THE HIGH COURT

PROBATE

[Record No. 16/5270]

IN THE MATTER OF THE ESTATE OF JAMES PATRICK HANNON, LATE OF HIGHFIELD HEALTHCARE, SWORDS ROAD, WHITEHALL, DUBLIN 9, FORMERLY OF OUR LADY'S MANOR, BULLOCK HARBOR, DALKEY, CO. DUBLIN, A ROMAN CATHOLIC PRIEST (RETIRED) DECEASED.

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

AND

IN THE MATTER OF AN APPLICATION BY PAUL BROWNE TO HAVE SUSAN HALPENNY, SOLICITOR APPOINTED AS ADMINISTRATRIX OF THE ESTATE OF THE DECEASED.

JUDGMENT of Ms. Justice Baker delivered on the 30th day of July, 2018

1. James Patrick Hannon died on 3 March 2015 having executed a testamentary document on 28 January 2014 (the "2014 Will"), under the terms of which he appointed Susan Halpenny, solicitor to be his sole executrix, and, after making a number of specific bequests, devised and bequeathed the rest, residue and remainder of his estate to the Roman Catholic Archbishop of Dublin for his charitable purposes.

2. The deceased had executed an earlier testamentary document on 20 July 1999, ("the 1999 Will"), in which he appointed John Moran and William Hannon as executors, and after making certain pecuniary bequests, gave, devised and bequeathed the rest, residue and remainder of his estate to his sisters, Margaret Browne and Vera O'Connor in equal shares.

3. Doubt having arisen as to the testamentary capacity of the deceased to execute the 2014 Will, an application was made to me in the High Court sitting in the Monday non-contentious probate list for an order admitting the 2014 Will to proof in common form of law.

4. In an *ex tempore* ruling on 23 January 2017, I declined to make an order admitting the 2014 Will to proof in common form of law, as I considered did not have sufficient evidence of the capacity of the deceased. In the hope of avoiding a contentious testamentary suit, the matter was adjourned generally and liberty was given to re-enter the application in the Monday list.

5. With a view to avoiding the necessity of further litigation in relation to the testamentary capacity of the deceased, and in the light of the likely costs of such litigation, the persons entitled to the estate of the deceased under and by virtue of the provisions of both the 2014 Will and the 1999 Will have agreed terms of compromise ("the Compromise") upon which the estate of the deceased is to be distributed.

6. This judgment is directed to the application pursuant to s. 27(4) of the Succession Act 1965 ("the Succession Act"), that Ms. Halpenny be given liberty to apply for and extract a grant of letters of administration without will annexed to the estate of the deceased, limited for the purpose of implementing the terms of the Compromise.

7. The question arising is whether such an order may be made without admitting either the 2014 or 1999 Will to probate.
The legislative provisions

8. Section 27 of the Succession Act provides as follows:

> "(1) The High Court shall have power to grant administration (with or without will annexed) of the estate of a deceased person, and a grant may be limited in any way the Court thinks fit.
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> (2) The High Court shall have power to revoke, cancel or recall any grant of administration.
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> (3) Subject to subsection (4), the person or persons to whom administration is to be granted shall be determined in accordance with rules of the High Court.
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> (4) Where by reason of any special circumstances it appears to the High Court (or, in a case within the jurisdiction of the Circuit Court, that Court) to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.
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> (5) On administration being granted, no person shall be or become entitled without a grant to administer any estate to which that administration relates.
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> (6) Every person to whom administration is granted shall, subject to any limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.
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> (7) Where any legal proceedings are pending touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any grant, the High Court may grant administration of the estate of the deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate of the deceased, and every person to whom such administration is granted shall be subject to the immediate control of the Court and act under its direction.
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> (8) The Court may, out of the estate of the deceased person, assign to an administrator appointed under subsection (7) such reasonable remuneration as the Court thinks fit.
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> (9) This section applies whether the deceased died before or after the commencement of this Act."

9. The relief sought by the applicants is under s. 27(4) that Ms. Halpenny be permitted to extract a limited grant for all purposes to give effect to the Compromise. The difficulty that presents is that the deceased died leaving the 2014 Will and the 1999 Will, neither

of which is proposed to be admitted to probate, and the last in time of which was the subject of a capacity challenge which was has not been definitively determined.

10. The estate of the deceased consists wholly of personalty in the form of bank accounts, the net value whereof is estimated to be €317,000. The Compromise provides that Ms. Halpenny shall apply for liberty to extract a grant of administration to the estate of the deceased for the purpose of giving effect to its terms. The relevant terms provide for the payment by Ms. Halpenny of the lawful debts of the estate, payment of the pecuniary bequests made in the 2014 Will and the 1999 Will, and the distribution of the estate equally between the persons entitled under the 1999 Will and the 2014 Will. The Compromise has achieved a satisfactory means of dealing with the estate in a practical way and for the avoidance of the costs of a full probate action which would have absorbed a substantial amount of the estate.

11. The question engaged in the present case is whether an order under s. 27(4) by which a person is given liberty to extract a full grant is to be made while the question as to whether the deceased died testate or intestate remains undecided.

The authorities

12. It is clear that the jurisdiction of the court under s. 27(4) permits the court to give liberty to a person other than the person who would be entitled with under a will or on death intestate to extract a grant, and that a full grant may issue under s. 27(4). The grant may be limited and a court can and often does make an order under this section notwithstanding that the court is aware that there is a will, or even that there is an executor willing and able to act. This is frequently the case when liberty of given to extract a grant *ad litem* or a grant *pendente lite* under s. 27(7), or a grant *ad colligenda bona.*

13. The provisions of s. 27(4) which give the court a discretion to order that administration be granted to such person as it thinks fit, may be exercised only when it is satisfied that the circumstances are sufficiently "special" to justify the engagement of the statutory power.

14. The subsection was considered by the Supreme Court in *In re the Estate of Glynn, Deceased. Ireland v. Kelly* [1992] IR 361. The executor named in the will of the deceased was convicted of the murder of the sister of the deceased to whom the testator had by his will devised a life estate in his farm, with reminder interest to the executor. The sole surviving next of kin renounced his right to a grant, and application was made to the High Court that liberty be given to the Chief State Solicitor to extract a grant in the estate. Gannon J. in the High Court made such order, but limited the power of the personal representative to the taking in and preservation of the assets of the deceased. On appeal the Supreme Court removed the limitation and held that the fact that the respondent accelerated his interest in reminder by murdering the tenant for life, together with the fact that his capacity to benefit under the will might not be determined unless administration of the estate was granted to the Chief State Solicitor amounted to "special circumstances" within the meaning of the subsection which made it necessary and expedient that administration be granted.

15. McCarthy J. noted at p. 365 the provisions of s. 78 of the Probates and Letters of Administration Act (Ireland) 1857, which vested a broadly similar power in the court to permit administration to be granted to the personal estate of a deceased person, but only where the court was satisfied that a person "has died or shall die wholly intestate" as to his personal estate, or "leaving a will affecting the personal estate, but without having appointed an executor thereof willing and competent to take probate". That section was also considered by Evans P. in *In re the Estate of Crippen, Deceased* [1911] P 108.

16. McCarthy J., noting the difference between s. 27(4) and these provisions of s. 78, described s. 27(4) as an "enabling section" and noted that the repealed provisions of s. 78 of the 1857 Act had postulated preconditions and was "in marked contrast to" the provisions of s. 27(4) of the Succession Act, where the discretion was not limited by any preconditions. McCarthy J. took the view that "the subsection should be given a liberal construction".

17. Laffoy J. in *In re the Estate of Rhatigan; Deceased. Scally v. Rhatigan* [2012] IEHC 140, [2012] 2 IR 286, exercised the power under s. 27(4) to pass over the person entitled to extract a grant of probate in the estate of the deceased having regard to her conclusion that the executrix had a conflict of duty and would have a conflict of interest if probate issued to her, and that the defendant who would next be entitled also had a conflict which precluded her acting.

18. Counsel for the applicant relies on my judgment in In r*e the Estate of O'Callaghan, Deceased* [2016] IEHC 668 where I made an order giving liberty to an independent person to apply for and extract letters of administration *ad colligenda bona* limited for the purpose of collecting in and preserving, but not disturbing, the estate of the deceased. At para. 28 of that judgment, having considered the jurisprudence with regard to the jurisdiction under s. 26(2) of the Succession Act to revoke, cancel or recall a grant, and the judgments of the Court of Appeal in *In re the Estate of Dunne, Deceased. Dunne v. Dunne* [2016] IECA 269 and the Supreme Court in *Dunne v. Heffernan* [1997] 3 IR 431, and having noted that the application before me was one under s. 27(4), I said the following:

> "This […] 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.
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> 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."

19. I rejected the proposition advanced by counsel for the executor that the sole basis on which a court may permit a grant to issue to a person other than an executor named in a will was where the executor was shown to be in conflict with the estate or not be, for whatever reason, in a position to administer the estate.

20. In *In re O'Callaghan* liberty was given to extract a grant *ad colligenda bona* with will annexed, as no question existed with regard to the validity of the will, and the order was made limited to the taking of all steps necessary to deal, by sale or otherwise of the assets in the estate, but the person who extracted the grant was not given liberty to distribute the estate.

21. The view that the power vested in the court by a provision broadly similar to s. 27(4) is not to be constructed narrowly was also taken by the English courts in *In Re Mathew, Deceased* [1984] 1 WLR 1011, in which Anthony Linkin J. said that the discretion is "without fetter" and followed Eubank J. in *In Re Clore, Deceased* [1982] 2 WLR 314 in taking the view that the interpretation was not to be a restrictive one.

22. Having regard to the case law, the decision of the Supreme Court in In re Glynn, the decision of Laffoy J. in *In re Rhatigan* and my judgment in *In re O'Callaghan*, it seems apparent to me that the limitations contained in s. 78 of the Act of 1857 are no longer a part of the law, and the court enjoys a wide enabling jurisdiction under s. 27(4) of the Succession Act to grant administration, should special circumstances be shown to exist.

23. It is to be observed that no precondition exists in the plain terms of s. 27(4) that any will or purported will be proved either in common or solemn form or that any determination be made as to whether a deceased died testate or intestate before its provisions may be invoked. A limited grant under s. 27(4) is frequently granted for the purposes of substantiating proceedings, and where a grant is made to a nominee of a creditor, and it is frequently the case in practice that the applicant for such orders is not aware whether the deceased dies testate or intestate. A grant under s. 27(4) to a creditor can in its practical effect mean that the person extracting the grant will exhaust the estate, where for example, the creditor obtains possession or sale of a property that comprises the sole asset in the estate. One of the factors that influenced me in coming to the decision in *In re O'Callaghan* was the likely costs of administering the estate, and Peart J. giving the decision of the Court of Appeal in *Dunne v. Dunne* noted too, that the costs of contentious proceedings were not readily to be justified.

24. Even when a full grant is made to the nominee of a creditor, the rights of the executor should the deceased have died testate would be maintained and are not abrogated, and that was an observation made by me in making the order for a grant *ad colligenda bona* in *In re O'Callaghan*.

25. But the engagement of s.27(4) requires circumstances which are "special" and I turn to examine how this is to be understood

Not a matter of mere convenience
26. The court must first ascertain whether circumstances exist which may be described as "special" and whether in those circumstances it is either necessary or expedient to give liberty to extract a grant.

27. I am of the view that for circumstances to be sufficiently "special" to engage the power under s. 27(4) the making of the order must be more than a mere convenience, such as where beneficiaries disagree as to the person who should extract a grant in an estate, or indeed as to the distribution of an estate, whether intestate or testate. The case law which considered the powers vested by s. 27(4) involved circumstances where either for moral or legal reasons the named executor, or person otherwise entitled to administer an estate, might have a conflict of interest or be otherwise unsuitable. The circumstances are different in the present case, and the reason it is sought that Ms. Halpenny be given liberty under s. 27(4) to extract letter of administration without reference to either the 2014 Will or the 1999 Will, or on the alternative basis that the deceased died intestate, are that there has been a contentious and as yet unresolved dispute between the persons entitled under the two testamentary document regarding the capacity of the testator to make the Will of 2014, and yet the claims to distribution of the estate have been compromised.

28. There does exists a *bona fide* dispute as regard the validity of the last testamentary document of the deceased and I regard it as significant that different views regarding capacity were expressed by third party professional persons, and by persons who were not beneficiaries or potential beneficiaries on intestacy or under the 1999 will. I agree with the submission made by counsel for the applicant that the application is not made merely on account of convenience but that there exist circumstances sufficiently special, viz the desire and objectively desirable decision of those beneficially entitled to quieten the dispute which has arisen and remains unresolved concerning the validity of the 2014 Will.

29. The order sought would enable the distribution of the entirety of the estate of the deceased in accordance with the Compromise, and it remains possible that the 2014 Will or the 1999 Will could at some time in the future be the subject of proceedings, and one or other of the testamentary document may come to be admitted to proof in solemn form of law, although in practical terms it is unlikely that such eventuality would occur as the persons entitled under the 2014 Will and the 1999 Will are parties to the compromise, and all persons who would be entitled on intestacy are on notice of an application and make no objection to the order.

30. I regard it as sufficiently "special" that the court should recognise the undesirability that the parties entitled under the two testimony documents of the deceased would engage in any further acrimonious and expensive litigation regarding the capacity of the deceased to make the will in 2014.

The Probate Rules
31. In any case where an application to extract a grant is made to the Probate Office the applicant must swear an oath. In the case of an executor deriving authority from a will of a deceased person, the form of the oath in provided in Form 3 of the Rules of the Superior Courts S.I. 15 of 1996 Appendix Q, and by which the proving executor declares a belief that the documents submitted for probate "contain the true and original last will" of the testator.

32. The oath of administrator is required under r. 22 of the Non-Contentious Probate Rules, Appendix C to the Rules of the Superior Courts, S.I. 15/1986 ("RSC"), as amended by S.I. 20/1989, r. 79 and provides that the fact that the form is made pursuant to an order under s. 27 of the Act shall be stated in the oath of administrator. Order 14, r. 28 provides that the oath of administrator "shall be so worded as to clear off all persons having a prior right to the grant. Where there are prior interests the grant shall show on its face who they have been cleared off".

33. In the case of an intestate estate the form of the oath is No. 5 and the oath declares that the deceased died intestate. In the case of an application for administration with will annexed the relevant form is Form 8.

34. In the case of an application for a limited grant for the purposes of substantiating proceedings, the application for a grant *ad litem*, the draft oath is silent as to whether the deceased died intestate or not.

35. The form of the oath to be sworn should a full grant issue in circumstances such as those in the present case can be suitably modified and the Rules do not provide a basis on which I may determine that the order sought is not one that is permitted by the Act.

Necessary or expedient?
36. Having regard to the disjunctive language used in the subsection, it is sufficient to establish that the applicant can show that it is expedient to do make the order.

37. The circumstances of the present case are sufficient for me to take a view that there is a *bona fide* dispute in regard to the cognitive capacity of the deceased, and an agreement has been reached following negotiations between the persons entitled under both wills by which they have compromised their respective claims and entered into an agreement that binds all relevant persons who might be entitled under the will of 2014 and that of 2009. A grant is required in order to give effect to the Compromise. It is expedient that the estate be administered in accordance with the Compromise and it is practical and desirable that Ms. Halpenny be permitted to do so.

Public policy considerations

38. Counsel for Ms. Halpenny who has no personal interest in the terms of compromise, made submissions as an *amicus curiae* and identified that the biggest objection to the making of the order was the general public policy that the will of a deceased be recognised. He noted too that Kearns P., giving the judgment of the Supreme Court in *Elliott v. Stamp* [2008] IESC 10, [2008] 3 IR 387, noted that on some cases a full probate action might be "cathartic".

39. I do not consider it the function of the court to facilitate a cathartic response to disputes, when the cathartic response is not legally mandated. But I do consider that the public interest and the solemnity to be afforded to a testamentary document is a matter of some importance.

40. There is a public policy reason in encouraging compromise and quietening litigation concerning the distribution of property on death. I accept that there is, as counsel instructed by Ms. Halpenny argued, a public interest purpose in the proper administration of the estate of the deceased, and indeed a public policy interest that the last wishes of a deceased expressed in his or her testamentary document be recognised by the court. Equally, it seems to me that there is public policy interest in quietening what is almost always difficult, contentious and possibly even bitter litigation involving oral evidence before an estate is distributed. Indeed, in many cases where a will is challenged on the grounds of incapacity, the dignity of the deceased person, and the extent to which his or her personal activities in the last years of life are scrutinised, might give rise to a view that the dignity of the deceased may better be respected by a compromise. In *PP v. HSE* 2014 IEHC 622 a Divisional High Court accepted the importance of the dignity of a person in death.

41. Certain statutory provisions give some support to the proposition that the estate of a deceased person may be distributed by the implementation of a compromise, and without proving a testamentary document, and s. 12 of the Capital Acquisitions Tax Consolidation Act 2003 provides that where the disclaimer of a claim under "a purported will" in respect of which a grant of representation has not issued, or in the case of "an alleged intestacy where a will exists in respect of which such a grant was issued" then the claim or right foregone shall not give rise to any tax liability and the disclaimer is not to be deemed to be a disposition for the purposes of that Act.

42. Further, legislation exits which expressly permits the distribution of the property of a deceased person without the extraction of a grant of probate. Section 61(7) of the Registration of Title Act 1964 permits a court to order on the application of any person claiming to be registered as owner of registered land in succession (but not in possession) to a deceased full owner of such land, in certain circumstances:

> "Where, on the application of any person claiming to be registered as owner of registered land in succession to a deceased full owner of such land, the court is satisfied—
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> (a) that at least six years have elapsed since the death of the deceased full owner, and
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> (b) that the personal representatives of such owner are dead or out of the jurisdiction,
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> the court may, if it thinks fit, notwithstanding anything in the Administration of Estates Act, 1959, or this Act, dispense the applicant from the necessity of raising representation to the deceased full owner or of giving notice to his personal representatives and may order that the applicant be registered as owner of the land."

43. Section 61(7), in my view, recognises that there may be circumstances where a court would dispense with the requirement that a grant issue in the estate of a registered owner who died either intestate or testate, and *ipso facto* the court may permit that a will is left unproven.

44. Further, s. 27(4) is frequently used to make title to registered land where a court is satisfied that it is necessary or expedient to grant representation to an estate of a deceased registered owner and where the alternative approach might require a succession of grants or where either the persons entitled to extract such grants are deceased or cannot be found or are too numerous, or where, as is frequently the case, an applicant for such order can show an entitlement to be registered as owner.

45. The practice of executing a deed of family arrangement for the distribution of an estate other than in accordance with the wishes of a testator, or in accordance with the entitlement intestate is long established: See Laffoy, *Irish Conveyancing Precedents* (Bloomsbury, 2008), and the discussion in Law Society of Ireland's *Conveyancing*, 7th ed. (OUP, 2014) para. 16.7.2.

46. For all of these reasons it seems to me that it is not necessary that a known will be admitted to probate or that the resolution of a contentious will suit must always involve a determination as to whether a deceased died testate or intestate, or which of two testamentary documents is to prevail.

Risk of Collusive Applications

47. I am aware from counsel's submissions that no reported case or written judgment has been found in which the issue was considered and where a court was asked to consider making an order under s. 27(4) permitting the issue of a full grant when a dispute regarding the validity of a testamentary document remained unresolved, or where the court did not make a determination regarding the question of whether a deceased died testate or intestate. Counsel also fairly said that in their experience, they have not encountered such an application in the non-contentious Probate List.

48. The fact that counsel cannot identify a similar application does not mean that the application is not one that may be made, and I consider that a number of factors must bear in my consideration. In the first place, whilst there is a public interest that the last wishes of a deceased person be respected, there is also a public benefit from the compromise of litigious claims between natural persons entitled to succeed on the death of a person, especially when most such actions can be divisive and lead to sometimes irreconcilable differences in families. There is also I consider a public interest in quietening litigation around the succession to the estate of a deceased person and in the consensual resolution of inter family disputes.

Conclusion
49. In all the circumstances, I conclude as follows:

> (i) There is no reason in the plain language of the Succession Act that an order under s. 27(4) may not be made where there exists an unresolved dispute as to the validity of a testamentary document of a deceased, or as to whether he or she died testate or intestate.
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> (ii) The court should exercise its discretion under s. 27(4) of the Succession Act in a cautious manner having regard to the fact that the legislation requires "special circumstances" in order that it may be invoked, but such circumstances to be special do not have to be extraordinary or highly unusual and can include a determination that assists the resolution of a *bona fide* dispute.
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> (iii) The circumstances must be more than the mere convenience of the parties, but the making of the order must be worthwhile or appropriate having regard to all of the circumstances.

50. I am satisfied that special circumstances do exist which make it expedient that Ms. Halpenny be permitted to extract a grant in the estate of the deceased limited for the purposes of giving effect to the Compromise. The grant to her does not amount to a determination of the court that the deceased died testate or intestate. Theoretically, there remains the possibility that the Will of 2014 or that of 2009 may come in due course to be admitted in solemn form of law by a competent court. Having regard to the fact that persons entitled to extract a grant under both Wills are parties to the Compromise the such application is unlikely. But from the point of view of probate practice a possibility, albeit remote, would continue to exist.

51. Therefore, I propose making the order sought.