THE HIGH COURT

[2021] IEHC 253

[2018/178 SP]

IN THE MATTER OF THE ESTATE OF E

AND

IN THE MATTER OF THE SUCCESSION ACT 1965

AND

IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT 1965

BETWEEN

O

PLAINTIFF

AND

M

AND

K

DEFENDANT

AND

[2020/315 SP]

IN THE MATTER OF THE ESTATE OF E

AND

IN THE MATTER OF SECTION 24 OF THE LAND AND CONVEYANCING LAW REFORM ACT, 2009

BETWEEN

M

AND

K

APPLICANTS

AND

O

AND

R

AND

G

RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 18th day of March, 2021.

1. E died on the [REDACTED]. Her last Will and Testament named the Applicants in the 2020 proceedings as her Executors and Trustees. Clause 29(c)(iii) of the Will reads:-

> "In the event of any of my grandchildren predeceasing my daughter O leaving a child or children him or her surviving then and in that event I GIVE AND BEQUEATH the share of that predeceased grandchild to his or her children, if any, in equal shares, the same to be held on trust by my Trustees until they shall attain the age of 18 years and thereafter to them absolutely."

2. E also made provision in her Will for her only child, O. The bequests to O included the income from the residuary estate of E, with the capital and any undistributed income in E's estate to O's two children after O died.

3. O has initiated proceedings under section 117 of the Succession Act 1965, alleging that E failed to make proper provision for her and therefore failed in her moral duty to O in accordance with the means of E.

4. It is impossible for me to assess the merits of O's claim, and I am not now asked to do so. I should explain briefly why this is the case. A significant part of O's claim is that the gift to her of the income from E's residuary estate is next to worthless as it attracts a large tax liability. However, the report obtained from tax consultants (which supports this argument) is not one upon which I can place any great reliance. The report is premised on the view that:-

> "In general, a provision that gives the income of a fund to a beneficiary for life is treated as a life interest to that person."

5. In his evidence in the section 117 proceedings, F (solicitor for the Executors and Trustees of the Will of E) states that the tax advisers have advised "that the Will creates a life estate in favour of [O]".

6. It is plain that any unfortunate tax consequences for O will arise only if a life estate in the residuary funds is created in her favour. However, early in their report the tax advisers state:-

> "You might note that [the tax advisers] provides taxation rather than legal advice and my advice is based on the facts and assumptions set out in this letter of advice. Any facts, assumptions and comments on legal issues should be reviewed, in order to confirm that the comments are in line with the relevant legal treatment, and the facts and assumptions are correct."

7. This is potentially a very broad reservation. On one view, any advice on tax involves comment on a legal issue as ultimately tax liabilities are set by law. It would be better, in framing a report such as this, if assumptions (either of fact or law) were to be clearly set out, followed by the advice which the professional or firm is providing. This comment in no way suggests that the advice provided here by the tax advisors is inaccurate or is advice for which they are not taking responsibility. It is simply not sufficiently plain that the legal proposition set out at paragraph four of this judgment is one which the advisors are standing over.

8. The effect of all this for the parties in the hearing before me, is that I will decide these two applications without reference to the strength of O's claim; that makes the burden on the parties (and in particular on the Executors and Trustees) more onerous, but this is an inevitable consequence of the quality of the evidence before me. I will explain at paragraph 24 of this judgment the significance of this issue.

9. The section 117 action taken by O was compromised by the parties, subject to court approval, on terms set out in the Affidavit of W grounding the Special Summons

proceedings commenced by the Applicants on the [REDACTED] 2020. These terms are summarised as follows (at paragraph 12):-

> "The parties to the [section 117] Proceedings and [the children of O] have compromised them by settlement [...] the terms of which provide, *inter alia*, after payment of the pecuniary legacies contained in the Will (other than those to the parties to the Settlement) for the distribution to [O] of 55% share of the remaining estate and the distribution of the balance thereof to the [children of O]."

10. Of course, this settlement would do away with the trust created by clause 2(c)(iii). That trust benefits the children, if any, of R and G (the children of O) who may qualify under the terms of the Will. These contingent beneficiaries cannot consent to the proposed settlement, not least because they cannot now be definitively identified. R and G are alive. While G has one child (A), R has none at this point in time. It was this uncertainty about the position of the contingent beneficiaries that gave O'Regan J. reason to pause when she was asked to approve the settlement of the section 117 proceedings. The Applicants have therefore brought the Special Summons seeking:-

(i) An order pursuant to s. 24(1) of the Land and Conveyancing Law Reform Act 2009 approving (in revocation and substitution of the trust created by clause 2(c)(iii) of the Will) for the benefit of the beneficiaries (or contingent beneficiaries) an arrangement in terms of the draft trust instruments exhibited to the Affidavit of W.

(ii) If necessary, an order pursuant to s. 23 of the 2009 Act designating the Applicants appropriate persons to make this application.

I have slightly paraphrased the reliefs sought.

11. The proposed arrangement is described at paragraphs 13, 16 and 17 of the Applicants' written submissions in the section 24 proceedings:-

> "The provision for the contingent beneficiaries that is incorporated in the settlement [...] is in the nature of a commensurate percentage of the residue being placed on trust for the contingent beneficiaries, and, specifically, for one fund to be placed on trust for the children of the second respondent and one fund to be placed on trust for the children [...] of the third respondent [...].
>
> The draft trust instruments […] provide, in each case, in broad terms, for the fund to be held for the benefit of the second or third respondent (as the case may be) for life or until the death of [O], whichever is the earlier, and thereafter for the children, if any, of the second and third respondents, for the share of either who should die without children, to be applied to the benefit of the children, if any, of the other.
>
> The funds to be placed on trust include some provision for the cost of administering the trusts, in circumstances where it is propose that a solicitor will be one of the trustees."

12. Section 24 (1) of the 2009 Act provides:-

> "24.— (1) An appropriate person may make, in respect of a relevant trust, an application to the court for an order to approve an arrangement specified in the application for the benefit of a relevant person specified in the application if the arrangement has been assented to in writing by each other person (if any) who—
>
> (a) is not a relevant person,
> (b) is beneficially interested in the trust, and
> (c) is capable of assenting to the arrangement."

13. Section 24(2) requires notice of any such application to be given to the Revenue Commissioners; Revenue has been notified of the application, and have no objection to the orders sought being made.

14. Section 23 defines "arrangement" as:-

> " 'arrangement', in relation to a relevant trust, means an arrangement—
>
> (a) varying, revoking or resettling the trust, or
> (b) varying, enlarging, adding to or restricting the powers of the trustees under the trust to manage or administer the property the subject of the trust;"

15. As is observed by Keane (Equity and the Law of Trusts in the Republic of Ireland, Second Edition, paragraph 10.92):-

> "Section 24(2) entitles the court to approve on behalf of four specified categories of persons an 'arrangement for varying, revoking or resettling all or any of the trusts upon which property is held or enlarging the powers of the trustees in managing or administering any of the property subject to the trusts.' The word 'resettling' does not appear in the English legislation and its inclusion in s 24 is in accordance with one of the Commission's recommendations. It had been held in England by Wilberforce J in *Re T's Settlement Trusts* that, if the proposed arrangement was more than a variation of the original trusts and amounted to a resettlement of the property, it could not be sanctioned by the court. However, in a later case, Megarry J was of the view that, provided the 'substratum' remains, an arrangement can be regarded as merely varying the original trusts, even though the means employed are wholly different and the form completely changed. The Irish provision goes some way to removing the uncertainty left by such decisions by ensuring that a relatively radical recasting of the trust can still be sanctioned."

16. Keane continues (at paragraph 10.95):-

> "We have seen that the variation sanctioned by the court may be so extensive as to take the form of a resettlement. The result may be contrary to the settlor's intentions, but if the court is satisfied that the arrangement is for the benefit of the person on whose behalf the approval is sought, that will not of itself preclude the court from making the order."

17. The power of the court under section 24 is, to use the language in Keane, "extensive". In exercising it, the interests of the contingent beneficiaries (in this case) are key. I will therefore set out how these interests are to be protected under the scheme proposed in replacement of the existing trust arrangements.

18. The Applicants have obtained a report from an actuarial firm which has calculated the value of clause 2(c)(iii) of the Will (which it describes as the contingency clause) in respect of G's children. The actuaries calculate that the value of the contingency clause to this class is (at its very height) 2.75% of the entire residue of the estate. The reasoning is as follows:-

> "We have, for the purpose of this calculation, assumed that G will be survived by at least one child, and, in fact the actuarial chances of G being predeceased by A and any other children she might have and predeceasing O are very low.
>
> It should be noted that whereas, on the basis of the above assumption, the actuarial probability of G's child/children becoming entitled to half of the reside of the estate of the Deceased by reason of the occurrence of the contingency provided for in clause 2(c)(iii) of the will is 5.5%, that is not the same thing as the value of the contingent interest, which must take into account the fact that the interest would fall into possession (on the occurrence of the contingency) at some unspecified date in the future, giving a value lower that the actuarial probability of the contingency occurring (assuming a positive rate of interest is allowed for in this calculation, in line with the current Court interest rate).
>
> However, it can be stated with confidence that the value of the contingent interest of O's child/children (on the above assumptions) does not exceed 5.5% of half of the residue of the estate, or 2.75% of the entire residue."

19. With regard to R's children, the value of the contingency clause (at its very height) is 4.4% of the entire residue of the estate. Again, I will record the reasoning of the actuaries:-

> "With regard to R, the first observation we wish to make is that it is not possible to provide any actuarial probability of his having children, or having children during O's lifetime.
>
> Therefore, we cannot put it further than to say that the actuarial chance of the contingency under clause 2(c)(iii) of the will occurring in the case of R's children, if any (on the assumptions made above), does not exceed 8.8%, and, therefore, that, although, again, the value of the contingency will be somewhat lower than the actuarial chance of the contingency occurring, it does not exceed 8.8% of half of the residue, or 4.4% of the estate.
>
> In actual fact, it might be observed that the chance of the contingency occurring (and its value) are lower than as set out immediately above, and maybe

significantly lower, in light of the fact that R is [REDACTED] years of age and has no children, but we are not, for the reason identified above, in a position to say how much lower."

20. Having considered the assets and liabilities of the estate, and having calculated with some precision what would have been in the residuary estate were it not for the section 117 proceedings, W concludes that 4.4% of the residue of the estate would come to €118,661. Again, this calculation favours the contingent beneficiaries as it ignores the existence of the section 117 claim; even if that claim fails, there is a real possibility that some of the costs of the proceedings will be visited on the estate. I am impressed by the responsible and realistic way that the current Applicants have addressed O's claim. While I believe strongly that it should not be virtually automatic that the costs of Executors or Trustees should be taken from an estate, and that on each occasion when costs are sought from an estate this must be justified, in this instance I would be surprised if the Applicants were not able to mount a strong case for the payment of their legal costs from the estate of E. It is therefore to the benefit of the contingent beneficiaries that this likely drag on the estate is ignored for the purpose of W's calculations.

21. W has also calculated that the administration costs of the Trust will amount to €40,837.50 over an admittedly arbitrary 30 year period. As far as provision is to be made for the contingent beneficiaries on R's side, a slightly rounded up figure of €159,500 is suggested by W.

22. On G's side, it is proposed that 3% of the residue be set aside given that G already has A, and it is assumed that A will survive G. 3% of the residue amounts to €80,905.68; adding the same professional fee as arises on R's side (€40,837.50) and again slightly rounding up the figures W suggests that €121,744 be set aside to provide for this class of contingent beneficiaries.

23. I should also say that O, and her children, agree to the proposed arrangement. In the event that the proposed arrangement is not approved by the court, R and G intend to press an application to be joined as co-Defendants to the section 117 proceedings; the proposed settlement of that claim will be problematic in the event that the suggested arrangement is not approved. Put simply, if the arrangement put forward by the Applicants is not approved it is likely that the section 117 action will proceed, that claim will be made more complex (and more expensive) by the addition of O's children, that action will go to trial and the residuary estate of E will be seriously depleted by the demands of that litigation. Leaving aside the unpleasantness of the section 117 proceedings and the effect they will have on the family, a purely mathematical calculation suggests that the approval of the section 24 application will in itself be to the benefit of the contingent beneficiaries.

24. At paragraph 41(d) of the written submissions of the Applicant, counsel argued that the section 117 action could lead to the dismantling of the existing Will trust. This could have laid the basis for an argument that, if O's case was a strong one, the potential dismantling of the existing trust could be taken into account by me in deciding to approve

the proposed alternative arrangement. However, this argument was not pressed by counsel at the hearing given the factors which I have identified at paragraphs four to eight of this judgment.

25. The Applicants submit that there is no decision in this jurisdiction that provides guidance about how the making of an order under section 24 is to be approached. I am directed to the decision in *Goulding & Anor. v. James & Anor*. [1997] 2 All ER 239. The facts of that case are summarised by counsel for the Applicants in this way:-

> "It concerned a will in which the testatrix had left her residue on trust for her daughter for life with remainder absolutely to the testatrix's grandson M absolutely on his attaining the age of 40. Should M not reach the age of 40 or should he predecease J, his children (as yet unborn), if any, were to take absolutely by substitution. Following the death of the testratix, J and M applied to court for a variation of the will trusts under s. 1(1)(c) of the Variation of Trusts Act, 1958, seeking approval of the distribution of 45% of the residue to J and M (each) with the remaining 10% to be held on trust for M's children."

26. The application to vary the trust was refused by the High Court, on the grounds that to vary the trust would be contrary to the wishes and intentions of the testatrix. The decision of the High Court was upset on appeal, with the headnote summarising the decision of the Court of Appeal in this fashion:-

> "Under s 1 of the 1958 Act the role of the court was not to stand in as, or for, the settlor in varying a trust, but to approve an arrangement doing so on behalf of the members of a specified class and to supply consent for persons incapable of consenting to the arrangement. Moreover, the nature of the jurisdiction under the Act was such that even the most carefully planned and meticulously drafted intentions of a settlor or testator were liable to be overridden by an arrangement between sui juris beneficiaries and by the sanction of the court. Since J and M were sui juris and so legally entitled to do what they wanted with their beneficial interests contrary to any expressed intentions and wishes of the testatrix, those intentions and wishes had little, if any, relevance to the exercise of the court's jurisdiction on behalf of the testatrix's unborn great grandchildren. It followed that the judge had erred in the exercise of his discretion by allowing extrinsic evidence of those subjective wishes to outweigh considerations of objective and substantial benefit to the unborn great grandchildren, the class on whose behalf the court was empowered to act. Accordingly, the appeal would be allowed and the arrangement approved."

27. In assessing the extent to which the proposed arrangement was in the interests of the unborn great grandchildren of the testatrix, the Court of Appeal relied upon actuarial evidence of the valuation of their contingent interest. This is described in the judgment of Mummery L.J.:-

> "The original arrangement proposed is simple. The trusts of the will are to be varied so that the residuary estate will be deemed to have devolved since the date of Mrs. Froud's death as if 45% of the residuary estate were held for Mrs. June Goulding absolutely, 45% for Mr. Marcus Goulding absolutely and the remaining 10% on the trusts of a grandchildren's trust fund. The evidence filed shows that the current actuarial valuation of the contingent interest of the future born children of Mr. Marcus Goulding is 1.4385% of the residuary estate. It is common ground, and was accepted by the judge, that the provision to be made for the future born children of Mr. Marcus Goulding is considerably more generous than the current value of their interest in residue and that the proposed variation is for their benefit."

28. I agree with counsel for the Applicants that *Goulding* is helpful in that it supports the use of actuarial evidence in order to assess the benefit (or lack of benefit) to contingent beneficiaries of a proposed arrangement in substitution of an existing trust. Even without the authority of *Goulding* I would have been prepared to accept the careful analysis of the actuaries in this case as the only realistic way of judging whether the requirements of section 24 are met. On the basis of that analysis, and given all the considerations I have described in this judgment, I will make the order sought at paragraph (1) above.

29. It is clear that the Applicants are appropriate persons to make this application, within the meaning of section 23. However, lest there be any doubt about it, I will make the order sought at paragraph (2) above.

30. In the light of the orders which I will make in the 2020 Special Summons proceedings, I will now consider the second application before me, which is to approve the settlement of the section 117 proceedings. I am conscious of the fact that O'Regan J. was prepared to approve the settlement if proper provision was made for the contingent beneficiaries; this reservation no longer applies, given my decision that the proposed arrangement is more advantageous for that class than the existing trust. I have nonetheless assessed afresh the proposed settlement. The parties to the compromise are all mature adults, advised by excellent lawyers. The interests of the residuary beneficiaries are not affected. The compromise is one which I assume reflects the informed views of the Executors and Trustees and of each of the [FAMILY] on the rights and wrongs of the claim. The settlement will avoid the financial cost and emotional upset that accompany almost every dispute of this sort. It will also free up a considerable amount of court time; the trial of this action will itself take the about a week at hearing. As Laffoy J. observed in *A et al v T.D. et al* [2010] IEHC 530:-

> "Indeed, it frequently happens that a personal representative, with the approbation of the beneficiaries affected, settles the claim of a s. 117 applicant and then applies to Court to rule the settlement. Invariably, if the applicant is of full age, the Court will rule the settlement."

31. I see no reason to depart from this approach; in fact, there is every reason to approve the settlement given the factors that I have identified. I therefore will approve the compromise of the section 117 action. I will give the parties liberty to apply in respect of

the precise order to be made but, so that further costs in both cases can be minimised, I would suggest that the solicitors for the Executors/Trustees draft the appropriate orders in both actions, have them agreed with the solicitors for the other parties, and present the agreed orders to my Registrar.

32. I should add that the hearing of the 2020 Special Summons and the contents of this judgment, are so intertwined that I believe it is appropriate to make an Order under Section 24(3) of the 2009 Act that the hearing be treated as held otherwise than in public, and that this judgment should be treated accordingly. The parties have liberty to apply in respect of this aspect of the Order.