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*(subject to editorial corrections)**

**2012 No: 142597**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**IN THE ESTATE OF FLORENCE PRESTON MOFFAT**

**and**

**IN THE MATTER OF THE WILL OF JOHN JOHNSTON MOFFAT**

**Between**

**DOROTHY MOFFAT**

**Plaintiff**

**and**

**LAURENCE MOFFAT**
**(Personal representative of John Johnston Moffat (Deceased)**
**and Florence Moffat (Deceased)**

**Defendant**

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**HORNER J**

**Introduction**

[1] The issues for determination by this court are twofold. Firstly, whether the plaintiff should be given permission to pursue a claim for financial provision under the Inheritance (Provision for Family and Dependants) (NI) Order 1979 ("the Order") in respect of the estate of John Johnston Moffat (Deceased) ("the Father") and secondly whether the plaintiff should be given permission to pursue a claim for financial provision under the Order against the estate of Florence Moffat (Deceased) ("the Mother").

[2] In both cases the plaintiff has brought applications well outside the six month window permitted for claims for financial provision under the Order. After six

months from the date on which representation with respect to the estate of a deceased is first taken out has expired, a claim for family provision under the Order can only be made with the leave of the court.

**Background Information**

[3] The plaintiff has brought various claims arising out of the deaths of her Father and her Mother. Some have been determined, some await determination. These proceedings concern claims which the plaintiff has made against the estates of both her Father who died on 9 March 1994 and her Mother who died on 11 October 2007.

[4] The defendant is the brother of the plaintiff. Both are offspring of the Father and Mother. The defendant is the surviving executor of the estate of the Father under the Father's Will dated 29 July 1983 which was admitted to Probate on 7 June 1994. He is also the personal representative of the estate of his Mother, letters of administration having been granted to him on 14 June 2009.

[5] The plaintiff has made various claims arising out of the deaths of her Father and Mother. Some of these have been adjudicated upon. Girvan LJ concluded that the gift of "his farm of land" by the Father included both the agricultural land comprised in Folio 41233 Co Down and the existing and former dwelling houses. The Court of Appeal agreed. This court has case managed the outstanding proceedings as Gillen LJ expected it would, and had directed that the issue of whether this court should extend time to permit the plaintiff to bring claims against both the estates of her parents should be tried as preliminary issues.

[6] The plaintiff is self-representing. The defendant is represented by Mr McEwan BL who is instructed by Holmes and Moffitt on behalf of the estates of the Father and the Mother.

**Legislative Background**

[7] Under Article 3 of the Order the court has the power where a person dies domiciled in Northern Ireland and is survived by any of the following persons, including a child of the deceased, to make financial provision under Article 4:

> "…on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant."

[8] It is important to note that "reasonable financial provision" is defined under Article 2 of the Order in respect of a child to mean "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance".

[9] Article 6 provides:

> "An application for an order under Article 4 shall not, except with the permission of the court, be made after the end of the period of six months to the date on which representation with respect to the estate of the deceased is first taken out."

**Relevant Case Law**

[10] Ms Sheena Grattan in her excellent book, Succession Law in Northern Ireland, deals with permission for late applications at paragraphs 8.17 and 8.18 and discusses the basis upon which such applications fall to be considered by the courts. She says:

> "**Permission for late applications**
>
> 8.17 There is no statutory guidance on how the court will exercise its discretion to allow an out of time application. Principles thus have to be gleaned from case law. The most comprehensive attempt by the judiciary at compiling a list of factors which the court should consider was at that of Sir Robert Megarry in Re Salmon [1980] 3 All ER 532. These non-exhaustive principles, which have been dubbed the **Megarry guidelines** and which were commended by the Northern Ireland Court of Appeal in Campbell v Campbell [1982] 18 NIJB as "**very useful**" are as follows:
>
> (a) The discretion is unfettered by any statutory provisions, but must be exercised judicially, in accordance with what is good and proper;
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> (b) The time limit is a substantive provision laid down by statute and not a mere procedural one which can be extended with the indulgence generally accorded to procedural time limits. The onus is on the applicant to show that there is a substantial case for the court to exercise its discretion to extend the time limit;
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> (c) Consideration must be given to how promptly after the time limit had expired that permission is being sought;

(d) It is relevant whether or not any negotiations had been commenced within the time limit;

(e) It is relevant whether or not the estate had already been distributed;

(f) It is relevant whether, if permission to extend this time is not granted, the applicant would have any form of redress against anyone else.

8.18 These principles were approved in Re Dennis [1981] 2 All ER 140 in which a seventh was added, namely, has the applicant shown:

… "that he has an arguable case, a case fit to go to trial, and that in approaching that matter the court's approach is rather the same as it adopts when considering whether a defendant ought to have leave to defend in proceedings for summary judgment."

[11] It is essential that parties appreciate that extensions of time are not granted as a matter of course. The onus remains throughout on the applicant to show that there is a sound basis upon which the court should exercise its discretion to extend the time limit.

[12] The fact that a claim may have merit does not automatically mean that the limitation period will be dis-applied. The recent decision of the Court of Appeal in England in Berger v Berger [2013] EWCA Civ 1305 is a timely reminder that even where a claim may have potential merit, the court will not necessarily exercise its discretion in favour of the applicant when there has been delay. In that case the deceased, who was applicant's husband, died on 26 June 2005. Probate was granted on 27 January 2006. There was a delay of six and a half years before the widow brought her application by commencing proceedings on 15 June 2012. At that stage she was in her mid-80s and in poor health. The appellant and the deceased had been together for 36 years and were married in October 1983. Both spouses had been married before.

[13] The Court of Appeal in Berger accepted that each case was fact sensitive. However, it looked at cases which had been drawn to its attention by the applicant. In **Stock v Brown** [1994] 1 FLR 840 the widow was granted permission to bring a claim nearly 5½ years out of time. It was however clear that an important factor in Thorpe J exercising his discretion was "extraneous circumstances", namely the dramatic fall in interest rates. The Court of Appeal noted that no such extenuating circumstances and meritorious need had been established in the instant case.

[14] The case of Re C (Deceased) (Leave to apply for provision) [1995] 2 FLR 24 related to a claim by the deceased's 8 year old illegitimate daughter which had begun 18 months after the expiry of the time limit, prior to which there had been a period of almost two years from the death. It was conceded that the child's case had merit and the explanation for the delay was unsatisfactory. But the judge said that account needed to be taken of the fact that if permission were to be refused then "the child would suffer as a result of another's fault". The estate had not been distributed and was large enough for the judge to contemplate a provision for the child, which could be accommodated alongside provision for the other beneficiaries.

[15] In McNulty v McNulty [2002] WTLR 737 the claim was 3½ years out of time. However, in that case the sons had deliberately withheld relevant information from the probate valuer as a result of which the business premises were valued for probate in January 1995 at £175,000 when the value was, in fact, worth significantly more. At the time of the hearing in 2001 the business had been wound up and the land sold for £1.6m. The judge concluded that there had been no prejudice to the sons by the widow's "inexcusable tardiness" and that in the "very unusual circumstances of this case" it was fair and just to allow the claim to be brought out of time.

[16] The Court of Appeal said at paragraph [77] in Berger:

> "Taking all the facts in the case together, I would not permit the appellant to make her claim. I give full weight to the potential merits of the claim and to the fact that the estate has not yet been fully distributed and it is likely that sufficient capital could be found to fund whatever award the appellant might reasonably expect without disturbing any gifts that have already taken effect. I also remind myself that the evidence does not establish that the appellant was advised about the possibility of a claim under the Act when she consulted solicitors in 2006/2007. Against these factors must be set not just the fact of the very substantial delay in bringing proceedings but the history during the period since the deceased died. This is not a claim which has been provoked by a particular event, be it something for which the respondents were responsible (as in the late discovery in McNulty of the true value of the land which the defendants have concealed) or something extraneous (such as the dramatic fall in interest rates in Stock v Brown). It appears much more likely that the appellant, who had hitherto understandably not wished to litigate with her family, eventually decided that proceedings were appropriate. We are in no position to test the proposition that she was fully involved in the strategy for and management of the

> estate over the years but what is clear is that she was actively interested in 2005/2006 when she consulted her own accountants and solicitors and showed herself able to pursue an interest should she have wished to do so. She says that she continued not to agree with the way in which the sons handled matters thereafter but the reality is that for years she took no steps and the respondents continued actively to manage the estate, and in particular the company, without the expectation of a challenge to the will, whilst the appellant continued to live in the Surrey property as she wished to do. In my view, it would not be appropriate, in all the circumstances, for the appellant to be permitted to make her claim six years after the expiry of the time limit in the Act."

[17] In Re Coventry [1979] 3 All ER 815 the court in England determined that adult children bringing claims under the Order should only succeed in "exceptional circumstances". In that case the deceased's only child had returned home to live with both his parents at the age of 26. Shortly afterwards his mother left and continued to live apart from the deceased until his death 20 years later during which time the applicant looked after both the deceased and his home. On the deceased's death the entire estate passed to the wife by intestacy. The applicant was relatively impecunious without any savings. However, his claim for family provision was rejected by Oliver J on the following basis:

> "(Awards in favour of) able bodied and comparatively young men in employment and able to maintain themselves must be relatively rare and need to be approached … with a degree of circumspection."

[18] The Court of Appeal affirmed this decision and concluded that there was no "special circumstances" which made the failure to provide financial provision unreasonable.

[19] The courts in Northern Ireland have taken a more relaxed view in respect of claims by adult children and there have been awards where an adult child has been able to establish a moral claim on the estate: see Re McGarrell [1983] 8 NIJB and Re Creeney [1985] NI 397.

**Short history of events and chronology**

[20] The Father's Will was made on 29 July 1983. He left the "farm of land" which I have already recorded the court has found included the properties constructed on the land, to the Mother for her life and then to the defendant. The Will specifically recorded at paragraph 5 that the Father had not made any provision for the plaintiff

or for his other son, James Brian, as he considered "that they are not in need of any provision from me and would not expect such provision".

[21] The residue was left to the Mother on the basis that she would leave this to the defendant although she was not legally bound to do so.

[22] The Father died on 9 March 1994. Probate was granted on 7 June 1994. The assent in respect of the "farm of land" was registered in the Land Registry finalising the administration of the estate on 24 October 1994. The plaintiff did not see the Will, she claims, until 1999. She expected to be devised 52 Glasswater Road. On the plaintiff's version of events, when she saw the Will in 1999 she would have understood that she obtained no benefit under it.

[23] The Mother, who has been given the life interest in the Will in the "farm of land," died on 11 October 2007. Letters of administration were extracted on 14 June 2009.

[24] Some 18 years after probate was granted in respect of the Father's estate and 3½ years after the letters of administration were issued in respect of the mother's estate, the applicant commenced proceedings under the Order in December 2012.

[25] There had been no negotiation about the Father's estate or the Mother's estate on the basis of the evidence presented to the court. The Father's estate has long since been distributed. The residue left to the Mother under the Father's Will has been exhausted on legal expenses.

**Discussion**

[26] The defendant argues that these are stale claims with a poor chance of success and that the court should not extend time. The plaintiff's submission fails to focus on the issue and seems to be more interested in complaining about the performance of the barristers retained for the respondent. In particular she complains that Mr McEwan BL has ignored the Human Rights Act and the first relevant Megarry guideline. The plaintiff is a personal litigant and I have set out what I consider to be the approach of the Chancery court to personal litigants in claims such as this in the case of Smith v Black 2016 NICh. I consider that I am bound to consider any argument advanced by the applicant in oral discussion, any argument which appears from the pleadings or from her skeleton arguments or which are obvious on the face of the papers. I do not understand what relevance the Human Rights Act has but I have paid particular attention to the Megarry guidelines and especially the first one.

(i) **The Father's estate**

A period of 18 years passed before proceedings were issued. Thereafter, the claim has proceeded at a leisurely pace for which I do not hold the plaintiff to

blame. She explains the delay up to 1999 on the basis that she did not see the Will until then. I have no evidence to contradict this and I therefore take this at face value. However, leaving aside any argument about the responsibility for obtaining a copy of the Will at a much earlier time, it is clear that nearly 13 years has passed from 1999 when she first saw the will. By any measure this is a gross and inordinate delay in respect of a time limit of 6 months. There is no explanation provided for the delay from 1999. There had been no negotiations between the parties. It is clear that there is no prospect whatsoever of the parties ever resolving their differences. The estate has long since been distributed. The applicant claims that she was given poor advice from her previous solicitors about being able to access relief under the Order. I am not in a position to reach any conclusion on this issue, but, if she is right, then she may have a claim against them. This will very much depend on the facts and the evidence. Her claim itself as a woman of full age, qualified as an art teacher, with no evidence of her being dependent on her Father at the date of the death would be, at best, a very difficult one to run. There is some suggestion of a moral claim arising because of promises made to her by her Father. These are denied. She still has a claim for proprietary estoppel outstanding. I consider that any claim for family provision under the Order is weak even if it was commenced within the 6 months deadline. In the circumstances and taking into account all the relevant Megarry guidelines as amended, I consider that this is not a case in which I should extend time especially given the gross and inordinate delay.

(ii) **The Mother's estate**

In this case there is the residue inherited from the Father. This has been used up in legal costs. The Mother's interest in the "farm of land" terminated on her death. Any other assets of the Mother fall to be dealt with under the rules of intestacy. This means that all the offspring of the Mother will share equally in her estate. It is difficult to see how the statutory scheme for dealing with intestacy in the circumstances before this court, fails to make reasonable provision for the applicant. In addition, there is also the substantial delay of 3½ years. This is unexplained. There does not seem to be a possibility of a claim against anyone else. The applicant's claim, as an adult woman who was not dependent on her Mother at the time of death, is on the facts, a very weak one. Again, without hesitation, I conclude that it would not be a proper exercise of my judicial discretion to extend time in this case.

**Conclusion**

[27] The court refuses the applications to extend time in respect of claims under the Order against either the Father's estate or the Mother's estate. I will hear the parties on the issue of costs. I will also hear the parties on directions proposed for the resolution of the outstanding claims and, in particular, the claim grounded on proprietary estoppel, which remains outstanding.