

THE HIGH COURT

PROBATE

[2022] IEHC 585

[Record No. 2021/PO11832]

[Record No. 2022/PO7025]

IN THE MATTER OF THE ESTATE OF P.M., LATE OF [ADDRESS],

[OCCUPATION], DECEASED

BETWEEN

S.M.

APPLICANT

AND

S.L.

RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 25th day of October 2022

Introduction

1. This judgment concerns the substantive application connected to the judgment I have already delivered in the same proceedings [2022] IEHC 449 dealing with whether the application should be heard in camera. The central issue before the court is whether the respondent, as the deceased's spouse is entitled to extract a grant of letters of administration to the deceased's estate or whether they have waived that right in a separation agreement such that the applicant, being the deceased's mother, is the person legally entitled to extract the grant.

2. The deceased died intestate in January of 2021. The applicant lodged a caveat in the Probate Office in respect of the deceased's estate in February 2021 and, in June of 2021, lodged an application for a grant of administration. The spouse lodged a caveat on 14 April 2021 and an application for a grant of administration in September 2021. This means that the Probate Office currently has conflicting applications for grant of administration from the deceased's mother and the deceased's spouse, as a result of which neither grant could be issued by it, thus necessitating this application.

3. In fact, by the time the substantive matter came on for hearing before me in the Probate List, a second application had been brought by the applicant. The first in time concerns the applicant's entitlement to extract a grant of letters of administration to the estate of the deceased. The second is an application by the applicant for an "*ad litem*" grant pursuant to s. 27(4) of the Succession Act 1965 to facilitate its intended Circuit Court proceedings to require the respondent to leave the deceased's property.

Background to the Application

4. These applications arise in circumstances where, approximately nine years before their death, the deceased married the respondent (whom I will refer to as "*the spouse*"). After a year of marriage, the parties separated, and a separation agreement was drawn up by the deceased's solicitor and executed by the spouse in March 2013. That separation agreement provided for a once-off payment by the deceased to the spouse, which payment was made shortly after the spouse signed the agreement. Subsequently, the spouse brought two maintenance summonses in the District Court, both of which were struck out when they did not appear on various return dates. The spouse then instituted divorce proceedings in the Circuit Court in 2017 in which various ancillary relief was sought which if granted would, in principle, have been contrary to the terms of the separation agreement. However, the existence of a separation agreement does

not constitute a legal impediment to either a maintenance application nor an application for financial relief or property adjustment orders a divorce application. A year later, the deceased filed a defence to the divorce proceedings containing a counterclaim seeking a decree of nullity. No court order was ever made in respect of the parties' separation nor the dissolution of their marriage.

5. The separation agreement is in largely standard terms. Two clauses are potentially relevant to the agreement the parties may have reached as regards their mutual rights in each other's estates. The first appears under the heading "*Succession Act Rights*" and is as follows:-

"The parties hereby mutually surrender and renounce all rights either of them may have under the Succession Act, 1965 to any share or legal right in the estate of the other on the other's death either testate or intestate and hereby renounce and waive their respective rights to the extraction of a grant of Probate or administration in the estate of the other and undertake not to interfere in any way with the extraction of a grant of Probate or administration to the estate of the other."

The second appears under the heading "*Miscellaneous Provisions*" and the relevant parts of para. 4 are as follows:-

"The parties hereby agree that neither of them shall issue any proceedings after the death of the other, to seek provision from the estate of the other pursuant to Section 15(A) of the Family Law Act 1995, as inserted by the Family Law (Divorce) Act 1996."

6. The applicant, who is the deceased's mother, relies on these terms in the separation agreement to contend that the spouse has waived all rights that they may have to the deceased's estate. This includes the statutory right the spouse would otherwise have had as the surviving spouse of the deceased to extract a grant of administration in priority to other members of the deceased's family. The applicant contends that the legal effect of the separation agreement is that the spouse is no longer the next-of-kin of the deceased. If correct, this has an impact not

just on the spouse's right to extract a grant of administration but also on the legal right the spouse would otherwise have to inherit the deceased's estate. In her originating Notice of Motion she seeks an order that she be at liberty to apply for letters of administration intestate and also a declaration that the respondent has, by virtue of the separation agreement, renounced the right to extract a grant of administration in the estate of the deceased. Thus, the applicant's application is dependent on the validity of the separation agreement.

Relevant Legislation and Rules:

7. Section 27(3) of the Succession Act 1965 provides that "*subject to subsection (4), the person or persons to whom administration is to be granted shall be determined in accordance with rules of the High Court*". Subsection (4) allows the High Court to order that administration be granted to "*such person as it thinks fit*" where there are special circumstances which, in the opinion of the High Court make it "*necessary or expedient*" to make such an order.

8. The rules of the High Court which currently govern non-contentious probate practice are Orders 79 and 80 of the Rules of the Superior Courts. Order 79, r.5 sets out the order of priority in which those persons having a beneficial interest in the estate of an intestate deceased person shall be entitled to apply for a grant of administration. Under O.70, r.5(1)(a) the surviving spouse or civil partner of such deceased person has absolute priority over all other persons. Sub-paragraphs (b), (c) and (d) deal with the entitlement of the children of the deceased and the issue of any child who has died during the deceased's lifetime who have priority over other members of the deceased's family. As the deceased in this case did not have children, these sub-paragraphs are not relevant the matters the court has to decide. Then, under O.79, r.5(1)(e), the parents of a deceased person may extract a grant in priority to the deceased's siblings, grandparents, uncles, aunts etc. Because of the separation agreement, under which

the applicant claims the spouse has waived their right to extract a grant, and the fact that the deceased died childless, the applicant claims to be the person now entitled to extract a grant of administration to her deceased child's estate.

9. Of course, the significance of the separation agreement goes beyond the entitlement to extract a grant of administration. Under s. 67(1) of the 1965 Act, the spouse of an intestate deceased person would normally be entitled to the entire of the deceased's estate where the deceased did not have any children. If the separation agreement is valid the spouse will be taken to have surrendered and renounced such right. Further, at the time of the deceased's death the spouse had divorce proceedings pending in which they were seeking financial relief including the transfer of the family home and other property. If the separation agreement is valid then not only does the spouse lose the entitlement to seek this relief from the deceased as the divorce proceedings cannot continue after the death, but after the death they would be precluded by clause 4 of the Miscellaneous Provisions from seeking provision from the deceased's estate. Thus, there is a lot more than the formality of administering the deceased's estate riding on the validity of the separation agreement.

Spouse's Position on the Separation Agreement

10. The spouse contends that the separation agreement is not valid. A number of reasons are advanced in support of this claim. Firstly, it is contended that the spouse was both mentally and physically unwell at the time the separation agreement was executed. In fact, the deceased was the spouse's doctor and either the deceased or the applicant (also a doctor) had referred the spouse to a psychiatrist who had prescribed antidepressants just a number of months earlier. Secondly, the spouse, although a qualified solicitor, did not have independent legal representation or advice in respect of the terms of the separation agreement before it was executed. Thirdly, it is asserted that the bargain reflected in the separation agreement is

manifestly improvident. No formal disclosure of assets was made by either party nor affidavits of means sworn before the separation agreement was signed. The deceased's estate is relatively substantial, as might be expected for a successful professional person of their age. In contrast, the once-off payment made to the spouse is undoubtedly small relative to the value of the deceased's estate. Fourthly, it is contended that the spouse signed the agreement in circumstances where they were vulnerable, not just because of ill health, but because of an immediate and pressing financial need to provide accommodation for themselves and to meet their day-to-day living expenses. In a similar vein, it is noted that there was a substantial age gap between the parties to the marriage with the deceased being some 20 to 25 years older than the spouse. Finally, the separation agreement is not completely executed. It is not executed by the deceased at all and the spouse's signature is undated and unwitnessed.

11. All of this is strenuously disputed by the applicant on various grounds, not least the apparent acceptance by the spouse of the validity of the separation agreement in earlier District Court proceedings. Non-execution of the agreement by the deceased is stated to be irrelevant where the deceased performed the obligation accepted by them under the terms of the agreement to make a once-off payment to the spouse which payment was accepted by the spouse.

12. The applicant points to a medical report from the psychiatrist attended by the spouse which reports the spouse as saying that they had stopped taking the prescribed medication around the time the separation agreement was signed in 2013 because they felt better at that stage. This is something which could, of course, cut either way as the improvement felt by the spouse might well have been due to the fact they were taking the prescribed medication and coming off the medication might well have reversed the beneficial effects. Certainly, the extent to which the spouse's ability to agree to the terms of the separation agreement was impaired by mental or other ill health is not something which can be decided on the basis of an exhibited

medical report and in the absence of evidence from the relevant doctor. In addition, the exhibited medical report is one prepared for purposes other than this application or the family law proceedings and does not expressly address the spouse's capacity to make such an agreement at the material time. Further, I note that the deceased's counterclaim for a nullity (which has not been determined by any court) is based on the spouse's alleged lack of capacity to contract a valid marriage due to their psychological and/or psychiatric condition, a personality disorder and/or immaturity. Obviously, it would be difficult for the deceased to have contended, on the one hand, that the spouse was psychologically incapable of contracting valid marriage but, on the other hand, was capable of executing a valid separation agreement.

Analysis of the Issues:

13. On the face of it, the court is being asked to choose between two very stark opposing positions, each of which has significant ramifications, not just for the formal steps to be taken as regards the administration of the deceased's estate, but more significantly, as regards the succession rights to that estate. If the applicant is correct and the separation agreement is valid, then not only does the spouse not have an entitlement to extract the grant of administration, they also have waived their entitlement to any share in the deceased's estate pursuant to the Succession Act. In those circumstances, the entire of the deceased's estate would be inherited by their immediate family, i.e. the surviving parent and siblings. On the other hand, if the spouse is correct and the separation agreement is not valid, then the spouse remains the lawful spouse of the deceased and, as such, has an absolute entitlement to extract a grant of administration in priority to all other persons and, further, would stand to inherit the entire of the deceased's estate to the exclusion of the deceased's parent and siblings.

14. The applicant argues not only that the separation agreement is valid as a matter of fact, but that it must be accepted as valid as a matter of law, particularly in circumstances where the

spouse never instituted proceedings seeking to have the separation agreement set aside. In response, the spouse contends that, whilst earlier case law suggested that a separation agreement remained valid unless and until it was set aside, that has changed since the introduction of divorce in 1996. The requirement that a court be satisfied that proper provision has been made for a dependent spouse before a decree of divorce can be granted, means that the *de facto* reality is that there is no need for a party to divorce proceedings to institute additional proceedings seeking to have a separation agreement set aside. The circumstances in which a separation agreement has been entered into and the terms of that agreement can be examined by the court with seisin of the divorce proceedings, and that court can make any order regarding the transfer of property, maintenance, pension rights and Succession Act rights that it deems appropriate in order to ensure that proper provision is made as between the spouses. Consequently, counsel on behalf of the spouse argues that his client cannot be faulted for not having issued separate proceedings seeking to set aside the separation agreement. He also points to the Family Law Civil Bill which was issued in the divorce proceedings. This expressly pleads that the separation agreement was made at a time when the spouse was extremely unwell and in dire financial straits; that the spouse felt they had no alternative but to execute the deed of separation and to accept the lump sum which had been offered; that the spouse was severely depressed and vulnerable at the time and not capable of fully appreciating the potential consequences of these actions. No specific relief is sought as regards the separation agreement as this was unnecessary in circumstances where the court had jurisdiction to make financial and property orders inconsistent with its terms, but it is clear from the pleadings that the validity of that agreement was impugned by the spouse.

15. I accept the argument that has been made on behalf of the spouse on this point. The cases referred to, namely *L-M v M* [1994] 2 Fam LJ 60 (SC) and *VW v JW* (Unreported High Court, April 1978), pre-date the introduction of divorce in this jurisdiction and consequently

considered questions concerning the validity of separation agreements in circumstances where the courts did not have a free-standing jurisdiction to make financial orders which might be contrary to the terms which had been agreed between the parties in finalising their separation. I accept that, since the introduction of the Family Law (Divorce) Act 1996, there is little practical purpose served by a spouse who is seeking a divorce in bringing separate proceedings to set aside a separation agreement. This is because all of the relief that might be sought by the spouse as a consequence of the separation agreement being set aside is in any event available on an application for divorce. Further, notwithstanding the lack of a formal challenge to the separation agreement, it is clear from the terms of the Family Law Civil Bill that the validity of that agreement was, in substance, being challenged by the spouse. Therefore, I am not prepared to treat the separation agreement as conclusively valid merely because of the absence of a formal challenge to its validity nor because the courts had not yet reached a conclusion on the arguments raised by the spouse in the divorce proceedings at the time of the deceased's death.

16. Having said that, it is equally not open to me to treat the separation agreement as conclusively invalid for the reasons advanced by the spouse or for any other reason. This matter came before me in the non-contentious Probate List as an application to determine which of the conflicting claims to be entitled to extract a grant of administration should be allowed. The issues raised challenging the validity of the separation agreement are undoubtedly serious, as are the grounds raised in support of its validity. It is simply not possible to determine those issues on the basis of affidavit evidence on what is supposed to be a non-contentious application. Therefore, this application must be decided by me in the knowledge that it reflects a significant dispute between the parties as to the substantive entitlement to succeed to the deceased's estate, which dispute cannot be resolved by this judgment.

17. However, the earlier case law concerning the validity of separation agreements remains relevant in some important respects. In particular, the cases cited demonstrate that a separation agreement entered into due to fraud or duress will be voidable and also that an agreement can be set aside if it is clearly unconscionable. For present purposes the significant principle is that a separation agreement entered into in such circumstances is voidable rather than void, a principle which was accepted by counsel for the spouse in the course of the hearing. Consequently, this means that unless and until the separation agreement is voided by a court, it should be treated as presumptively valid. Whilst the spouse undoubtedly has an entitlement to challenge the validity of the separation agreement, until that has been done and the challenge determined, it remains potentially voidable rather than actually void. Because of the death of the deceased, it will no longer be possible for the spouse to advance arguments as to the validity of the separation agreement in the context of in the divorce proceedings and, therefore, it may well be necessary for separate proceedings to be instituted in this regard. Counsel for the spouse has fairly acknowledged the very high likelihood of the need for substantive proceedings to determine the succession issue.

18. In light of these considerations, I will make an order pursuant to s. 27(4) allowing the applicant to extract a grant of administration to the estate of the deceased. I am specifically making that order under s. 27(4) rather than simply declaring the applicant's entitlement to do so pursuant to O. 79, r. 5(1)(e). This is because I acknowledge the very substantial issue between the parties as to the validity of the separation agreement which, in turn, will have a decisive bearing on the distribution of the deceased's estate. I do not want any order made by me at this stage to be seen as a conclusion, however tentative, as to the validity or the invalidity of the separation agreement. For similar reasons I will refuse the declaration sought by the applicant to the effect that the spouse has renounced and waived her right to extract a grant of administration. That issue, which is dependant on the validity or otherwise of the separation

agreement, remains to be determined in properly constituted proceedings brought for that purpose.

19. I am also conscious of the fact that, in order for this succession issue to be resolved, further proceedings will have to be brought. No matter which of the competing claims were to be accepted by the court at this stage, there would be an element of conflict in the administrator's position as each of the applicant and the spouse proposes to distribute the estate in a manner consistent with their own claim and contrary to the claim of the other. However, on a purely practical level, it makes more sense that the applicant, who disputes the spouse's entitlement to inherit, should have carriage of the defence of any such proceedings on behalf of the estate.

20. Therefore, as previously indicated I will make an order under s. 27(4) granting the applicant liberty to extract a grant of administration to the estate of the deceased. Given the nature and value of the estate, I anticipate that it will take some time for it to be administered. However, in order to ensure that the spouse has an adequate opportunity to make a claim, *qua* spouse to the entire of the deceased's estate, I will make an order staying the distribution of the deceased's estate for a period of six months from the date of this order. This should not prevent the applicant from gathering in the assets of the estate nor should it prevent her, as administrator, from instituting or defending such proceedings as may be appropriate on behalf of the estate. If proceedings are instituted by the spouse within that timeframe, the further administration of the estate, including its distribution, will become a matter for the court seised of those proceedings. If no proceedings are instituted, the applicant as administrator then will be at liberty to conclude the administration by proceeding to distribution.

The Second Motion:

21. The second application brought by the applicant is for what is commonly described as an “*ad litem*” grant under s. 27(4) for the purposes of enabling the applicant to bring proceedings against the spouse in connection with the spouse’s occupation of one of the deceased’s properties. Of course, such occupation is only unlawful if the applicant is correct in her assertion that the spouse has surrendered and renounced her entitlement to the deceased’s estate. This remains to be determined. Apart from the fact that the spouse’s right to occupy of the property is disputed by other members of the deceased’s family, there is no suggestion that any damage is being caused to the property. As an order has been made in favour of the applicant allowing her to extract a grant of administration proper, I agree with counsel for the spouse that no additional purpose would be served by making a second order under s. 27(4), also in favour of the applicant, specifically for the purposes of enabling her to bring these proceedings. I appreciate that this may entail some delay in the institution of such proceedings but, in circumstances where an application for a grant had been lodged in the Probate Office by the applicant prior to the events which ultimately necessitated the bringing of this motion, that delay should not be very long. Therefore, I will refuse the relief sought in the second motion.