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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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IN THE MATTER OF THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDENTS) (NORTHERN IRELAND) ORDER 1979

IN THE MATTER OF JOHN ROBINSON NOBLE (DECEASED)

BETWEEN:

KRISTVEJG CATHARINA NOBLE

Plaintiff

and

SOLVEIG MORRISON AS PERSONAL REPRESENTATIVE OF THE DECEASED

and

SOLVEIG MORRISON AND JOHN NOBLE AS BENEFICIARIES UNDER THE WILL OF THE DECEASED

Defendants

_____

McBRIDE J

Application

[1] The plaintiff by application dated 25 November 2015, seeks an order under the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 ("the 1979 Order") for such reasonable financial provision as the court thinks fit to be made for her out of the estate of John Robinson Noble Deceased ("the deceased").

[2] The plaintiff was initially legally represented and was entitled to legal aid. The plaintiff changed solicitors on 29 April 2016. These solicitors came off record on 27 June 2016. Thereafter the plaintiff acted as a litigant in person. For a period of time she had the assistance of the Reverend Mr Gamble who acted as her McKenzie

Friend. Unfortunately Mr Gamble was unable to continue to carry out this role and the plaintiff appeared as a litigant in person at the trial without the assistance of a McKenzie Friend. This court wishes to record its gratitude to Mr` Gamble for his considerable assistance in attempting to negotiate a settlement in this case.

[3] The first-named defendant was represented by Ms Sheena Grattan of counsel and the second-named defendant was represented by Mr Donal Lunny of counsel. The court is grateful for the diligent researches and careful analysis of the jurisprudence in relation to the 1979 Order carried out by counsel as appears in their extremely helpful skeleton arguments.

[4] In her grounding affidavit the plaintiff, in addition to providing evidence relevant to the present application also appeared to challenge the validity of the deceased's Will on the ground that it did not reflect the deceased's true intentions and further appeared to make a claim based on proprietary estoppel.

[5] As a result of these averments the court gave the plaintiff repeated opportunities to bring a claim to challenge the validity of the Will and/or to issue proceedings to rectify the Will and/or to issue a proprietary estoppel claim. Despite being given these repeated opportunities the plaintiff failed to file any such applications. Accordingly the only application before this court is the 1979 Order application.

[6] Prior to the hearing of this case the plaintiff engaged in sending voluminous letters and emails to the court and to the other parties. This correspondence consisted either of matters which were entirely irrelevant to the issues before the court and/or complaints against the defendants, their legal representatives, her former solicitors and the judge who previously dealt with the case management of this case. As a result of this correspondence; the plaintiff's repeated failure to comply with court orders; her failure to attend court on a number of occasions and her insistence on airing irrelevant matters at court review hearings, this case has had a very long and protracted case management history.

Background

[7] The plaintiff was born on 26 August 1965. She is the daughter of the deceased who died on 3 August 2014. The first and second defendants are her siblings. The first defendant was born on 30 June 1961. She is a widow and has one daughter. The second defendant who was born on 17 February 1972 is married and has two children. The plaintiff is unemployed and resides at 137 Whiterock Bay, Killinchy ("the family home").

[8] The deceased and his wife Catharina Noble made identical Wills dated 22 July 2009. Clause 5 of Catharina's Will provided that in the event that she pre-deceased her husband her entire estate would pass to him absolutely. Catharina Noble died on 23 July 2013.

[9] The first-named defendant is the sole executrix of the deceased's Will. A grant of probate issued to her on 11 February 2015.

The Deceased's Will

[10] By his last Will and Testament dated 22 July 2009 the deceased appointed his daughter, the first defendant to be the executrix of his Will. Clause 3.2 provided that if his wife did not survive him then all his property would pass to his trustees upon the trust set out in Clause 5 subject to the powers and provisions contained in Clauses 4 and 6. Clause 5 provided that the trustees;

> "shall hold my estate upon trust to divide it between those of my children who survive me for a period of 14 days and if more than one in equal shares."

Clause 4 sets out the deceased's expression of wishes as follows:-

> "If my wife does not survive me by 14 days or more it is my desire that either of my two daughters shall be permitted to reside in my dwelling house known as 137 Whiterock Bay, Killinchy for so long as they require but I declare that the foregoing request or expression of wishes shall not be deemed to form part of my Will or have any testamentary character or effect or to create any trust or legal obligation even if the same shall have already have been or shall be communicated to any of my children or my trustees in my lifetime."

[11] The net effect of the Deceased's Will is that, because the plaintiff was not granted a right of residence in the family home, the executrix has power to sell the family home and divide the proceeds among the three siblings equally in accordance with the terms of the deceased's Will.

The Net Estate

[12] As appears from the most recent statement of account the deceased's estate comprises the following assets and liabilities:-

Assets

(a) **The family home**

This is situated on the Western shore of Strangford Lough and has direct frontage onto Whiterock Bay Killinchy. It is a detached two-storey building built approximately 60 years ago. It occupies a slightly elevated site and has partial views across Strangford Lough. It comprises 4 bedrooms, a study, kitchen, bathroom, shower room, lounge, dining area and hall with outside workshop, store and sheds.

The property requires some works of repair. The property was valued for probate purposes on 17 October 2014 by Lindsay Fyffe & Co at £150,000. It was then valued by Tim Martin, Estate Agent by way of a drive-by valuation on 5 March 2018 at £175,000.

(b) **Boat.**

The boat was valued at £20,000 for probate purposes. It is now valued at £6,000 by Quinton Nelson, Marine Surveys as of 5 March 2015.

(c) **Skoda Fabia car.**

The car was valued at £1,000.

(d) **Various bank accounts, shares, bonds, policies, pensions.**

These total £17,128.57.

(e) **Chose in action**

The estate may have a professional negligence claim which is against solicitors arising out of the services they provided to the deceased relating to a clinical negligence claim.

Liabilities

(a) **Funeral account, various utility bills, credit card debts**

These total £25,578.64.

(b) **Administration Costs including solicitors fee on probate–**

These total approximately £8,115.60.

(c) **Litigation Costs –**

The executrix's litigation costs are estimated to be £21,985.47
The second named defendant's litigation costs are estimated to be £15,000

[13] As appears from the most recent statement of account, a number of adjustments have had to be made to accommodate the differences in the value of the boat and the family home between the date of death and date of trial. Further adjustments have had been made to reflect the fact that the credit card liabilities have now been written off in full. After making these adjustments and allowing for various administration expenses the estimated net value of the estate as of 5

December 2018 is £143,701.96. This figure includes a first interim distribution of the car valued at £1,000 to the plaintiff.

[14] In practical terms the estate consists of the following assets:-

- The family home valued at £175,000.
- Personal items valued at £5,000.
- Boat valued at £6,000.
- Shares valued at £319.67.
- Funds held on account totalling £4,926.39.

Assets not forming part of the net estate

[15] In addition to the assets which form part of the net estate the deceased also held a number of other assets. In particular the deceased and the plaintiff held a joint Bank of Ireland account which had a balance of £1,578.61 at the date of the testator's death. The plaintiff acquired the entire proceeds by way of survivorship.

[16] The deceased also held a policy with Canada Life which was written in trust for the plaintiff and her two siblings in equal shares. The plaintiff is entitled to a one-third share of the total policy proceeds being £84,849.52. The plaintiff's share is £28,283.

The Plaintiff's Evidence

[17] The plaintiff filed a grounding affidavit dated 24 November 2015 and provided a draft affidavit dated 22 February 2016. The plaintiff gave oral evidence and was not subject to cross-examination.

[18] When the plaintiff gave evidence she was very emotional and excitable. She was unable to focus on the issues. Rather than answering questions which were designed to elicit relevant information, she proceeded to be abusive and threatened to report solicitors and counsel to their respective professional bodies and to the police. She was extremely abusive to her siblings and again threatened to report them to the police. She indicated that she had reported "the judge to the Lord Chancellor and the police" and now intended to take her complaint to the top and complain to "the Queen".

[19] As a result her evidence comprised large trunks of irrelevant material. Rather than having it interspersed with the repeated objections by counsel I permitted her to give her evidence in an uninterrupted flow on the basis that I would then distinguish between what I considered to be relevant and what I considered to be irrelevant. In the event I found that most of her evidence related to irrelevant matters. I do not intend to rehearse this part of her evidence. Rather I now set out the relevant matters which appeared in her affidavit and oral evidence. Overall I found that the plaintiff gave her evidence in an honest manner.

[20] The plaintiff was born on 26 August 1965 and is now aged 53 years of age. She is single without dependants. She is unemployed and in receipt of State benefits. It is unclear if these are means tested. She has no capital assets save 210 British Telecom shares.

[21] The plaintiff suffers from ill health. Although there is no medical evidence before the court, I accept her evidence that she suffers from both physical and mental ill health. Indeed she had to be taken to A&E immediately following a court hearing due to severe pains in her chest. It is also clear from her presentation that she is very stressed.

[22] The plaintiff averred that her physical ill health stemmed from a number of surgical procedures which were negligently performed. She gave evidence that she had initiated a number of claims for medical negligence arising out of these operations. She stated that her solicitor had informed her that, after seeking discovery, there were no medical records showing that she had ever received operative treatment. In these circumstances he advised her that there was no evidence that any "medical devices" had been left in her body as alleged by her. In light of the lack of medical records and because the cases are now statute barred, I am satisfied that any claims brought by her for medical negligence are unlikely to be successful.

[23] I am further satisfied in light of her presentation and evidence about the claims for medical negligence that the plaintiff suffers from ill health which explains why she has never been in gainful employment and her future prospects of gainful employment are extremely poor. I am therefore satisfied that, although she is not on benefits for any disability, she is presently unable to work and will be unable to work in the future.

[24] I accept the plaintiff's evidence that she was financially dependent on her parents throughout her adult life. She lived in the family home with her parents and received an allowance of £550 per month. In addition her parents purchased a car for her. I am satisfied that the deceased continued to pay all the utility bills in respect of the home until the date of his death and there was an acceptance that the plaintiff would be able to continue to reside in the family home for her life. I also find that she assisted her parents by carrying out household chores and transported them to medical appointments and the shops. Most of this evidence is corroborated by the evidence of the first defendant and is not hotly disputed by the second defendant.

[25] I accept that the family home is now in need of repairs and that the plaintiff has no means to finance these. I also accept her evidence that her brother, the second named defendant, was financially supported by the deceased, as this evidence is corroborated by both defendants. Initially the deceased and his wife set up the second defendant in his boat business and paid for the purchase of three boats and associated costs. After his marriage he received an allowance each month from his

parents which he used to finance his mortgage. Later when monthly payments ceased he had the use of his father's credit cards and accumulated a number of credit card debts which were then discharged by the deceased. Some years prior to his death the deceased indicated he was no longer willing or able to pay these debts and he stopped payment.

[26] The plaintiff stated that it was her father's and mother's wish that the second defendant would not receive any inheritance from them because he had already received this during his life. This evidence was not corroborated by the first-named defendant and was disputed by the second-named defendant. I do not find that it was the deceased's wish that his son would not receive any inheritance upon his death. This is particularly so given that the deceased made provision for him in his Will. The plaintiff further gave evidence that the house was to be left to her and her sister on the basis that her sister would never put her out of the house. The plaintiff stated that her parents had expressed this wish to her on a number of occasions. I accept her evidence that her parents indicated to her that she could live in the house so long as she wished, particularly as this appears in the deceased's expression of wishes in his Will.

First-named defendant's evidence

[27] Mrs Solveig Morrison is both executrix of the deceased's Will and a beneficiary. She filed three affidavits sworn on 22 December 2015, 22 May 2017 and 16 April 2018. Mrs Morrison did not give oral evidence.

[28] Mrs Morrison is the sister both of the plaintiff and the brother of the second-defendant. She is the sole executrix of the deceased's Will and entitled to a one-third equal share of his entire estate. Her initial affidavit was filed in compliance with her obligation, as personal representative of the deceased's estate, under Order 99 of the Rules of the Court of Judicature, and sets out details of the assets and liabilities of the estate. In addition she sets out details of other assets held by the deceased which did not form part of the net estate. She confirmed that she did not wish to confirm her own financial resources to the court and accepted that she could not therefore rely on a "needs based" defence. She accepted the accuracy of the plaintiff's averments as to her modest income, lack of earning capacity and the fact that she lived at home with her parents for most of her life. She further accepted that her brother benefited significantly from the deceased during his lifetime and noted that he had accepted responsibility for two of the credit card debts which were in the testator's name at the date of the testator's death.

[29] Her second affidavit dated 25 May 2017 provided an updated statement of account. She further averred that her husband had died suddenly on 13 July 2016 and due to a continuous period of harassment by the plaintiff she had obtained a non-molestation order against the plaintiff.

[30] In her third affidavit sworn on 16 April 2018 she made the following averments at paragraphs 7 and 8:-

> "7. I have found the litigation brought by my sister to be incredibly stressful especially in light of my husband's sudden death in 2016. To that end I have decided to release my entire beneficial entitlement in the net estate so that this is available, as the court sees fit, to make good any claim which the court considers my sister to have. However, I require my costs as executor, both of the administration of the estate and of these proceedings to be discharged from either the net estate or by my brother and sister, for example, out of their share of the Canada Life policy. I realise that if the court determines that the dwelling house should not be sold my legal costs will have to be met in some manner from my siblings' share of the Canada Life policy or their other assets (which I understand to be minimal).
>
> 8. I confirm that I will continue to act as executor at present, but only because I consider that to seek a substitute personal representative at this stage would only delay the proceedings and the administration of my father's estate even more. I reserve the right to reconsider this position should circumstances change."

Second-named defendant's evidence

[31] The second-named defendant, John Noble is the brother of the plaintiff and the first-named defendant and the son of the deceased. His evidence consisted of affidavits sworn by him on 22 January 2016 and 17 April 2018. He did not give oral evidence.

[32] As appears from his affidavits he was born on 17 June 1972 and is the youngest child of the deceased. He married on 17 May 2008 and has two children aged 8 years and 5 years.

[33] He graduated in 1999 with a degree in Marine Zoology. After graduating he worked in the Department of Agriculture for 2½ years and then became a self-employed fisherman. In May 2015 he realised that he did not have a viable future as a fisherman and he sold his boat and took up part-time work as an oyster farmer. Since 2017 this defendant has not been able to work due to ill health and he has been in receipt of benefits.

[34] The second-named defendant has no savings and denies that he owns any property. He lives with his wife and children in the matrimonial home which was

purchased for £155,000 with the assistance of a mortgage of £60,000. It is unclear if the matrimonial home is jointly owned. The second defendant's wife works as an Environmental Practices Advisor for the National Trust and earns £32,200 per annum gross. The family have approximately £2,636 outgoings per month.

[35] The second-named defendant avers that he was financially dependent on his parents and received £1,000 per month maintenance from them. They further assisted him financially when he set up his fishing business. In particular they loaned him £4,000 to buy his first boat in 2008 and gave him money to buy his second boat. They also sold shares to finance the purchase of a third boat at £40,000. In the 2000's he had the use of his father's credit cards. He accepts that he made significant use of these cards which were paid by the deceased until he cancelled them in January/February 2014. He avers that he believes it was the plaintiff who procured the cancellation of the credit cards.

[36] This defendant confirmed that he has a poor relationship with the plaintiff. Indeed during the hearing the plaintiff had an emotional outburst during which she made highly offensive and critical comments about both defendants. The second-named defendant became so upset that he had to leave the court and the court had to adjourn for a short period of time. He was unable to return to court that day. Subsequently the second named defendant filed medical evidence in which his GP concluded that he is currently suffering from a significant amount of stress and anxiety which is related to the ongoing litigation.

[37] The second-named defendant avers that it was always intended that the money he received during his life which came from the proceeds of shares equated to the value of the expensive jewellery his sisters would inherit from their mother. He denied that it was intended or stated by his parents that he was not to receive inheritance on the basis he had received money from his parents during their lives.

Relevant Legal Provisions

[38] The relevant provisions of the 1979 Order are as follows:-

> "**Article 3**
>
> *Application for financial provision from deceased's estate.*
>
> (i) Where after the commencement of this order a person dies domiciled in Northern Ireland and is survived by any of the following persons:-
>
> (c) A child of the deceased … that person may to the court for an order under Article 4 on the grounds that the disposition of the deceased's estate effected by his will by 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. This is the 'threshold' test."

[39] Reasonable financial provision is defined in Article 2(2)(b) in respect of an adult child applicant as:-

> "such financial provision as it would be reasonable in all the circumstance of the case for the applicant to receive for his maintenance".

[40] If the threshold is met Article 4 then sets out the orders which the court may make. These are as follows:

> "4.—(1) Subject to the provisions of this Order, where an application is made for an order under this Article, the court may, if it is satisfied 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, make any one or more of the following orders:—
>
> (a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;
>
> (b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;
>
> (c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;
>
> (d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;
>
> (e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;

(f) an order varying any ante-nuptial or post-nuptial settlement …

(g) an order varying any settlement made—

(i) during the subsistence of a civil partnership formed by the deceased, or

(ii) in anticipation of the formation of a civil partnership by the deceased,

…

(4) An order under this Article may contain such consequential and supplementary provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to the generality of this paragraph—

(a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;

(b) vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will and the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;

…"

[41] In determining whether the threshold is met and in determining whether and in what manner it ought to exercise its powers under Article 4, the court must have regard to the following matters set out in Article 5: –

"(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under Article 4 has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under Article 4 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased and the likely effect on any business undertaking included in the estate of an order resulting in the division of property;

(f) any physical or mental disability of any applicant for an order under Article 4 or any beneficiary or the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

…

(6) In considering the financial resources of any person for the purposes of this Article the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this Article the court shall take into account his financial obligations and responsibilities."

Relevant Jurisprudence

[42] The leading case dealing with the English equivalent of the 1979 Order is the Supreme Court decision in *Ilott v The Blue Cross and others* [2017] UKSC 17. This case involved an application by an adult daughter who had lived independently of her parent, the deceased, for many years but was in straitened financial circumstances. Although the case involved a claim by an adult child the Supreme Court took the opportunity to give some general guidance in respect of applications generally under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). Lord Hughes who gave the lead judgment, did however caution that each case must be resolved on a "case by case basis" as these cases involve different

classes of applicant, different factual circumstances and different competing claims by others upon the estate of the deceased.

[43] Lord Hughes recognised the significance attributed to testamentary freedom and at paragraph [2] of his judgment set out the four key features of the operation of the 1975 Act as follows:

> "(i) The will (or the intestacy rules) apply unless a specific application is made to, and acceded to by, the court and a specific order for provision is made.
>
> (ii) Only a limited class of persons may make such an application;
>
> (iii) All but spouses and civil partners who were in that relationship at the time of death can claim only what is needed for their maintenance; they cannot make a claim on the general basis that it was unfair that they did not receive any, or a larger, slice of the estate. Those three features are laid down expressly in the 1975 Act.
>
> (iv) The test of reasonable financial provision is objective."

"Maintenance"

[44] In defining "maintenance", Lord Hughes held at paragraph [14] as follows:

> "The concept of maintenance is no doubt broad, but the distinction made by the differing paragraphs of section 1(2) shows that it cannot extend to any or everything which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living. … The summary of Browne-Wilkinson J in *In re Dennis, deceased* [1981] 2 All ER 140 at 145-146 is helpful and has often been cited with approval:
>
> > `… in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant

> can be housed, thereby relieving him pro tanto of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable him to continue to carry on a profit-making business or profession may well be for his maintenance.'"

He further stated at paragraph [15]:

> "The level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level. Nor, although maintenance is by definition the provision of income rather than capital, need it necessarily be provided for by way of periodical payments, for example under a trust. … As Browne-Wilkinson J envisaged (obiter) in *In re Dennis* (above) there is no reason why the provision of housing should not be maintenance in some cases; families have for generations provided for the maintenance of relatives, and indeed for others such as former employees, by housing them. …"

[45] At paragraphs [41] and [44] he set out some examples of maintenance. He observed that, "the necessary replacement of essential household items is not [such] an indulgence; rather it is the maintenance of daily living". He further accepted that some judges might legitimately conclude that reasonable financial provision for a claimant should be made by way of housing. On the facts of *Ilott* he expressed the view that the right order to meet housing needs would likely have been by way of a life interest rather than by way of an absolute transfer.

Threshold Question

[46] Dealing with the threshold question Lord Hughes stated at paragraph [16] as follows:

> "The condition for making an order under the 1975 Act is that the will, or the intestacy regime, as the case may be, does not "make reasonable financial provision" for the claimant (section 1(1)). Reasonable financial provision is, by section 1(2), what it is "reasonable for [the claimant] to receive", either for maintenance or without that limitation according to the class of claimant. These are words of objective standard of financial provision, to be determined by the court. The Act does not say that the

> court may make an order when it judges that the deceased acted unreasonably. That too would be an objective judgment, but it would not be the one required by the Act."

He further stated at paragraph [18]:

> "The right test was well set out by Oliver J in *In re Coventry* [1980] Ch 461 at 474-475 in a passage which has often been cited with approval since:
>
> > 'It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant - and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position.'"

Proper Approach for the Court to take in consideration of 1979 Order Claims

[47] Traditionally, the consideration of a claim under the 1979 Order involved the following two-stage process:

(i) has there been a failure to make reasonable financial provision and, if so;

(ii) what order ought to be made?

[48] The Supreme Court in *Ilott* at paragraph [23] considered the traditional approach and held as follows:

> "… That approach is founded to an extent on the terms of the Act, for it addresses the two questions successively in, first, section 1(1) and 1(2) and, second, section 2. In *In re Coventry* at 487 Goff LJ referred to these as distinct questions, and indeed described the first as one of value judgment and the second as one of discretion. However, there is in most cases a very large degree of overlap between the two stages. Although section 2 does not in terms enjoin the court, if it has determined that the will or intestacy does not make reasonable financial provision for the claimant, to tailor its order to what is in all the circumstances reasonable, this is clearly the objective. Section 3(1) of the Act, in introducing the factors to be considered by the court, makes them applicable equally to both stages. Thus the two questions will usually become: (1) did the will/intestacy make reasonable financial provision for the claimant and (2) if not, what reasonable financial provision ought now to be made for him?"

[49] Accordingly, the court must apply the Article 5 factors to both traditional questions.

Article 5 factors

[50] In respect of the Article 5 factors generally, and specifically in relation to claims brought by adult children, Lord Hughes made the following observations:

(i) In the case of an adult claimant who is well capable of living independently, something more than the qualifying relationship is needed to found a claim. In some cases that 'additional something' could be a 'moral claim'.

(ii) "Needs" are not necessarily the measure of the order to be made. The court must also, importantly, look at the competing needs of other beneficiaries.

(iii) The circumstances of the relationship between the deceased and the claimants may affect what is the just order to be made. At paragraph [35] Lord Hughes noted that in many cases the nature of the relationship between the deceased and the claimant will be of considerable importance.

(iv) The testator's wishes are part of the circumstances of the case and fall to be assessed in the round together with all the other relevant factors.

(v) The conduct of the parties is relevant.

(vi) The court can consider the impact any order it makes has on benefits.

(vii) The court can take into account the impact any order it makes will have on others. In *Ilott* he noted that an increased award to the claimant would prejudice the other beneficiary as it reduced the benefit to it.

(viii) Article 5(g) is framed very broadly.

[51] As noted by Lady Hale there is a lack of guidance in respect of the application of the Article 5 factors. As appears from the 1979 Order, Article 5 does not rank the matters to be taken into consideration. Accordingly the weight to be attached to each of the matters depends upon the facts of each case. In some cases one or two factors may have magnetic or even decisive influence on the outcome.

[52] Therefore in determining whether threshold is met and if so, in determining what order the court ought to make, the court should adopt a broad brush approach having regard to the fact that each case is fact specific. According to the Supreme Court the trial judge should set out the facts and then deal with the two traditional questions sequentially, whilst taking into account the Article 5 factors in respect of both questions.

Submissions of the Parties

[53] After the oral hearing, both defendants made written submissions to the court. The plaintiff was given the opportunity to respond to these orally as she indicated that she had a problem in writing out her submissions.

[54] The plaintiff's case is that reasonable financial provision was not made for her as the deceased's Will did not give her any legal right to reside in the family home. Under the terms of his Will the plaintiff is only entitled to a one-third share and accordingly the executrix is at liberty to sell the family home and divide the proceeds between the 3 siblings equally. The plaintiff submits that this is a breach of her Article 8 rights. Secondly, she avers that the second-named defendant has been in receipt of large sums of money from the deceased during his life which were in lieu of entitlement under the deceased's will. In particular, she refers to the purchase of

boats, the payment of credit card debts and other payments which enabled her brother to live "a life of luxury" whilst her father had to live frugally. Consequently she submits that having regard to all the Article 5 factors her needs outweigh those of this beneficiary.

[55] The plaintiff further submitted that the deceased's will did not reflect her father's true wishes as he wished to leave the family home to her and the first-named defendant and that she would have the right to remain in occupation so long as she wished.

[56] During the hearing I asked the plaintiff what order she was seeking. She refused to answer this question directly and only stated that she wanted "justice".

[57] The first-named defendant indicated to the court that she was prepared to make her beneficial interest in the net estate available to the court to satisfy any award in favour of the plaintiff but did so strictly on condition that her costs of litigation and the costs of administering the estate were discharged. The first-named defendant accepted that the Will, as executed, had probably failed to make reasonable financial provision for the plaintiff's maintenance. She then made a number of detailed submissions, which I will refer to later, in respect of the type of order that the court should make.

[58] The second-named defendant accepted that the plaintiff had a financial dependency on the deceased. He submitted that he was also financially dependent on the deceased. He impliedly accepted that reasonable financial provision had not been made for the plaintiff's maintenance by reason of the deceased's Will. Like the first-named defendant he set out a number of options to resolve the plaintiff's claim. His preferred option was to have the family home transferred to the plaintiff subject to payment of his litigation costs and a provision that in the event the family home was sold within 3 years of the court order and yielded a price exceeding £200,000, one third of the difference between the estimated value and the actual sale price would be paid to him and the first-named defendant. In the event that the first-named defendant did not seek this payment, half of the excess would be paid to him.

Questions for the Court

[59] In determining this application I consider that the Court should determine the following questions sequentially:-

(i) Does the plaintiff have locus standi to bring a claim?

(ii) If so, what is the extent/nature of her claim?

(iii) Has the threshold been met, that is has the deceased failed to make reasonable financial provision for the plaintiff's maintenance?

(iv) If the threshold is met what Article 4 Order or Orders ought to be made by the court?

(v) What consequential or supplementary court orders or directions ought the court to make?

Consideration

Question 1 – Does the plaintiff have locus standi?

[60] There is no dispute that the plaintiff is a child of the deceased and in accordance with Article 3 has locus standi to bring this claim.

Question 2 – What is the extent of the plaintiff's claim?

[61] The plaintiff has to establish that the disposition of the deceased's estate is not such as to make reasonable financial provision for her. In respect of a claim made by an adult child reasonable financial provision is defined in Article 2(2) as "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance". Accordingly I am satisfied that the plaintiff's claim is for maintenance only.

Question 3 – Has threshold been met?

[62] In determining whether threshold is met the court must, after taking into account the factors set out in Article 5, determine whether, when viewed objectively, the deceased's decision to leave his estate equally between his three children produces an unreasonable result, in that it does not make greater provision for the plaintiff's maintenance.

[63] Having regard to the Article 5 factors I make the following findings:

(a) *The financial resources and financial needs which the applicant has or is likely to have in the foreseeable future.*

I am satisfied that the plaintiff has limited financial resources. She is unemployed and in receipt of state benefits. She has no savings. She is now aged 53 years and given her lack of employment history and my findings about her health and inability to work in the future I find that she is unlikely to have any financial resources in the future. The only resource she will have is her share in the Canada Life policy. In terms of needs the plaintiff needs to be fed, clothed and sheltered. In practical terms she needs income to buy food and clothes and to pay utility bills. She needs a roof over her head. In addition, she needs a car or other means of transport to enable her to go to the shops and attend doctors' appointments etc. These needs will continue into the foreseeable future.

(b) *The financial resources and financial needs which any other applicant for an order under Article 4 has or is likely to have in the foreseeable future.*

This provision is not applicable.

(c) *The financial resources and financial needs which any beneficiary of the estate of this deceased has or is likely to have in the foreseeable future.*

The first-named defendant has not given details of her financial resources as she is not making a needs based defence. The second-named defendant is married with children. His wife works and he has a 'roof over his head' although it is unclear if the home is jointly owned. At the present time he is not working but as appears from the medical evidence this is largely due to stress arising from the ongoing litigation. I consider that in the future the second-named defendant is likely to be able to find gainful employment as he has a reasonably good work history. I consider that the second named defendant is at present only able to sustain a modest existence and that he is unable to afford many luxuries. This is unlikely to change in the future.

(d) *Any obligations and responsibilities which the deceased had towards any applicant for an order under Article 4 or towards any beneficiary of the estate of the deceased.*

On the basis of the evidence I find that the deceased assumed obligations and responsibilities towards the plaintiff. He provided her with a home throughout her entire life. He paid all the utility bills, gave her a car and paid regular maintenance to her. I also find that the deceased assumed obligations and responsibilities towards the second-named defendant. In particular, the deceased set the second-named defendant up in his fishing business by paying for the boats and the associated costs. Thereafter, he paid maintenance which enabled the second-named defendant to pay a mortgage. The deceased further permitted this defendant to use his credit cards which the deceased then paid for many years. I am satisfied however that the deceased's obligations and responsibilities towards the second-named defendant ceased before his death. The deceased cancelled some credit cards and otherwise stopped paying them. I further find that although this defendant stated he was paid £1,000 per month maintenance he did not produce any proof of this and I am not satisfied that this was being paid as of the date of the deceased's death. Hence I find the deceased's obligations towards the second-named defendant had ceased before his death.

(e) *The size and nature of the net estate of the deceased and the likely effect on any business undertaking included in the estate of an order resulting in the division of the property.*

I have set out details of the net estate above. It consists of a home, boat, car and some cash assets. There is no business undertaking in the estate. The fact that the family home is the main asset is a very relevant consideration and a matter I will return to when considering what order the court ought to make.

(f) *Any physical or mental disability of any applicant for an order under Article 4 or any beneficiary of the estate of the deceased.*

Neither the plaintiff nor any of the beneficiaries has a diagnosed physical or mental disability. Having heard the plaintiff give evidence and having regard to all the evidence before the court I am satisfied that the plaintiff suffers from both physical and mental ill health.

(g) *Any other matter, including; the conduct of the plaintiff or any other person which in the circumstances of the case the court may consider relevant.*

This is a broad ground and in the present case the court takes into account the plaintiff's conduct, the deceased's wishes and the deceased's relationship with the plaintiff.

I have noted the bad conduct exhibited by the plaintiff throughout these proceedings. She was offensive, obstructive and rude to the court, to counsel and to the other defendants. She was un-cooperative in relation to any attempt to settle the case. I have however closely observed the plaintiff and I consider that her behaviour arose not from malice but rather from ill-health. Nonetheless, her conduct is relevant to the type of order the court should make. It is clear that there is a very poor relationship between the siblings and as a result of the plaintiff's behaviour the second-named defendant has suffered stress and the first-named defendant has had to obtain a non-molestation order. It is also very clear that the plaintiff will not co-operate in the future with her siblings. As a result, I consider that there is a need for the court to make orders which effect a clean break settlement.

I further consider it relevant to the determination of this case that the plaintiff enjoyed a close relationship with the deceased. I accept her evidence that she lived with her parents and assisted them by doing household chores, shopping and taking them to doctors' and hospital appointments. I otherwise accept that she cared for them. I consider that the deceased had a moral obligation towards her to permit her to continue to live in the family home for so long as she wished. Further, the testator expressed such a wish in his Will.

[64] The effect of his Will is that the family home will have to be sold and the plaintiff would in such circumstances receive approximately £58,000 from the sale proceeds. I consider that such a sum would be insufficient to rehouse her. As a result she would no longer be able to continue to reside in the family home and would be left without a "roof over her head".

[65] In this case: the plaintiff has limited resources; the deceased assumed obligations towards her; the deceased provided her with the security of living in the family home; the deceased paid all household bills and provided regular maintenance to the plaintiff; and enjoyed a close relationship with her throughout his life. I consider that these are factors which should be given great weight.

[66] In determining whether the threshold is met I have sought to balance the claims of the other beneficiaries. I take into account the fact that the first-named defendant is not making a "needs based" defence. I also take into account the fact that the second-named defendant was not financially dependent on the deceased at the date of his death; that he has the capacity to work in the future; and that he benefits from his wife's income and has a "roof over his head".

[67] The first-named defendant expressly conceded that reasonable financial provision had not been made for the plaintiff by the deceased's Will. This was also tacitly accepted by the second-named defendant in his written submissions. Having regard to all the Article 5 factors I consider that the deceased's Will failed to make reasonable financial provision for the plaintiff's maintenance.

Question 4 – What Article 4 Order or Orders ought the court to make?

[68] Under Article 4 the court has power to make various orders including payment of periodical payments, lump sums and/or transfers of property. The role of the court however is to modify the original disposition only to the extent necessary to ensure that reasonable financial provision is made for the plaintiff's maintenance rather than to undertake a full-scale rewriting of the deceased's Will. This is because the court does not have "carte blanche to reform the deceased's disposition or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position" per Oliver J in *In Re Coventry* [1980] Ch 461 at pages 474-475.

[69] In determining in what manner the court should exercise its powers under Article 4 the court must have regard to the matters set out in Article 5.

[70] I have already set out my findings in respect of the financial resources the plaintiff has and is likely to have in the foreseeable future; her need for accommodation and income to meet the expenses of daily living; the financial resources and needs of both the first-named and second-named defendants; the obligations the deceased assumed towards the plaintiff, in particular, the obligation to provide her with rent free accommodation in the family home for so long as she wished; the size and nature of the estate consisting largely of illiquid assets and primarily comprising the family home; the wishes of the deceased as expressed in his Will, and the close relationship between the deceased and the plaintiff.

[71] Taking all my finding in respect of the Article 5 factors into account, I consider that reasonable financial provision for the plaintiff requires her to be provided with rent free accommodation, preferably in the family home, for her life.

[72] As required by Article 2 (4) I must ensure that any order operates fairly as between the beneficiaries. I consider that fairness between the beneficiaries dictates that both defendants are entitled to be paid their reasonable litigation costs from the estate, in so far as these can be met. I consider that they are entitled to their costs because they both attempted throughout the proceedings to resolve the issues and this did not prove possible because of the conduct of the plaintiff. In the event that there is a short fall I consider that the first-named defendant's litigation costs should be paid in priority as she gave up her entitlement at an early stage and in addition continued to act as executrix in very difficult circumstances where the court would have relieved her of this duty if she had applied for such relief. Her continued involvement as executrix avoided both delay and increased expense to the estate.

[73] In addition I consider that the first-named defendant's costs of administration of the estate must also be paid from the estate on an indemnity basis.

[74] I have already set out that I consider that reasonable financial provision for the plaintiff means that she should have rent free accommodation for life, preferably in the family home. This objective can be achieved by granting her a life estate, a right of residence or an outright transfer of the family home. In determining which order the court should make, there are a number of matters which require to be taken into account.

[75] First, all parties need finality and closure to this litigation and the elimination of any future related or ancillary litigation. There is a risk, given the actions of the plaintiff to date, that she may make criticism of the first-named defendant's actions in respect of the administration of the estate. To this end it is important that the court makes an order in the plaintiff's favour as this will terminate any chose in action she may have to ensure the proper administration of the deceased's estate. Further the first named defendant wishes to transfer any chose in action in respect of a professional negligence claim which the estate of the deceased might have against a firm of solicitors, to the plaintiff, on the basis that this brings closure for the first-named defendant to this litigation. She further wants to remain as the technical residuary beneficiary even though the residuary estate will be exhausted by the payment of *bona fide* liabilities, including the non-contentious costs of the administration of the estate.

[76] Second, as outlined above there has been a complete breakdown in relations between the parties and the court considers, and both defendants agree, that any order must bring about a clean break settlement. Consequently, the grant of a right of residence or a life estate is an entirely unworkable solution and it would be unfair to both defendants to have their property interests intertwined with those of the plaintiff. Whilst I accept that outright transfer of the property in factually similar

cases, may well go beyond the concept of maintenance, in the present case I consider an outright transfer may be appropriate and reasonable because of:- the need for a clean break settlement; the fact the first-named defendant has made her share available to the court to satisfy any award in favour of the plaintiff; and because the deceased expressed the wish that the plaintiff should remain in the home if she so wished.

[77] Third, there is a practical difficulty in making an order for outright transfer of the family home to the plaintiff. This is because the absence of a sale of the family home means that there is insufficient liquidity in the estate to discharge its liabilities and the litigation costs of the defendants.

[78] Four, the optimum way in which the plaintiff's occupation of the home can be preserved and the estate liabilities and litigation costs met, is if the plaintiff voluntarily agrees that her share of the Canada Life policy is made available to the estate. The plaintiff has already indicated that she will not agree to transfer her share of the Canada Life policy to the estate. Consequently a Consent Order cannot be made whereby the family home is transferred into her name on condition that she pays her share of the Canada Life's policy into the estate.

[79] Consequently the practical difficulty for the court is how it can provide for the absolute transfer of the home to the plaintiff and at the same time provide a mechanism whereby the estate liabilities and at least some of the litigation costs can be paid. This dilemma together with a possible solution was noted in Tyler, *Family Provision*, 1997, 3rd Edition which states as follows at page 389:-

> "In cases where the principal asset in the estate is a dwelling house and the court is not minded to award the applicant the whole estate, but is anxious to preserve the occupation by the applicant of the dwelling house, the court has transferred the house to the applicant subject to a legacy in favour of a beneficiary. In cases where the claims of the applicant do not justify awarding an absolute interest in all of a dwelling house, the court appears to have power to order the transfer of the house subject to the payment of the outstanding proportion of the value of the house."

Similarly Pearce, *A Practitioner's Guide to Inheritance Act Claims, 2017*, 3rd Edition observes at paragraph 8.4 as follows:-

> "Where an order for the transfer of property in favour of a claimant is justified, but would mean that the needs of the other beneficiaries would not be met because the other assets are insufficient, the court may order the transfer subject to a legacy in favour of the beneficiary or subject to a charge over the property or a life interest. "

In *Re Guidera* [2001] NI 71 Girvan J, in a "maintenance" case gave the applicant a home subject to certain charges/conditions.

[80] Both defendants made a number of submissions in respect of the order the court should make. The first-named defendant proposed that the family home should be transferred to the plaintiff absolutely on condition that the plaintiff paid £28,283.17 to the first-named defendant in her capacity as executrix of the estate, within a specific time. In addition she submitted that the plaintiff would also obtain the car, the personal chattels and any chose in action regarding the professional negligence claim. The residue would then be paid to the first-named defendant. The debts and liabilities of the estate including both defendants' legal costs would be paid from the residue in the following order of priority:- first, estate debts and liabilities, next administration of estate fees, next, the first-named defendant's reasonable litigation costs (as agreed, assessed by the court or taxed) and then the second-named defendant's reasonable litigation costs (as agreed, assessed by the court or taxed). In the event that the plaintiff failed to comply with the condition precedent the family home would be immediately marketed for sale and the sale proceeds used to pay the estate debts and defendants' litigation costs before distribution of the surplus to the plaintiff.

[81] The second-named defendant agreed with the first-named defendant's proposal about transfer of the family home subject to a condition but sought an additional provision to secure a portion of the net estate for his benefit in the event that the family home was sold in the near future and attracted a significantly higher purchase price than the current estimate of £175,000. He further sought an amendment of the first-named defendant's proposal to allow all of his litigation costs to be met either by increasing the sum that the plaintiff was required pay into the estate or by the court measuring the first-named defendant's costs under Order 62 below the figure claimed or alternatively by way of an order which transferred a number of chattels to him, for example, the boat, paintings or jewellery. In addition the second-named defendant sought a share of the contents of the family home including items of sentimental value. An alternative option proposed by the second-named defendant was to adjourn the case to market the family home, so that its true value could be gauged.

[82] Before setting out the order I propose to make it is necessary to consider the extent of the court's powers. First, Article 4 provides that the court has power to order the transfer of property *in specie* to an applicant. Property is defined in Article 2 (2) (e) to include a chose in action. I am therefore satisfied that the court has power to transfer the family home and the chose in action to the plaintiff.

[83] Second, for the reasons set out at paragraph [79] above I am satisfied that the court has power to transfer assets subject to a charge or a condition, including a condition that a transferee pays a pecuniary legacy.

[84] Third, the second-named defendant seeks a suspensory order. Tyler, *Family Provision* 3rd Edition 1997 under the heading 'Suspensory Orders' at page 381 sets out

a number of techniques to circumvent the prohibition on suspensory orders. In particular he states as follows:-

> "…the court can make a substantial order, but reduce its effect by the imposition of conditions which might take effect upon subsequent events…Whilst these powers exist they should only be exercised having regard to the interests of beneficiaries and the statutory policy of fixing the parties' rights at an early stage. It is therefore suggested that orders having a suspensory effect should only be made where there is real uncertainty as to the value of the estate or where such an order will probably be of more immediate benefit to the beneficiary than an immediate order in favour of the applicant."

I do not intend to make a suspensory order in this case as I consider there is no real uncertainty in regard to the value of the family home and I further consider that it is important to fix the parties' rights at this stage given all the parties' need for certainty and finality.

[85] Fourth, under Article 4(4) the court has power to make consequential directions. Although these provisions are framed in very wide terms, Tyler, when commenting on the equivalent English provisions noted at page 410 that they are:-

> "..limited to property forming part of the net estate; the Law Commission rejected a proposal that any beneficiary could be required to pay money or transfer property directly to the applicant, whether or not it was contained in the net estate, because of the unnecessary complications which would be caused by such a provision."

It was accepted by the first named defendant that, subject to various anti-avoidance provisions which are not relevant, the court may only make an order out of the net estate of the deceased. It was accepted that the Canada Life policy was not part of the net estate.

[86] Fifth, under Article 4 (1) (f) the court has power to vary any ante-nuptial or post-nuptial settlement. If the Canada Life policy was a nuptial settlement the court would have power to vary it directly, for example, by making the plaintiff's share available to the first and second-named defendants. The Canada Life policy benefitted the children of the marriage but it did not provide for the financial benefit of one or other of the spouses as spouses with reference to their marital relationship. Accordingly, I am satisfied that it is not a nuptial settlement and consequently the Court does not have power to vary it.

[87] This court is most anxious to ensure, if possible, that the plaintiff remains living in the family home for her life. It also recognises that the administration costs

of the estate need to be met and that both defendants are entitled, in so far as possible to have their reasonable litigation costs met. To achieve these objectives, having regard to all the circumstances, I consider it appropriate, in the first instance, to make an order providing for the transfer of the family home to the plaintiff absolutely subject to a condition precedent. The condition precedent is that the plaintiff pays a sum equivalent to her share of the Canada Life policy to the first-named defendant in her capacity as executrix within a set timeframe and/or in the alternative the plaintiff directs Canada Life to pay her share of the policy to the first-named defendant in her capacity as executrix. In the event that the condition precedent is not fulfilled within the permitted time frame, the case should be referred back to this court. At that stage the court will then consider the most appropriate alternative order to make in light of the plaintiff's failure to comply with the condition precedent.

[88] I further consider that this may be a case where it is appropriate for the parties' costs to be dealt with under Order 62 rule 7. If the parties wish to have costs assessed by the court the necessary application should be made together with the necessary documentation to enable the court to make the appropriate determination.

Draft Order

[89] The court orders:-

- Upon condition ("the condition precedent") that the plaintiff either pays a lump sum of £28,283 to the first-named defendant in her capacity as executrix of the estate of the deceased within 14 days of the date hereof or in the alternative within 14 days of the date hereof directs Canada Life to pay her share of the Canada Life policy number 8506058 to the first-named defendant in her capacity as executrix of the estate of the deceased, the property situate at and known as 137 Whiterock Bay, Killinchy shall be transferred absolutely to the plaintiff.

- In default of compliance with the condition precedent the case is to be referred back to this court.

- The deceased's car and all personal chattels, save the boat and such items as the parties shall agree otherwise, shall be transferred to the plaintiff.

- Any chose in action in respect of a professional negligence case which the estate of the deceased might have against solicitors arising out of the services they provided to the deceased relating to a clinical negligence claim shall be transferred to the plaintiff.

- The boat and its accessories and the second-named defendant's personal effects which remain in the family home shall be transferred to the second-named defendant and the plaintiff, upon the giving of reasonable notice by or

on behalf of the second-named defendant, shall afford him access to the property situate and known as 137 Whiterock Bay, Killinchy, in order to take possession of the said boat, accessories, and personal effects.

- The residue of the estate shall pass to the first-named defendant.

- The debts and liabilities of the estate shall be discharged from the residuary estate in the following order of priority:- Johns Elliott's costs for administering the estate, being in the sum of £8,115.60; the first-named defendant's executor's and litigation costs as agreed, assessed by the court or as taxed; the second-named defendant's litigation costs as agreed, assessed by the court or taxed.

Conclusion

[90] The case will be adjourned until 27 June 2019 to confirm that the condition precedent has been met.