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Judgment: approved by the Court for handing down | *Delivered:* **13/01/09**

*(subject to editorial corrections – the parties are invited to submit any suggested corrections of misprints, inadvertent errors of fact or ambiguities of expression)**

2008 No. 35571

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

IN THE ESTATE OF JAMES DONNELLY (DECEASED)

_____

BETWEEN:

BERNADINE MARY HEGARTY

Plaintiff

-and-

MARY ELIZABETH COLLINS

Defendant

_____

McCLOSKEY J

I INTRODUCTION

[1] This action arises out of the death of James Donnelly (hereinafter "*the deceased*"), on 27th April 2003. The deceased died intestate. In short, the Plaintiff claims to be the daughter of the deceased and seeks relief accordingly.

[2] The protagonists in this matter are:

(a) Bernadine Mary Hegarty – the Plaintiff.

(b) James Donnelly – the deceased.

(c) Mary Elizabeth Collins – the Defendant, a sister of the deceased to whom Letters of Administration of his estate were granted.

(d) Maureen Gormley, now deceased, the Plaintiff's natural mother.

(e) Martina Gaffney, niece of the deceased.

(f) Alice Theresa Callaghan, sister of the deceased.

(g) Francis Joseph Donnelly, brother of the deceased.

[3] The key dates and events are:

(a) 29th October 1961: the Plaintiff's date of birth.

(b) Circa 1972: the occasion of a critical conversation between the Plaintiff and her mother – cf. paragraph [5](a), *infra*.

(c) 1982: the year of the Plaintiff's marriage.

(d) 1993: the year of the Plaintiff's mother's death.

(e) 1994: letter from the Plaintiff to the deceased.

(f) 27th April 2003: death of the deceased, then aged eighty years.

(g) January 2005: conversations and events involving the Plaintiff and Alice Theresa Callaghan, sister of the deceased.

(h) 2006: when the Plaintiff first instructed solicitors.

(i) 21st December 2007: DNA reports – see paragraph [9], *infra*.

(j) 4th April 2008: initiation of these proceedings.

[4] Until May 2008, certain letters were written on the Defendant's behalf by a firm of solicitors, albeit this firm did not enter any Appearance to the Writ. By letter dated 28th May 2008, the firm informed the Plaintiff's solicitors that they no longer had instructions in the matter. The Plaintiff attested to her belief that the Defendant now resides outside Northern Ireland, elsewhere in the United Kingdom. This action has proceeded undefended at all times.

II EVIDENCE AND FINDINGS

[5] The only witness who gave sworn testimony was the Plaintiff. She was a demonstrably candid and truthful witness who has satisfied me, on the balance of probabilities, of the following factual matters:

(a) When she was aged approximately eleven years, she was informed by her mother that the deceased (then aged around fifty years) was her father.

(b) The Plaintiff has had a strong lifetime friendship with Martina Gaffney, niece of the deceased.

(c) During her childhood, the Plaintiff knew who the deceased was: they lived some few miles apart and coincided a few times in the local shop, albeit without any conversation.

(d) Around 1994, the Plaintiff wrote to the deceased, asking him to confirm that he was her father. In her own words, she stated in her letter that she "*just wanted to know*" and said that if he were to decline to respond in writing, she would find this understandable. The letter also made clear that she was writing without any ulterior motive. Within the letter she disclosed her address and telephone number.

(e) Approximately two weeks before the death of the deceased, his niece, Martina Gaffney, telephoned the Plaintiff and informed her that her uncle had suffered a stroke. She stated that she would keep the Plaintiff advised of his progress and she duly did so.

(f) Around January 2005, Alice Theresa Callaghan, sister of the deceased, approached the Plaintiff. This occurred in a supermarket. She stated that she had not known that the deceased was the Plaintiff's father and that if she had known this, "*things would have been different*". She further indicated that she had learned this from Martina Gaffney.

(g) One week later, in the same supermarket, Ms Callaghan gave the Plaintiff an envelope. The Plaintiff discovered that this contained £500 in cash. The Plaintiff attempted to return the money, but Ms Callaghan retorted that she felt the Plaintiff was owed it.

(h) Some time after the death, Ms Callaghan sent the Plaintiff a memorial card relating to the death of the deceased.

(i) Some three years after the death of the deceased, Martina Gaffney informed the Plaintiff that two of the deceased's sisters and one brother

were claiming the deceased's land, which consisted of an unoccupied house and farmlands. In the Plaintiff's words, if the deceased had made no will she "*was entitled to it as much as them*". This was what precipitated her decision to seek legal advice.

[6] The Plaintiff's Birth Certificate, which was proved in evidence, records that she was born on 29th October 1961 and that her mother was Bridget Mary Gormley. Provision is made in the Certificate for particulars of the name, surname, dwelling place and occupation of the father. None of these particulars is included.

[7] The Grant of Letters of Administration to the Defendant was made on 30th August 2005 out of the Probate and Matrimonial Office of the High Court of Justice in Northern Ireland, Family Division. Thus there was a representation, which must have been accepted, to the effect that the Defendant was the personal representative of the intestate deceased. The Certificate recites that the gross value of the estate of the deceased does not exceed £180,000.

[8] The Plaintiff also relied on certain DNA evidence. This consisted of two reports, both dated 21st December 2007, provided by Orchid Cellmark Limited of Abingdon, England. These reports were exhibited to an affidavit sworn by Melanie Beard, who describes herself as the Assistant Team Leader in the organisation. The court permitted the evidence to be adduced in this way in the exercise of its power under Order 38, Rule 2(1) of the Rules of the Supreme Court, which provides that "*…the affidavit of any witness may be read at the trial if in the circumstances of the case* [the court] *thinks it reasonable so to order.*" I considered it reasonable to thus order, for the following reasons:

(a) The evidence in question, contained in the affidavit and accompanying reports, in tandem, is set out in full, comprehensible and cogent terms.

(b) In correspondence with the solicitors previously representing the Defendant, the Plaintiff's willingness to submit to DNA testing on the Defendant's behalf had been clearly expressed. However, the Defendant did not take up the Plaintiff's offer. Thus the evidence appeared to be uncontroversial, *inter-partes*.

(c) Having regard to the nature of this litigation and the case made by the Plaintiff in support of her claim for relief, it would be a disproportionate expense to require the attendance of an English based expert for the sole purpose of proving two scientific reports which have the characteristics noted above, give rise to no concerns on the part of the court and contain no ambiguities or unexplained complexities, in circumstances where the witness would not be cross-examined on behalf of the Defendant.

[9] The first Cellmark report contains the following material passages:

> "***This report provides evidence that Francis Joseph Donnelly is the biological uncle of Bernadine Mary Hegarty ...***
>
> ***Combined Avuncular Index = 44***
>
> *The results are forty-four times more likely if Francis Joseph Donnelly is the biological uncle of Bernadine Mary Hegarty than if they are unrelated …*
>
> *Please note that this relationship analysis is not as conclusive as testing both parents against their alleged child*".

The second report, of the same date, concerns Alice Theresa Callaghan. It contains the following material passages:

> "***This report provides evidence that Alice Theresa Callaghan is the biological aunt of Bernadine Mary Hegarty.***
>
> ***Combined Avuncular Index = 230***
>
> *The results are two hundred and thirty times more likely if Alice Theresa Callaghan is the biological aunt of Bernadine Mary Hegarty than if they are unrelated …*
>
> *Please note that this relationship analysis is not as conclusive as testing both parents against their alleged child*".

The reports further document that the DNA samples on which they are based were taken from the subjects (Francis Donnelly and Alice Callaghan) by a "*suitably qualified sampler*".

[10] In the affidavit of Melanie Beard, it is averred:

> "*As can be seen from the reports there is moderately strong evidence that the Plaintiff is the biological niece of Alice Theresa Callaghan. There is moderate evidence that the Plaintiff is the niece of Francis Joseph Donnelly*".

The affidavit further confirms that the DNA testing was conducted in accordance with standard protocols and, further, that the organisation has the relevant Quality Standards accreditation.

[11] The central fact which the Plaintiff seeks to prove in this action is that the deceased is her biological father. I am satisfied on the basis of the findings recited in paragraph [5] above that the Plaintiff has discharged this onus, on the balance of

probabilities. I find accordingly. This finding would have been made in the absence of the scientific evidence. It is duly fortified by this further evidence.

III DISPOSAL

[12] Article 11 of the Administration of Estates (Northern Ireland) Order 1979 ("*the 1979 Order*") empowers the court to revoke a grant of administration. It provides:

> "*(1) The High Court has power*
>
> *(a) to recall any grant;*
>
> *(b) to revoke any grant.*
>
> *(2) Without prejudice to paragraph (1), where it appears to the High Court that a grant either ought not to have been made or contains an error, the High Court may call in the grant and, if satisfied that it would be revoked at the instance of a party interested, may revoke it.*
>
> *(3) A grant may be revoked under paragraph (2) without being called in, if it cannot be called in.*"

In ***Succession Law in Northern Ireland*** (Grattan), it is suggested that the power enshrined in Article 11(1) is designed to be exercised where the grant has been made to a person not truly entitled to it: see paragraph 11.102.

[13] Article 4 of the 1979 Order provides:

> "*(1) The High Court has power –*
>
> *(a) to grant probate of the will of a deceased person to one or more of his executors and*
>
> *(b)* ***to grant administration of the estate of a deceased person, or of any part of his estate, to such person as the High Court may determine in accordance with Rules of Court***".

[Emphasis added].

The corresponding Rules of Court are contained in Order 97 of the Rules of the Supreme Court. Rule 20 makes provision for the granting of administration of the estate of a person who dies intestate and domiciled in Northern Ireland. The Rule provides that certain persons, in a specified order of priority, "*shall be entitled to*" a grant of administration. First priority is given to the surviving spouse or civil partner of the deceased. This is followed by three remaining categories, in

descending order. The next category is constituted by *the children of the deceased*. The fourth and final category is constituted by brothers and sisters of the deceased. Thus, in the context of the present litigation, the Plaintiff, in light of the finding in paragraph [11] above, has priority over the existing grantee, the Defendant, who is a sister of the deceased.

[14] The two primary forms of relief claimed in the specially endorsed Writ of Summons are:

(i) Revocation of the grant dated 30th August 2005 to the Defendant, pursuant to Article 11 of the 1979 Order.

(ii) A Grant of Letters of Administration to the Plaintiff, pursuant to Article 4 of the 1979 Order and Order 97 of the Rules of the Supreme Court.

Having regard to the findings contained in this judgment, I am satisfied that the Plaintiff is entitled to both forms of relief and I order accordingly.

Costs

[15] It was candidly acknowledged by Mr. Dunlop, on behalf of the Plaintiff, that the Defendant, in extracting the Grant of Administration, did not act culpably or otherwise improperly. There is, clearly, no evidence to this effect. Accordingly, an order for costs against the Defendant would be inappropriate. Further, it would seem pointless to order that the costs be borne by the estate, given the relief which the Plaintiff has secured from the court. Accordingly, there will be no order as to costs.