THE HIGH COURT

IN THE MATTER OF THE SUCCESSION ACT 1965

Between:

Record No. 1396/09

L. C. (A MINOR, SUING THROUGH HER MOTHER AND NEXT FRIEND M. C.)

APPELLANT

-AND-

H. S.

RESPONDENT

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 27th day of January, 2014.

1. This appeal from the Circuit Court has a chequered history. In February, 2006, the Appellant/ Plaintiff L.C. who was born on the 7th July, 2000 commenced her action seeking eleven reliefs which can be reduced to three headings;

> (i) Declarations pursuant to Section 35 of the Status of Children Act 1987 that she was a child of the deceased W.S. who died on the 18th October, 2005;
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> (ii) An interim order restraining the Defendant who is the widow of W.S. from intermeddling with the estate of W.S.; and
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> (iii) Declarations that she was entitled to a share in the estate of W.S. whether under Section 117 of the Succession Act 1965 if he died testate or otherwise if he died intestate.

2. It is possible that on the issue of those proceedings, the Plaintiff was not fully aware whether W.S. had died testate or intestate. The pleadings assert that the Defendant had failed to acknowledge the Plaintiff as a child of the deceased notwithstanding the Defendant's actual knowledge of the existence of the Plaintiff as the child of the deceased.

3. Letters of administration issued to the Defendant on the 25th May, 2006, some three months after the issue of proceedings. On an unstated day in February, 2006, the Plaintiff issued a motion seeking certain orders and injunctive relief. On the 26th July, 2006 Her Honour Judge Alice Doyle granted orders:-

> (i) directing DNA testing of the Plaintiff, her mother and next friend, and the deceased;
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> (ii) restraining the Defendant from administering or intermeddling with the estate of W.S. until further order. However, if certain specified lands in Wexford were held on joint tenancy and documents were furnished to prove same, the Defendant was permitted to deal with those lands; and
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> (iii) restraining the Defendant from dealing with or distributing the estate of W.S. until the dispute as to the Plaintiff's parentage was resolved and/or until the Plaintiff's entitlement to her share in the estate of W.S. was established and/or until the application pursuant to Section 117 of the Succession Act 1965 was determined; and
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> (iv) the costs were reserved.

4. In February, 2008 the Plaintiff issued a motion for judgment in default of defence and in her grounding affidavit sworn on the ***24th January, 2006***,[1] the Plaintiff's mother and next friend averred that she was aware from the Defendant that the putative father of the Plaintiff died intestate and that her daughter was entitled to a share in the estate of her natural father. The affidavit then contradicts this statement as it avers that the Defendant had failed to acknowledge that the infant Plaintiff is the daughter of the deceased or that she has an entitlement to the estate of the diseased "*whether on testacy or intestacy*", and further that the Defendant was seeking to develop the lands of the deceased to the exclusion of the infant Plaintiff.

5. It must be inferred that it was clear to the Plaintiff's mother and next friend from as early as January, 2006 (and if that date was a typographical error then from at least the 26th July, 2006 when Judge Doyle made orders in relation to the case) that W.S. died intestate and that before his death in October, 2005, he and his wife had purchased lands as joint tenants in County Wexford.

6. On the 23rd January, 2008 a Defence was filed wherein the Defendant objected to the form of the pleadings and the Plaintiff's failure to first lodge a caveat. The Defence otherwise admitted that W.S. died intestate survived by his widow (the Defendant), three marital children and three non-marital children including the infant Plaintiff. It was denied that the Defendant had intermeddled with the estate to the exclusion or disadvantage of the Plaintiff as alleged or at all; that the estate of W.S. had not been distributed at the time of the issue of the proceedings; and that the Defendant had ever denied that the Plaintiff was the child of W.S. as his six children were noted on the Internal Revenue affidavit.[2] It was pleaded that the Plaintiff's entitlement to a share in the estate under the rules of intestacy had never been denied and that this fact had been made known to the Plaintiff and that the Defendant was "*at a loss to understand why the Plaintiff brings the within proceedings and why the Plaintiff seeks declarations of the court to parentage*." The Defence then states that the estate of W.S. who died intestate comprises a net estate of €112,143.32 and that under the rules of intestacy each of W.S.'s children was entitled to one-sixth of one-third of the estate making the Plaintiff's share in or around €6,230.18.

7. Of relevance to this action the Defence delivered in 2008 specifically pleads that "*the Defendant is prohibited from administering and distributing the estate of the said late [W.S.] (deceased) by virtue of a court order obtained by the Plaintiff on or about 26th*

July 2006 and which said court order restrains the defendant from in essence administering or intermeddling in the estate of the late [W.S.] (deceased) until further order of the Honourable Court. The Order sought on the 26th July 2006 was sought without regard for any difficulties, financial or otherwise that may be caused to the Defendant and in circumstances where the Plaintiff had been assured that any entitlements she may have under the rules on intestacy would be granted to her. Until this Order has been vacated the Defendant cannot hand over to the Plaintiff her said share of the estate of the said [W.S.] (deceased) being €6,230.18. The Plaintiff further had the said court order extended at a second sitting on the 26th July 2006 to include property which did not form part of the estate of the said late Mr. [W.S.] (deceased) pending the provision of proof to the Plaintiff that the title to said property was held by the Defendant and the said [W.S.] (deceased) as joint tenants despite assurances by the Plaintiff to the Defendant that such was the case and despite any difficulties that said restriction might place on the Defendant. The said proof was duly furnished by the Defendant and that part of the extended order restraining the Defendant from dealing with the family home and other said property which did not form part of the estate of the said [W.S.] (deceased) ceased forthwith on the furnishing of the said proof and as directed by the Honourable Court when making the extended order on or about 26th July 2006" (the Court's emphasis).

8. On the 31st of August, 2009, some nineteen months after the Defence was served and a minimum of three years after the Plaintiff became aware that the Defendant was a joint owner with W.S. of lands at locations which will be referred to as "B" and "C", and almost four years after his death intestate, the Plaintiff issued a second set of proceedings entitled a 'Succession Law Civil Bill' claiming *inter alia*:

> (i) That the deceased had at various stages throughout his life acquired certain properties including (a) the family home and lands at a specified location "B" and (b) farmhouse and lands at a separate specified location "C", which were put in the joint names of deceased and the Defendant hereto.
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> (ii) That upon the death of the deceased the entire beneficial ownership of the said properties vested in the Defendant and as such was a 'disposition' of property within the meaning ascribed by Section 121 of the Succession Act 1965; and
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> (iii) That the effects and purpose of the said dispositions was an attempt to defeat or diminish the Plaintiff's share in the said estates.

9. A Defence was delivered in the second set of proceedings on the 29th April, 2010, where the key points pleaded were (once again) that the Defendant did not deny that the Plaintiff was entitled to a share on intestacy in common with the other children of W.S. as already acknowledged by her and that the Defendant was therefore at a loss as why the Plaintiff had recited that the Defendant had, despite request, failed to acknowledge that the Plaintiff's entitlement to her legal share. The Defence then recites that the Defendant had been unable to pay any sum due to the Plaintiff on intestacy by virtue of the order obtained by the Plaintiff on or about the 26th July, 2006, prohibiting the Defendant administering the estate of W.S. It was specifically denied that the Plaintiff was entitled to any real estate as the estate of W.S. did not comprise any real estate. Details were then provided of the intestate estate of W.S. and it was pleaded that all this had been made known to the Plaintiff in the Defence of the Defendant delivered in respect of the previous Circuit Court proceedings. It was specifically pleaded that the family home and lands of the Defendant and W.S. at location "B" were purchased in 1985 in the joint names of the Defendant and W.S. as joint tenants, more than fifteen years prior to the birth of the Plaintiff, and thus could not have been a disposition within the meaning of Section 121 of the Succession Act 1965. It was also specifically pleaded that the farmhouse and lands at location "C" were purchased in November, 2003 in the joint names of the Defendant and W.S. as joint tenants and could not have been a disposition made for the purpose of defeating and substantially diminishing any share of the Plaintiff on intestacy or otherwise in circumstances where W.S. died suddenly and prematurely and in circumstances where properties purchased by the Defendant and her late husband were always purchased in their joint names and as joint tenants.

10. The matter appears to have been set down for trial on the 6th, 13th, and 14th October, 2011, before His Honour Judge Griffin. It seems that both sets of proceedings were consolidated at that stage and the only live issue was whether the purchase of the farmhouse and lands at location "C" in 2003 was a disposition made to defeat the rights of the infant Plaintiff within the meaning of Section 121 of the Succession Act 1965. The learned Circuit Court Judge made an order declaring that:-

> (a) the Plaintiff was entitled to her legal share in the estate of W.S., being of one sixth of a one third share;
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> (b) the Defendant administer the estate of W.S.; and
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> (c) That the Plaintiff do recover from the Defendant the sum of €4,004.19 being one sixth of one third share in the estate of W.S.

11. Thus it appears that the Plaintiff essentially lost her claim under Section 121 of the Act of 1965 and was reduced to the intestate share which had been acknowledged by the Defendant some six years previously, shortly after letters of administration issued, and again in the Defence filed in response to the first Civil Bill in 2008 and to the second Civil Bill in 2009.

12. This Court was informed that when the Plaintiff's appeal to the High Court was set down for hearing before Herbert J., the issue of the Statute of Limitations was raised for the first time by the Defendant. The case was remitted to the Circuit Court for that discrete issue to the determined. The issue was determined in favour of the Plaintiff but no reasons were provided in the order made. The infant Plaintiff's appeal against the order of the Circuit Court was then set down for hearing before this Court in Kilkenny in December, 2013. The parties agreed that the first issue to be determined was the preliminary limitation point where the Defendant asserted that the Plaintiff was out of time to bring proceedings under Section 121 while the Plaintiff asserted that once her initial proceedings had been commenced under Section 117 of the Succession Act 1965 within the six month statutory period, then her claim under Section 121 could be brought at any time thereafter.

13. Due to time constraints the limitation issue was only part heard in December, 2013. The Court then raised its own concerns as to whether a purchase of lands subject to mortgage could be a '*disposition*' within the meaning of Section 121 and invited the parties to prepare written submissions on that issue.

The Relevant Provisions

14. Section 117 of the Succession Act 1965 provides:

> "*(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the*

court may order that such provision shall be made for the child out of the estate as the court thinks just.

(1A) (a) An application made under this section by virtue of Part V of the Status of Children Act, 1987, shall be considered in accordance with subsection (2) irrespective of whether the testator executed his will before or after the commencement of the said Part V.

(b) Nothing in paragraph (a) shall be construed as referring to a right to apply under this section in respect of a testator who dies before the commencement of the said Part V."

15. Thus it can be seen that applications under Section 117 apply only where the parent died testate. Where the parent died intestate, all children of the deceased are entitled to an equal share of the estate as under the intestacy rules governed by Section 67(2) of the Act of 1965: if an intestate dies leaving a spouse and issue, the spouse takes two thirds of the estate and the remainder shall be distributed among the issue in equal shares.

16. Applications under Section 117 must be brought within six months from the first taking out of representation of the deceased's estate, pursuant to Section 117(6), as amended, and there is no provision for the extension of that short time limit where the applicant is under a 'disability', i.e. a minor of or unsound mind. Section 127 of the Act of 1965 – which extends the 'disability' provisions of the Statute of Limitations 1957 to actions in respect of a claim to the estate of the deceased person or a share in the estate – does not apply to applications by children under Section 117. This reflects the principle, identified by the Supreme Court in *Moynihan v. Greensmyth* [1977] 1 I.R. 55, that there is a public interest in the speedy administration of estates.

17. Section 121 of the Succession Act 1965 applies to a disposition of property (other than a testamentary disposition or a disposition to a purchaser) under which the beneficial ownership of the property vests in the donee within three years before the death of the person who made the disposition or on his death or later. These are sometimes referred to as '*disinheriting dispositions'*. Such a '*disposition*' is defined to include a donation mortis causa but is not otherwise defined. If the disponee disposes of the property to a purchaser for value, Section 121 ceases to apply to the property and applies instead to the consideration given for the purchase. In other words, the sale itself is unaffected but the proceeds of the sale may be affected. Before any disposition can be made the subject of an order under Section 121 the Court must be satisfied that the disposition was made for the purpose of defeating or substantially diminishing the share of the disponer's spouse or civil partner or the intestate share of any of his children, or of leaving any of his children insufficiently provided for. If the Court is so satisfied, it may order that the disposition shall be deemed, for the purposes of Parts VI and IX of the Act of 1965, to be a devise or bequest made by him by will and to form part of his estate, and to have no other effect. This may have the consequence that an application made by or on behalf of a child under Section 117 could succeed even if the deceased otherwise died intestate.

18. Of interest in this case, Section 121(5), as amended, provides that an order may be made under Section 121 either (a) in the interests of the spouse or civil partner, on the application of the spouse or civil partner or the personal representative, made within one year of the first taking out of representation, or (b) in the interest of a child, on an application made under Section 117. No time limit is expressly imposed in the case of an application made by a child, but Carroll J. held in *MPD v. MD* [1981] ILRM 179 that only one set of proceedings is necessary to bring an application under Sections 117 and 121, and that the time limit of six months from the taking out of representation imposed by Section 117(6) applies equally to an application under Section 121. In the second edition of his monograph *Keating on Probate*, Albert Keating expresses the view at p. 173 that an application made by a child of the deceased under Sections 117 and 121 beyond the statutory limitation period will not be entertained by the court for want of jurisdiction, no matter how serious the injustice caused to that child as a result, unless the defendant consents to the jurisdiction of the court. Keating suggests that legislation would be required to enable children to rely on the extending provisions of Section 127 of the Succession Act 1965

MPD v MD

19. The seminal judgment dealing with the interaction between Sections 117 and 121 is that of Carroll J. in *MPD v MD* [1981] ILRM 179. This was an appeal to the High Court from the order of the Master dismissing a claim brought by a widow under Section 121 because it was out of time. The case concerned the estate of a man who had two families – (i) his estranged wife and their four marital children who lived in the family home and (ii) his partner and their non-marital two children who lived in a house which he had acquired in their joint names. During his lifetime and within three years of his death, his partner acquired a half interest in his business and was joint tenant of their home. A grant of probate of his will issued on the 25th September, 1978. On the 16th October, 1979 (i.e. more than 12 months later) his widow issued two summonses against his partner seeking a declaration under Section 117 on behalf of the children of his marriage and the other seeking a declaration under Section 121 in the interests of the widow and in the interests of her four children.

20. Carroll J. held that the widow was barred from making an application under Section 121 in her own interest because the Section 121 summons issued outside of the one year time limit set by Section 121(5). She further held at p. 181 of her judgment that the success of the Section 121 application in the interest of the children was dependent on the success of the Section 117 application and accordingly, only one set of proceedings was necessary. The Section 117 time limit cannot be extended in the case of a plaintiff who is under a disability such as infancy as it is not a claim under a will or on intestacy or as a legal right, but rather "*a claim made independently of the will and against its provisions"* (Carroll J., at p. 183). The Court had no jurisdiction to make an order under Section 117 as the summons issued outside of the then-12 month limitation period. The Section 121 application was, therefore, also statute barred.

Analysis of the Limitation Issue

21. It is clear from *MPD v MD* that the six month time limit applicable to Section 117 applications applies equally to Section 121 applications, which can only be sought as a relief in Section 117 proceedings in cases where the order is sought in the interest of a child of the deceased. The Plaintiff in these proceedings clearly did not seek relief under Section 121 as part of her Section 117 application and indeed she did not seek relief under Section 121 until the 31st August, 2009 – long after the expiry of the six month time limit applicable under Section 117(6), which occurred in November, 2006. It is of some considerable significance that the Plaintiff (through her next friend) was fully aware since at the latest the 26th July, 2006 that the lands at location "C" had been purchased by the deceased and his spouse as joint tenants in 2004. The finding by Carroll J. in *MPD v MD* that one set of proceedings is sufficient to mount a claim under Sections 117 and 121 is a recognition of their connection under the Succession Act but is not a licence to use one set of proceedings to stay any statutory time limitations for the other. That is *not* to say that in an appropriate case, in order to ensure that proper provision has been made for the child of a testator in accordance with Section 117, the Court could not grant an order under Section 121, as part of its inherent jurisdiction to provide just relief, even if no such claim was made. The Court's discretion would clearly depend on a number of pre-conditions being met; i.e. that (1) the Section 117 proceedings were commenced within the statutory time; (2) it would be unjust to ignore the disinheriting disposition; (3) there would otherwise be little or no estate

available to provide just provision for the child; and (4) as soon as reasonably possible after becoming aware of the disputed disposition, the Plaintiff put the Defendant on notice that he / she would be seeking to have the disposition treated as a bequest or devise made by will and treated as part of the estate, in the context of the Section 117 proceedings. An order may only be made under Section 117 "*on application by or on behalf of the child of a testator*" and cannot generally be made if the deceased died intestate. However, as previously mentioned, Section 121 is not subject to that limitation and where an order is made under Section 121, the deceased is treated as though he made a bequest or devise by will, which potentially brings Section 117 into play even if the deceased otherwise died intestate (see the judgment of Carroll J. in *MPD v MD*).

22. In contrast to Section 121(5) (a), which provides that an order may be made in the interests of a surviving spouse "*on the application of the spouse or personal representative of the deceased*", Section 121(5) (b) simply provides that an order may be made under Section 121 "*in the interest of a child, on an application under section 117*". A heading seeking the relief of "*Such further or other orders, declarations and reliefs as this Honourable Court shall deem meet and just*", as was included in the Plaintiff's 2006 proceedings, may in appropriate circumstances be sufficient to provide jurisdiction to grant a Section 121 order in Section 117 proceedings.

23. Nonetheless, while it might be unnecessary to expressly seek a declaration under Section 121 in Section 117 proceedings, this does not equate to what happened in this case where more than three years elapsed between the time when Plaintiff became aware of the disposition and the date on which the Defendant was first put on notice of the Section 121 claim by way of the 2009 proceedings. Although the Section 117 proceedings were brought within time they were not appropriate to an intestacy and they did not include a claim under Section 121 nor was any claim brought to amend the pleadings within a reasonable time after the Plaintiff was aware that W.S. had died intestate and that it had been asserted by the Defendant that his estate did not comprise any real property. In those circumstances it is clear that her claim falls to be dealt with under the intestacy rules under Section 67, and it would be unconscionable for the Court to exercise its inherent jurisdiction to make an order under Section 121. The Court is satisfied that the action is statute barred.

The Second Issue: Was this a Disposition?
24. The second issue is whether, on the facts, the transaction which the Plaintiff / Appellant sought to challenge amounts to a 'disposition' within the contemplation of the statute.

25. The facts are that the deceased and his spouse the Defendant, who were married for more than twenty years before he died, were the owners of several parcels of agricultural land. In common with modern custom each purchase of land was registered in both their names as joint tenants. In early 2004 the couple entered into a contract to purchase a parcel of land at location "C". The purchase was financed by a loan in the sum of €380,000 and a further private loan from the deceased's brother in the sum of €450,000. Documents support the fact of these loans and the obligations of the deceased and his wife the Defendant under these loans. The charge of €380.000 appears as a burden on the folio when the property was first purchased and when the property was transferred to the Defendant following the death of her husband. The purchase was made within three years of the death of the deceased. W.S. was also obliged to take out an insurance policy indemnifying his repayments under the mortgage in the event that he would become incapacitated and unable to work. That policy was in place and it can be assumed that he had to attend for a medical examination before such policy issued. There was nothing suspect, unusual or uncommon about this purchase in the joint names of the husband and wife. On the death of the husband all the land passed held jointly passed by succession to his spouse subject to any charges by way of mortgage or otherwise.

26. The question is whether the purchase or *acquisition* of this land in their joint names and subject to a mortgage could be a '*disposition*' within the meaning of Section 121 which applies to "*a disposition of property (other than a testamentary disposition or a disposition to a purchaser) under which the beneficial ownership of the property vests in possession in the donee within three years before the death of the person who made it or on his death or later*" (Section 121(1), emphasis added).

27. On the ordinary construction rules, in giving the natural meaning to words, an acquisition or purchase is not a disposition. The two words have opposite meanings and an acquisition of property by purchase / gift / inheritance cannot equate to the divesting of the beneficial ownership of property which involves the sale / transfer / gift by will or a *donation mortis causa*.

28. The intention of Section 121 of the Succession Act is to prevent the divesting of property in anticipation of death specifically to prevent the surviving spouse and children from enjoying the benefit of the deceased's estate. While the Act is, as mentioned above, silent as to what amounts to a 'disposition', apart from the specific mention of a *donation mortis causa*, it cannot be inferred that the silence in the Act changes the meaning of what has heretofore been recognised as a *disposition* which is defined in the Oxford Dictionary of Law as "*the transfer of property by some act of its owner, e.g. by sale, gift, will or exchange*" and in Halsbury's Laws of England (5th edition, Volume 102 , p. 12) as "*the term disposition arises a number of times, the most relevant context being in relation to a consideration of the essential characteristics of a will*". It is noted that on death the testator's will "*crystallises and takes effect as an appointment, disposition or otherwise. A will must be distinguished from a disposition made inter vivos, such as a donation mortis causa…or a voluntary settlement with a power of revocation, or an instrument which is final on execution by the maker, although intended to take effect on some future event, or a nomination of a beneficiary under the trust deed and rules of a pension scheme operation by reason of the force of that deed and rules'*. A *disposition* is further defined in Murdoch's Dictionary of Irish Law (4th edition, p. 348) as '*the passing of property whether by act of parties or act of law'* and Stroud's Judicial Dictionary (7th edition, Volume 1, p. 738) quotes Lord Macnaghten in *Northumberland v. Att-Gen* [1905] A.C. 406, who said that "*the terms 'disposition' and 'devolution' must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law"*. All of these definitions anticipate that the person who engaged in the disposition was the owner of the land being *disposed of*; none envisage that the person who engaged in the disposition was *acquiring* property subject to a mortgage. None of those definitions include an acquisition of property by purchase or otherwise.

29. The same is true of Spierin, in *'The Succession Act 1965 and Related Legislation, A Commentary'* (3rd edition, p. 370) who notes that Section 121 would "*include the transfer by way of gift of property already vested in the deceased. It is also to be assumed that it would include more complex transactions under which a gift was made indirectly, for instance where property is purchased in the name of a third party (and where no resulting trust arises)".* In later considering the protection of purchasers at page 373 he notes that, "*this section applies only to gifts*".

30. The Court is of the view that as the acquisition of property is not a disposition, it follows that the acquisition of property in joint names from borrowed funds is not a disposition within the meaning of Section 121 of the Succession Act 1965. While it could be envisaged that if, within the three years prior to his or her death, lands held in the sole name of a deceased were sold and the proceeds used to purchase lands in the joint names of the deceased and his spouse or marital children (to the exclusion of any non-marital children), or if the deceased's available cash deposits were used to purchase land in joint names, in appropriate circumstances, as a gift to the joint tenant arises, the Court might interfere and direct that the disposition should be treated as a

devise or bequest by will, bringing Section 117 into play. Similarly, the Court in appropriate circumstances might look with suspicion at a transfer of lands from the deceased's sole name into the joint ownership of him / herself with another party. In each of those examples there has been a disposition by sale of property in the transferor's estate to finance the acquisition or the use of cash deposits to purchase and a disposition by ***gift*** to the joint owner. Those examples are very far from the purchase in joint names of lands with borrowed funds where, on the death of the deceased, the surviving spouse takes on the sole obligation to discharge the mortgage as occurred in this case.

31. The infant Plaintiff's mother and next friend claims that the Plaintiff has been insufficiently provided for and that the purchase of the lands in joint names should be treated as a bequest or devise by will and therefore potentially subject to an order under Section 117, because the land was purchased after her birth and within 3 years of the intestate death of her father. She submits that the passing of property into the sole name of the Defendant by virtue of the rule of survivorship is an act of law and under Section 121 the vesting of the beneficial ownership in a donee is when the disposition occurs. The fallacy in this argument is that the spouse was not a donee but a joint purchaser jointly responsible for the mortgage and when her husband died she became solely liable, although her husband's share of the equity did pass to her by survivorship. While there is no doubt that transfers of land from sole to joint names can be deemed to be a *'vesting of the beneficial ownership'* of the entire property in the survivor intended to defeat rights defined by the Succession Act, the purchase of property from borrowed money is not such a transfer and the rights of the joint tenant on survivorship do not constitute a disposition. The legal ownership of a mortgaged estate lies with the mortgagee while the equitable interest or mortgage of redemption lies with the mortgagor. Moreover, the potential estate of W.S. was not been interfered with or depleted in any way as a result of the purchase of lands from borrowed money and the sum of money to which the Plaintiff became entitled on intestacy is unaffected.

32. The Court is not called upon to hear evidence on the intention of the deceased intestate at the time of the purchase of the lands as the transaction was not a 'disposition' within the meaning of Section 121. However, even if the Court is wrong in this regard it is clear that the transaction was not of the nature envisaged by Section 121 which requires that the Court be satisfied that the disposition in question was made for *the purpose of* defeating or substantially diminishing the share of the disponer's spouse or civil partner or the intestate share of any of his children, or of leaving any of his children insufficiently provided for. In this case the deceased died suddenly from a brain haemorrhage while still in his forties. He had not made a will. His death was not anticipated and the purchase of the lands in question could not have been an act designed to defeat the rights of the infant Plaintiff.

33. In the circumstances, the Court is satisfied that the Plaintiff is not entitled to an order under Section 121 of the Act of 1965 and it follows that the Court cannot grant an order under Section 117 as the deceased father of the Plaintiff cannot be construed as a testator in the absence of an order under Section 121.

[1.] The Court's emphasis.

[2.] Filed in May, 2006.