Master 30

20/05/2005

**04/049031**

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

**FAMILY DIVISION**

**PROBATE & MATRIMONIAL OFFICE**

**--------**

IN THE ESTATE OF MARGARET KIERAN, OTHERWISE KNOWN AS MARGARET CAIRNS (DECEASED)

BETWEEN:

NEWRY & MOURNE HEALTH & SOCIAL SERVICES TRUST

Plaintiff;

And

PETER QUIGLEY

Defendant.

**--------**

MASTER ELLISON

[1] This is an application by the Plaintiff Trust ('the Trust') for an order pursuant to Article 5 of the Administration of Estates (NI) Order 1979 ("the 1979 Order") appointing Martin Dillon, Director of Finance Daisy Hill Hospital, Newry, as administrator of the estate of the above-named deceased ('the Deceased'), the grant to be limited 'for the purpose of administration of that portion of the deceased's estate comprised in banking accounts held in the deceased's name at the Ulster Bank, Newry Branch'.

[2] Those banking accounts are (a) a current account in which it appears that as at 29 January 2004 there was a credit balance of £3,619.38, and (b) a 'Club 55 Saving Account' which as at that date appears to have been in credit in the sum of £8,537.82 (with interest stated in a letter dated 29 January 2004 from the bank to continue to accrue on the principal "at a rate of 0.90% daily").

[3] This application is unusual as the intention of the Trust is to have recourse exclusively to that part of the estate comprising the credit balances in these accounts for the purpose of settling invoices totalling £5,013.11 and stated to be due to the Trust in respect of accommodation of the Deceased in a nursing home prior to her death. According to Mr Dillon's affidavit evidence grounding the application ("the affidavit evidence") the other known assets of the Deceased are (a) an unspecified sum held in the Post Office and (b) the deceased's former dwelling house at 25 Canal Street, Newry, in which a Mr Peter Quigley ("Mr Quigley") is believed by the deponent to reside.

[4] The Deceased died on 12 March 1999 having, it is claimed, executed her last will ("the purported will") on 8 October 1996 (in the name 'Margaret Kieran'). Under the terms of the purported will, the Deceased appointed Mr Quigley executor and provided (a) that her house be sold and the proceeds given to the Dromore Diocese St Joseph's Young Priests Society, (b) that any monies held in her name at the Post Office would be used for the saying of Mass for the repose of her soul and the souls of members of her family, and (c) that the residue of her estate is to be divided between St. Joseph's Convent and The Society of St. Vincent de Paul, Newry.

[5] Exhibited to the affidavit evidence is a bundle of correspondence between the Trust, its legal advisors in the Legal Services Directorate of the Central Services Agency and the firm of Kieran Rafferty Solicitors who would appear to have been the solicitors acting for the Deceased in the preparation and execution of the purported will.

[6] Its seems clear enough from the affidavit evidence that Mr Quigley, who is not believed to be a relative of the Deceased and who takes no beneficial interest under the purported will, does not appear to be interested in extracting probate. Equally, neither of the religious institutions appearing from the purported Will to be entitled to the residuary estate is interested in extracting a grant of representation. There is nothing in the affidavit evidence to clarify whether the Deceased left any relatives who might be entitled in the event that she died intestate – or indeed, who might conceivably have some knowledge of a later will or some other reason for challenging the purported will.

[7] The absence of a proving executor or other personal representative left the Trust as a creditor of the Deceased with a number of established options to endeavour to recover its debt from the estate: -

1. apply as a creditor (preferably as a judgment creditor) for appointment as personal representative for the purpose of administering the entire estate – which could be done whether the estate is solvent or insolvent;
2. if the estate appears insolvent apply under The Insolvency (Northern Ireland) Order 1989 to have the entire estate administered "in bankruptcy" under an insolvency administration order – which course would allow the

Trust to avoid any possible liability for failing to pay debts in the correct order;

3. issue proceedings against the estate and make an application under the appropriate rules of Court for an order appointing a person to represent the estate for the purpose of those proceedings – which person would have to have given his or her consent to such appointment but in the absence of such consent from a person appropriately associated with the estate the plaintiff's own nominee may be appointed: Firth Finance and General Ltd –v- McNarry [1987] NI 125 per Murray J (as he then was).

[8] The Trust has made it clear that it does not wish to initiate either the administration of the entire estate or court proceedings for payment of the debt. The view urged upon me by Mr Good, Counsel for the Trust is that it would be inappropriate and disproportionate for the Trust to be expected to either administer the whole estate or apply for an obtain a judgment and have it enforced through the Enforcement of Judgments Office; it would be much more expedient and satisfactory for the Trust to have a grant of representation limited to the "administration of" the proceeds of two bank accounts. Counsel further submitted that if it is correct that Mr Quigley resides in the dwelling at 25 Canal Street, Newry, administration of the whole estate or enforcement proceedings through the Enforcement of Judgments Office could lead ultimately to his eviction and it would be inappropriate for the Trust to be seen to initiate such a course of events. The Trust's reluctance to take such steps appears to be attributable in large part to a desire to avoid publicity for its endeavours to recover the debt claimed to be due to it as opposed to any concern for the welfare

of Mr Quigley whose reluctance to prove the purported will (despite correspondence over a protracted period) has not facilitated the Trust in recovering the debt.

[9] I agree with Counsel that the Court appears to have a wide discretion under Article 5 of the 1979 Order to appoint, as a personal representative in a particular case, any person whom it thinks fit. Article 5 reads as follows: -

> *"Discretionary power to appoint administrator in certain cases*
>
> 5.-(1) Where-
> (a) a person has died, and
>
> (b) by reason of any circumstances it appears to the High Court necessary or expedient to appoint an administrator under this Article,
>
> the High Court may grant administration of the deceased person's estate, appointing as administrator such person as the High Court in its discretion thinks fit.
>
> (2) Administration under this Article –
>
> (a) may be granted whether the deceased person died before or after the end of the year 1955;
>
> (b) may be limited as the High Court thinks fit.
>
> (3) On administration being granted under this Article no person shall be or become entitled to administer the estate of the deceased person by virtue of the chain of representation."

[10] However, in considering whether to exercise the discretion conferred by the Article, the Court must have regard to a range of matters including whether it is appropriate to allow a person who claims to be a creditor of the deceased to apply for a grant essentially for the purpose of reimbursing itself out of a particular asset or assets – a course which might in the absence of most scrupulous inquiries and other

steps on the part of the personal representative operate to prejudice inappropriately other persons including other creditors (if any) who might be interested in the estate.

[11] A troubling aspect of the present application is that the Trust's disinclination to initiate a course of administration or enforcement proceedings which could lead to the possible eviction of Mr Quigley appears contrary to the testamentary wishes of the Deceased who made specific provision for the sale of the dwelling in the purported will. Accordingly, if this application were granted, the limitation on the grant of representation could be criticised as calculated to avoid the implementation of an important testamentary provision.

[12] To take the course requested by the Trust might be said to bypass what is normally regarded as due process in both the administration of deceased persons' estates and the recovering of debts through judgments, and could render estates in which the Deceased left no readily ascertainable next of kin or other persons interested in extracting a grant particularly vulnerable to predation of assets by unscrupulous, fraudulent or negligent persons claiming to be creditors. (A limited grant to a reputable health trust claiming to be a creditor might be regarded as quite a different exercise from a limited grant to (say) a purported contractor on the strength of invoices allegedly raised for resurfacing a deceased person's driveway, but the latter would presumably be able to rely on the precedent of a limited grant to the former.) The result in practice could be an unfair "fast-tracking" of debt collection which would favour creditors who elect <u>not</u> to apply for judgement or full administration of estates over creditors who, with due transparency (ie with a willingness to countenance any attendant publicity) either obtain judgment and apply

for enforcement through the Enforcement of Judgements Office or for administration of the entire estate. Moreover, many estates which would otherwise be administered in full by creditors would no longer be wound up as, understandably, many creditors would be more inclined to apply for grants limited to the "administration" of specific parts of estates.

[13] In circumstances such as those in the present case scrupulous inquiries by a personal representative nominated by the Trust under a grant limited to part of the estate would presumably include advertising for creditors and other persons who may be interested in the estate. If the Trust is to be certain of avoiding liability for recovering its debt out of the banking accounts in preference to other creditors, an advertisement would require to be published in accordance with the strict requirements of section 28 of the Trustee Act (NI) 1958; see paragraph 12.97 to 12.100 of Succession Law in Northern Ireland by Sheena Grattan, and the judgment of Danckwerts J in Re Aldous (deceased) (1955) 2 All ER 80 (in which it was held that the wording of such an advertisement should be worded in substance to "indicate to normal people that it is it not merely the claims of creditors which are to be sent in, but also those of beneficiaries"). Such advertising would involve a degree of publicity which, based on the Trust's apparent wish to avoid publicity for other steps, the Trust might not wish to attract.

[14] Moreover, any such advertisement would require to be published as soon as possible after death (see Grattan para 12.99 and Re Kay [1897] 2 Ch 518, 522). As the Deceased died more than six years ago the Trust is clearly not in a position to comply with that requirement.

[15] If the Trust's application for a limited grant were successful, the primary functions of the personal representatives, namely to get in the estate, pay debts and distribute the balance to those entitled in accordance with the testamentary wishes of the deceased or the rules of distribution on intestacy, would be replaced for no compelling reason by a grant of representation limited for the purpose of recouping expediently with minimal publicity a single debt– moreover one in respect of which the creditor has not obtained a judgment. (Incidentally, in the present case enforcement of a money judgment through the Enforcement of Judgements Office might not require the making of an order charging land against the deceased's dwelling-house should that Office be satisfied that it is appropriate to make an attachment of debts order pursuant to the provisions of Articles 69 to 72 of the Judgements Enforcement (Northern Ireland) Order 1981 in respect of the moneys standing to the credit of the deceased in the Ulster Bank and/or the Post Office.)

[16] I refer to the judgment of Willmar J in Re Edwards–Taylor [1951] P 24 as authority for the proposition that the Court should not exercise its statutory discretion in circumstances where the motive would be ulterior to the due administration of an estate. In that case, Willmar J refused to pass over the residuary legatee for a grant of representation on the ground of her immaturity and alleged inability to enjoy the fortune left to her, as to have acceded to the application would have set a bad precedent by using the discretion for a motive ulterior to the due administration of the estate.

[17] The affidavit evidence discloses no endeavour to ascertain whether there are any next of kin surviving the Deceased. No citation has been issued against any person to accept or refuse a grant (although that would not normally be a pre-requisite for success of an application under Article 5 of the 1979 Order) and there is no statement in accordance with Order 97 rule 50(b) of the Rules of the Supreme Court (NI) 1980 to the effect that the estate is believed to be solvent. Moreover, it is difficult to envisage a satisfactory form of Oath of Administrator given that the Trust appears motivated in part by a disinclination to give effect to the testatrix's clear intention in the purported will in respect of the dwelling house.

[18] I agree with Margaret K M Atkin's view in Probate Practice Notes when she states, at page 26: -

> "A grant may be given to a creditor of the deceased in order that he may be able to recover his debt. He must administer the whole estate according to law…"

I quote also from Ingpen on Executors (Second Edition, 1914) at page 3: -

> "The whole jurisdiction of Courts of Equity in the administration of assets is founded on the principle that it is the duty of the Court to enforce the execution of trusts, and that the executor or administrator who has the property in his lands is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the Will, or, in case of intestacy, according to the Statutes of Distribution."

[19] Therefore any personal representative who extracts a grant is expected to be willing to assume the obligations of a trusteeship for the benefit of the persons who may be interested (actively or otherwise) in the estate – which, in the absence of compelling reasons to the contrary, means the whole estate.

[20] This is qualified in long established categories of circumstances where it would be appropriate to issue a grant limited to a specific part of the estate there being no reasonable or realistic alternative to such a course, especially where the grant is made ad colligenda bona in order to protect assets that are at imminent risk of depletion, destruction or loss. The personal representative is nonetheless appointed in such cases for the benefit of the estate and the persons (who of course may include the personal representative) interested in it. I am satisfied that, having regard to the alternatives and to the potential adverse implications of taking the course urged upon me by the Trust, a grant limited to the "administration" of particular assets for the purpose specified in the application would not be appropriate.

[21] The Order I shall make will dismiss this application and direct that there be no order as to the costs of or incidental to the application save that no part of those costs shall be allowable against the estate.