**THE HIGH COURT**

**PROBATE**

**IN THE MATTER OF THE ESTATE OF SIOBHÁN O'CALLAGHAN, DECEASED, LATE OF BLOCK 10, APARTMENT 111, BROOK LAWN, STRANDVILLE AVENUE, CLONTARF, DUBLIN 3**

**AND IN THE MATTER OF SECTION 27(4) OF THE SUCCESSION ACT, 1965**

**AND THE IN THE MATTER OF AN APPLICATION BY JAMES BYRNE**

**JUDGMENT of Ms. Justice Baker delivered on the 21st day of November, 2016.**

1. This is an application by James Byrne, a creditor of Kevin McKeever, the executor named in the will of Siobhán O'Callaghan, deceased, who died on 25th November, 2013. The application is framed as an application pursuant to s. 27(4) of the Succession Act 1965 ("the Act of 1965"), that Mr. Mc Keever be "removed" as executor of the estate, and that liberty be given to an independent person, Jim Trueick, solicitor, to apply for and extract letters of administration in the estate of the deceased limited for such purpose as the court may determine.

2. In the alternative, an order is sought pursuant to s. 27(4) of the Act of 1965 for a grant *ad colligenda bona* limited for the purpose of collecting in and preserving, but not distributing the estate of the deceased.

3. The application came before me in the non-contentious Probate List and both the applicant and Mr. McKeever were represented by senior counsel.

4. Counsel accept that as applications in the non-contentious Probate List are determined on affidavit, I do not have any jurisdiction to resolve contentious matters on the affidavit evidence. The matter is primarily one of legal argument, and there is no real difference between the parties as to the essential facts giving rise to the application.

5. Briefly, the deceased died on 25th November, 2013 and at the date of her death she was in a long-term intimate relationship with Mr. McKeever whom she appointed executor of her will made on the 24th August, 2006. After making a number of pecuniary bequests, the testatrix devised and bequeathed the balance of her estate to Mr. McKeever. The Inland Revenue affidavit, sworn on 5th August, 2015, shows the estate as having a net value of €525,217.

**The position of the applicant judgment creditor**

6. The applicant, James Byrne, recovered judgment against Mr. McKeever on 24th October, 2014, in the sum of €663,824, together with interest pursuant to the Courts Act, 1981 on that sum from 16th August, 2006. As of 26th May, 2016, the applicant claims that the amount due on foot of that judgment, to include interest, amounts to €1,183,223.30.

7. The judgment creditor says that his investigations suggest that the assets Mr. McKeever stands to inherit in the estate of the deceased is the main source from which the judgment may be satisfied. He avers to what he describes as the "utterly untrustworthy" past behaviour of Mr. McKeever, and his fear that Mr. McKeever will seek to put the assets to which he is entitled in the estate beyond the reach of the creditor unless an independent person is appointed to administer the estate.

8. The background circumstances are that Mr. McKeever operated a property acquisition and trading business in Ireland through which he sold property in Dubai to Irish investors. The full purchase price was paid by those investors before the properties were built. Mr. Byrne says that on or around 16th August, 2006, he entered into a contract with Mr. McKeever to purchase a number of properties in Dubai, and that in accordance with the contractual arrangement, he paid the full purchase price of €632,914.90 between August, 2006 and September, 2007 to Mr. McKeever.

9. In the events, Mr. McKeever failed to convey the properties as they had already had been sold and conveyed to other persons. It was in that context that the applicant obtained judgment for the contract price and interest as noted above.

10. Subsequently, orders were made for discovery in aid of execution, and that Mr. McKeever be examined before the Master of the High Court. In the course of cross-examination, Mr. McKeever admitted to owning between five and seven unfinished apartments in Dubai and a shareholding in a number of companies in the British Virgin Isles and Belize, one of which owns property in Co. Galway.

11. After the death of his partner, the deceased, Mr. McKeever "disappeared" or as is said in the grounding affidavit "staged his own abduction". He later pleaded guilty to charges of knowingly making false reports and statements to the gardaí contrary to s. 12(b) of the Criminal Law Act 1976, and of wasting garda time contrary to s. 12(a) of the same Act.

12. A receiver by way of equitable execution was appointed in July, 2015 by Hedigan J. over so much of the assets payable to Mr. McKeever from the estate of Siobhán O'Callaghan, deceased, as would satisfy the judgment and costs of the applicant.

**The application in the Probate List**

13. Mr. McKeever has instructed Tom Brabazon, solicitor, to act for him for the purpose of the administration of the estate of the deceased. Mr. Brabazon has sworn two replying affidavits of 26th October, 2016, and 4th November, 2016. Mr. McKeever has only now, immediately before this judgment is delivered, sworn an affidavit confirming the contents of the affidavits of Mr. Brabazon.

14. Mr. Brabazon exhibited what he describes as an "agreement giving rise to a *lien* for fees" entered into between himself and Mr. McKeever, and in respect of which he claims priority. That agreement made on 8th June, 2015 relates to the costs and fees on a solicitor and own client basis, and outlay including counsel's fees, in the defence of the criminal charges mentioned above. It is not my role in these proceedings to determine the question of priority, or whether Mr. Brabazon, as a matter of law, has the benefit of a *lien* for those fees and costs. Mr. Brabazon however asserts on affidavit, (paragraph 16 of the affidavit sworn on 26th October, 2016) that the fees are a "debt which the estate owes me". He accepts that he and the executor must be bound by any decision of the court in proceedings between the judgment creditor, Mr. Byrne and himself with regard to priority, in any issue between the creditors. His affidavit is predicated on a view that the debt is one due by the estate to him and not by Mr. McKeever personally.

15. Mr. Brabazon also says that the effect of "removing" the executor would impose an extra burden of expense on the estate.

16. Correspondence exhibited between Mr. Brabazon and the receiver by way of equitable execution appointed by the High Court has been contentious, and Mr. Brabazon argues that the application is as an attempt to "hijack our agreed fees".

17. In his second replying affidavit sworn on the 4th November, 2016 Mr. Brabazon says that his client remains able and willing to extract a grant of probate and that the delay in extracting the grant arises because of the lodgement of two caveats, one by a sibling of the deceased, vacated some months ago, and the other lodged by the applicant, now agreed to be vacated.

18. The final affidavit in the chain of affidavits was sworn by David Walsh on 3rd November, 2016. He exhibits email correspondence between Mr. McKeever and Mr. Brabazon concerning the reason for the delay in Mr. McKeever executing a share transfer form to allow the applicant to make application to restore a Belize registered company in which Mr. McKeever has a beneficial interest. These emails, and two short medical reports, are the only direct evidence before me of the current personal circumstances of Mr. McKeever and it is convenient to set out the content of the email from Mr. McKeever to his solicitor Mr. Brabazon.

19. In the email of 1st November, 2016, Mr. McKeever says he is confined to bed and is "not taking any calls or answering emails at this time", and that his doctor has advised him to "stay away from anything that causes the least amount of stress for a period", fixed by reference to a hoped for reduction in his blood pressure. He says his life "is far more important than anything else at this time" and that he will resume contact with Mr. Brabazon once his blood pressure reduces to the advised levels.

20. A report from Mr. McKeever's GP dated 25th October, 2016 confirms the severe hypertension, and that he is "unfit for legal activity/court appearance for next two weeks". A further medical report furnished in photocopy form annexed to the replying legal submissions and dated 16th November, 2016 says he has "severe hypertension" and was that day referred to a hospital emergency department. He is said to be "unable to attend court for at least two weeks" for that reason.

21. Mr. Brabazon's position stated on affidavit is that he has "instructions to administer the estate in accordance with law", but he identifies no specific instructions with regard to whether the real property in the estate is proposed to be sold. The agreement for fees contains an acknowledgment by Mr McKeever that he will instruct the "liquidation" of the estate in early course.

**Legal principles**

22. The court has jurisdiction under s. 26(2) of the Act of 1965 to revoke, cancel or recall any grant of probate. Such an order by its nature is made after a grant has issued. This jurisdiction was engaged in a number of cases opened to me. The most recent is the judgment of the Court of Appeal in *re Dunne deceased: Dunne & Ors v. Dunne* [2016] IECA 269 where Peart J. giving the judgment of that Court set aside an order of the High Court revoking a grant and giving liberty to a third party to extract a grant. The Court of Appeal followed the decision of the Supreme Court in *Dunne v. Heffernan* [1997] 3 I.R. 431 in taking as a guiding first principle the proposition that the court would be slow to revoke a grant of probate.

23. There are a number of reasons identified in the case law for the general reluctance on the part of the court to revoke a grant of probate. In *Dunne v. Heffernan* the Supreme Court pointed out that "serious misconduct and/or serious special circumstances on the part of the executor would be required in order to justify such a drastic step". The Court noted that the executor had in proving the will accepted the duty of administering the testator's estate, and that to overrule the wishes of the testator would require weighty reasons. In that case the court refused to make an order revoking the grant because it was not satisfied that any reason had been shown for the plaintiff's distrust in the ability of the proving executor to administer the estate properly.

24. The Court of Appeal in its judgment in *re Dunne deceased: Dunne & Ors. v. Dunne* held that there were no special circumstances and rejected the argument that the defendant, who had already extracted a grant of probate in the estate of his late father, was in a situation of irreconcilable conflict of interest with the estate. The court noted that there was an identified dispute between the proving executor and his siblings in regard to whether he and his late mother had barred the title of his siblings under the Statute of Limitations as a result of which he became entitled to the entire of those lands as surviving joint tenants with his late mother.

25. Peart J. rejected the argument that the personal representative was in a conflict of interest with the estate. There was a dispute between the siblings, and the personal representative was advancing a proposition the practical result of which was that his nine siblings would not take their distributive share in the estate of their late father. Peart J. said that the issue between the parties was a legal issue capable of being determined by a court, the determination of which would bind the estate and the potential beneficiaries. He held that the conflict of interest or the potential conflict of interest was not "one which has the capacity to hinder or prevent the proper and fair determination of the issue that had arisen". He went on to describe it as an "operative conflict", capable of resolution in a suitable application to the court in proceedings between the parties or under O.3 r. 2 of the Rules of the Superior Courts by special summons, or, presumably, in the Circuit Court.

26. Peart J. gave number of reasons for his decisions:

> (a) The litigation could involve a considerable drain on the resources of the estate to the detriment of the beneficiaries, and to replace the person or representative was a step that should be taken only when it was necessary to do so.
>
> (b) The issue of the Statute of Limitations was one between the personal representative, the defendant in the proceedings, and his siblings. It was not as such an issue between the defendant and the estate.

27. The situation which prevailed in *Flood v. Flood* [1999] 2 I.R. 234 was different, and Macken J. did make an order revoking the grant of probate to the executor named in the will of the deceased because she found that executor was, or was likely to be, in a direct conflict with the estate and had a claim against the estate which could have had the effect that the value of the estate would be reduced. She made the order, but did not wholly displace the executor in his role, and indicated that when the relevant litigation between the executor and the estate, now to be represented by an independent person appointed under s. 27 (4) of the Act of 1965, had concluded that the executor could resume the role and continue and finish the administration of the estate.

28. Certain matters are to be observed with regard to this case law. Each of the three cases mentioned were applications to revoke a grant under s. 26(2) of the Act of 1965. This is not such and it is one brought under s. 27(4), and is properly characterised as an application to pass over the right of the executor to extract a grant. As a general principle in respect of both classes of application a court must respect the wishes of a testator that his or her estate be administered by the person chosen to take on that task. However the combined effect of ss. 27(1) and (4) of the Act of 1965 is that the High Court may grant administration with or without will annexed of the estate of a deceased limited in any way that it thinks fit. The court has a power to pass over the executor named in a will and permit another person to extract a grant, but the authority of the person thus permitted may be limited in several ways. The High Court frequently gives liberty to extract an *ad litem* grant for the purposes of substantiating proceedings. Equally the court may permit a grant to issue limited in other ways, and I will return to deal in more detail below with these. The fact that the court

may limit the power of an administrator who extracts a grant with will annexed in circumstances where an executor is passed over suggests that the Act envisages circumstances where all rights of the executor will not thereby be extinguished.

29. Specifically s. 27(4) of the Act of 1965 provides that the High Court may order that administration be granted "by reason of any special circumstances" or when it is "necessary or expedient to do so".

30. I reject therefore the argument of counsel for the executor that the decision of the Court of Appeal in *re Dunne deceased: Dunne & Ors. v. Dunne* is authority for the proposition that the sole basis on which the Court may permit a grant to issue to a person other than the executor named in a will under s.27 is where the executor is shown to be in a conflict with the estate, or where the executor is found not to be in a position to administer the estate because of his conduct as executor.

31. For the same reason, counsel for the executor is not correct that the only circumstances in which the Court may pass over a named executor and permit administration to be granted to another person is where it is "necessary" to do so. The Act clearly gives power to the Court to do so when it would be "expedient", that is in circumstances other than where necessity is shown.

32. The case law relied on by both parties, and briefly outlined above, suggests some of the factors that the Court may take into account in making an order under s. 27(4), but there is a significant difference legally and practically between the removal of an executor who has already extracted a grant, and the revocation of a grant by which that executor is deprived of all powers derived under the will and the grant, on the one hand, and where the Court grants administration limited for a purpose or purposes to another person. In the latter case the rights of the executor may be maintained and do not require to be abrogated. Another difference of a practical nature is that the costs of extracting a grant and costs incurred in the administration of the estate will generally not be unnecessarily wasted.

33. The Court of Appeal in *re Dunne deceased: Dunne & Ors. v. Dunne* was influenced by the fact that the likely litigation between the family members would be more costly as a result of the interposition of another party, i.e. an independent person appointed as personal representative under s. 27 (4) after the grant to the proving executor was revoked, and where the Court of Appeal considered that a third party personal representative in the litigation would not add anything to the dispute, and would not have any direct evidence or argument to make, which would be in addition to, or even different from that which would emerge in the course of the action between the family members.

34. I reject the argument of counsel for the executor that the reason why the Court of Appeal rejected the application was that the administrator had confirmed that he would be bound by any order of the Court. A person extracting a grant of probate or administration intestate swears an affidavit that he will administer the estate in accordance with law. The Court of Appeal recognised that a legal obligation and burden exists on a personal representative, whether executor or administrator of an intestate estate, and the personal representative is obliged by his oath to lawfully perform the solemn task undertaken. It is incorrect to characterise the executor in the estate of Cecil Dunne deceased as having expressed a "willingness" to be bound by any order of the court, and it was the general obligations arising from the oath that persuaded the Court of Appeal that the proving executor would perform the task vested in him.

**Application of the principles**

35. There are a number of unusual elements in the present application. The applicant is not a creditor of the estate, but a judgment creditor of the executor and principal beneficiary in the estate. It is not asserted that the executor is in a position of conflict with the estate, but rather that the executor is unlikely to administer the estate in a way that will protect sufficiently the interests of the judgment creditor in enforcing his debt against that beneficiary.

36. I reject the suggestion by the applicant that Mr. McKeever has no beneficial interest in the estate. He is entitled to the residue of the estate after the payment of a small number of pecuniary bequests. He undoubtedly has a beneficial interest, albeit the will has not yet been admitted to probate, and theoretically at least there remains the possibility of a challenge. Mr. McKeever's interest in the estate might be fixed with the rights arising following the appointment of a receiver by way of equitable execution over such of his interests in the estate as may be necessary to satisfy the debt of the applicant, but his entitlement in the estate has not been displaced. Equally and for the same reason, the applicant has no interest in the estate and it stretches argument to suggest that he has.

37. It seems that Mr. McKeever is the beneficial owner of a company which is wholly entitled to the interest in real property in the west of Ireland. The legal submissions furnished by the executor on 17th November, 2016 suggest that this property is sufficient to meet the debt of Mr. Byrne. In recent days Mr. McKeever has executed a document to transfer his shareholding in the company which owns this property. The submissions describe the property as "quite substantial" and quite extraordinarily exhibit a Google Maps street view of the property and embed an article from an Irish newspaper where the property was described as "one of Celtic Tiger's biggest mansions". Counsel describe themselves as "confident" that the eventual sale of this property will more than cover the applicant's judgment debt, making redundant the applicant's reasons for this application.

38. It goes without saying that legal submissions are not evidence. Legal submissions ought not to make arguments based on facts which are not proven before the Court. It is not appropriate that I be asked to extrapolate from an embedded newspaper article and a street view from Google Maps the potential value of the property held by Mr. McKeever's company. This is a wholly inappropriate use of legal submissions.

39. Mr. McKeever has not set up a contest between himself and the estate, but his solicitor Mr. Brabazon has, in my view, in his affidavit set up a claim against the estate, a claim that he has *lien* over the estate papers for fees due to him by the beneficiary, Mr. McKeever. Of itself the fact that the executor named in the will of the deceased has chosen to appoint a solicitor who has set up on affidavit a claim against the estate such that he may not act in the prosecution of that claim may not amount to sufficient ground to prevent the executor extracting a grant.

40. In written legal submissions signed by senior and junior counsel on behalf of the executor it is asserted that "use of the word *lien* is colloquial". I do not accept this attempt by counsel to reformulate the proposition advanced by Mr. Brabazon in two affidavits. Mr. Brabazon has asserted on affidavit a *lien* over the estate papers, and has asserted that he is a creditor of the estate. He says so expressly in paragraphs 12 and 16 of his affidavit sworn on 26th October, 2016. It is implicit in paragraphs 17 to 22, inclusive of that affidavit. The averments must be seen as a claim of right by a solicitor and I could not accept that Mr. Brabazon intended to use the word "*lien*" in a colloquial sense. The word has a legal meaning, the meaning of which a solicitor in practice will well know.

41. In paragraph 14 of his later affidavit sworn on 4th November, 2016, Mr. Brabazon accepts that "questions of priority" in respect of the estate can be dealt with at a later time. Nowhere in that affidavit does he withdraw his assertion that he holds a *lien*, or that the

estate owes him a debt.

42. Furthermore I am concerned that Mr. Brabazon has mischaracterised his role as solicitor appointed by the executor to take out a grant. At paragraph 2 of his first affidavit he suggests that the application before me is in effect an application to appoint another person "effectively in my place" to administer the estate. Mr. Brabazon has been engaged by the executor to take the procedural steps to extract a grant. He is not yet the solicitor for the estate, no grant has issued, and it is the proving executor who will administer the estate and give instructions to his solicitor, who will act on those instructions.

43. An immediate problem is apparent in the administration of the estate, as a determination on the question of the validity of the claim of a *lien*, and whether legal costs are in fact owed by the estate to Mr. Brabazon, must be determined before the net value of the estate is ascertainable.

44. Another unusual element in this case is that the executor Mr. McKeever has not dealt in any way with the merits of the application, and he has left this to his solicitor. Two affidavits have been sworn by his solicitor and from the second of these affidavits, sworn on the 4th November, 2016, it is clear that Mr. Brabazon has no specific instructions. I consider that I must read the email from Mr. McKeever, and the two medical reports as indicating that he is at present unable for health reasons to further instruct Mr. Brabazon or any other solicitor to administer the estate if a grant should issue to him. I find it impossible to glean with any degree of confidence when, and if, Mr. McKeever will be in a position to instruct his solicitor and indeed any other person or body that would be needed to administer the estate, such as an estate agent or accountant.

45. Mr. Brabazon, at paragraph 17 of his second affidavit says that his instructions are and remain clear to administer the estate and "to do so as efficiently as possible and in accordance with law". The instructions so characterised are vague and unspecific, and Mr. McKeever's personal and health circumstances would suggest that he is unable or unwilling to engage with any matter which requires him to make a decision or to engage in any matter which is stressful.

46. Were the grant to issue to Mr. McKeever now, I am not satisfied that Mr. McKeever is in a position to instruct his solicitor to sell or otherwise deal with the real property in the estate, to make the distributions of the pecuniary bequests, or to otherwise deal with the debts of the estate.

47. Two problems are therefore apparent: Mr McKeever is unwell, and his solicitor has raised an unresolved dispute with the estate. The circumstances suggest that the appropriate course of action is for me to permit the extraction of a grant *ad colligenda bona*, and *ad litem*.

48. The nature of the grant *ad colligenda bona* was explained by Hanna J. in *the Goods of Walter Dyas (deceased)* [1937] 1 I.R. 479, in circumstances that bear some resemblance to the ones in the present proceedings. The applicants were creditors of the deceased, beneficiary in a will of his late father who died resident in the Irish Free State. The debtor was entitled to a life estate in capital lodged in the Irish High Court and invested in Consolidated Stock. Hanna J. held that the applicants were entitled to a grant of letters of administration *ad colligenda bona* limited to apply to have the monies paid out of court and subject to a direction that they be paid into the appropriate court of the Orange Free State where the debtor was domiciled at his death. Hanna J. expressly made the order to put the applicants in a position where:

> "[W]hatever their rights, they will be protected, and their debt and the liability of the estate investigated … by the competent Court in South Africa."

He went on to explain why he would not permit the issue of a full grant to the creditor because to do so would require further inquiry, one which was not within his jurisdiction.

49. I consider that in the light of the uncertainty and difficulties in the present case that it is appropriate that I should make an order permitting Jim Trueick solicitor, the person nominated by the applicant, to apply for and extract letters of administration in the estate of the deceased pursuant to s. 27 (4) of the Act of 1965, but limited as follows:

50. The grant be limited to the taking of all steps necessary to extract the grant and deal by sale or otherwise with the assets in the estate with a view to realising those assets. At that point it should be possible to ascertain the value of the gift that falls to Mr. McKeever under the will. Because Mr. McKeever has given no instructions as to his wishes with regard to the administration of the estate, it is not possible for me to say whether he lives in one of the apartments in the ownership of the deceased at her death. His wishes in regards accommodation needs should be respected by the personal representative as far as possible.

51. It seems that the grant can issue with will annexed, as no question with regard to the validity of the will arises at this juncture.

52. As the grant *ad colligenda bona* does not import authority to substantiate proceedings, Mr. Trueick is also given liberty to apply for and extract a grant *ad litem*, for the purposes of substantiating proceedings, either to be brought on behalf of the estate against Mr. Brabazon for declaratory relief, or to defend such proceedings as may be brought by Mr. Brabazon in regard to his costs. He is also to be authorised to accept any notices or take any other action or receive any other documents that are necessary for the determination of that issue.

53. The order is not an order that Mr. McKeever be passed over for all time, and it may be that the final conclusion of the administration of this estate requires that a grant be issued to him. For the present, the personal representative appointed pursuant to my order will have power to realise the estate, and the effect of his actions will be that it will be possible to then quantify the value of the residuary estate of which Mr. McKeever is sole beneficiary.

54. I expressly do not make this order on the basis that Mr. McKeever has shown that he has any conflict with the estate, nor that he has unduly delayed in extracting the grant, but because he has shown through his solicitor that he is not in a position to now take the steps to administer the estate should a grant be issued to him, and also because the claim of Mr. Brabazon is not one that may be maintained by or against Mr. McKeever were he to be permitted to extract a grant, as I consider that the claim of Mr. Brabazon against the estate is one that will have to be determined before any further distribution of the estate is made.

55. I therefore propose to make an order as follows:

> (a) An order under s. 27(4) of the Act of 1965 that Jim Trueick be appointed administrator *ad colligenda bona* with will annexed in the estate of Siobhán O'Callaghan, deceased.

(b) An order under s. 27(4) of the Act of 1965 that Jim Trueick be granted liberty to apply for and extract letters of administration *ad litem* in the estate of the deceased, limited for the purposes of substantiating proceedings which may be commenced either by that personal representative or by Mr. Brabazon in respect of the claim of Mr. Brabazon that he has a lien over the estate papers of the deceased, or that the estate is indebted to him in the manner contended.

(c) No distribution may be made by the personal representative until further order of this Court or of the Chancery Court or Circuit Court as the case may be.