

THE HIGH COURT

**IN THE MATTER OF THE ESTATE OF PETER CLOHESSY LATE OF BILBERRY, MIDLETON IN THE COUNTY OF CORK, RETIRED CARPENTER, DECEASED**

**AND IN THE MATTER OF SECTION 27 OF THE SUCCESSION ACT 1965**

**AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 27 OF THE SUCCESSION ACT 1965 BY PATRICIA HICKEY, COMMITTEE OF THE PERSON AND OF THE ESTATE OF ANN CLOHESSY, A WARD OF COURT IN THE NAME OF AND ON BEHALF OF ANN CLOHESSY, A WARD OF COURT**

**JUDGMENT of Mr Justice Binchy delivered on the 20th day of December, 2017**

1. This is a motion brought by Patricia Hickey, General Solicitor for minors and wards of court ( the "Committee") who was appointed as committee of the person and of the estate of Ann Clohessy (the "Ward") on 19th August, 2016, by order of Kelly P., he having found the Ward to be a person of unsound mind.
2. By this motion, the Committee seeks an order pursuant to s. 27(1), s. 27(4) and/or s. 27(7) of the Succession Act 1965, granting liberty to one Richard Hammond, Solicitor, to extract a grant of representation *pendente lite* in the estate of Peter Clohessy, deceased (the "deceased"), pending the determination of proceedings that have issued in the Circuit Court between Valerie Coleman (daughter of the deceased) and Fintan Coleman (who were both appointed executors in the estate of the deceased pursuant to his last will and testament), plaintiffs and Ann Clohessy, Veronica Clohessy and Patrick Clohessy, defendants, together with the further and additional power to distribute the legal right share of the Ward in the estate of the deceased, who had been her husband, but from whom she had been estranged, for many years.
3. All of the parties to the proceedings referred to in the last paragraph were served with notice of this application, which was returnable before this court on 18th December, 2017, by registered letter sent to each of them on 11th December, 2017. Mr. Patrick Clohessy ("P.C."), son of the Ward and the deceased, filed an affidavit in opposition to this application on 13th December, 2017, but did not serve it on the Committee or her solicitor. He swore his affidavit before a Commissioner for Oaths at 3 Inns Quay, Chancery Place, Dublin 7. The offices of the solicitor acting for the Committee are in the Capel Building, a little more than a stone's throw away. The Committee herself, who is of course the General Solicitor for wards of court and minors, operates out of premises at Phoenix Street North, also a short distance away. In spite of this, P.C. who it appears has some considerable experience in litigation, failed to serve his replying affidavit on the Committee or her solicitor. He said that he did not have time to do so. While I appreciate that he got the application herein at quite short notice, he nonetheless managed to assemble a replying affidavit and have it sworn five days in advance of the return date of this motion. I do not think it credible that he would not have had time to post, email, or even leave a copy of his affidavit into the office of the Committee of her solicitor. Be that as it may, I afforded the Committee an opportunity to consider the contents of P.C.'s affidavit and it was possible for the application to proceed having due regard to P.C.'s affidavit and the arguments that he made in person, in opposition to this application.
4. The Ward is 95 years of age. The deceased died on 26th January, 2010, survived by his wife, the Ward, and three children. One of those children, together with her husband, was represented by Counsel at this application as executors nominated by the will of the deceased which he executed on 9th January, 2008. They did not object in principle to this application, but they did express some concerns and made suggestions as to conditions that might be attached to any order the court might make, which I address below. However P.C. did raise objections to the application, both in the affidavit referred to above, and in person.
5. At the time of his death, the deceased and the Ward were estranged and the deceased left the Ward only the sum of €1,000 in his will. On 6th May, 2010, solicitors acting on the instructions of the executors wrote to the Ward informing her of her entitlement to one third of the estate of the deceased, and putting her on her election for the purposes of s. 115 of the Succession Act 1965. I understand that the Ward did not reply to that letter.
6. By order made on 26th July, 2017, by Kelly P., the Committee was authorised in the name and on behalf of the Ward to elect to take her share in the estate of the deceased to which she is entitled as her legal right share which, in this case, amounts to one third of the estate of the deceased. The solicitors acting on behalf of the Committee wrote to the solicitors acting on behalf of the executors nominated by the deceased on 1st August, 2017, informing them that the Ward was exercising her right of election in accordance with s. 115 of the Succession Act 1965. On 25th October, 2017, Kelly P. made an order authorising the Committee to apply on behalf of the Ward for a limited grant of representation *pendente lite* in the estate of the deceased and further authorising the Committee when making such application to apply for the power to distribute the legal estate of the Ward.
7. The Committee then brought forward this motion on 4th December, 2017, grounded upon the affidavit of the Committee. In this affidavit, Ms. Hickey expresses concern that having regard to the age of the Ward, and the delay that there has already been in extracting letters of representation in the estate of the deceased, that the Ward may never receive the benefit of her entitlements in the estate of the deceased. She says that the Ward is resident in a hospital and has ongoing care needs and requires finances. She says that she, the Committee, has had no cooperation from family members and she is unaware as to the precise assets of the Ward. She further avers that she has no idea as to the condition of the deceased's lands or other assets or what has happened to rents and profits from those lands.
8. She avers that the estate of the deceased gave rise to the filing of seventeen caveats, three of which remain live. In addition, there have been proceedings before the Circuit Court. One set of testamentary proceedings was struck out on 4th April, 2014, "without prejudice". This is because an affidavit of verification had not been filed at the time of issue of the testamentary Civil Bill. However, further proceedings issued on 26th August, 2014 and are ongoing. The Committee avers that those proceedings have given rise to numerous interlocutory applications in respect of which there are outstanding appeals. It seems clear from the averments of the Committee that no end to these proceedings is in sight.
9. The Committee has moved this application in order to ensure, if at all possible, that the Ward will have the benefit of her inheritance in the estate of the deceased. She asks that the assets of the estate be identified, secured, and if necessary, sold in order to realise the entitlement of the Ward. She says that if necessary there can be some provision for accounting recoupment to the estate of the deceased upon the conclusion of the second set of testamentary proceedings referred to above.

10. As mentioned above, Counsel on behalf of the executors indicated that the executors were not opposing the application but did express concern as to the possibility that the distribution of one third of the estate for the benefit of the Ward, before the conclusion of the testamentary proceedings, could give rise to a shortfall in relation to the costs payable in respect of those proceedings. Counsel suggested that that in permitting a distribution of her legal right share to the Ward, the Court ought to have regard to this possibility and put in place some mechanism to avoid what might turn out to be an over payment to the Ward, such as requiring the provision of a bond to meet this contingency, or alternatively by directing that some of the Ward's share should be retained until the costs associated with the administration of the deceased's estate are known.

11. P.C. opposed the application on the following grounds:-

- (i) He claims that the order of 19th August, 2016 whereby the Ward was declared of unsound mind and incapable of managing her personal property is invalid, by reason of the fact that it has not been perfected in accordance with O. 115 of the Rules of the Superior Courts.
- (ii) Furthermore, he says that the order of 19th August, 2016 is invalid because it was not served on the Ward herself, or on P.C. himself, and he argues that the further orders of Kelly P. dated 26th July, 2017 and 28th October, 2017 referred to above are not valid for the same reasons.
- (iii) He also complains that the Committee exercised the right of election on behalf of the Ward without notice to him, P.C.
- (iv) He argues that the Committee should have applied to become a party to the testamentary proceedings, and has not done so.
- (v) He argues that the Committee was out of time in exercising the statutory right of election on behalf of the Ward. In this regard in s. 115(4) of the Succession Act 1965 provides:-

"It shall be the duty of the personal representatives to notify the spouse in writing of the right of election conferred by this section. The right shall not be exercisable after the expiration of six months from the receipt by the spouse of such notification or one year from the first taking out of representation of the deceased's estate, whichever is the later".

It is not disputed that six months has elapsed since the Ward received notification from the solicitor's acting on behalf of the executors pursuant to their letter of 6th May, 2010. However, the Committee relies upon the second part of the limitation period and says that that period has not begun to run because letters of representations in the estate of the deceased have not yet been taken out. P.C. says that there is no reference in s. 115(4) to the grant of letters of administration or probate and that the executors have been acting as such since the death of the deceased, and that accordingly time has expired for the purposes of s. 115(4).

(vi) P.C. complains that if the orders sought are granted, the estate of the deceased will be gathered and sold and that this will include his (P.C.'s) house and lands. Insofar as P.C. claims an entitlement to lands to which the deceased had title at the date of his death and over which P.C. claims ownership, P.C. accepts that a dispute in this regard has already been the subject of an adjudication (unfavourable to P.C.) by this Court on appeal from the Circuit Court, but P.C. claims that there are ongoing proceedings arising out of that determination. P.C. failed to mention those proceedings or the outcome of the same in his affidavit.

(vii) In his affidavit, P.C. makes another argument that, while very hard to follow, appears to be to the effect that the provisions of the Lunacy Regulation (Ireland) Act 1871 is unconstitutional and that he is entitled, on behalf of the Ward to advance such a case to the intent of having the order made by Kelly P. on 19th August, 2016 set aside.

12. After giving due consideration to all of the above I am of the opinion that the application should be granted in full in the terms of the notice of motion, subject only to the limitation mentioned below. My reasons for this are as follows:-

(1) The order declaring the Ward to be of unsound mind and incapable of managing her person, and appointing this General Solicitor to be Committee of the person and the estate of the Ward subsists and has not been set aside. Both Counsel for the Committee and P.C. himself referred to a determination of the Supreme Court in respect of two appeals brought by P.C. arising out of decisions made firstly by Kelly P., and secondly by Ryan P. in the Court of Appeal, in relation to applications brought by P.C. pursuant to Article 40.4 of the Constitution. It appears from the determination of the Supreme Court that P.C. sought an inquiry into the detention of the Ward on two different occasions complaining about the treatment of his mother while detained in hospital. In its determination (dated 5th September, 2017) the Supreme Court noted that no challenge had been brought to the appointment of the Committee either in the High Court or by way of appeal from the order made by Kelly P. The Supreme Court endorsed the comments of Ryan P. in the Court of Appeal to the effect that the wardship order subsists until set aside. P.C. accepts that the order has not been set aside, and while I am unclear from what he submitted whether or not any proceedings have been brought with a view to setting the order aside, what is clear is that, in considering this application, I must do so on the basis that it is a valid subsisting order until evidence to the contrary is provided.

(2) While P.C. is correct that O. 115(4) of the rules of the superior courts provides that every order of the High Court shall be "passed and perfected with all convenient speed" and O. 115(2) states that the date of perfecting shall be endorsed on the order, it does not follow that the order is invalid simply because of the absence of the word "perfected". This is an issue that would require to be raised by proceedings appropriately taken, and argued in the context of such proceedings. It cannot simply be raised as an argument in response to a motion which is founded on a subsisting order. It may be noted that the order is properly dated and signed by Kelly P. in accordance with O. 115.

(3) As to the argument that the order declaring the Ward to be of unsound mind should have been served on the Ward, P.C. advanced no authority for that proposition. Counsel for the Committee submitted that the Ward was of course notified of the application to declare her to be a person of unsound mind, but once that declaration is made, it is not the practice to serve such orders for the very practical reason that the Ward is by that time a person of unsound mind, as a matter of law. He also submitted that there is was no obligation to serve P.C. himself with that or any subsequent orders, which are in any case procedural in nature. It seems to me to be very likely that Counsel for the Committee is correct in these submissions, and the onus is on P.C., in advancing this argument, to support it with authority. He has not done so and accordingly I accept the submissions of Counsel in this regard, and reject P.C.'s argument that this application should

be refused because the order of 19th August, 2016 and subsequent orders have not been served on the Ward and/or P.C.

(4) Similarly, I can see no basis at all for the argument that the Committee had an obligation to notify P.C. that she was exercising the Ward's right of election. The Committee is charged with the responsibility of looking after the affairs of the Ward, and in doing so may exercise all the rights enjoyed by the Ward as though she herself was of sound mind and doing so.

(5) I simply do not understand the argument that P.C. makes that the Committee should have applied to become a party to the testamentary proceedings. That is a matter entirely for Committee, and has no bearing on the present application. The duty of the Committee is to safeguard the interests of the Ward and in that context to secure the legal right share of the Ward in the estate of the deceased. The Committee is meeting her obligations to the Ward in this regard by bringing forward this application.

(6) It is quite clear that the reference in s. 115(4) of the Succession Act 1965 to the "first taking out of representation of the deceased's estate" is a reference to a taking out of a grant of probate or administration in the estate of a deceased person. Indeed the word "representation" is defined in the interpretation section of the Succession Act 1965 as meaning probate or administration. Accordingly the limitation period for exercising the right of election pursuant to s. 115(4) has not yet commenced running as against the Ward, and her right of election has been exercised in time.

(7) As to P.C.'s concern that the administrator *pendente lite* may gather in and dispose of assets which P.C. claims belong to him, two points may be made. Firstly, the administrator can only gather in and sell assets belonging to the estate of the deceased. If there is any dispute concerning ownership of assets, the administrator may have to initiate proceedings to resolve that dispute, or in the context of a sale of land, take such steps as are necessary in order to clear any claims off title in order to be able to convey a good and marketable title to a purchaser.

(8) As I mentioned above, P.C. did not volunteer in his affidavit opposing this application that there has already been a determination, by the High Court on Circuit, of a dispute concerning lands belonging to the deceased and over which P.C. claims ownership. Accordingly, there was no actual evidence of before me in relation to that dispute or the precise nature of the determination of the court, but Counsel for the executors informed the court of the outcome of the circuit appeal, following 25 days hearing before Budd J. P.C. does not dispute that he was unsuccessful in those proceedings, although he appears to say that he continues, in some manner that is unclear to me, to dispute what is the final determination of the High Court on appeal from the Circuit Court. For these reasons it does not seem to me that P.C.'s claim to any entitlement to lands belonging to the deceased at the date of his death should operate as a bar to the administrator gathering in and disposing of the assets of the deceased, including lands, and accounting to the Committee for the one third share of the Ward.

(9) As to the argument that this application should not be allowed in order to enable P.C. challenge the validity of the Lunacy Regulation (Ireland) Act 1871, on behalf of the Ward, that clearly must be dismissed. The purpose of such proceedings could only be to try and set aside the order of 19th August, 2016, or to delay matters further. As stated above, the order made by Kelly P. on 19th August, 2016 subsists unless and until it is said aside by a higher court.

13. For all of these reasons, I am satisfied that P.C.'s objections to this application should be dismissed. Moreover, the deceased died almost eight years ago and it seems clear that the administration of his estate has become consumed by internecine disputes which show no signs of resolution. On the contrary, if I understand P.C. correctly he intends to continue purporting to challenge a decision of this Court which has already become final. That is apart altogether from the testamentary proceedings before the Circuit Court, which have not even been set down for hearing because they have become bogged down in interlocutory applications. It is quite simply intolerable that his mother, in her 95th year, should be deprived of her legal right share for even one day longer than is necessary in light of the comfort that her share in the estate of the deceased could afford her in whatever time remains to her.

14. There is some validity in the concern raised by Ms. Beechinor on behalf of the executors. A straightforward pay-out of one third of the assets of the deceased on behalf of the Ward would almost certainly result in an overpayment to the estate of the ward because she could only be entitled to receive one third of the net estate. Ms Beechinor suggested that it might be possible to deal with this through the provision of a bond, but a bond of this kind is likely to be expensive, if it could be obtained at all. I think that the more correct approach is the alternative that she suggested which is that when the estate of the deceased is realised, the Committee should make application, on notice to the executors to make a payment out of her share to the Ward, having due regard to whatever the liabilities of the estate may be, and it would be a matter for the executors to respond appropriately to that application by providing full particulars of all liabilities of the estate of the deceased then known to the executors, and an estimate of any liabilities not yet determined: at that point the court can make an appropriate order as to payment out of the estate of the Ward.