THE HIGH COURT

[2023] IEHC 720

Record No. 2022/8612PO

IN THE MATTER OF THE SUCCESSION ACT, 1965, AND IN THE MATTER OF THE ESTATE OF E.F., DECEASED

AND IN THE MATTER OF SECTION 27(4) OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF AN APPLICATION BY H.F., J.F. AND K.F. TO APPOINT AN ADMINISTRATOR AD LITEM

JUDGMENT of Ms. Justice Stack delivered on the 18th day of December, 2023.

Introduction

1. This is an application pursuant to s. 27(4) of the Succession Act, 1965, ("the 1965 Act") to appoint an administrator *ad litem* in the estate of the E.F., deceased ("the Deceased"), who died on 11 November, 2020, having made a Will on 19 February, 2014. According to that Will, the Deceased appointed her daughter, G., as sole executrix and sole beneficiary of the main asset in the estate, which is a substantial dwelling house situate in a major city. The Deceased also bequeathed to G. the contents of that property and any motor car she might own on the date of her death.

2. The Deceased, who was a widow, was also survived by three other children, the applicants herein. All four children were entitled under the Will to share equally in the residue of the estate of the Deceased.

3. The Notice of Motion initially issued on the basis that G. was of unsound mind, not so found. However, on the final adjourned date of the application on 4 December, 2023, it was contended that the Executrix is in fact of sound mind. For reasons set out below, I am not satisfied on the evidence before me that that is so, and, while it is my view that the issue should be determined in the appropriate application pursuant to the Assisted Decision-Making (Capacity) Act, 2015, as amended ("the 2015 Act"), it seems to me that there are, at the very least, serious grounds for believing that the presumption of sanity has been rebutted in this matter.

4. However, the key issue in this case is whether it is necessary or expedient within the meaning of s. 27 (4) of the 1965 Act that I appoint an independent solicitor to administer the estate. I have recently had to consider the application of s. 27(4) to situations where the effect of making the order pursuant to s. 27 (4) is to remove an executor appointed by a will: see *Re Bernard Casey decd.* [2023] IEHC 643**.** Briefly, where an executor is guilty of misconduct and is not fit to act, has a material conflict of interest with the estate, or is unable or unwilling to act as executor, it may be necessary and expedient to appoint someone other than the person chosen by the testator. In this case, there is no allegation of serious misconduct and the application was brought on the basis that the nominated Executrix lacked the capacity to administer the estate.

5. As referred to further below, there is in fact provision in O. 79 of the Rules of the Superior Courts for what is to happen when the capacity of the person entitled to take out a grant of representation is in doubt. It does not therefore follow that, simply because a nominated executor is lacking in capacity, an order pursuant to s. 27 (4) of the 1965 Act (other than that

envisaged by O. 79, r. 27) should automatically follow. It is difficult, if not impossible, to try to anticipate all of the circumstances in which the issue might arise and therefore it is also difficult to attempt to set out in any comprehensive way the factors which might be relevant to the consideration of an application under s. 27 (4) in circumstances where the capacity of the executor chosen by a deceased is in doubt and the proposed personal representative is not a decision-making representative appointed pursuant to the 2015 Act.

6. However, such a circumstance might arise where the nominated executor suffering from an incapacity is not a significant beneficiary and is not entitled to seek proper provision or to claim any share in the estate, or where the administration will be particularly complex. In those circumstances, it might be more appropriate to allow another suitable person, such the residuary legatee, to take over the duties of executor. I note that in England and Wales, it seems to be the practice to issue the grant to an individual nominated by the Court of Protection to act on behalf of the nominated executor, at least where the incapacitated person is a beneficiary under the will: see Williams, Mortimer and Sunnocks, *Executors, Administrators and Probate*, (London: Thomson Reuters, 2018) at para. 19-28. In addition, applications pursuant to s. 27(4) are made relatively frequently in non-contentious situations by the person registered as Attorney of a nominated executor or of the person first entitled to extract a grant of letters of administration under Order 79.

7. However, the situation which arises differs from those situations as there is, in effect, a challenge to the incapacitated person's entitlement to succeed.

Whether it is "necessary or expedient" to replace the Executrix in this case

8. The reason why this application is brought is that the applicants wish to challenge the 2014 Will of the Deceased and for that purpose they seek to appoint an administrator *ad litem*

to defend proceedings which they intend to bring to condemn that Will. The basis for the challenge is an alleged lack of capacity on the part of the Deceased on the date she made the 2014 Will.

9. The Deceased had a stroke in 2011 and the cause of death as stated on the death certificate was: *"Vascular dementia 4-5 Year(s)"*. This time frame of course suggests that the Deceased did not suffer from this condition on the date of execution of the 2014 Will, but this would obviously be subject to more detailed consideration of her medical records.

10. It is relevant to this application that the Deceased had executed a Will on 26 May, 2011, which was in materially different terms. (Because no detail is given in the affidavits as to when the Deceased suffered the stroke, it is not clear whether this occurred prior to or after the execution of the 2011 Will.)

11. In any event, the 2011 Will provided that the family home of the Deceased was to be sold and the proceeds divided equally between all four of the Deceased's children. In addition, all four were to share equally in the residue. Significantly, the Deceased nominated one of her sons and her other daughter to be executors. It should be noted that the 2014 Will contained a general revocation clause and the original of the 2011 Will was destroyed, I assume when the 2014 Will was executed.

12. G., according to the grounding affidavit, resided abroad for some years, before returning to the family home in 2013. In that year also, she was involuntarily detained pursuant to the Mental Health Act, 2001, as amended, and apparently there have been *"a series of subsequent detentions/admissions"*, which I take to mean both voluntary and involuntary admissions, though I don't think that the fact that they may not all have been involuntary admissions is material to this application. G. has, for some years, lived in sheltered accommodation run by the Health Service Executive but I am not told when she moved there or what her condition was in 2014, when the Will was executed.

13. However, these are really matters for the intended probate action challenging the 2014 Will, as one of the considerations in those proceedings will be whether the Will is rational on its face. For example, it may be that G.'s circumstances, relative to her siblings, were such that the Deceased may have decided, as a prudent parent, that she should provide for her daughter. The Deceased may also have reasonably considered that control of the administration of the estate should remain with G., either because at the time of execution of the 2014 Will it seemed G. would be capable of executing it, or because the Deceased considered that it would nevertheless be in G.'s interests to administer the estate, either herself or through an appropriate representative as envisaged by O.79. I do not have any evidence on that as these issues are not for determination in this application.

14. The grounding affidavit appears to disclose that the decision to bring this application was at least in part predicated on the probability that it is extremely unlikely that G. would ever extract a Grant of Probate and, certainly, delay of this nature in extracting a Grant would, in the normal course, demonstrate an unwillingness on the part of a named executor to administer the estate in accordance with the wishes of a deceased as expressed in a will (unless, perhaps, where the executor was the sole beneficiary, there were no outstanding debts, and the funeral expenses had been paid). However, in the case of a person of unsound mind, I do not think delay is indicative of anything other than lack of capacity to act.

15. The question then is: what is the appropriate manner to proceed where the named executor is incapable of acting as such?

16. The first concern which arose on the hearing of this application was how the applicant was to be represented. This clearly arose as the effect of the order sought would be to remove her as executrix, contrary to the Deceased's wishes. In the ordinary course, she could simply be served and then decide whether or not to instruct solicitors. But given that it was specifically

stated in the Notice of Motion and in the grounding affidavit that G. was not of sound mind, the question arose as to how her interests in this application were to be protected.

17. That necessitated a number of adjournments and on 27 March, 2023, I made an Order granting liberty to the proposed administer *ad litem* to apply for and extract a Grant of Letters of Administration limited to preserving the assets of the estate pending the determination of this application and the proposed challenge to the will, to include insuring the property comprised in the estate.

18. Ultimately, after various adjournments, I appointed a guardian *ad litem* ("GAL") by Order made 16 October, 2023, in order to communicate G.'s wishes so far as this application was concerned. The GAL visited G. in her accommodation in October, 2023. G. advised the GAL that she had married when very young and that her husband lives in the UK but that they spoke most days and that he was in the city where G. lives from time to time. One of G.'s brothers has sworn an affidavit to the effect that he and the other applicants are not aware of G. being married to the individual named by her as her husband or to any other person and that while G. has mentioned this individual as being due to visit her, G.'s brother has averred that this did not occur. I think it is fair to say that the applicants suspect that G. is not married to the named person or to anyone else. Furthermore, G. gave her GAL an email address to contact the individual she claims is her husband and her GAL says she is satisfied that this is not a valid e-mail address.

19. G. has also told her GAL that she does not believe the applicants are her siblings and she wants a DNA test. This is strongly disputed by the applicants. It should of course be noted that the Deceased named G and the applicants as her children in both the 2011 Will and the 2014 Will.

20. Finally, G. told her GAL that she believes that the family home was put in her name by means of a Deed of Trust and not a will. G.'s brother says that the first time he or any of the

applicants heard of this trust was in the affidavit of the GAL recounting her conversation with G. and he does not believe any such Deed of Trust exists. G. also told her GAL that the 2011 Will was not dated but G.'s brother points out, by reference to the available copy of the 2011 Will, that this is not correct. Other allegations related by G. to the effect that the applicants mistreated her during her childhood are completely denied by the applicants.

21. As regards this application, G. does not believe that she was left the family home in the Will and therefore clearly does not seem to understand the significance of the 2014 Will. She has said that she is tired of meeting her solicitor and her husband's solicitor and indicated that, having met them once, she had not met them again. When it was explained to her that it was important that her rights were protected, she said that the GAL or her husband could meet a solicitor on her behalf.

22. I am satisfied for the purposes of this application that G. does not understand the significance of the application or of the proposed challenge to the 2014 Will. Indeed, she believes that she is entitled to the family home pursuant to a Deed of Trust and does not seem to realise that the 2014 Will must be upheld as valid for her to succeed to this property. She does not, however, seem to want to take any active steps herself to uphold the validity of the 2014 Will.

23. As a result, I am satisfied that G. does not have capacity to give instructions in connection with this application or indeed in connection with the proposed challenge to the 2014 Will.

24. Order 79, rule 26 provides that a grant of administration may issue to the committee of a person of unsound mind for that person's use and benefit. That was clearly designed to apply where a named executor had been made a Ward of Court. That has not occurred here, possibly because G. does not have any assets that would have required her to be taken into Wardship, a regime which has of course now been replaced by the provisions of the 2015 Act.

25. Order 79, rule 27 was drafted to cover a situation where, prior to the commencement of the 2015 Act, a person of unsound mind was entitled to take out representation to a deceased's estate but had not been taken into Wardship. Prior to its amendment by the Rules of the Superior Courts (Assisted Decision-Making (Capacity) Act, 2015 (S.I. 261 of 2023), It provided:

> *"In a case where a person of unsound mind has not a committee appointed by the Court, a grant may issue to such person as the Probate Officer may by order assign with the consent of the Registrar of Wards of Court. The application for such order shall be grounded on an affidavit of the applicant showing the amount of the assets, the age and residence of the person of unsound mind and his relationship to the applicant together with an affidavit of a medical practitioner relating to the incapacity of such person."*

26. That rule has now been amended to reflect the commencement of the 2015 Act, and now provides as follows:

> *"Where an application is made under section 27 (4) of the Succession Act 1965 for a grant of administration, and the applicant is the decision-making representative of a relevant person, appointed under the Assisted Decision-Making (Capacity) Act 2015 , in circumstances where such relevant person could otherwise apply for a grant of administration, the applicant shall set out details of the order of the Circuit Court under section 38 of the said Act of 2015 and of how such application is for such relevant person's use and benefit."*

27. The question which then arises on this application is whether it is *"necessary or expedient"* to grant liberty to an independent solicitor to extract letters of administration in place of the named executor. In general, the deceased's wishes as to his or her choice of executor will be respected, and serious reasons or misconduct must be demonstrated in order to remove an executor: see *Dunne v. Heffernan* [1997] 3 I.R. 431. It must also be recalled that

an executor is appointed by the will and is vested from death with the assets of the deceased: see s. 10 of the 1965 Act.

28. If there were no dispute about the validity of the Will, I would have no difficulty in concluding that one of G.'s siblings, for example, should be appointed as administrator in order to assent to the vesting of the family home in her. Thereafter, most probably a decision-making representative would have to be appointed under the 2015 Act in order to manage that asset for her, or indeed to sell it and invest the proceeds.

29. In this case, however, the real role of the personal representative of the Deceased will be to defend the proceedings which the applicants wish to bring to challenge the validity of the Will. This will require solicitor and counsel to be instructed and may require consideration to be given to the compromise of the action once evidence as to the capacity of the Deceased on the date of the execution of the 2014 Will becomes available. It is G. alone who stands to lose from the institution and possible success of those proceedings, but she does not appear to be capable of instructing a solicitor or making any of the decisions which would be necessary in order to defend those proceedings.

30. In that event, it seems to me that someone needs to be appointed in order to look after her interests and to discharge the role of *legitimus contradictor* in the proceedings to be instituted. In the ordinary course, it is the executor who would discharge that role. As O.79, r. 27 specifically contemplates that, where a person of unsound mind is entitled to take out a grant, someone can be appointed in order to discharge that role on their behalf, it seems to me that, in the circumstances of this case, the procedure envisaged for in O.79, r. 27 should be used and that it is neither necessary nor expedient that the applicant would be passed over in the manner contemplated by this application. An independent solicitor has been nominated and has consented to act as administrator *ad litem* for the purpose of defending the proposed challenge

to the Will, but it seems clear he has not been asked to represent the executrix or to act in her best interests.

31. Were I to accede to the application, it is contended that G. could in any event be represented by a guardian *ad litem* in the proceedings to challenge the 2014 Will, as contemplated by O.15 of the Rules. I do not see how that would simplify the steps to be taken by the applicants in order to progress their proceedings as they would first have procured, by way of this application, the appointment of an independent solicitor to act as personal representative, and they would then, in any event, have to appoint someone to act on behalf of G.

32. In those circumstances, the appointment of an independent solicitor is an additional step which incurs further expense and does not, in my view, require to be taken. The Court of Appeal has stated in *Dunne v Dunne* [2016] IECA 269 (*per* Peart J., at para. 47) that it is not always necessary to appoint an independent person to act as administrator and that this may increase costs. That would be precisely the result in this case as, having obtained an order pursuant to s. 27 (4) for the appointment of an independent person, another person would have to be found to act on behalf of G. in the proceedings to challenge the will in any event.

33. In my view, the appointment of the proposed person pursuant to s. 27 (4) would, in these circumstances, merely increase the costs by introducing another party to the proceedings, when a person would in any event have to be appointed to represent G. in those proceedings. This is neither necessary nor expedient within the meaning of s. 27 (4) of the 1965 Act, and I therefore refuse the application.

34. The next step should be, in my view, an application for a declaration as to G.'s capacity in the Circuit Court pursuant to the 2015 Act, followed, if that is found to be appropriate, by the appointment of a decision-making representative who should then apply pursuant to s. 27 (4) of the 1965 Act to take out letters of administration or, prior to the extraction of a grant,

should defend the challenge to the 2014 Will on behalf of G. or take such other steps as are necessary in G.'s best interests.

35. In those circumstances, I refuse the application.