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| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29/06/2021** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**IN THE MATTER OF THE ESTATE OF MARY TERESA TONER (DECEASED)**

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**Between:**

**KATHRYN FRANCES THOMSON AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY TERESA TONER (DECEASED)**

**Plaintiff**

**and**

**JAMES McCUSKER**

**Defendant**

_____

**Sheena Grattan (instructed by Mackenzie & Dorman Solicitors) for the Plaintiff**
**William Gowdy QC (instructed by King & Gowdy) for the Defendant**

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**HUMPHREYS J**

**Introduction**

[1] Mary Teresa Toner, known as Maureen, died on 27 September 2017 leaving as her last Will a statutory will executed on 22 February 2013 ('the Will). On 3 July 2019 Letters of Administration with Will annexed were granted to the plaintiff.

[2] By an originating summons issued on 22 July 2020 the plaintiff has sought the directions of the court in relation to the distribution of the estate; in particular, an issue has arisen as to the correct treatment of a series of pecuniary legacies.

[3] In January 2021 the defendant applied to be joined to the proceedings in order to represent the interests of all beneficiaries who would be entitled in the event of intestacy.

[4] The court wishes to record its gratitude to the Counsel and Solicitors for the quality of the written and oral submissions received, and for the manner in which the litigation was conducted.

**The Will**

[5] By her Will the deceased bequeathed a number of pecuniary legacies of sums between £5,000 and £30,000. A number of the pecuniary legatees predeceased the deceased. The legacies to those who survived the deceased amount to £260,000.

[6] The residue of the estate was left ¼ to the plaintiff, ¼ to Claire Barr and ½ to Margaret Gibney. Mrs Gibney, who was the deceased's sister-in-law predeceased the deceased and therefore her ½ share of the residuary estate lapsed to partial intestacy.

[7] The deceased's next of kin within the meaning of Part II of the Administration of Estates Act (Northern Ireland) 1955 ('the 1955 Act') at the date of her death were the issue of her siblings. The defendant, James McCusker, is the son of the deceased's brother James McCusker (also deceased).

[8] Ms Hutchinson, the solicitor having carriage of the administration of the estate, raised her concern as to whether the pecuniary legacies were properly payable out of the portion of the estate which passes by virtue of the intestacy rules or whether they are properly split across the entirety of the residuary estate. As will be seen, this is an issue which has given rise to considerable uncertainty and Ms Hutchinson was entirely justified in bringing the matter to the court for determination.

[9] The question at hand is not only of academic interest to practitioners in the field but it also, in this case, has a significant effect on the entitlement of the residuary beneficiaries. Each of the plaintiff and Clare Barr would receive £65,000 more in the event that the pecuniary legacies are payable out of the intestate estate.

[10] Prior to 1956, any pecuniary legacy was satisfied out of a testator's general personal estate. It mattered not whether there was a lapse of any gift of personalty which caused partial intestacy – the legacy was payable out of the whole of the residuary personalty. Generally, the pecuniary legatee had no right to be paid out of any part of the real estate.

**The Statutory Scheme**

[11] The 1955 Act was passed as legislation to, *inter alia*, amend the law in relation to the administration of the estates of deceased persons. Section 1 caused an assimilation of real and personal estate. From 1 January 1956, the commencement of the Act, real estate to which a deceased person was entitled devolved to personal

representatives and was distributed to beneficiaries in like manner to personal estate. Section 2(5) states:

> *"In the administration of the assets of a deceased person, his real estate shall be administered, subject to and in accordance with the provisions of Part IV, in the same manner and with the same incidents as if it were personal estate."*

[12] Section 6 of the 1955 Act provides that:

> *"All estate to which a deceased person was entitled for an estate or interest not ceasing on his death and as to which he dies intestate after the commencement of this Act shall, after payment of all debts, duties and expenses properly payable thereout, be distributed in accordance with this Part"*

[13] By virtue of section 30(3):

> *"Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the first schedule."*

[14] Part II to the first schedule sets out the order of application of assets in the case of a solvent estate as follows:

> *"1. Property of the deceased person undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.*
>
> *2. Property of the deceased person not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.*
>
> *3. Property of the deceased person specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.*
>
> *4. Property of the deceased person charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for, the payment of debts.*

*5. The fund, if any, retained to meet pecuniary legacies.*

*6. Property specifically devised or bequeathed, rateably according to value.*

*7. Property appointed by will under a general power, rateably according to value.*

*8. The following provisions shall also apply –*

*(a) The order of application may be varied by the will of the deceased."*

[15] The issue for determination, therefore, is whether, as a matter of statutory construction, the property of the deceased undisposed of by a will should be applied in the first instance to the payment of the pecuniary legacies. The parties agree that this asset class should be applied to meet the funeral, testamentary and administration expenses, debts and liabilities of the estate but disagree as to whether this extends to pecuniary legacies.

[16] There is no judicial authority on this question in Northern Ireland although the matter has given rise to some conflicting and confusing case law in England & Wales. Before considering some of these authorities, it is necessary to recognise the differences in the legislative arrangements which apply in that jurisdiction.

**The English Legislation**

[17] The Administration of Estates Act 1925 ('the 1925 Act') in England & Wales was part of the Lord Birkenhead reforms. The Northern Irish statute is similar but there are significant differences. The 1925 Act creates a statutory trust for sale by virtue of section 33(1), as originally enacted:

*"(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives –*

*(a) as to the real estate upon trust to sell the same; and*

*(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money,*

*with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also*

*that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason.*"

[18] This section was amended by the Trusts of Land and Appointment of Trustees Act 1996 which abolished the doctrine of conversion and it now provides:

> *"On the death of a person intestate as to any real or personal estate, that estate shall be held in trust by his personal representatives with the power to sell it."*

[19] Section 33(2) provides:

> "*(2) The personal representatives shall pay out of—*
>
> *(a) the ready money of the deceased (so far as not disposed of by his will, if any); and*
>
> *(b) any net money arising from disposing of any other part of his estate (after payment of costs),*
>
> *All such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."*

[20] There is not, and never has been, an equivalent provision in Northern Ireland to section 33. A personal representative in England & Wales will hold the property as to which the deceased person has died intestate on trust for sale. He is then directed to pay out the funeral, testamentary and administration expenses, debts and other liabilities and then to set aside a fund sufficient to pay the pecuniary legacies.

[21] Section 34(3) of the 1925 Act is in identical terms to section 30(3) of the 1955 Act, as is Part II of the first schedule to each Act.

**The Caselaw**

[22] There is only one decision of the Court of Appeal in England & Wales on this question – *Re Worthington* [1933] 1 Ch 771. In that case, a statutory trust for sale arose and it was held that the pecuniary legacies, as well as the debts and expenses, were payable out of the lapsed share of the residue. In reaching this conclusion, the court relied both on section 33 and section 34(3). In the absence of any contrary intention appearing from the will, it was held that the same order of administration

applied to both legacies and debts. The difficulty with the analysis of the court is that, on one view, there was no purpose in referring to section 34 and part II of the first schedule since the position is governed entirely by section 33 when a statutory trust for sale arises.

[23] In a first instance decision some three years later, *Re Thompson* [1936] 1 Ch. 676, the will created an express trust and therefore section 33 did not operate. The court was concerned solely with section 34(3) and the related provisions of the first schedule. Clauson J held:

> *"The provision is concerned with the way in which funeral testamentary and administration expenses, debts and liabilities are to be met. There is no indication that there is any intention of altering the law in respect of the rights of legatees…or in respect of the rights inter se of those interested in the residuary realty and personalty respectively, as regards bearing the charge of legacies, and I can see no foundation for the suggestion that that provision has in any way altered the law…"*

[24] It is notable that *Re Worthington* does not seem to have been cited to Clauson J. The confused picture developing through the authorities is well illustrated by two decisions of Danckwerts J, *Re Beaumont* [1950] 1 Ch. 462 and *Re Martin* [1955] 1 All ER 865. In the former case he held that section 34 made no provision in respect of pecuniary legacies and therefore the pre-1926 law applied and they were payable out of the whole residuary estate. This was also a case where section 33 had no application since there was an express trust in the will. However, he arrived at a different conclusion in the latter case when finding that the legacies were payable out of the undisposed-of property. His reasoning, which is not altogether easy to follow, for the distinction was that in *Re Martin* there was an intestacy of a particular asset whilst in *Re Beaumont* there was an intestacy of a share of the fund, and in the latter there was an express trust for sale but not in the former. It is not apparent why either of these should give rise to a different outcome.

[25] In the same year as *Re Martin*, Harman J held in *Re Midgley* [1955] 3 WLR 119 that pecuniary legacies were payable out of the undisposed of estate. There was an express trust for sale and therefore section 33 had no application. The learned judge noted the obligation, arising under paragraph 1 of part II to the first schedule to retain out of the undisposed property a fund sufficient to meet any pecuniary legacies. The debts, expenses and liabilities are then paid out of the rest of the property undisposed of. In the view of Harman J the retained fund must then be used to pay the pecuniary legacies although he did recognise that this represented a *"tortuous way of legislating."* It is apparent that these various first instance decisions are irreconcilable.

[26] The authorities were reviewed by Salt QC Ch, the Chancellor of the County Palatine of Durham, in *Re Taylor* [1969] 2 Ch. 245. He concluded that there was

nothing in the 1925 Act to throw the burden of the pecuniary legacies on the undisposed of share of the residue and therefore they should be paid out of the whole of the residuary estate. The learned Chancellor found that it was not permissible to read the words *"and pecuniary legacies"* into section 34(3) without doing *"violence to the Act."* He was able, however, to read the words *"where appropriate"* or *"at the discretion of the personal representatives"* into part II of the first schedule in order to make it clear that the retention of such a fund is not mandatory (unlike the position prevailing under section 33(2)). He was bolstered in this finding by paragraph 5 and its use of the words *"if any"* in relation to the fund retained.

[27] Following *Re Taylor*, the state of the authorities in England & Wales, whilst not entirely settled, appears to be that where section 33 applies, pecuniary legacies are borne in the first instance by the property undisposed of by will. Where section 33 does not apply, they are paid out of the whole of the residuary estate. In the opinion of the learned editors of Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (at [1310]):

> *"it is considered that this is the correct view, and that s.34(3) should not be used to effect, by a side-wind, a radical change in the existing rules on a question on which it neither purported nor was intended to legislate"*

**An Australian Perspective**

[28] To an extent, this view is followed by the Australian authorities. In *Re Selby* [1952] VLR 273, Smith J stated:

> *"Section 34 purports to deal only with the order of application of assets for payment of expenses, debts and liabilities; and it would be odd to find in a schedule to such a section a provision operating of its own force to alter the order of application for payment of legacies"*

[29] Similarly, in *Re Berry* [1954] VLR 557, Dean J held:

> *"Where section 33 applies, the undisposed of property is charged with the payment of legacies, a direction which is ample to support the decisions in Re Worthington and Re Lawlor. The basis for a similar decision disappears in a case like the present where section 33 is not applicable. I have accordingly come to the conclusion that I am not bound by Re Worthington and Re Lawlor and am free to give to section 34 and the Schedule the operation which on their construction I think should be given to them, namely that they deal with the order in which assets are to be applied to pay debts and expenses and do not deal with the incidence of legacies as between the residuary estate and undisposed of property"*

[30] It should be recognised, however, that the opposite conclusion was reached by Roper CJ in New South Wales in *Re Foley* [1952] 53 SR (NSW) 31, when interpreting the equivalent statutory provisions in that state. He held that the terms of the schedule were sufficient to change the law as to the incident of payment of legacies, and that these were payable out of the undisposed of property.

**The Law in Northern Ireland**

[31] The proper interpretation of the provisions of the 1955 Act has not previously been the subject of judicial interpretation in this jurisdiction. The court must therefore approach the matter as a question of statutory construction, with the benefit of full argument and consideration of the various authorities from other jurisdictions.

[32] It is, of course, well recognised that courts in Northern Ireland will treat decisions of the Court of Appeal in England & Wales as being strongly persuasive and will follow them unless there is good reason not to do so – see, for example, *Beaufort Developments –v- Gilbert Ash* [1997] NI 42. However, the 1955 Act differs from the 1925 legislation in important respects including the absence of any equivalent of section 33.

[33] I start from the uncontroversial proposition that I should give the words of a statute their plain and ordinary meaning. Section 30(3) to the 1955 Act says nothing about the payment of pecuniary legacies and it certainly does not purport to change the pre-1956 law in relation to the payment thereof, unless the word "*liabilities*" can be construed as including pecuniary legacies. Such a construction is, however, untenable. The liabilities of an estate are the legal obligations owed to third parties, claims which would be enforceable against the estate, and which are payable out of the gross estate. Legacies are a matter of distribution of the net estate and cannot properly be recognised as liabilities.

[34] The only way in which such a change could have been effected, therefore, is by operation of the words in part II to the first schedule. In *Inland Revenue Commissioners v Gittus* [1920] 1 KB 563, Lord Sterndale MR commented:

> *"It seems to me there are two principles or rules of interpretation which ought to be applied to the combination of Act and schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the schedule as though the schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the schedule words and terms that*

> *go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the schedule or by the purpose mentioned in the Act for which the schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act."*

[35] The purpose of Part II to the first schedule, as indicated by section 30(3), is to set out how the estate is applied in discharge of "*the funeral, testamentary and administration expenses, debts and liabilities.*" The question therefore is whether the words of the schedule themselves go clearly outside that purpose and define how the estate is to be applied for the payment of pecuniary legacies.

[36] Paragraphs 1 and 2 of part II to the first schedule both speak of "*the retention out of such property of a fund sufficient to meet any pecuniary legacies*" but do not impose an obligation to pay such legacies out of that fund. Paragraph 5 refers to "*the fund, if any, retained to meet pecuniary legacies.*" What is the purpose of the retention of this fund, if not to pay the legacies? Dean J explained it thus in *Re Berry*:

> "*So far as the application of the assets of the deceased towards the payment of expenses and debts is concerned, the present case presents no difficulty. The legacy fund is taken in the first instance from undisposed of property, including an undisposed of share of the residue. If this exhausts the undisposed of property, or if insufficient remains for the discharge of expenses and debts, other property is then applied for this purpose in accordance with the order in the Schedule including in its place, if necessary, the legacy fund. But if the undisposed of property is sufficient to meet the expenses and debts and also the legacies, there is no need to set aside a legacy fund out of such property in order to meet such expenses and debts. As the purposes for which the legacy fund is to be retained no longer applies in such a case, there is no need to retain the fund…*"

[37] On this analysis, the purpose of the retention of the legacy fund is not for the payment of such legacies but to ensure the proper priority of legacies as against other property for the payment of debts.

[38] This approach chimes with the views of the editors of Williams, Sunnocks and Mortimer. It also avoids "*doing violence to the Act*" as cautioned against by Salt QC ,Ch in *Re Taylor* and the "*tortuous way of legislating*" alluded to by Harman J in *Re Midgley*.

[39] I have therefore concluded that the 1955 Act provides that payment of pecuniary legacies lies on the residue of the estate as a whole, not on the lapsed

share. This follows as a matter of statutory construction since the words of the schedule do not go outside the purpose laid down by section 30(3).

[40] I am conscious that the outcome of this case would be different if the administration of this estate were being conducted in England & Wales. In that scenario, given that there is a partial intestacy and no express trust, section 33(2) of the 1925 Act would have been in play and the pecuniary legacies therefore payable from the lapsed share, in accordance with *Re Worthington*. However, the Northern Irish legislature, passing the 1955 Act some 30 years after the English equivalent, made a conscious decision not to include section 33 with its clear provision throwing the incidence of pecuniary legacies onto the undisposed of property. The role of this court is limited to the interpretation of section 30(3) to the 1955 Act and the related schedule and, for the reasons I have set out, a different outcome pertains.

[41] It must also be acknowledged that the conclusion which I have reached is at odds with the analysis of William Leitch whose Handbook on the Administration of Estates Act (Northern Ireland) 1955 was published in 1968. His view was the statutory order in Part II of the first schedule does apply to pecuniary legacies. This conclusion was influenced by the fact that one of the principal objectives of the 1955 Act was to effect assimilation between real and personal estate in Northern Ireland, as enacted by section 2(5).

[42] This principle of assimilation led Mr Leitch to the view that residuary realty and residuary personalty must be administered in the same way and that both must be available for the payment of debts and legacies. This opinion is not in the slightest controversial in light of the express statutory words. However, it does not mean that pecuniary legacies ought to be paid out of property undisposed of by will rather than the entirety of the residue. On the contrary, it simply means that there is no distinction between realty and personalty when one is identifying the property in the residue available to pay the legacies. In the instant case, I note that there is no realty in the residuary estate but this does not detract from my findings on the question of statutory construction.

**Conclusion**

[43] The court therefore directs that the personal representative distributes the deceased's estate in accordance with the court's finding that the pecuniary legacies should be paid out of the whole residue of the estate.

[44] I order that the costs of both parties be paid out of the deceased's estate, such costs to be taxed in default of agreement.