule are outlined in Delaney *on Equity and the Law of Trusts in Ireland*, 3rd Ed., at p. 703, where it is pointed out that it has been expressly preserved by s. 63(9) of the Succession Act, 1965, which provides that nothing in s. 63 shall affect any rule of law as to the satisfaction of portion debts. Accordingly, there is express recognition of the rule in a post 1937 statute. Aside from that, neither the question whether the rule was carried over in 1937 on the coming into force of the Constitution nor whether it is compatible with the European Convention on Human Rights was raised in the pleadings, either generally or by reference to the facts of the case. In the circumstances I consider it inappropriate to express any view on those questions in these proceedings.

11. The presumption of satisfaction of a portion by a legacy has traditionally been applied in this jurisdiction where the settlor or testator is the father of, or *in loco parentis*, to the donee, the first gift is a portion and both gifts are substantially of the same nature and in favour of the same person. In this case, I am satisfied that the provision made in 1993 was a portion in the sense of being a gift of a substantial nature relative to the means of the testator and intended to set up the fourth defendant in life. Moreover, I am satisfied that the provision made in the 1993 Trust and the provision made by the testator in his will for the fourth defendant were substantially of the same nature. They were both, essentially, dispositions of money to which the fourth defendant was to be absolutely entitled, albeit in the case of the bequest in the will the trustees would have control until she attained 25 years of age. Although the provision in the will was substantially smaller than what the policy yielded, the doctrine of satisfaction admits of a lesser provision in a will being satisfaction pro tanto of an earlier portion.

12. There is a helpful commentary on the strength of the presumption of satisfaction in relation to the different classes of satisfaction in para. 44.9 of *Williams*. It is pointed out that the strength of the presumption against double portions, and what it takes to rebut the presumption, varies according to the nature of the instruments and the order in which they are executed. Presumption is strongest in the case where a testamentary provision for a child is followed by a settlement, which does not arise in this case. The rationale for that proposition is that both provisions are still under the testator's control when he executes the later instrument. The presumption is less strong where a settlement, which creates an obligation remaining unperformed, is followed by a testamentary provision. I would surmise that the editors of *Williams* are referring there to an irrevocable settlement. The rationale of the weaker presumption in that situation is that the testator is not free from the obligation of the settlement when he makes the will, and it is not so readily presumed that he meant the latter to take the place of the former. The strength of the presumption is further reduced when the double provision is contained in consecutive settlements, since, in the case of a will, the testator is supposed to be disposing of the whole of his property and distributing it among the different objects of his bounty, but not so in the case of a settlement. Further, if the first settlement contains a power of revocation which is not exercised, this will be an indication that the provisions are intended to be cumulative.

13. In this case the testator did not expressly declare his intention. Accordingly, it is necessary to consider whether the presumption applies. In relation to the two instruments at issue in this case, and considering the evidence they afford intrinsically without the aid of extrinsic evidence other than evidence of what the personal circumstances of the testator, his age and marital status, were when they were executed, the following seem to be the relevant factors:

(1) When he was a single man aged 28, in the 1993 Trust, the testator put in place an arrangement to provide for the fourth defendant in default of him exercising the power of appointment in relation to the trust funds. The exercise of the power of appointment would have overridden the default provision, so that the trust fund was still under the testator's control.

(2) In 1998, after he had married, and when he was aged 33, the testator made a will in which he disposed of his entire estate and made provision for the fourth defendant. A will is ambulatory, so that the testator's estate was still under his control after he made his will.

(3) After he made his will the testator neither revoked the will nor did he exercise the power of appointment under the 1993 Trust. The fourth defendant was his only child.

(4) On his death the entitlement of the fourth defendant to the trust fund under the default provision in the 1993 Trust took effect. At the same time, the testator's will took effect and the entitlement of the fourth defendant to the provision made for her in it took effect. In my view, the foregoing circumstances give rise to a presumption that the testator did not intend the fourth defendant to take both provisions. The issue which remains is whether extrinsic evidence is admissible to either support or rebut that presumption and, if it is, what is the effect of the evidence.

14. Section 90 of the Succession Act, 1965 provides that extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will. It is well settled that extrinsic evidence may only be adduced pursuant to s. 90 if it assists in the construction of a will or resolves a contradiction in the will and, in either case, the purpose of its admission is to show what the intention of the testator was in the particular context (O'Connell v. Bank of Ireland [1998] 2 I.R. 596). As I said at the outset, it is accepted by the plaintiff that the bequest in favour of the fourth defendant contained in the testator's will is a valid bequest. No question arises as to the admission of extrinsic evidence to construe the will. In any event, the will is unquestionably clear and unambiguous.

15. What the plaintiff asserts is that extrinsic evidence is admissible in support of the presumption that the testator did not intend to make double provision for the fourth defendant. In this connection, counsel for the plaintiff relied on the following passage from

Williams at 14.14:

> "Parol Evidence cannot be admitted to add to or vary a written instrument; but where from two written instruments, taken in conjunction with the surrounding circumstances, the court raises a presumption of satisfaction, then parol evidence is admissible to rebut the presumption, and therefore also to support it. In the case of a will and a settlement the rule is the same whether the will precedes or follows the settlement."

16. The evidence adduced by the plaintiff which it is contended supports a presumption of satisfaction is as follows:

> (a) In her grounding affidavit, having earlier averred that prior to and after her marriage she discussed with the testator the provision he had made for the fourth defendant, the plaintiff averred that it was always her clear understanding from the testator that it was his understanding that he had settled his affairs in such a manner that IR£100,000 from the life assurance policy would be held for the benefit of the fourth defendant but that thereafter the balance of the estate would devolve to herself, the plaintiff. In relation to that averment, the factual position is that the proceeds of the policy were not part of the estate of the testator.
>
> (b) Apropos of the averment at (a), the first defendant, in his affidavit filed in response to the summons, averred that he admitted that it was the deceased's understanding that he had settled his affairs in such a manner that IR£100,000 from the policy would be held for the benefit of the fourth defendant and that thereafter the balance of the estate would devolve to the plaintiff. The first defendant did not identify his means of knowledge as to the testator's understanding. In relation to the general approach adopted by the first and second defendants on this application, in the same affidavit the first defendant averred that he and the second defendant were willing to abide by any decision of the court in respect of the plaintiff's application.
>
> (c) The solicitor who acted for the testator in the drawing and execution of his will gave oral testimony to prove the notes of his attendance on the testator on 6th March, 1998 when he took instructions from the testator for the drawing of the will. The attendance notes record the following in relation to provision for the fourth defendant:
>
> > "100K to Nicole in trust.
> >
> > This is available through life policy on J.H.'s life – approx. 280K.
> >
> > Trust [?] 25 yrs."

17. The third and fourth defendants did not seek to cross-examine the plaintiff or the first defendant on their respective affidavits.

18. In my view, neither the averment of the plaintiff nor the averment of the first defendant is of a probative quality to either support or rebut the presumption. In relation to the evidence of the solicitor, that goes no further than to prove the instructions recorded by the solicitor when he took instructions for the drafting of the testator's will almost three months before it was executed.

19. The position adopted by the third defendant in her affidavit was that the attendance notes of the solicitor were not admissible. Further, she averred that she visited the testator in hospital on the Friday afternoon prior to his death, when he assured her that the fourth defendant would be well looked after. She further averred that at all material times she understood that the policy was in place and also that the fourth defendant had been provided for under the terms of the testator's will. The source of her understanding is not identified. In my view, those averments are not of a probative quality to rebut the presumption.

20. The only other evidence which might be relevant to rebutting or supporting the presumption is the evidence of the testator's assets when he made his will. There is no direct evidence of this, but, as he died just eight months after making his will, this can be inferred. The only asset of any substance which the testator had was his dwelling house, which was valued at €114,176.43 (IR£90,000) as of the date of his death on the Inland Revenue affidavit filed with the Revenue Commissioners. The dwelling house was mortgaged but there was a mortgage protection policy in place which would, if it was kept up, and in fact did, clear off the mortgage on the death of the testator. The testator was a member of his employer's pension plan. Following his death the plaintiff, as the nominated beneficiary, received €69,537.19 on foot of the pension plan, but this did not form part of his estate.

21. The totality of the relevant evidence in relation to the testator's age, marital status and personal circumstances and the state of his assets when he made his will, in my view, support the presumption that the testator did not intend that the fourth defendant should receive both the entirety of the proceeds of the policy and the bequest contained in his will. In other words, the presumption stands.

22. Before answering the questions raised on the special summons in relation to the first issue, it is necessary to explain the consequence of the conclusion that the doctrine of satisfaction applies. It is that an election must be made on behalf of the fourth defendant, who is still a minor, between the provision contained in the 1993 Trust and the provision under the will. On the facts of this case, it must be assumed that the election would be to take the provision under the 1993 Trust the trust fund represented by the proceeds of the policy.

23. Finally, by way of clarification, it is stated in *Delaney* at p. 703 that, if the father has actually advanced the portion to the child, a subsequent legacy will not be regarded as satisfaction, the reasoning being that, if the father has already given the child the gift in the nature of a portion, he would undoubtedly intend that child to benefit in addition from any provision made for him under a subsequent will. There is authority for that proposition in *Smyth v. Gleeson* [1911] 1 I.R. 113 at p. 119. On the facts of this case, the prior portion had not been actually transferred or paid to or on behalf of the fourth defendant when the will was made. The provision in the 1993 Trust was liable to be displaced by the exercise of the power of appointment.

**Answers to questions in relation to the first issue**

24. The answers in relation to the first issue are as follows:

> (a)(i) The testator did not by his will execute the power of appointment in relation to the proceeds of the policy. By virtue of the terms of the 1993 Trust the power of appointment was exercisable by deed only.
>
> (a)(ii) The fourth defendant is entitled to elect to take the proceeds of the policy or the bequest contained in the will.

(a)(iii) The interest of the plaintiff in the proceeds of the policy depends on the election made by the fourth defendant. On the assumption that she will elect to take the proceeds of the policy and, indeed, the proceeds have already been paid to trustees on her behalf, the plaintiff has no interest in the proceeds.

(a)(iv) The provision in the testator's will in favour of the fourth defendant was intended to be in part satisfaction of the proceeds of the policy the subject of the 1993 trust.

(a)(v) The distribution of the proceeds of the policy depends on the election to be made on behalf of the fourth defendant. On the assumption that the election is to take the proceeds of the policy, the distribution of the proceeds to trustees on behalf of the fourth defendant will stand.

**The second issue**

25. At the date of his death the testator was the sole legal owner of the dwelling house, 9 The Dell, Huntsfield, Dooradoyle, Limerick, which has a current value of €265,000. The testator purchased the dwelling house, as a newly constructed house, around 1994. He financed the purchase price, which was in excess of IR£60,000, by a loan of IR£4,000 from his then employer to pay the deposit, the State grant of IR£3,000 and a mortgage for the balance. On completion of the purchase the testator and the plaintiff moved into the dwelling house and they resided there until the date of his death.

The questions raised on the special summons in relation to the dwelling house are as follows:

(b)(i) At the date of the death of the testator did the testator and the plaintiff own it in all the circumstances in equity as joint tenants?

(b)(ii) Is the plaintiff entitled to a beneficial interest in the dwelling house?

(b)(iii) If the answer to (ii) above is in the affirmative, what is the extent of the plaintiff's beneficial entitlement?

26. The basis of the plaintiff's claim to a beneficial interest is that she made financial contributions to the cost of the acquisition of the dwelling house. It is not in issue that the principles of law to be applied in determining whether the plaintiff's claim is well-founded are those set out in the judgment of Finlay P., as he then was, in *W v. W* [1981] I.L.R.M. 202.

27. The factual basis of the plaintiff's claim is as follows. The testator purchased the dwelling house "from the plans". When it was completed the testator and the plaintiff decided to live together there. They considered that they were moving into their "home". It was decided to leave the house in the testator's name, the intention being that the plaintiff could buy a house as well. Some time after they moved in, the testator changed his employer, whereupon the loan he had obtained for the deposit became repayable. The plaintiff borrowed a sum of IR£4,000 on a term loan and gave that sum to the testator so that the testator could repay his employer. The testator and the plaintiff had a joint account before they were married. Their respective salaries were paid into the joint account and the mortgage and mortgage protection policy instalments were paid out of the joint account. The mortgage debt was discharged out of the proceeds of the mortgage protection policy.

28. The basis on which a court will decide that a wife is entitled to an equitable interest in a property in the sole name of her husband on the basis of a contribution of money to the purchase or on the basis of a contribution, either directly or indirectly, towards repayment of the mortgage instalments is subject to the overriding requirement that such a decision will be made only "in the absence of evidence of some inconsistent agreement or arrangement" per Finlay J. in *W v. W* at p. 204. In this case, the evidence is not consistent with an understanding by the testator and the plaintiff that the plaintiff would have a beneficial interest in the house. First, the assistance the plaintiff gave the testator in relation to repayment of the loan he had borrowed to pay the deposit cannot be construed as a contribution to the purchase price of the dwelling house. Secondly, on the plaintiff's own evidence, the understanding between them was that each would own and have title to a house, the house in issue here being the testator's. In fact, the plaintiff did acquire a house in her own name later, which she rented out.

29. Apart from that the court has been furnished with very little concrete evidence to support the plaintiff's claim. Copies of the bank statements on the joint account of the testator and the plaintiff dating from 30th October, 1997 to 4th February, 1999 have been put in evidence. From the pagination of the statements I would surmise that the joint account was opened very shortly before 30th October, 1997. Over the period for which statements have been furnished there are gaps. Even if I was satisfied that the plaintiff's claim for a beneficial interest based on the principles set out in W v. W. had been made out, I would find it impossible to calculate the contribution on the basis of the evidence before the court.

**Answers to questions in relation to the second issue:**

30. My answers in relation to the second issue are as follows:

(b)(i) The testator and the plaintiff did not own the dwelling house in equity as joint tenants at the date of the death of the testator.

(b)(ii) The plaintiff was not entitled to a beneficial interest in the dwelling house at the date of the testator's death.

(b)(iii) This does not arise.