GIRF3293

Family provision – intestacy of deceased – applicant cohabitant of deceased – entitlement to home – claims of widow and son – impact of European Convention on Human Rights articles 8 and 14.

2000 No. 167

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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

-AND-

IN THE MATTER OF THE ESTATE OF PATRICK MICHAEL GUIDERA DECEASED

BETWEEN:

GILLIAN BINGHAM

Plaintiff;

-and-

DEAN ALEXANDER GUIDERA
AS ADMINISTRATOR OF THE ESTATE OF PATRICK MICHAEL GUIDERA DECEASED

Defendant.

GIRVAN J

Introduction

This is an application by Gillian Bingham ("the plaintiff") under the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 ("the 1979 Order"). Patrick Michael Guidera deceased ("the deceased")

died intestate on 9 November 1998 at the age of 57 having been born on 14 October 1941 leaving an estranged widow and one son, the defendant, who is aged 30. The widow was born on 8 September 1934. The plaintiff who had formed a relationship with the deceased in or about 1987 began to live with the deceased in or about April 1989 and they continued to live together as man and wife up until his death on 9 November 1998. The deceased died intestate. The defendant took out a grant of letters of administration to the estate on 27 January 2000.

Under the rules of intestacy the estate falls to be divided between the deceased's widow and her son and the plaintiff receives nothing in the estate of the deceased. It is accepted by the defendant that the deceased failed to make reasonable financial provision for the plaintiff. It is clear from the provisions of article 3(1) of the 1979 Order that a person qualified to make an application under the Order may apply for an order on the grounds that the disposition of the estate effected by the law of intestacy is not such as to make reasonable financial provision for the applicant.

<u>Factual background to the application</u>

The plaintiff and the deceased began to cohabit in April 1989 originally in rented accommodation and from March 1991 in premises at 8 Boltnaconnell Road, Crumlin, County Antrim ("the relevant premises"). The relevant premises were purchased by the defendant in his sole name with the assistance of a mortgage taken out by the deceased in his own name. The plaintiff asserted in evidence and I accept that she made a contribution of

£5,000 towards the original purchase price of the premises which was £64,000. The repayment of the mortgage was made by standing order out of the deceased's own bank account. The plaintiff in evidence stated and I accept that although the mortgage was paid out of the deceased's account parties effectively pooled their income from their joint resources.

The deceased had married Mary Guidera on 30 December 1968. That marriage broke down. The defendant blames the plaintiff for the breakdown, although the plaintiff says and I accept that the marriage had broken down before her relationship with the deceased began. Following the separation of the deceased and the widow the deceased paid the widow a weekly sum for maintenance, initially £50.10 per week and latterly £70.10 per week as from February 1997. The contents of the former matrimonial home were divided equally.

The deceased was a major in the regular army until he retired in or about April 1989. He then took up a position with the Territorial Auxiliary and Volunteer Reserve Association ("TAVRA") in or about May 1989. Following the deceased's death the widow has become entitled to a military pension of some £400 per month, a pension of £132 from TAVRA and an old age pension of £280 per month.

The deceased's estate has a value of some £343,992.90 with the relevant premises being valued at £125,000 with contents of £30,000. The rest of the estate appears to be in largely liquid form comprising life assurance policies, shares and units and some £65,000 in bank and building society accounts.

The plaintiff is a qualified physiotherapist. She is employed by a health trust and earns £1,300 per month. She formerly additionally carried on a private practice in premises belonging to her mother which she renovated for her professional use. She no longer carries on the private practice there, a locum now carrying on the practice and effectively meeting the costs of funding the renovation expenses. In addition the plaintiff earns £1,000 a year in tax free bounty in respect of service in the TA and additionally earns about £1800 per year, subject to tax, as a TA captain.

As a result of the deceased's death the defendant has received £29,000 from the TA funds.

The defendant in his evidence indicated that in or about September 1999 following the death of the deceased the widow and he agreed to purchase a house for the widow. She now resides at 30 Dillon Heights, Armagh and pays the mortgage element of the mortgage which amounts to about £300 per month with the son paying the endowment element which is £150 per month. The house is in joint names and was purchased for £77,000.

The defendant worked for the RUC for some 12 years, but was medically retired following a car accident. He is in receipt of a pension of £960 per month. He asserted that he had a close relationship with his father and alleged that the deceased promised that he would ultimately get the deceased's house. The defendant produced no medical evidence to show that he is unfit to work and he appears to be a relatively fit young man. I was not

satisfied on the evidence that the defendant was as close to his father as he suggested although I do accept that he and his father were on good terms.

Under the rules of intestacy the widow is entitled in addition to the personal chattels to £125,000 free of duties, charges and costs with interest from death and to one half of the residue. The defendant as the surviving issue of the deceased is entitled to the remainder of the estate.

The plaintiff's claim under the 1979 Order

The plaintiff's claim is based on the proposition that she qualifies under article 3(1)(ba) of the 1979 Order as amended by the Succession (Northern Ireland) Order 1996 ("the 1996 Order"), that is to say she is a person who during the period of two years ending immediately before the date of death was living -

(a) in the same household as the deceased; and

(b) as the husband or wife of the deceased.

Although the provision requires that the person should have been living for the qualifying period as husband and wife it clearly refers to persons who were solely together without actually being married. A spouse may bring a claim within article 3(1)(a) and a former spouse within paragraph (b).

The defendant accepts that the plaintiff qualifies under article 3(1)(ba) of the 1979 Order and that the laws of intestacy do not make reasonable provision for her. The real issue in the case accordingly is what reasonable provision should be made for the applicant.

Article 5 of the 1979 Order sets out the matters to which the court must have regard in exercising powers under article 4. These include the financial resources and needs of the applicant presently or in the foreseeable future, the financial resources and financial needs which any other applicant is likely to have, the financial resources and financial needs of any beneficiary of the estate of the deceased, any obligations and responsibilities which the deceased had towards any applicant for an order under article 4 or towards any beneficiary of the estate, the size and nature of the net estate of the deceased and any physical or mental disability of the applicant or any beneficiary. The court is also to have regard is paragraph (g) to 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.

In the case of a person qualifying under article 3(1)(ba) the 1979 Order as amended by the 1986 Order the court must in addition to the matters specifically mentioned in paragraphs (a) to (f) of article 4(1) have regard to:

> "(a) The age of the applicant and the length of the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased; and
>
> (b) The contribution made by the applicant to the welfare of the family of the deceased including any contribution made by looking after the home or caring for the family."

The meaning of reasonable financial provision in the case of an application by a spouse means "such reasonable financial provision as it would be reasonable in all the circumstances of the case for a husband or a

wife to receive whether or not that provision is required for his or her maintenance".

In the case of any other applicant under article 3(1) it means "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive *for his maintenance*" (italics added)

The applicant argues that in her case her entitlement to reasonable financial provision would be satisfied by a transfer to her of the relevant premises and contents and the payment to her of a sum of £10,000 to meet the costs of a new car to replace the deceased's motor vehicle, a Rover 400, which the defendant had removed and sold. The respondent argues that this would go beyond reasonable maintenance in all the circumstances of the case and even if the court were minded to permit the applicant to continue to reside in the premises that could be achieved by granting her a limited nature such as a life estate or a licence to occupy which would ensure that the beneficiaries in the estate would retain an interest in the premises in the long term.

<u>The proper approach to the application</u>

It is necessary to consider the relevant principles to be applied in considering the application as applied before the incorporation of the European Convention on Human Rights ("the Convention") and then to consider the impact, if any, of the Convention on the proper modern approach to the application.

It is clear from the authorities that:

> "The court has no carte blanche to alter the deceased's dispositions or those which the state made of his estate to accord with whatever the court itself might have thought would be sensible if it had been in the deceased's position."
>
> (per Oliver J in *Re Coventry* [1980] Ch 461 at 475)

The issue for the court is whether considered objectively reasonable financial provision was made for the applicant and if not what reasonable financial provision should be made.

The ordinary standard which applies to applicants other than spouses means such financial provision as would be reasonable in the circumstances for her to receive for her maintenance. Under the provisions of the 1960 legislation that was also the standard for surviving spouses but as noted the 1979 Order has widened the scope for reasonable provision in the case of spouses. This change followed changes in the English legislation which had been recommended by the Law Commission in its report No. 61 primarily because restricting spouses applicants to a claim for maintenance could result in a sum being awarded which was considerably less than would be awarded if the marriage had ended in divorce rather than death.

The concept of maintenance, however, is not capable of precise definition. As Goff LJ pointed out in *Re Coventry* [1979] 3 All ER 815 at 819:

> "What is proper maintenance must in all cases depend on all the facts and circumstances of the particular case … but I think it is clear that one must not put too limited a meaning on it; it does not mean just enough to enable a person to get by on the other hand it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare."

In *Re Christie* [1979] 1 All ER 546 the deputy judge of the High Court Vivien Price QC considered that "although reasonable financial provision means provision for the applicant's maintenance that did not imply the applicant had to prove that he was destitute or in financial difficulty. Maintenance referred to the maintenance of the way of life well-being, health and financial security of the applicant and his immediate family." In *Re Coventry* Goff LJ considered that "that case may well have gone too far though it was a strong case." Goff LJ referred with apparent approval to the language of the Canadian court in *Re Duranceau* (1952) 3 DLR 714 at 720 when the court said that the question is "Is the provision sufficient to enable the dependent to live neither luxuriously nor miserably but decently and comfortably according to his or her station in life?"

In the case of an application by a surviving spouse the prevailing approach in England has been to give pre-eminence to the question as to what provision the applicant might reasonably have excepted to receive if on the day that the deceased died the marriage had been terminated by divorce. Thus in *Re Moody* [1992] 2 All ER 542 at 533 Waite J stated that:

> "When stripped to its barest terms the 1975 Act amounts to a direction to the judge to ask himself in surviving spouse cases: what would a family judge have ordered for this couple if divorce instead of death had divided them; what is the effect of any other section 3 (in Northern Ireland article 5) factors of which I have not taken account already in answering that question and what in the light of those two enquiries am I to make of the reasonableness (when viewed objectively) of the dispositions made by the will and/or intestacy?"

This approach was followed in this jurisdiction in *Re Morrow* (1995) NIJB 46 (see in particular the remarks of Campbell J (as he then was) at 51).

Until the changes of the law effected by the 1996 Order and its English equivalent in claims by cohabitants the court was concerned to see whether the deceased was maintaining the defendant In this context the deceased was to be deemed to be maintaining a person if the deceased otherwise than for full consideration made a substantial contribution in money or money's worth to the reasonable needs of that person. When the flow of benefits between an unmarried couple living together as man and wife had been broadly commensurate that would demonstrate that the applicant had given full valuable consideration for the benefit conferred (thus negativing maintenance) but if there had been an obvious imbalance between the benefits because those conferred by the deceased on the applicant outweighed those conferred by the applicant on the deceased that would demonstrate that there had been substantial contribution by the deceased towards the applicant's needs (thus establishing maintenance). In *Bishop –v- Plumely* [1991] 1 All ER 236 the deceased provided a secure home for his partner and the partner provided connubial services. That demonstrated to the court's satisfaction that the deceased had made a substantial contribution towards the needs of the cohabitant for the purposes of the statutory provision. That case demonstrates that at least for the purposes of article 3(2) the provisions of a home can be regarded as maintenance.

The provisions of the 1996 Order give qualifying cohabitants a right to make a claim under the 1979 Order without the necessity of proving that they were being maintained within the meaning of the Order. It was somewhat distasteful to require a cohabitant to prove that he or she was getting back financially from the relationship more than she was putting into it. As Butler Sloss LJ in *Bishop –v- Plumely* [1991] 1 All ER 236 at 242 stated:

> "If a man or a woman living as a man and wife with a partner gives the other extra devoted care and attention particularly when the party is in poor health is she or he to be in a less advantageous position in applications under the Act than one who may be less loving and give less attention?"

The impact of the Convention

The question arises as to effect if at all the Convention and in particular article 8 has on the issues raised in the present case. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in the democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others."

Two other provisions of the Convention are potentially material. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol 1 dealing with the protection of property provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Baker in his Practitioner's Guide to the Human Rights Act suggests that:

> "Discrimination in respect of inheritance rights is likely to give rise to claims under the Convention (see for example *Camp and Bourmimi –v- Netherlands* (1997 HRCD Volume VIII No. 111 page 731, App. No. 28369-95). Domestic laws on inheritance and financial provision contain examples of a difference of treatment between various classes of person, married and unmarried, and between spouses and children. Married and non-married partners are treated differently on a consideration of property division on separation. The use of the constructive or resulting trust will assist unmarried couples in many cases, but the court cannot take into account all of the circumstances of the case as it can in dividing property in divorce under section 25 of the Matrimonial Causes Act 1973 … In some cases differential treatment of married and unmarried persons has been justified by the European Court (eg. *McMichael* (1998) 20 EHRR 205), but such discrimination is increasingly difficult to

> justify and in some cases may violate Article 8, Article 14 and Article 1 of the first protocol. An application has been made against Spain concerning the refusal, following the applicant's separation from her co-habitee to transfer their home which they had shared to her on the ground that such a claim could only arise out of a marriage."

In *Marckx –v- Belgium* 2 EHRR 330 the applicants Paula and her infant daughter Alexandra complained that certain aspects of the illegitimacy laws in Belgium (including the requirement that maternal affiliation could be established only by a formal act of recognition and the existence of limitations on the mother's capacity to give or bequeath and the child's capacity to take or inherit property) infringed article 8 taken in conjunction with article 14 and article 1 of the First Protocol. The Court accepted that article 8 made no distinction between a "legitimate family" and an "illegitimate family". The Court went on at page 342 to state:

> "By proclaiming in paragraph 1 the right to respect for family life, article 8 signifies first that the state cannot interfere with the existence of that right otherwise than in accordance with the strict conditions set out in paragraph 2. As the Court stated in the *Belgian Linguistic Case* the object of the article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in and effective 'respect' for family life.
>
> This means among other things, that when the state determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in the manner calculated to allow those concerned to lead a normal family life. As envisaged by article 8, respect for family life implies in particular in the court's view,

> the existence in domestic law of legal safeguards that render possible as from the moment of birth, the child's integration in its family. In this connection, the state has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of article 8 without there being any call to examine it under paragraph 2."

Rules of succession which come into play following the death of a member of the family on one view do not of themselves prevent those concerned leading a normal family life during their lifetime, a view to which the Commission by a majority subscribed. The Court, however considered that matters of intestate succession and of disposition between near relatives were intimately connected with family life. The Court went on at paragraph 53-55 to state:

> "53. … in the matter of patrimonial rights article 8 in principle leaves to the contracting states the choice of the means calculated to allow everyone to lead a normal family life … and such an entitlement is not indispensable in a pursuit of a normal family life. In consequence, the restrictions which the Belgian civil court places on Alexandra Marckx's inheritance rights on intestacy are not of themselves in conflict with the Convention, that is, if they are considered independently of the reason underlying them. Similar reasoning is to be applied to the question of voluntary dispositions.
>
> 54. On the other hand, the distinction made in these two respects between illegitimate and legitimate children does raise an issue under articles 14 and 8 when they are taken in conjunction.
>
> 55. Until she was adopted (30 October 1974), Alexandra had only a capacity to receive property from Paula Marckx (see paragraph 49 above) that was markedly less than that which a child born in wedlock would have enjoyed. The court considers that this difference of treatment in respect of which the

> Government put forward no special argument, lacks objective and reasonable justification: ….."

In *Johnston –v- Ireland* [1986] 9 EHRR 203 the European Court of Human Rights unanimously upheld the right of Ireland to maintain a constitutional prohibition on divorce and upheld the propriety consequences arising from the unavailability of divorce. In that case a cohabiting couple, one of whom was already married to a third party, alleged violations of articles 8,9,12 and 14 of the Convention as regards their inability to marry, their legal status as co-habitants and the legal status of their illegitimate child. The Court recognised that co-habiting partners and their child constituted a family for the purposes of article 8. They were entitled to its protection notwithstanding the fact that that relationship exists outside marriage. The question was whether an effective respect for the applicant's family life imposed on Ireland a positive obligation to introduce a measure that would permit divorce. The Court held that article 8 could not be regarded as extending to an obligation on its part to introduce measures permitting the divorce and remarriage of the parties which the applicants sought. There had been no failure to respect the family life of the partners.

The applicants in that case further alleged that in violation of article 8 there had been an interference with and lack of respect of family life on account of their status under Irish law. They cited by way of illustration the absence of mutual maintenance obligations and mutual succession rights. The court in paragraph 68 of the judgment pointed out:

> "It is true that certain legislative provisions designed to support family life are not available to the first and second applicants. However, like the Commission, the court does not consider that it is possible to derive from article 8 an obligation on the part of Ireland to establish for unmarried couples a status analogous to that of married couples … Article 8 cannot be interpreted as imposing an obligation to establish a special regime for a particular category of unmarried couples."

In recent years there have been rapid and far reaching changes in society's attitudes and norms in respect of interpersonal adult relationships. While the married state in the past was regarded as the only legitimate form of state sanctioned relationship having legal privileges and consequences and cohabitation was regarded as illicit and socially unacceptable, modern attitudes no longer accept such an approach. The provisions of the 1996 Order give tangible legal expression to this ongoing and developing change of attitude and is a recognition that the law must recognise the reality of modern society. The increase in the number of cohabitional relationships, the decrease in the number of married relationships as a consequence and the increase in the number of both cohabitional and married relationships which individuals may form in a life-time may call for a review of legal norms and practices which presently lag behind societal developments (see generally the comments of the Law Reform Advisory Committee's Report on Matrimonial Property (LRAC No. 8, 2000). In some jurisdictions such as the States within the Commonwealth of Australia the legislatures have made detailed provisions for property and succession rights of parties to de facto relationships. It is not, however, permissible for the courts to pre-empt

legislative change or to determine what policy changes are or may be called for to deal with prevailing circumstances in this field. This is an area par excellence which calls for careful reflection, consultation and democratic debate. The state's margin of appreciation in determining how best to deal with the succession rights of cohabitants as compared to spouses must be fully respected.

While the relationship between spouses and cohabitants share common features the law continues to distinguish between the two statuses and the two cannot be equated either in law or in fact. The Convention itself in article 12 recognises the special status of marriage as a right which the state must uphold. In *Cossey –v- United Kingdom* 13 EHRR 622 at 642 the court stated that it could not be said that there was any general abandonment of the traditional concept of marriage. Since the two relationships differ in law and in fact differential treatment (inter alia) in the field of succession rights can be justified provided that the state's succession law recognises that the cohabitional relationship is a family relationship within article 8 of the Convention and calls for special protection.

The prohibition under article 14 of discrimination on the ground of status and the enjoyment of the rights and freedoms set forth in the Convention does not mean that there can be no distinction drawn between the rights of cohabitants and spouses in succession rights. There is a principle of domestic, community and convention law that comparable

situations call for comparable treatment. Since the relationship of co-habitants and spouses differ differential treatment can be justified.

The provisions of the 1986 Order modifying the 1979 Order in introducing a form of succession law protection for cohabitants represent the legitimate outcome of the balancing exercise which the state must perform in order to comply with article 8 obligations to ensure proper respect to be afforded to the family life of cohabitants.

A further and separate question arises as to whether anything in articles 8 and 14 and article 1 of the First Protocol affects or qualifies the way in which the court should exercise its powers under article 4 of the 1979 Order.

As noted the legislation represents the legitimate proportionate exercise by the state of giving effect to the respect due to the family relationship which exists between the cohabitants. It calls for the exercise of a balanced judgment by the court as to what would represent a fair and reasonable assessment of the financial provision to be made in favour of a person such as the applicant taking account of the circumstances of their relationship. The court in exercising its powers is thus called on to give effect to the proper respect due in respect of the relationship. In carrying out the exercise in the light of all the circumstances it must take account of and protect the rights of the widow and son who also had a family life with the deceased.

Article 8 calls for respect for everyone's home. The relevant premises constituted and still constitute the plaintiff's home, the term "home" being an autonomous concept which does not depend upon classification under domestic law but on the factual circumstances namely the existence of sufficient and continuous links (*Buckley –v- UK* (1996) RJD, 1996 – IV No. 10). In this instance the plaintiff has an equitable interest in the relevant premises at least proportionate to her direct contributions to the purchase price. The evidence falls short of establishing a greater equitable interest by virtue of indirect contributions in the absence of an understanding or arrangement between the applicant and the deceased that her indirect contributions would increase her beneficial interest in the premises. As an equitable tenant-in-common of the premises she is entitled to occupy the property until sale or partition of the premises is effected. Under the provisions of the Partition Acts 1868 to 1876 the personal representative of the deceased would be entitled to bring proceedings for a sale of the property, partition being impractical. Heretofore it was the prevailing view that the jurisdiction to order sale was not of a discretionary nature although in *Ulster Bank –v- Carter* [1999] NI 93 the court left open the question whether the court could decline to make an order in an application by one spouse (or his or her mortgagee) against the other. Article 49 of the Property (Northern Ireland) Order 1997 confers a power on the court to impose a suspension or conditions in the making of an order under the Partition Acts 1868 to 1876. In exercise of that

power now it may be that court must take into account the provisions of article 8 and have regard to the home rights of the party in occupation.

The court must in addition balance the interests of the other co-owner (in this instance the estate of the deceased) who has a right under article 1 of the First Protocol to the peaceful enjoyment of his possessions. Enjoyment of one's possessions would normally imply a right to realise that interest in appropriate circumstances although the property rights of individuals can properly be qualified in the public interest and subject to conditions provided for by law.

There is limited European case law on this aspect of article 8. In *S –v- UK* (1986) 47 DR 274 the lesbian partner of the deceased brought an application alleging a violation of Article 8. The deceased had been a secured tenant of premises under the Housing Act 1980. The applicant and deceased lived together in a relationship equating to that of husband and wife for a number of years before death in the premises. Following the death of the deceased the applicant was required to vacant the premises. She alleged that she and the deceased were in a family relationship and that her interest in the premises at her home was not being respected. The Commission rejected her contention that there was a family relationship considering that a stable homosexual relationship between individuals did not fall within the scope of the right to respect for family life as assured by article 8. The Commission concluded that on the death of the partner under the ordinary law the applicant was no longer entitled to remain in the house and the local

authority was entitled to possession so that the house could no longer be regarded as "home" within the meaning of article 8. The approach of the Commission on the issue of homosexual relationships may require reconsideration in the light of changing attitudes (see for example the comments of Lord Slynn in *Fitzpatrick –v- Sterling Housing Association* [1999] 4 All ER 705. However that may be, Stammer on European Human Rights Law at 579 states:

> "Had the Commission found that a family relationship between the applicant and her partner - a lesbian couple - existed the result might have been different."

In the present case the parties were in a heterosexual relationship and the plaintiff had an equitable interest in the relevant premises. Both those factors clearly distinguish the present case from *S –v- UK*.

The degree of respect which must be afforded to the individual's home under article 8 in a case such as the present must depend on all the circumstances of the case including the rights and interests of the widow and son in the intestacy of the deceased and in respect of their moral claim to a share thereof. In considering the circumstances which are relevant under article 5(1)(g) the court must have regard to the provisions of article 9. Article 9 however does not in itself mean that the plaintiff must succeed in her argument that she should be entitled to the relevant premises or to a particular form of interest therein.

Determination of the application

The following factors, however, lead me to the conclusion that in the balancing of the interest of the parties and taking account of the family relationship between the deceased, the applicant, the widow and the son the court should accede to the applicant's argument that she should be entitled to remain in the dwelling house and enjoy its contents though I do not accept the argument for a further capital sum. Thus:

(a) The parties had a stable long relationship which in all probability would have continued for a lengthy period.

(b) The house was acquired at least in part out of joint resources. The applicant made a direct contribution to its purchase and her contribution to the family finances over the years indirectly assisted in the discharge of the mortgage debt on the premises even if the arrangement did not increase her equitable interest under the prevailing property rules.

(c) The deceased was a relatively young man when he died. He could normally have been expected to have survived for many more years and would doubtless have continued to have lived in the premises with the plaintiff.

(d) The plaintiff contributed in terms of money and emotional commitment to the development and improvement of the premises as a home for herself and the deceased.

(e) The widow and son receive financial benefits from the death of the deceased outside the estate itself. In the case of the widow she receives

pensions and in the case of the son he receives a lump sum. In financial terms of income the widow is now somewhat better off than she was.

(f) The marriage between the plaintiff and the widow was long since over. Taking the house and contents out of the estate leaves the widow with a sum which in fact is greater in all probability (when the pensions are taken into account) than she would have received in a financial settlement on divorce. In a claim by a spouse for financial provision her expectations in a divorce represents prima facie a reasonable level of award under the 1979 Order (see the discussion above). That must be a relevant consideration when balancing the competing claims of the widow and cohabitant.

(g) Having regard to the standard of living of the applicant and the deceased when they lived together and to her present earnings providing the plaintiff with a substantial interest in the house can properly be regarded as appropriate maintenance.

The house and contents together represent a significant part of the estate which will reduce the final amount divisible between the widow and son. It is right that the applicant should have a right to remain in the house as long as she needs to do so and when she moves it is right that she should be in a financial position to buy other suitable accommodation. However if she remains single when she sells the premises it is likely that she will require smaller accommodation. If she forms another relationship, married or unmarried, then the likelihood is that a new partner will contribute to joint resources. In these circumstances I consider that it is right to provide that the

applicant should be entitled to receive the relevant premises for the full interests of the deceased therein but subject to a charge on those premises for the sum of £25,000 (index linked) realisable and payable to the personal representative of the deceased on the happening of the first of any of the following events.

(a) The death of the plaintiff whilst still residing in the relevant premises.

(b) The marriage of the plaintiff.

(c) The commencement of occupation of the relevant premises by another partner of the plaintiff.

(d) The sale or letting of the relevant premises.

The sum of £25,000 shall be index linked and increased on 1 January in each year by the appropriate amount of inflation established by the retail price index. The said sum when paid to the personal representative of the deceased shall be held in trust for the widow during her lifetime with the remainder to the defendant.

Having regard to my decision it is necessary to make consequential directions under article 4(4) in order to achieve fairness between the beneficiaries.

Under section 18 of the Administration of Estates Act (Northern Ireland) 1955 where only part of the estate is left by will the residue is divisible as on a partial intestacy in accordance with section 18. A direction to apply the residue of the estate (after providing for the plaintiff in accordance with the rules of intestacy on current figures would roughly

result in the widow receiving a sum of £154,500 and the son £29,500. Bearing in mind that the defendant has received a lump sum of £29,000 from TAVRA and taking account of my directions in relation to the sum of £25,000 charged on the premises as aforesaid the overall result of a distribution of the balance of the estate as on a partial intestacy achieves broad justice and I so direct.

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