

THE HIGH COURT

CHANCERY

[2014 No. 612 P]

BETWEEN

ARTHUR DUNNE, DYMPNA DORMON (NEE DUNNE), JAMES DUNNE, GERRY DUNNE, CECIL DUNNE JUNIOR, DOMINIC DUNNE, ANN RYAN (NEE DUNNE), PATRICK DUNNE AND MARTIN DUNNE

PLAINTIFFS

AND

WILLIAM DUNNE

DEFENDANT

JUDGMENT of Mr Justice CREGAN delivered EX TEMPORE on the 15th July, 2015

Introduction

1. The issue in this application is whether the Court should remove the defendant, Mr William Dunne, as legal personal representative of the deceased, on the grounds of a conflict of interest.

2. This application is brought by way of notice of motion in which the plaintiffs in these proceedings seek various orders, including,

1. An order pursuant to s 27 (2) of the Succession Act, 1965, revoking, cancelling and recalling the grant of letters of administration *de bonis non* dated 31st August, 2011 of the estate of the deceased.

2. Secondly, an order if necessary, pursuant to section 27 (4) of the Succession Act, 1965, giving liberty to such person(s) as to whom this Honourable Court seems fit to apply for, and extract letters of administration *de bonis non* of the estate of the deceased.

3. Thirdly, if necessary, a declaration that the defendant is conflicted in his role as legal personal representative of the deceased, or is otherwise an inappropriate person to act as such legal personal representative.

4. If necessary, an order permitting such amendments of the pleadings already had herein as may be necessary to seek the reliefs sought.

3. The application is grounded upon the affidavit of Cecil Dunne, one of the plaintiffs in the proceedings. There is a replying affidavit on behalf of the defendant and a second affidavit of Mr Cecil Dunne.

4. In order to assess this matter it is necessary to have regard to the underlying pleadings in this case.

The pleadings

5. The plaintiffs are nine of the fourteen children of Cecil Dunne deceased, and in the Equity Civil Bill they plead as follows:

1. At paragraph 1, that Cecil Dunne, hereinafter referred to as "the deceased", late of Millicent Cross, Clane, Co. Kildare, Farmer, deceased, died on 29th March, 1995.

2. At paragraph 11, that the plaintiffs take these proceedings as next-of-kin and nine of the lawful children of the deceased and therefore beneficiaries of the estate of the deceased.

3. At paragraph 12, that the defendant is a driving instructor and resides at 108, Castletown Drive, Celbridge, Co. Kildare; that the defendant is sued in his capacity as legal personal representative of the estate of the deceased under Grant of Administration Intestate (*de bonis non*) which issued forth to him from the probate office on 31st August, 2011.

4. At paragraph 13, that the deceased died intestate a married man survived by his wife Eileen Dunne who has subsequently died and by fourteen lawful and only children and they set their names out therein.

5. At paragraph 14, that following the death of the deceased on 24th July, 1996, a Grant of Letters of Administration Intestate issued forth of the Probate Office to Eileen Dunne, the widow of the deceased, who after taking such administration upon herself, intermeddled in the estate of the deceased and afterwards on 20th October, 2010, died leaving part of the estate unadministered.

6. At paragraph 15, that the unadministered estate of the deceased comprised, to the knowledge of the plaintiffs, agricultural land at Moatfield, Clane, Co. Kildare, together with the dwelling house of the deceased at Millicent Cross, Clane, Co. Kildare, and the property adjacent thereto.

7. At paragraph 16, that following the death of Eileen Dunne, the plaintiffs called upon the defendant in his capacity as legal personal representative of the estate to administer the estate and to distribute to them their shares.

8. At paragraph 17, that despite being called upon to do so, and despite having acknowledged the entitlement of the plaintiffs in the estate of the deceased, the defendant has failed, neglected and/or refused to administer the estate.

9. At paragraph 18, that the defendant is also the legal personal representative of the estate of Eileen Dunne deceased and in that capacity is called upon to account for her administration of the estate of Cecil Dunne Deceased.

6. In the prayer, they seek:

1. An order that the defendant administer the estate of the deceased, properly, promptly and in accordance with law.
2. An order that the defendant account for the administration of the estate of the deceased.
3. In the alternative, an order revoking and/ or cancelling the grant of letters of administration intestate de bonis non which issued to the defendant.

7. In the defence, the defendant has pleaded as follows, at paras. 1 and 2, "Preliminary objections":

"1. The plaintiffs' claims to a share or interest in the estate of Cecil Dunne deceased are barred by operation of section 126 of the Succession Act, 1965 as substituted in section 45 of the Statute of Limitations, 1957.

2. Further or in the alternative and without prejudice to the generality of the foregoing insofar as the plaintiffs' claim relates to any share in land comprised in the estate of the said deceased such claim is barred by the provisions of section 125 of the Succession Act, 1965 and by operation of the Statute of Limitations Acts, 1957 – 2000."

8. At paragraph 8, the defendant pleads as follows;

" The defendant pleads that following the death of the said deceased, the said Eileen Dunne and the defendant herein as persons entitled to shares in the lands comprised in the Estate of the said Deceased entered into possession of these said lands and remained in exclusive possession thereof for twelve years and upwards thereafter such that the said Eileen Dunne and the defendant acquired title by possession to the said lands as regards their own shares and also the respective shares of the plaintiffs and each of them. Consequently, the claims of the plaintiffs and each of them to any share or shares or interest in the Estate of the deceased are jointly and severally statute barred pursuant to the provisions of section 125 of the Succession Act, 1965."

9. There is also a Reply to the Defence filed by the plaintiffs wherein at paras. 2 & 3 the plaintiffs join issue with the pleas on the Statute of Limitations. In essence therefore, the defendant is pleading that Eileen Dunne and the defendant entered into possession of the lands of the deceased and remained in exclusive possession thereof for twelve years and that Eileen Dunne and the defendant acquired title by adverse possession as regards his own share, and also that the plaintiffs' shares are statute barred pursuant to section 125 of the Succession Act and section 18 of the Statute of Limitations.

10. The defendant may be right or wrong in that claim; that is not a matter for me to decide, that is a matter for the trial judge to decide at the full hearing of the action. The only issue I have to decide in this application is whether the defendant has a conflict of interest or not.

The legal principles

11. Many statutory provisions and case law have been opened to me in the course of this hearing. There is a somewhat complex statutory framework which governs this issue.

12. The relevant statutory provisions are as follows: section 10 of the Succession Act, 1965 provides at s. 10 (1) that *"the real and personal estate of a deceased person, shall on his death, notwithstanding any testamentary disposition, devolve on and become vested in his personal representatives."* Subsection. 3 provides: *"the personal representatives shall be the representatives of the deceased in regard to his real and personal estate and shall hold the estate as trustees for the persons by law entitled thereto."*

13. Section 27 (2) of the Succession Act provides that: *"The High Court shall have power to revoke, cancel or recall any grant of administration."*

14. The third provision is section 123 (1) of the Succession Act which provides that *"A personal representative in the capacity of personal representative shall not, by reason only of section 10, be a trustee for the purposes of the Statute of Limitations, 1957"*.

15. Section 125 (1) of the Succession Act provides *"Where each of two or more persons is entitled to any share in land comprised in the estate of a deceased person, whether such shares are equal or unequal, and any or all of them enter into possession of the land, then, notwithstanding any rule of law to the contrary, those who enter shall (as between themselves and as between themselves and those (if any) who do not enter) be deemed, for the purposes of the Statute of Limitations, 1957, to have entered and to acquire title by possession as joint tenants (and not as tenants in common) as regards their own respective shares and also as regards the respective shares of those (if any) who do not enter."* Section 125 (2) provides *"Subsection (1) shall apply whether or not any such person entered into possession as personal representative of the deceased, or having entered, was subsequently granted representation to the estate of the deceased"*.

16. Section 126 of the Succession Act amends s.45 of the Statute of Limitations by providing as follows: *"The Statute of Limitations, 1957, is hereby amended by the substitution of the following section for section 45: '45. (1) Subject to section 71, no action in respect of any claim to the estate of a deceased person or to any share or interest in such estate, whether under a will, on intestacy or under section 111 of the Succession Act, 1965, shall be brought after the expiration of six years from the date when the right to receive the share or interest accrued."*

17. Section 24 of the Statute of Limitations 1957 provides *"Subject to section 25 of this Act and to section 52 of the Act of 1891, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."*

18. I have also been referred to numerous cases in relation to applications to have personal representatives or executors removed and/or replaced. It is agreed between the parties that the leading case in this area, dealing with the removal and/ or replacement of executors is the Supreme Court decision in *Dunne v Heffernan & Ors* [1997] 3 I.R. 431.

19. In that case Lynch J gave a decision on behalf of a unanimous Supreme Court. The head note to that decision states at para. 2:

"That once an executor had been appointed, had proven a will and had thus accepted the duty of administering a testator's estate, he or she could be removed... only if there were serious grounds or weighty reasons for overruling the wishes of the testator. 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 appointment of a new executor pursuant to s.27 ss. 4 of the Act of 1965 was not justified merely because one of the beneficiaries felt frustrated or excluded from his legitimate concerns."

20. At page 442 of the report, Lynch J states as follows:

"An order removing the defendant as executrix... and appointing some other person as administrator with the will annexed (by virtue of s.27 ss.4) is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded from what he considers his legitimate concerns. It would require serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step."

21. I pause here to note that there appears therefore to be two possible grounds upon which an executrix or executor or personal representative could be removed: these are either (a.) serious misconduct or (b.) serious special circumstances. On the facts of this case, no serious misconduct has been alleged and the application is made on the grounds of serious special circumstances.

22. At page 447 of the report, Lynch J also states as follows:

"A fact of the matter is that the defendant has done nothing wrong in her capacity as executrix and the mistaken perception of the plaintiff that she has done wrong, cannot alter the position that she has not. The alleged conflict of interest is flimsy in the extreme. Any family business can raise similar situations to those arising in this case and it would be a strange state of affairs if a parent or a member of a family was not entitled to entrust the administration of their estate to a child or brother or sister just because of the nature and complications of the business enterprise."

23. In *Flood & Anor v Flood* [1999] 2 I.R. 234, Macken J, in the High Court, did order the removal of the defendant as executor because there was a sufficient question mark over the transfers of monies in question to justify considering the appointment of an alternative person as administrator of the estate of the deceased. In that case, as is set out in the head note to the case, the defendant was the executor of the estate of the deceased, the plaintiff claimed that the defendant had borrowed monies from the deceased which he was now refusing to pay back to the estate. They claimed that this created a conflict of interest between the defendant's role as executor to the estate and as a possible debtor to that estate. The defendant denied that the monies were owed to the estate and claimed that if any such monies were owing, the plaintiff's claim was statute barred and no prudent executor would endanger the assets of an estate in litigation which had only a remote prospect of success.

24. The High Court held that there was a sufficient question mark over the transfer of monies in question to justify considering the appointment of an alternative person. Secondly it held that, as it was not possible at this state of the proceedings to determine the questions regarding the status of the monies at issue and the relevant limitation period, it was not possible to accept the defendant's argument that no cause of action could exist. Thirdly, it held that given the defendant's stated intention not to return the monies to the estate, there was a conflict between his role as executor and his position as a possible debtor to that estate. Fourthly, it held that removal of an executor was only justified where there was serious misconduct on the part of the executor and/or some other serious special circumstance and although the Court would be reluctant to take steps which might have the effect of depleting the value of the estate, the issues between the parties regarding the monies constituted sufficiently serious circumstances to justify the removal of the defendant from his position as executor.

25. At p. 242 of the decision Macken J stated as follows:

"Since the defendant has clearly stated – and this has been confirmed by the defendant's solicitor – that he does not intend to return the monies to the estate, and intends to continue to claim it was a gift, it seems to me that the defendant is, on the facts, in a complete conflict between his role as executor, since as such executor he has no intention of ensuring the monies are returned to the estate, and his role as possible debtor to the estate."

In these circumstances, I have to consider finally whether, even accepting that there is a conflict, it would nevertheless not be appropriate to appoint an alternative person to administer the estate of the late Christopher Flood. The real basis for the defendant's argument against such appointment is that one of the plaintiffs, or indeed an appointed administrator could not, as a prudent administrator, expend the monies in question on an action which, the defendant says, has little chance of success. Whereas I think it is proper to take into account the fact that a prudent administrator might not embark on such a course of action, nevertheless in the circumstances of this case, I am satisfied that the plaintiffs have set out and established sufficient facts to suggest that there is a serious matter to be considered."

26. She then sets out some of the facts and on p. 243 she states:

*"A court should not remove an executor from his role, unless it is satisfied that it is necessary so to do. It is clear from the decision in *Dunne v Heffernan* [1997] 3 I.R. 431, that the Supreme Court considers this should only occur where the court is satisfied it must be done and that Court made it clear that it is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded, but requires serious misconduct and/ or serious special circumstances on the part of the executor to justify such a drastic step..."*

*Having regard to the decision of the Supreme Court in *Dunne v Heffernan* [1997] 3 I.R. 431 above and although I am reluctant to take steps which would in any way have the effect of depleting the value of the estate, nevertheless I am also satisfied that a very serious matter arises in the administration of the estate, and the only way in which that can be dealt with is to remove the defendant as executor (pursuant to s. 26 (2) of the Succession Act) and appoint an alternative to the defendant, pursuant to s.27 (4) of that Act."*

27. The next relevant decision which I have considered is *Kirby v Barden* 12th March 1999 (Unreported), a decision of Carroll J. At p. 6 of the decision Carroll J states as follows:

"[that] the proper person to query the entitlement of the defendant to retain the £29,000 is the personal representative of Margaret Dill who is the defendant herself. There is no presumption of advancement to support her claim. This creates a conflict of interest that cannot be reconciled."

28. At p. 7, the learned Judge states as follows:

"The conflict of interest between her claim to be beneficially entitled to the bulk of Margaret Dill's liquid assets and the duty of a personal representative to get in the assets, can only be resolved by removing her as personal representative of Margaret Dill's estate."

And subsequently:

"I accept that the jurisdiction of the Court to remove a trustee should be exercised with caution [see Arnold v Arnold, (1924) 58 ILTR 145]. I consider the circumstances of this case amply justify such removal."

29. The next relevant case which I have considered is the case of *Gunning v Gunning Hameed* 31st July 2003 (Unreported) a decision of Smith J. At p. 3 of the judgment Smith J states as follows:

"The primary obligation of any trustee is to protect in advance the interests of the beneficiaries. The case of Cowan v Scargill (1985) Ch 270 is the relevant legal authority supportive of this general proposition. Therein Megarry, VC stated that:-

'The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards the beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interest of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally the best financial interest.'

30. At p.7 of his decision, Smith J states as follows:

"In the instant case the defendant's intention to have herself registered as owner of the premises is in complete conflict with her role as executrix. In my judgment it is a very necessary and serious step to take to remove the defendant from her role – but on the evidence I am satisfied that it must be done. It is the only way in which this matter can be dealt with properly and impartially."

31. Another relevant case to which I have had regard is the decision in *Sally v Rhatigan* [2012] 2 I.R. 286 where Laffoy J held that it would be inappropriate to grant probate of the will to the plaintiff's solicitor as her potentially conflicted position amounted to "serious special circumstances" in the sense intended by Lynch J in *Dunne v Heffernan*. If a grant of probate of the will were to have issued to the plaintiff, she might not only have been conflicted as to her professional duties as a solicitor, but she would have had a potential conflict of interest. The plaintiff might have been in a position of having irreconcilable duties to the beneficiaries of the estate assets, on the one hand, and the beneficiaries of the non- estate assets, on the other hand.

32. In that case, the court removed Ms Scally as personal representative because of a potential conflict of interest. In the present case, I am dealing with an actual conflict of interest, rather than a potential conflict of interest. In the Scally decision the court also removed the personal representative even though she did not seek to gain in any way under the estate, whereas here, the defendant is laying claim to the bulk of the Estate.

The conflict of interest raised in this case

33. The conflict of interest raised in this case can be stated in the following terms:

1. The defendant is the personal representative of the Estate; his duty is to gather in the appropriate assets of the estate and to distribute them.
2. The bulk of the assets in the estate are in fact being claimed by the defendant in his personal capacity. He says that he has acquired the bulk of the assets of the estate, namely land, by virtue of adverse possession and therefore has acquired possessory title which defeats the interests of the plaintiff.

34. The matter only has to be stated in these stark terms to reveal the clear conflict of interest. Thus, if the personal representative in this case took the view that the claim for adverse possession was not well – founded, he would issue proceedings against the person making that claim. In such a case, William Dunne, acting as personal representative, would be the plaintiff, and William Dunne, as the person making the claim for adverse possession would be the defendant. This shows in clear and unequivocal terms that Mr Dunne has a conflict of interest in his role as personal representative.

35. Mr Dunne's claim for adverse possession may be a good, or a bad claim, that is not the point in this application. Again, as I stated above, that is a matter for the trial judge. The issue here, is whether he is in a conflict of interest situation and in my view, he is. The fact that this is so is also confirmed by the fact that both counsel confirmed, that in the event that Mr Dunne was replaced as personal representative, what would happen, is that a new personal representative would be appointed, that he or she would review the file and that he or she may decide not to plead the statute. However, it would then fall on William Dunne to hand back land to which he has claimed possessory title and if he did not do so, then it would result either in the new personal representative issuing proceedings against Mr Dunne, or, Mr Dunne issuing proceedings against the personal representative, seeking declaratory orders in relation to his alleged possessory title.

36. Again however, that would show clearly what an indefensible conflict of interest Mr Dunne has placed himself in, not, I emphasise, by claiming adverse possession but rather by seeking also to be the personal representative. Counsel for the defendant sought to argue that Mr Dunne had merely pleaded the statute in his defence and therefore there was no conflict of interest or misconduct; however, in my view that is to ignore the substance of these pleas in the defence.

37. The pleas, when taken in conjunction with para. 8 of the defence, raise a substantive plea: firstly that the defendant has been in adverse possession of the land for over twelve years; secondly, that the defendant has hereby acquired possessory title to these lands; thirdly, that this title defeats the claims of the plaintiff and; fourthly, that the defendant's claims are statute barred. It is the substance of these pleas and the substance of his defence as a beneficiary, that puts him in a conflict of interest in his role as a personal representative. As personal representative, he must contest the claims of a beneficiary, to a large portion of the estate, if he is of the view that there are valid grounds for such a challenge. In this case, the beneficiary and the personal representative are the same person, so he would, in effect, be suing himself. This of course would never happen, and he is therefore not in a position to properly discharge his duties as a personal representative.

38. Moreover, I am satisfied on the affidavit evidence before the court, that there are bona fide and reasonable grounds upon which to challenge the claim for adverse possession. These claims are set out at para. 24 of the grounding affidavit of Cecil Dunne and para 24 states as follows:

"Argument Available to the Estate of Cecil Dunne

The circumstances and acknowledgments to which we refer above (and of which we are currently aware), which might be relied upon in support of the assertion on behalf of the estate of Cecil Dunne that its title was not extinguished by Eileen Dunne and/ or the defendant, may be summarised as follows:

(a) Eileen Dunne, in completing the Inland Revenue affidavit, identified herself and 14 children as the persons entitled to the estate.

(b) The Moatfield lands were vested by assent in Eileen Dunne, and she received them, expressly as trustee.

(c) As far as we are aware, Eileen Dunne never took steps to vest any of the deceased's lands in herself.

(d) Some time shortly after 2000, Eileen Dunne wished to transfer a site... to her daughter Valerie... but decided against doing so when she encountered resistance/ non – co – operation from other children.

(e) Various statements have been made to by or on behalf of the defendant, as executor of Eileen Dunne, that we believe necessarily imply that her use or occupation of the land was as trustee for the estate. Thus:-

(i) By letter of the 20th April 2011 Patrick J Farrell Solicitors stated that they acted on behalf of Eileen Dunne in the administration of the estate... and the letter concludes as follows:

'The matter of the one forty second share of the fourteen children in the estate of Cecil Dunne will be addressed when this grant of probate (of Eileen Dunne) issues and the estate can then be administered.'

(ii) By letter of 31st August 2011, Patrick J Farrell Solicitors stated (a) that they act for the executor of Eileen Dunne (being the defendant herein) and (b) that they acted for Eileen Dunne during her lifetime. The letter goes on to say that Eileen Dunne was entitled to a two thirds share of her husband's estate on his intestate death and that his children were entitled to the balance between them (which is admittedly no more than a statement of fact). The letter goes on to say, however, that 'our client is aware of all of the above and when the grant of probate issues he will then be in a position to address the matter of the entitlement of the beneficiaries to their share of their father's estate' and that 'our client's hands are tied until the grant of probate issues to his mother's estate.'

The affidavit continues:

"We believe that it is hard to read the foregoing as anything other than implied acknowledgment of the deceased's childrens' surviving entitlement to a share in the deceased's estate."

39. There are other paragraphs set out in the affidavit at paras. (iii), (iv), (v) and then at paras. (f) – (j) inclusive. It is not necessary for me to set out all of these in full. It is sufficient to note that there is, in my view, sufficient affidavit evidence put before this court to indicate that there is a reasonable argument available to contest the claim being made by the defendant for adverse possession of the land.

40. Again, to reiterate, the defendant's claim may or may not succeed - that is a matter for another day - but it is clear that the defendant is in a conflict of interest in this situation. Clearly, these are matters which the personal representative needs to consider and to test Mr Dunne's claim to his possessory title, to the bulk of the estate, by adverse possession. But it is clear that the personal representative cannot do this properly if he is the same person as the person who is claiming the right to the property under adverse possession.

41. I also note that the defendant accepts at para. 33 of their legal submissions, that the plaintiffs have evidence to adduce, and arguments to marshal, in support of their claim that their intestate share of the Estate of the deceased was at all times acknowledged.

42. However of course, these are arguments in evidence that should be deployed by the personal representatives, not the plaintiffs, against the person asserting the right of adverse possession - in this case, the defendant. Thus the defendant is defending an action as personal representative which arguably he should not be defending. The personal representative instead, should be the plaintiff in any action against William Dunne, in relation to the recovery of the lands.

43. It is indeed difficult to see, on what basis the defendant sought to defend his position. It is such an obvious conflict of interest - that Mr Dunne cannot be both plaintiff, and the defendant, in the same proceedings, and that he cannot sue himself.

44. Mr Dunne, as personal representative, is seeking to rely on the truthfulness of what Mr William Dunne, beneficiary, is saying with respect to the claim for adverse possession. This is clearly a conflict of interest situation. The consequences are that the defendant's claims for adverse possession would not be properly challenged by the personal representative. That personal representative remains Mr William Dunne himself. That is a very serious situation which can only be resolved by Mr Dunne's removal.

Conclusion

45. I would therefore conclude:

1. That Mr Dunne is in a serious, obvious and indefensible conflict of interest situation in his role as personal representative.

2. That this is a serious special circumstance to justify his removal within the terms of the Supreme Court decision in *Dunne v Heffernan*.