Neutral Citation: [2016] IEHC 303

THE HIGH COURT

[2014 No. 3103 P]

BETWEEN

HELEN SHAUGHNESSY

PLAINTIFF

AND

TERENCE SHAUGHNESSY

DEFENDANT

JUDGMENT of Mr. Justice Paul Gilligan on the 25th day of May, 2016.

1. The plaintiff in these proceedings seeks the following declarations and orders:

(i) A declaration that the defendant was negligent and in breach of his duties as executor for the estate of his mother Helen Shaughnessy Senior (deceased) to the detriment of the plaintiff;

(ii) Damages for negligence and/or breach of duty;

(iii) Insofar as may be necessary, such consequential orders as may be required;

(iv) Interest;

(v) Such further or other order as the court deems fit;

(vi) Costs.

2. Both the plaintiff and the defendant are self-representing.

3. The background to these proceedings is that the plaintiff and defendant are sister and brother and are both beneficiaries of the estate of their deceased mother, Helen Shaughnessy Senior, who died on the 7th of September, 2007, a widow and the mother of four children. The deceased Helen Shaughnessy Senior made her last will and testament on the 7th day of May, 2004, in which she appointed her son, the defendant, Terence Shaughnessy, her sole executor.

4. There is no doubt but that the deceased executed an unusual last will and testament in that she divided any monies standing to her credit in her sole name between her three daughters the plaintiff herein and her two sisters in addition to an entitlement to each daughter to a building site not to exceed ½ an acre on such part of her lands as maybe agreed with her son Terence, the defendant herein. The deceased further directed that her son, the defendant herein, was to pay the plaintiff a sum of €3,500.00 if she married.

5. The deceased left all her live stock, machinery and dead stock to her son Terence the defendant herein for his own use absolutely. She bequeathed her dwelling house and garden with contents to her three daughters being the plaintiff herein and her two sisters in equal shares as tenants in common.

6. The deceased then proceeded to bequeath her two holdings of land at Seskinryan together with the farm yard, farm buildings and out offices to her son the defendant herein for the term of his natural life and after his death in the event of her son the defendant herein dying leaving issue the deceased bequeathed such property to such issue of her son Terence the defendant herein as he may by will or deed appoint and in default of appointment to such issue in equal shares. This bequest however was subject to the proviso that should her son Terence Shaughnessy, the defendant herein, die without leaving issue then and in that event only she bequeathed her farm lands to her three daughters the plaintiff herein and her two sisters in equal shares as tenants in common and this bequest was subjected to the proviso that if any of her daughters predeceased her leaving issue then the share would pass to such issue in equal shares and provided always that if any of her daughters were to die without leaving issue that share would pass to the remaining daughters in equal shares or in the event that any daughter shall have predeceased her mother the deceased daughter leaving issue then her share shall pass to her issue.

7. Following the deceased's death the nominated executor the defendant herein proceeded to attend to the administration of the estate and retained the family solicitor and gathered details of the deceased's assets and liabilities for the purpose of preparing an Inland Revenue affidavit prior to admitting the last will and testament of his deceased mother to probate. The Inland Revenue affidavit was compiled by the solicitors and approved by the Revenue Commissioners on the 4th November, 2008. Then the family solicitor sought to have the oath of executor duly completed by the defendant but he declined to do so in circumstances where he expressed a number of reservations about the will but in particular that his mother had seen fit to bequeath to him a life interest only in the farmlands. As became evident during the course of the hearing a number of other difficulties surfaced. The first was that the defendant since he was a boy had farmed the lands previously with his father and subsequent to his death with his mother and he maintains that in effect he has had a very difficult life and really has not got very much out of the farm for all he has put into it and he cannot understand how his mother could simply not have bequeathed to him the farmlands to enable him to continue farming those lands in his own right and to have bequeathed them to his wife or some other party he not having any issue. Accordingly the proviso in the will of his late mother brought about a situation whereby he not having issue, the farmlands were going to pass on his death to his three sisters.

8. A further complication was that previously in time the deceased had given the defendant a site for a house which he had built on and which is now the family home of himself and his wife but no legal arrangement was ever made for the transfer of the land to him

so in effect as matters stand he has no registered title or any other documentation in respect of title relating to the house where he lives with his wife on the farm.

9. To further complicate matters it was necessary for the defendant prior to the death of his mother to put in a perculation area and septic tank and this was all done on lands adjacent to the site upon which he lives.

10. A further complicating feature is that the deceased's house which was left to her three daughters is between the house where the defendant lives and the farm buildings and in order to access the farm buildings the defendant walks from his house across a passageway very close to his mother's house and into the farm outbuilding area. Unfortunately the parties' mother's house has no appropriate arrangement for a septic tank and perculation area and there is not adequate space within the area attached to that house for the installation of an appropriate sewage system.

11. Going back in time the defendant having begun to raise queries about the whole situation and stalling on taking out a grant moved from the family solicitor to another solicitor and sought senior counsel's advice as to the validity of his deceased mother's will and during this period time was simply dragging on with no move by the defendant to take out the grant and enable his mother's estate to be administered. Eventually the opinion of a counsel was obtained and this indicated to the defendant that he was unlikely to succeed in an action to set aside his mother's will.

12. The defendant was being repeatedly called upon to take out the grant and administer his mother's will because from 2007 onwards the value of property was falling drastically and the defendant's three sisters were very concerned about getting the sites agreed so that they could sell them as appropriate and getting the transfer of their mother's house into their names and in this regard the plaintiff has submitted valuations to the court of the residence bequeathed to herself and her two sisters in her mother's will. On the 7th of September, 2007, the property was valued by Seamus Somers, Auctioneer, Valuer & Livestock Salesman, at €300,000.00. Exactly one year later, the same valuer estimated the current market value of the property in question at €270,000.00. On the 21st of July, 2012, the value of the property was estimated at €125,000.00. Two years later, on the 21st of July, 2014, the value remained at €125,000.00. This marks a loss of €175,000.00 between the date of the plaintiff's mother's death and July, 2014. In relation to the half acre building site left to the plaintiff, a valuation by ERA Donoghue Properties put the open market value of the site at €70,000.00 in September, 2008. In October, 2012, Douglas Newman Good valued the site at €25,000.00, showing a loss of €45,000.00.

13. Furthermore, the plaintiff contends that she lost €46,000.00 on a property she had purchased in Estonia in 2005. Due to interest rate increases and a lack of tenants, the plaintiff found herself in default on her mortgage repayments by June, 2008, and by the 24th of September, 2008, the Bank foreclosed the loan. With arrears of €6,203.000, the plaintiff was liable for the full amount of the Bank loan borrowed, being €128,116.00. The plaintiff lost the deposit of €46,000.00. By March, 2010, following a transfer of ownership of the apartment to the Bank, the apartment was sold for €76,677.00. The plaintiff maintains that had she received the money bequeathed to her and her two sisters under the terms of the will (circa €20,000.00 each) she would have been able to service the mortgage on her property in Estonia and the bank would not have foreclosed her loan. However, the plaintiff could not give a definite answer to the question the Court asked in relation to whether she ever specifically put the defendant on notice that his actions or lack thereof would lead to her losing her deposit on the apartment in Estonia. The plaintiff indicated that due to the fraught relationship between herself and her brother, she would not have wanted to aggravate the situation or give her brother any more leverage over her. The defendant maintains that he was never made aware of the financial situation of the plaintiff in relation to this foreign investment.

14. The plaintiff gave evidence to the Court to the effect that she has been out of work due to the personal stress that her financial situation has caused her. Correspondence from her employer submitted to the Court sets out that on the 10th of August, 2015, the plaintiff had reached the maximum paid sick leave entitlement of 183 days in a four year period and that her paid sick leave would cease at that point in time. It has been recommended to her by her employer that she should apply for early retirement on medical grounds. The plaintiff also submitted that she has suffered from bouts of depression which could have been avoided had her monetary problems not occurred due to the negligence of the defendant. A psychiatrist's report was submitted to the Court and its content was accepted by the defendant. The defendant, however, disputes that the personal and medical issues of the plaintiff have anything to do with the administration of their mother's will and that the plaintiff's psychological problems began long before the death of their mother.

15. The plaintiff and her two sisters in or about August, 2009, took legal advice and made a formal application to have Terence Shaughnessy set aside as executor and that the plaintiff and her two sisters would proceed to be appointed executors and administer the estate.

16. In particular it was averred in an affidavit as sworn by the plaintiff and her two sisters on the 17th August, 2009, that they believed it was no longer appropriate that Terence Shaughnessy should act as executor in the estate of Helen Shaughnessy deceased given the clear and unambiguous reservations he had expressed about the deceased's last will and testament and that further his failure to act has led to a loss to the plaintiff and her two sisters in that certain financial bequests had not been realised as directed in the deceased's last will and that the inaction of the defendant as executor has brought about a situation that they have been unable to obtain title to the properties bequeathed to them in their mother's last will and that they have suffered financial detriment as a result of the executor's failure to attend to his lawful obligations. Accordingly a citation issued from the Probate office on the 20th August, 2009, and the defendant did not enter an appearance to the citation and on the 30th September, 2009, the Probate office made an order under O. 79 r. 57 of the Rules of the Superior Courts deeming him to have renounced his rights by virtue of his non-appearance to the citation. The legal position was now such that the plaintiff and her two sisters were in a position to apply for a grant of letters of administration with will annexed in their mother's estate by virtue of being legatees and devisees under her will and this they proceeded to do but on the 6th November, 2009, a caveat was lodged in the Kilkenny District Probate Registry by solicitors on behalf of the defendant and this caveat impeded the issue of a grant to the estate. The caveat was warned on the 24th February, 2010, and an appearance was entered on the 26th February, 2010, and the status quo remained in place until June, 2012, when Terence Shaughnessy withdrew all objection and the plaintiff and her two sisters were appointed to administer the estate and take out the grant.

17. The Court heard evidence from Mr. John Foley solicitor who advised the plaintiff and her two sisters at different stages of these proceedings, and is generally referred to as the family solicitor. Mr. Foley explained to the Court that although the executor generally has one year from the date of death to administer the will, this is not a fixed rule, and that often preparing an inventory of assets and completing the Inland Revenue Affidavit can be a time consuming exercise which requires time and attention. As a result, he submitted that the one year rule is not rigidly applied and indeed it would be unfair to rigidly apply it on the facts of this case. He told the Court that once the defendant had lodged the caveat in November, 2009, the plaintiff and her sisters instructed him to take action and a warning was lodged in February, 2010. Instead of filing a motion to remove the caveat, Mr. Foley informed the Court

that everybody thought it prudent to try to reach an agreement on the administration of the will and nobody wished to go to Court and undertake potentially costly litigation. As a result, it took until June, 2012, for consent to be obtained from the defendant and for the caveat to be lifted.

18. A sister of the plaintiff, Sheila Ryan, who is not a party to these proceedings, told the Court that she supports her sister in these proceedings and that she believes the defendant has been extremely unreasonable in his handling of the estate. In relation to the dwelling house which was left to the three sisters, Mrs. Ryan indicated that she wanted to keep it as a family holiday home for her children and nieces and nephews in the summertime. It is very clear to the Court that relations between the plaintiff and her two sisters and their brother Terence are extremely strained and it is a very unfortunate situation. All attempts to resolve matters amicably have failed for one reason or another.

19. While it is understandable, against the background facts and familial nature of these proceedings, that the plaintiff and the solicitors acting on her behalf were reluctant to incur further legal costs and risk further aggravation by applying to Court to set aside the caveat lodged by the defendant on the 6th of November, 2009, the reality of the situation is that such an application is simply done by notice of motion, and is generally heard on affidavit evidence in the Monday Motion List. As set out recently by this Court (Baker J.) in *In The Matter of the Estate of Charles (otherwise Cathal) Gillespie Late of Stranarva, Crolly County Donegal, Batchelor, Labourer, Retired, And In the Matter of An Application by Patrick Joseph Boyle,* [2015] IEHC 462, at para. 34:

> "34. The purpose of entering a caveat is to prevent the issue of a grant of probate, but a caveator cannot indefinitely hold up the issue of a grant merely on account of suspicion. As is stated at para. 221 of Spierin, *The Succession Act 1965 and Related Legislation: A Commentary, 4th Ed,* (2011, Bloomsbury):-
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> "A caveator who has or claims no interest, but has reason to oppose a grant being made to an applicant, may commence action to show cause."
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> 35. In *Re Nevin deceased* (unreported, High Court, 13th March, 1997) Shanley J. at p. 4 pointed to the fact that the effect of s. 38 of the Succession Act 1965, and O. 79, r. 41 to 51 of the Rules of the Superior Courts is:
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> "… that the warning in response to the Caveat obliges the person entering the Caveat either to abandon his claim to a grant or to take contentious proceedings in furtherance of his claim…."
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> 36. Later Shanley J. at p.5 noted that the purpose of the caveat is
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> "…merely to ensure that no grant issues unknown to the Caveator: its presence does not restrain the Court from ordering a grant where a Caveator is on notice of the application of the grant." (Emphasis in original)
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> 37. I adopt that statement of the law, and also the statement contained in p. 243 of *Miller's Irish Probate Irish Practice* (1900, Maxwell) that the effect of warning a caveat is "to compel the caveator either to take contentious proceedings or to abandon his claim to a grant".

20. There are two central issues in this case the first being as to whether or not the defendant in his capacity as executor of his late mother's estate failed in the duty of care which he owed in this instance in these proceedings to the plaintiff as a beneficiary under the will and if he did so fail is the plaintiff entitled to an award of damages for any loss she has proven to have sustained and the second aspect is as to whether or not the caveat lodged on the 6th November, 2009, in the Kilkenny District Registry by the solicitors then acting on behalf of Terence Shaughnessy was frivolous and vexatious and designed to impede and delay the administration of the estate of the deceased to the detriment in this instance of the plaintiff and as to whether or not if she suffered any loss and damage as a result thereof as proven by her is she entitled to an award of damages.

21. The defendant particularly in his closing submissions to the Court clarifies his situation emotionally by indicating to the court that he always farmed the lands, that he got very little recompense for all his work, that he is an innocent party in that he did not understand what being appointed an executor meant and that if he had known he could have renounced he would have done so and not got involved and his main complaint to this day is as to how his mother could have brought herself to leave him only a life interest in the farmlands and buildings which he has worked on all his life. He complains that nothing was fully explained to him and that it was all in the hands of his solicitors. He submits to the Court that he did not even know what was meant by a caveat and that he never gave instructions that it should be lodged and that if it was and delayed the administration of the estate it is not his fault.

22. As a point of clarification, it is important to note that the defendant was entitled not to accept his appointment as executor of his mother's will. It is clear that an unwilling executor should be allowed the opportunity to renounce, as the functions of an executor can prove to be onerous and may also entail a risk of personal liability. In my view, it does not absolve a personal representative of their liabilities if they simply state that they were unaware of the attendant duties and responsibilities or that they did not know that they could renounce their executorship. The onus is on them to understand the legal situation and the responsibilities attached to the role, and to seek legal advice if they are unsure as to their duties. As is set out by Keating in *Keating on Probate,* at page 221 and 222:

> "After the death of the testator an executor must decide whether to accept the office of executor or renounce it. An executor of course may accept the office by applying for a grant of probate, but where he renounces he must do so in writing and the renunciation will then be included in the papers when a co-executor applies for a grant of probate. If there is no other executor of the will, as a result of a renunciation the type of grant that must be sought by the person next entitled by virtue of Order 79 of the Rules of the Superior Courts will not be that of probate but rather of letters of administration with will annexed. Once an executor renounces his right to probate, his rights as executor will wholly cease and he will not be given representation in another character unless by order of the Court (Section 17, Succession Act, 1965; Order 79, rule 38, RSC.)
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> It was said by Sir J. P. Wilde in *In the Goods of Russell* L.R. 1 P. 380 that: "Where a man under a will occupies in reference to the testator two different characters he shall not select either one he pleases as the basis of the grant, but must take administration on the largest ground – he cannot throw aside probate and take a more limited grant." An executor's right to renounce will cease, however, once he has obtained probate of the will because the grant of probate not only proves the will of the testator but also confirms the executor in his office and "once an executor, always an executor" (*In the Goods of Veiga* 32 L.J.P.M. & A.9.) An executor may also by his own acts be prevented from renouncing probate where, for instance, he carries out acts in relation to the estate of the deceased that would normally be carried out by an executor (*Re Stevens* [1897] 1 Ch 422.) In other words, the form of behaviour that renders a person executor

de son tort similarly prevents an executor from renouncing as executor (*Long and Feaver v Symes and Hannam* 3 Hagg. Ecc. 771) unless the court orders otherwise (In the Goods of Hanlon [1894] 1 IR 551) or all the interested parties consent to a court order discharging him as executor (In the Goods of Fitzpatrick 26 ILTR 125). In In the Goods of Keller [1955-1956] Ir Jur Rep 69, the Court allowed the executor to file a renunciation where the applicant was the sole person interested in the assets of the deceased. Generally, a renunciation by an executor *de son tort* will not be accepted (*In the Goods of Badenach* 3 Sw & Tr 465; *Mordant v Clarke* LR 1 P&D 592) even though his intermeddling is confined to property situated abroad (*Re Lord and Fullerton's Contract* [1896] 1 Ch 228.)"

23. If an executor does not wish to renounce his or her executorship, then they have a number of duties which they must attend to. The first duty of the personal representative is to gather in the assets of the deceased, and once this is done they will be in a position to ascertain the solvency of the estate. This exercise will also determine the nature of the administration to be undertaken and the order of application of the assets of the deceased. Once all debts and liabilities have been discharged, the personal representatives will be in a position to commence the distribution of the estate among the beneficiaries in accordance with the provisions of the will or, in the case of intestacy, in compliance with the rules of intestacy.

24. The important aspect is that the personal representatives in whom the whole estate vests must perform their duties diligently (*Re Tankard* [1942] Ch. 69; *Re Gunning* [1918] 1 IR 221) and if they fail to do so the beneficiaries may bring an action against them (*Re Hayes WT* [1971] 2 All ER 341). A beneficiary will also have a right to take legal action against the personal representatives for their failure to distribute the estate after the expiration of the executor's year (section 62(1) Succession Act 1965):

> "62.—(1) The personal representatives of a deceased person shall distribute his estate as soon after his death as is reasonably practicable having regard to the nature of the estate, the manner in which it is required to be distributed and all other relevant circumstances, but proceedings against the personal representatives in respect of their failure to distribute shall not, without leave of the court, be brought before the expiration of one year from the date of the death of the deceased.
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> (2) Nothing in this section shall prejudice or affect the rights of creditors of a deceased person to bring proceedings against his personal representatives before the expiration of one year from his death."

25. The law relating to the duties of an executor are well summarised by the following treatises:

Michael Ryan: Executorship & Administration (3rd Edition, 1995), at page 147:

> "It is generally accepted that after a period of one year from the date of death the personal representative should have realised the estate assets and settled the liabilities; while this should not be taken as a fixed rule, the onus lies on him to substantiate reasons for delay. All of the assets in which the deceased had a beneficial interest may be used to settle the liabilities. Personal representatives are not liable if there is any loss caused by their having postponed a sale beyond the period of one year after the death, if they acted in their reasonable discretion. The personal representative is under no obligation to distribute the estate of the deceased before the expiration of a year from the date of death, but after that period has elapsed, a legatee or other person interested in the estate may call on the personal representative to give an account of his actions to date. Any legacies which remain unpaid twelve months after the date of death become eligible for interest from that date up to the date of payment."

Albert Keating: Keating on Probate (3rd Edition, 2007), at page 271 and 272:

> "The personal representatives are not only obliged to perform their duties but to perform them diligently or at least prudently. Where the estate sustains a loss owing to a breach of duty by a personal representative, he may be personally liable for the *devastavit. A devastavit* by a personal representative renders him personally liable to creditors and beneficiaries of the deceased alike. The duty of diligence that a personal representative owes to creditors and beneficiaries commences from the date of the grant, and continues while gathering in and preserving the assets and when administering and distributing the estate among the persons entitled…
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> During the administration of the estate the personal representative owes a duty of diligence not only to creditors but also to beneficiaries. It was stated by Uthwatt J. in *Re: Tankard* [1942] Ch. 69 that: "the duty is owed, not only to creditors, but also to beneficiaries, for the ultimate object of administration of an estate is to place the beneficiaries in possession of their interest, and that cannot be fully achieved unless all debts are satisfied." While a personal representative is required to act diligently and save the estate from all unnecessary expenditure, he must also act prudently to ensure that the beneficiaries receive their share in the estate, and if as a result of his carelessness a beneficiary does not receive his share, he may be liable accordingly (*Re Gunning*, [1918] 1 IR 221.)"

James C. Brady: *Succession Law in Ireland* (2nd Edition, 1995), at page 323:

> "The Succession Act incorporates the long established rule that personal representatives have one year from the death of the deceased in which to administer the estate and beneficiaries under a will may not initiate action against the executors until the end of the so-called 'executor's year.' There is nothing to prevent the personal representatives distributing the estate within the executor's year if they so choose and indeed failure to do so may leave them open to the charge that they have failed to administer the estate with due diligence. This is particularly the case with regard to payment of the deceased's debts, since failure to do will invariably mean that interest on the debt grows, and it may grow to a point where it threatens the interests of beneficiaries.
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> The court has jurisdiction to make an order directing the personal representatives to transfer land to the person entitled. Such jurisdiction may be exercised at any time after the expiration of one year from the death of an owner of land. If the personal representatives have failed to respond to the request of the person entitled, to transfer the land to such person, the court may, if it thinks fit on the application of the person entitled, and after notice to the personal representatives make an order that such transfer be made (Section 52(4) of the Succession Act.) If such order is not complied with within the time specified by the court the court may make a further order vesting the land in the person entitled as fully and effectually as might have been done by a transfer thereof by the personal representatives.
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> Thus, a beneficiary who has failed to make the personal representatives transfer to him, by assent or otherwise, land to which he is entitled is not without legal redress on the expiry of one year from the death of the owner of the land.

Section 52(4) of the Succession Act is worded as follows:

> 52 (4) At any time after the expiration of one year from the death of an owner of land, if the personal representatives have failed on the request of the person entitled to transfer, by assent or otherwise, the land to the person entitled, the court may, if it thinks fit, on the application of the person entitled and after notice to the personal representatives, order that the transfer be made, and, in default of compliance with that order within the time specified therein by the court, may make an order vesting the land in the person entitled as fully and effectually as might have been done by a transfer thereof by the personal representatives."

Citizen's Information sets out the following on their public website:

> "Duties of Executor/Administrators: Generally, you are obliged to distribute the assets as soon as possible after the death (within a year if possible - you may be sued by the beneficiaries if you do not distribute the estate within a year). This may not be possible if there are legal issues to be decided.
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> You are under a duty to preserve the assets of the deceased until they are distributed and to protect the assets from devaluation. For example, you should make sure that all assets required to be insured are insured for their market value."

26. The following was stated by Uthwatt J in *Re: Tankard* [1942] Ch. 69, in relation to the non-payment of debts by the executor within one year -

> "With respect to the period within which debts should be paid, there is, in my opinion, no rule of law that it is the duty of executors to pay such debts within a year from the testator's death. The duty is to pay with due diligence. Due diligence may, indeed, require that payment should be made before the expiration of the year, but the circumstances affecting the estate and the assets comprised in it may justify non-payment within the year, but, if debts are not paid within the year, the onus is thrown on the executors to justify the delay."

27. Ross J. in *Re: Gunning* [1918] 1 IR 221 also sets out the following:

> "There must be one standard for all… and the standard is this: that the executor in managing the trust must take al1 those precautions which an ordinary prudent man in business would take in managing similar affairs of his own. It is allowed to him to employ proper agents. He is not bound to scrutinize with suspicion each step taken by such agents or to deal with them as if they were dishonest; but he must not expose the trust funds to unreasonable or unnecessary risks. An ignorant, uneducated trustee cannot escape from liability by reason of his shortcomings. On the other hand, a highly educated man is not to be held to stricter accountability by reason of his superior training. Each must act up to the Court's standard of prudence. No more is required, and no less can be accepted. These are the well-settled principles applicable to the matter in question."

28. In view of the foregoing and having regard to section 62(1) of the Succession Act 1965, it seems appropriate to come to the conclusion that where there are no justifiable reasons why an estate has not been administered within one year from the date of death of the testator, then the executor may be liable for any devaluation in lands bequeathed to the beneficiaries under the will. If there are reasonable justifications for the delay then these will be taken into account by the Court in the exercise of its discretion in any proceedings on foot thereof, and the Court shall have regard to all of the relevant circumstances. If it appears to the Court that the executor acted with due diligence in carrying out their duties then they shall be absolved of their liabilities. However, if the Court finds that the executor simply sat on his hands, out of idleness or for personal gain, as the value of assets bequeathed under the will fall, to the detriment of the beneficiaries, then the Court may form a view that the executor is liable for any losses incurred. Of course, the normal rules of reasonable foreseeability of loss shall apply. The circumstances of this case must impress upon executors of an estate the onus that lies upon them to carry out their legal duties in accordance with the will, in a reasonable and prudent manner and in a reasonable period of time.

29. I am satisfied that the defendant in his capacity as the nominated executor of his mother's estate failed in the duty of care which he owed to the estate and to the plaintiff as a beneficiary thereof. The reality of the situation is that it was a straight forward situation to pay the funeral and testamentary expenses, pay out the amounts that were due to each of his three sisters in accordance with his mother's will, transfer the title to his mother's house to his three sisters and agree a site of ½ acre each with them and transfer the lands to them and finalise matters relating to his own bequest but clearly he prevaricated and wanted to obtain advice in respect of the will and in effect as of September, 2009, he still had not advanced the situation. He should have renounced as executor so as to enable his three sisters as beneficiaries and devisees under the will to have taken his place and administered the estate and he did not do so. Accordingly, in my view, in his capacity as executor he was guilty of negligence and breach of duty.

30. The Court would normally set aside a caveat if the caveator has no interest in the estate or that the caveat was entered vexatiously with the Court being satisfied that the lodgement of the caveat amounted to conduct which in all the circumstances no reasonable person could properly treat as *bona fide.* This was reaffirmed by the recent Supreme Court decision (Dunne J.) in *Estate of O'Connell (deceased); and Estate of Reen (deceased)* [2014] IESC 55. In the instant case, the defendant had a clearly defined interest in the estate but this interest was not disputed by any third party. I am satisfied on the evidence that the caveat was entered vexatiously and for the sole purpose and with no basis other than to prevent the defendant's three sisters taking out the grant of administration. As was set out by Shanley J in *Re: Nevin* and reiterated by Dunne J in *Estate of O'Connell (deceased),* where a caveat is warned then a caveator must either "abandon his claim to a grant or take contentious proceedings in furtherance of his claim." A caveator cannot simply lodge a caveat indefinitely in order to stymie the administration of a will.

31. It has to be accepted that an application could have been made to the Monday probate list to have the caveat set aside against the existing background but a preference appears to have been opted for attempting to resolve the matter by negotiation but in the end this proved impossible. It is appropriate I believe to state that the Court tried to facilitate the parties with a view to try to resolve the various side issues namely the perculation areas for the defendant house and the appropriate additional land to be ceded in respect of the parties mother's house so that the necessary facilities could be put in place to make the house habitable but unfortunately despite the Court's intervention in this regard and that of Mr. Foley the family solicitor it became apparent that the deceased's three daughters and in particular her son the defendant herein could not reach an agreement and to this day since 2012 apart from the payment of the relevant cash sums each in the region of approximately €20,000.00 no further steps have been taken to finalise the transfer of the three ½ acre sites to the plaintiff and her two sisters, the transfer of the deceased house to the plaintiff and her two sisters, and the transfer to the defendant of his entitlement to the farm under the will. A further issue not relevant to these proceedings is that the defendant's own position as regards the site that his mother gave him and the house that he built thereon remains un-regularised.

32. It thus appears to the Court that without the immediate agreement and consent of the plaintiff's sisters to sell the deceased's property in 2008, or to buy the plaintiff's share, the plaintiff would have had to apply to the Court under Section 31 of the Land and Conveyancing Law Reform Act 2009 and seek an order to sell or partition the property. Bearing in mind the court process and the time involved in preparing and litigating proceedings of that nature, on the balance of probabilities obtaining an order of the Court would have taken at least a year or two even if the plaintiff acted with immediate haste. As a result, even if the defendant's solicitors had not lodged a caveat to the estate on the 6th of November, 2009, and the plaintiff and her sisters had taken out a Grant of Letters of Administration with Will Annexed on the 30th of September, 2009 (at which point in time they were entitled to do so following the defendant's failure to enter an appearance to their citation) it appears to the Court, on the balance of probabilities, that it would have taken until well into 2011 before an order of the Court under Section 31 of the 2009 Act could have been obtained. Legal costs would also have been incurred by this stage. This timeframe also does not take into consideration the time it may take to find a buyer and finalise a sale. As outlined, on the 21st of July, 2012, the value of the property was estimated at €125,000.00. Two years later, on the 21st of July, 2014, the value remained at €125,000.00. Without evidence from all three sisters that they were each willing to sell their mother's house after her death I cannot accept that the plaintiff has suffered any real identifiable loss. Since 2012 the care and upkeep of the property rests with the three executors including the plaintiff and it appears they have done little or nothing to maintain the property and there is the added difficulty of a sewerage system and perculation area. The plaintiff, despite the bequest, had a number of hurdles to clear before the house could be sold and in my view these have become intermingled with the delay involved. The plaintiff does not satisfy me that any loss suffered can be attributed directly and solely to the defendant and his behaviour in respect of the administration of the estate and the lodging of the subsequent caveat.

33. The Court now turns to consider the €46,000.00 the plaintiff lost on the apartment in Estonia. It is clear from the text messages as exhibited which were sent from the plaintiff to the defendant between the 15th of March, 2009, and the 24th of July, 2009, that the defendant was put on notice that the value of the properties was depreciating and that this was causing distress to the plaintiff. At this point in time, the defendant had written to John Foley Solicitors indicating an intention to challenge the will, and the plaintiff makes clear to him that he must renounce his executorship if he intends to go down that route. The will has never been challenged and thus the will stands. However, it is not borne out by the correspondence as submitted to the Court by the plaintiff that the defendant was ever put on notice that the plaintiff was at risk of losing her apartment in Estonia. As such an issue arises as to the reasonable foreseeability of the plaintiff's loss. While it is true that the money (circa €20,000.00) bequeathed to the plaintiff could have been released by the executor, being the defendant, relatively easily and quickly, it is also true that the bank foreclosed the plaintiff's loan in relation to the Estonian property on the 24th of September, 2008. That is just short of one year and three weeks after the date of death of the deceased. It is the Court's view that to impose such a strict interpretation of the "executor's year" would be unfair on the facts of this particular case, and the Court is assisted in this regard by the evidence of John Foley, the family solicitor. I also bear in mind that the plaintiff never specifically put the defendant on notice of her difficulty with continuing financial repayments on the apartment in Estonia and this was an arrangement and commitment she entered into prior to her mother's death and her mother's will only speaks from the date of death. I take the view any loss or damage suffered was not foreseeable to the defendant and in any event is too remote.

34. The transfer of a ½ acre site to the plaintiff was always a relatively simple and straight forward matter and I take the view that any reasonable executor abiding by his mother's wishes as expressed in her last will and testament should at least within two years of the date of his mother's death have executed the necessary transfer. The defendant was on notice of falling land prices. The plaintiff could then either have obtained planning permission and sold her site with planning, or sold the site subject to planning. At the date of death in 2007 the site was valued at €90,000.00. As of September, 2008, the value was €70,000.00, and by June, 2009, the site was valued at €50,000.00. As of October, 2012, the value was €25,000.00. Allowing time for a sale and some leeway for the exigencies of the market I take the view that if a sale could have been effected within a reasonable period of time after the death of the deceased the plaintiff would have obtained a price in the region of 50 - 60,000.00 Euro and in October, 2012, a price of €25,000.00, and thus the plaintiff's loss can be ascertained at €30,000.00.

35. I accept that the plaintiff suffers from a number of medical complaints and the situation has not been helped by the circumstances surrounding the administration of her mother's estate. I am not satisfied on the balance of probabilities that the medical complaints of the plaintiff can be linked to the actions of the defendant, and in any event since 2012 the plaintiff is one of the executors of her late mother's estate and it has been within her power to complete the administration of the estate since that time. In the circumstances I am not satisfied on the balance of probabilities that there is a sufficient nexus between the personal injuries as complained of and the actions of the defendant.

36. The overall situation is extremely unsatisfactory and it is clearly now incumbent on the plaintiff and her two sisters to administer the estate of her late mother and to take legal advice from Mr. Foley the family solicitor or another solicitor and sufficient funds to finalise the estate and pay all the necessary legal costs will have to be raised from within the estate by the sale of machinery, cattle, land or other property goods and chattels which form part of the estate.

37. There will be judgment for the plaintiff against the defendant in the sum of €30,000.00.