Neutral Citation Number: [2011] IEHC 217

THE HIGH COURT

2010 376 SP

IN THE MATTER OF AN APPLICATION UNDER THE LAND AND CONVEYANCING LAW REFORM ACT 2009

BETWEEN

W.

PLAINTIFF

AND

M. A PERSON OF UNSOUND MIND NOT SO FOUND DEFENDING BY HER GUARDIAN APPOINTED BY THE COURT B. AND D.

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 27th day of May, 2011.

1. Update

1.1 The events which have occurred since I delivered a preliminary judgment in this matter of 30th July, 2010 (the July judgment) are outlined hereunder. This judgment should be read in conjunction with the July judgment.

1.2 An amended special summons between W, as plaintiff, and M and D, as defendants, was filed pursuant to an order of the Court dated 5th October, 2010.

1.3 In the amended special endorsement of claim on the amended special summons the plaintiff's claim is expressed to be made on behalf of M, as the relevant person for whose benefit the plaintiff is seeking relief in these proceedings. The relief claimed is an order pursuant to s. 24 of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) approving the Amended Scheme of Arrangement contained in Appendix 1 in respect of the declaration of trust made on 18th July, 1997 (the trust document). The Amended Scheme of Arrangement was executed by the plaintiff, who was expressed to execute on behalf of herself and her infant children, and by D and B, and also by A. The variations proposed to the trust document in the Amended Scheme of Arrangement are:

> (a) the substitution for what I referred to in the July judgment as segment III of clause 1 of the trust document of the following:
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> > "and in default of and subject to any such appointment for the absolute benefit of
> > C or the personal representatives or estate of C as to 50% of the Trust Fund
> >
> > D or the personal representatives or estate of D as to 50% of the Trust Fund."
>
> (b) the substitution for segment IV of the following:
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> > "Provided that if any of the said beneficiaries shall predecease such one of the Settlors in consequence of whose death a benefit under the policy shall become payable then (in default of and subject to any appointment as aforesaid) that beneficiary's share of the Trust Fund shall be held upon trust for the legal personal representatives of such beneficiary."

The foregoing variations comply with the suggestions made at paragraph 6.5 of the July judgment. On reflection, in the interests of drafting clarity, it would probably be advisable to insert the words "in accordance with the proviso next hereinafter contained" after the words "C or" and "D or" in segment III. I also note that the amended scheme of arrangement as executed proposes the inclusion of "the spouse of the children of the Settlors" as members of the class of persons in whose favour the power of appointment contained in clause 1 might be exercised. As I have stated in para. 6.1 of the July judgment, having regard to the incapacity of M, such inclusion would achieve nothing. Accordingly, I consider that it should be omitted. Neither of those suggested amendments affects the substance of the proposal.

1.4 The following further affidavits have been filed in support of the application:

> (a) the affidavit of the plaintiff sworn on 22nd October, 2010;
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> (b) the affidavit of B sworn on 15th October, 2010;
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> (c) an affidavit of D sworn on 28th October, 2010; and
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> (d) an affidavit sworn by the plaintiff's accountant and financial adviser, Manus Brady, on 19th November, 2010.

I will outline what I consider to be the relevant new facts which were established by those affidavits later.

1.5 Irish Life has produced the entire file in relation to the policy and the trust document pursuant to an order of this Court made on 2nd November, 2010.

1.6 Counsel instructed on behalf of the Revenue Commissioners appeared before the Court in relation to the matter. In consequence, there was interaction between the Revenue Commissioners and the Revenue solicitor, on the one hand, and the plaintiff, her accountant and her solicitors, on the other hand, in relation to the issues which arise on this application. By letter dated 21st April, 2011 to the plaintiff's solicitors the Revenue Commissioners stated:

> "Having reviewed and considered the pleadings furnished in relation to the application, as well as the additional information furnished at various times in response to the queries raised by my clients in relation to the application, I now wish to advise you that the Revenue Commissioners will not seek to satisfy the Court that the application to vary the Declaration of Trust made on the 18th July, 1997 is substantially motivated by a desire to avoid, or reduce the incidence of tax, and will therefore not be opposing the application for variation." (Emphasis in original)

When the hearing of the application resumed on 6th May, 2011, counsel for the Revenue Commissioners informed the Court of the position of the Revenue Commissioners and was excused from appearing at the resumed hearing. However, counsel for the Revenue Commissioners intimated that, in due course, the Revenue Commissioners would be applying for an order that they recover their legal costs as a statutory notice party to the application, either against the plaintiff or from the assets comprised in the Trust Fund.

2. Factual position

2.1 An additional fact which has arisen from the production of the Irish Life file on foot of the order of 2nd November, 2010 is that, as was believed to be the case, M wrote to Irish Life on 20th October, 2004 stating:

> "It is my wish that both [D] & my son [C's] widow [*i.e.* the plaintiff] should benefit equally from this policy upon my death."

The letter was handwritten by M and the number of the policy was set out opposite her address on the letter.

2.2 B, the only daughter of M, who is a solicitor by profession, in her second affidavit sworn on 15th October, 2010 has endeavoured to establish for the Court the probable destination of the assets of M after her death. For some years past, including several years prior to M's present incapacity, B has been solely responsible for assisting in, and managing, the affairs, including the legal and financial affairs, of M. In January 2008, B accompanied M to the offices of a firm of solicitors in a provincial town, where M made and executed what B believes to be her last will and testament. B has averred that she is aware of the provisions of that will because she was present in the offices of M's solicitors in the company of M for the execution of the will and she was there when the will was read out to M and when she subsequently executed it and it was attested. B has averred that the policy is not mentioned in that will. M, having made certain relatively small cash bequests to her grandchildren, bequeathed the residue of her estate to B and D. B has further averred that she is aware of no later will executed by M and has stated her belief that, as M's carer and constant companion and assistant in relation to her affairs generally, she would almost certainly have known if her mother had made a later will and that she would almost certainly have discussed the matter with B. The firm of solicitors in whose office B has averred M made her last will in January 2008 has informed the plaintiff's solicitors that they have no instructions from M to provide the plaintiff's solicitors with any information as to whether they hold a will on her behalf or the date on which a will was made or to furnish a will to them and, in the absence of express instructions from their client, M, they are not in a position to assist the plaintiff. That was a proper approach for the firm to adopt.

2.3 B, in her second affidavit, has confirmed that M has only four grandchildren: the two daughters of the plaintiff and C whose ages have been set out in the July judgment; and two sons of D who are now aged 16 years and 14 years respectively.

3. The Court's function

3.1 I have already formed the view (para. 2.2 of the July judgment) that the trust created by the trust document is a "relevant trust" within the meaning of that expression in s. 23 of the Act of 2009. I have also formed the view (para. 7.2 of the July judgment) that the plaintiff, as personal representative of C, is an appropriate person, within the meaning of s. 23, to bring this application under s. 24.

3.2 The first step in the exercise of the Court's jurisdiction is to determine whether the Amended Scheme of Arrangement has been assented to in writing by each person, other than M, who is beneficially interested in the trust as currently constituted. Apart from D, who is beneficially interested in the 50% of the Trust Fund settled on him in the trust document and will continue to be so entitled provided he survives M, which entitlement, in the events which have happened, cannot be displaced because the surviving settlor, M, lacks capacity to exercise the power of appointment by deed conferred on her, it is not possible to identify who is beneficially entitled to the Trust Fund with certainty. As things stand, the position is that the other 50%, when the Trust Fund materialises on the death of M, will become part of the estate of M, as will the 50% to which D is now entitled in the event that he predeceases M. The evidential difficulty identified in para. 5.3 of the July judgment has been alleviated, to an extent but not fully, by the averments in the second affidavit of B. The probability is that M will die testate, in which case, the 50% of the Trust Fund will fall into the residue of her estate. The probability is that the residuary beneficiaries will be B and D, both of whom have assented to the Amended Scheme of Arrangement. As regards the possibility that M may die intestate, on the assumption that A, B and D and the children of C are alive at the date of her death, they will be solely entitled to her estate on intestacy. A has assented to the Amended Scheme of Arrangement, as have B and D. As I stated in the July judgment (para. 7.10), the children of C would receive a greater share on distribution of the 50% on the intestacy of C than on the intestacy of M, so that the proposed variation is for their benefit. It seems to me that the only other possible eventualities are –

> (a) that the will made by M in January 2008 might be challenged after the death of M and an earlier will, if such was executed, would be admitted to probate, or
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> (b) that M may have made a later will than the will she executed in January 2008 in which the earlier will was revoked.

On the evidence, both of those eventualities seem extremely remote.

3.3 I have considered whether the Court has jurisdiction to direct that the will executed by M be lodged in Court so that the Court could verify that its contents are as averred to by B. M has not been brought into wardship and, accordingly, in my view no such jurisdiction exists. I do not think it appropriate to direct that she be brought into wardship merely to empower the Court to ascertain the contents of her will. The Court has also ascertained that M has not executed an enduring power of attorney. I am satisfied that there is no other avenue open to the Court to explore the ultimate destination of the assets of M following her death. However, on the basis of the evidence available, I am satisfied, on the balance of probabilities, that B, D, and possibly A, are the only persons beneficially interested in the 50% of the Trust Fund which, as things stand, will become part of the estate of M on her death. B, D and A are fully competent adults and have assented to the Amended Scheme of Arrangement. Therefore, I am satisfied that the Court has jurisdiction to make a determination under s. 24.

3.4 Given the position adopted by the Revenue Commissioners, the Court's function on the application of s. 24 is to determine whether it is satisfied, in relation to the variations to the trust document specified in the Amended Scheme of Arrangement, that the carrying out of those variations would be for the benefit of M and "any other relevant person" (s. 24(4)). For the purpose of that

determination, the Court may have regard to any benefit or detriment, financial or otherwise, that may accrue to M or any other relevant person directly or indirectly in consequence of the variations (s. 24(5)).

3.5 In order to make a determination under s. 24(4) the Court has first to decide whether there is "any other relevant person". In para. 2.1 of the July judgment I have set out the meaning of "relevant person" in relation to a relevant trust, as defined in s. 23. In the July judgment (para. 7.3) I implicitly accepted that M is a "relevant person". I continue to be of that view because, as things stand –

> (a) she must be deemed to have a vested interest because she is the arbiter of the ultimate destination of the 50% of the Trust Fund in issue here, the destination of which will be determined by whether she dies intestate or testate, and if she dies testate, by the provisions of her last will, and
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> (b) she is incapable of assenting to the variations by reason of lack of capacity.

Because of the imponderables arising from the eventualities referred to at 3.2 above, a question arises as to whether there are any other relevant persons. It is interesting to note that in Wylie on *Irish Land Law* (4th Ed., 2010) it is observed (in footnote 370 on page 703) that it is not clear how the courts can consider the position of such "other" relevant persons, if they are not identified in the application. I have come to the conclusion, on the basis of the evidence, that it is reasonable to conclude, in the application of s. 24(4) to the facts of this case, that there is no other relevant person whose position the Court has to consider. In particular, I have come to the conclusion that neither the minor children of C nor the minor children of D are "other relevant" persons. Accordingly, in determining whether to accede to the application, the question which the Court has to determine is whether the variations proposed would be for the benefit of M.

4. Conclusion

4.1 Applying the reasoning of Cross J. in *In re C.L.* [1969] 1 Ch. 587, which is dealt with in para. 7.6 *et. seq*. of the July judgment, and having regard to the fact that the evidence before the Court indicates to a degree of cogency which, in my view, goes beyond the balance of probabilities that, if she had the capacity to do so, M would assent to the Amended Scheme of Arrangement, it must be to her benefit that an order approving the Amended Scheme of Arrangement be made to give effect to her express wishes.

4.2 Further, the proposed variations of the trust document deal not only with the problem which arose on the death of C, but also anticipate that a similar problem which would arise if D were to predecease M. Accordingly, if, contrary to the conclusion I have come to and expressed above, the minor children of D are "other relevant" persons for the purposes of s. 24(4), the Amended Scheme of Arrangement is for their benefit, because the variations of the trust provisions will benefit them in the same way as they benefit the minor children of C in the event that D were to predecease M. As he has averred in his second affidavit, this is the reason why D "readily consented" to the original Scheme and has continued to support this application.

5. Procedural issues

5.1 In the July judgment (para. 9.2) I dealt with the fact that, although she lacks capacity, M is not a ward of court and does not have a committee of her person or estate, and I observed that I consider that under Part 5 of the Act of 2009 it is intended that the High Court should have jurisdiction where an adult is incapable of assenting to an arrangement by reason of the absence of mental capacity, notwithstanding that the adult has not been taken into wardship. I am still of the same view. However, I should have noted in the July judgment that, by naming M as a defendant, these proceedings were procedurally incorrect. Order 15, rule 17 of the Rules of the Superior Courts 1986 (the Rules) provides that a person of unsound mind "may defend by his committee or guardian appointed for that purpose". By order of the Court made on 17th May, 2011, B was appointed as guardian of M for the purpose of defending these proceedings on her part. The title of the proceedings was amended accordingly. B has undertaken to enter an appearance.

5.2 Counsel for the plaintiff referred the Court to the decision of Chancery Division of the English High Court in *In re Whittall* [1973] 1 WLR 1027, where it was held that, under the Variation of Trusts Act 1958, in England and Wales the Court has jurisdiction to approve an arrangement even in the absence of an infant and, by parity of reasoning, could approve a scheme in the absence of positive expression of a view on the proposed arrangement by the guardian *ad litem*. I have already expressed the view that the infants whose position has been considered earlier, the four grandchildren of M, are not "other relevant" persons for the purposes of s. 24(4). Therefore, I am of the view that it was not necessary to join them as defendants. They have not been so joined, and obviously it is not necessary to appoint guardians to defend on their behalf under Order 15, rule 16 of the Rules.

5.3 The Amended Scheme of Arrangement, as appended to the special summons, has been structured on the basis that, if the Court so directs, it will be executed on behalf of M by B, if the Court gives approval pursuant to s. 24. I think the more appropriate approach would be for the Court's approval to be evidenced by the order of the Court itself.

6. Order

6.1 I am satisfied that this is an appropriate case in which to make an order approving the arrangement embodied in the Amended Scheme of Arrangement pursuant to s. 24(4) of the Act of 2009 as outlined above. I would envisage that the curial part of the Order will state that pursuant to s. 24(4) the Court approves the arrangement specified in the endorsement on the special summons which has been assented to by A, B and D, but –

> (i) incorporating the drafting amendment in the interests of clarity, and
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> (ii) excluding the unnecessary variation to clause 1 to include the spouses of the children of the Settlors as members of the class in whose favour the power of appointment might be executed,

as suggested at para. 1.3 above, so that the trust document shall henceforth apply with the variations to clause 1 approved of by the Court, the text of the varied clause 1 being set out in an appendix to the Order. The text is set out in the appendix to this judgment.

7. Appointment of new trustees

7.1 I propose dealing with the application for the appointment of new trustees of the trust document by exercising the power conferred on the Court by s. 25 of the Trustee Act 1893.

8. *In camera*

8.1 Section 24(3) of the Act of 2009 provides that the Court may hear an application made to it under subs. (1) otherwise than in public, if it considers that it is appropriate to do so. Given that the position of a person of unsound mind not so found and the position of infants was under consideration in these proceedings, I considered it appropriate to hear the matter *in camera* and to redact the

judgments delivered appropriately.

APPENDIX

CLAUSE 1 OF THE TRUST DOCUMENT AS VARIED

1. The trustee or trustees for the time being hereof (hereinafter called "the Trustee") shall hold the policy and the full benefit thereof and all monies which may become payable thereunder and all assets which may from time to time represent the same and all income derived therefrom (hereinafter called "the Trust Fund") upon trust, if and only if the benefit under the policy shall become payable in consequence of the death of the survivor of the Settlors or in consequence of the simultaneous deaths of both of the Settlors, for the benefit of all or such one or more exclusively of the others or other of all the children and remoter issue of either of the Settlors (including children and remoter issue adopted whether before or after the date hereof), the parents, brothers, sisters, uncles, aunts, nephews and nieces of either of the Settlors who are now living or shall hereafter be born during the lifetime of either of the Settlors and the additional beneficiary or beneficiaries (if any) named later in this clause in such shares and subject to such conditions as the Settlors, or the survivor of the Settlors, in their absolute discretion shall by deed or deeds revocable or irrevocable appoint PROVIDED THAT

(a) no appointment shall be made nor any power of revocation exercised after the death of the survivor of the Settlors or after the simultaneous deaths of both Settlors

(b) no appointment or revocation by which any beneficiary may benefit may be made by that beneficiary acting as sole Trustee and

(c) the Settlors may at any time or times by deed wholly or partially release or restrict the future exercise of this power of appointment

and in default of and subject to any such appointment for the absolute benefit of

C or in accordance with the proviso next hereinafter contained the personal representative or estate of C as to 50% of the Trust Fund.

D or in accordance with the proviso next hereinafter contained the personal representatives or estate of D as to 50% of the Trust Fund

Provided that if any of the said beneficiaries shall predecease such one of the Settlors in consequence of whose death a benefit under the policy shall become payable then (in default of and subject to any appointment as aforesaid) that beneficiary's share of the Trust Fund shall be held upon trust for the legal personal representatives of such beneficiary PROVIDED ALWAYS that any benefit which shall become payable under the policy in consequence of the death of the first to die of the Settlors shall be held by the Trustee upon trust for the absolute benefit of the survivor of the Settlors and any benefit which shall become payable otherwise than in consequence of the death of either or both of the Settlors shall be held by the Trustee upon trust for the absolute benefit of the Settlors in equal shares.