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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* ***11/12/2007***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

RE: KATHLEEN McKERNAN DECEASED

BETWEEN:

MARY McKERNAN

Plaintiff;

v

DERMOT McKERNAN and
SEAN McKERNAN
(Personal Representatives of the Estate of Kathleen McKernan, Deceased)

Defendants.

DEENY J

[1] The plaintiff brought these proceedings pursuant to Articles 3(1) and 4 of the Inheritance (Provision for Family and Dependants) (NI) Order 1979 on the ground that reasonable financial provision had not been made for her out of estate of her deceased mother, Kathleen McKernan. Mr Rory McNamee appeared for the plaintiff and Mr Stephen Elliott appeared for Sean McKernan. Dermot McKernan had renounced his role as an executor under the will of his late mother. He took no part in these proceedings as either party or witness.

[2] The plaintiff was born on 18 June 1956. She is the third child of the deceased. Her elder brothers are Dermot and Francis McKernan who currently reside with her at 257 Camlough Road, Pomeroy, County Tyrone. The defendant is her younger brother who is now 38 years of age. Their father died on 10 November 1985, intestate. His personal representatives joined in the family farm at the above address, of approximately 30 acres, being registered in the name of Kathleen McKernan.

[3] Counsel had helpfully agreed a short statement of facts. This followed a short chronology prepared by the plaintiff. Furthermore a bundle of documents was put before the court on an agreed basis. The plaintiff was called to give evidence as was her general practitioner Dr Robert H Wray. The only evidence for the defendant was his own. The following summary of the facts is as found by me from the oral and documentary evidence.

[4] The plaintiff does not seem to have ever achieved a sustained permanent job over her lifetime but she did frequently work in either part time or short term jobs. She resided at home ("257") with her parents and her brothers until about 1985. She paid one short visit to the United States. Whether that was as an au pair as her brother said in evidence or for a holiday is something I need not resolve. It is agreed that in 1985 she took a flat in the town of Cookstown, about 9 miles away, which is the nearest town to the plaintiff's farm. She lived there for the next 9 years having a variety of jobs of a cleaning or catering kind, mostly it would seem, part time. She also, over the years, engaged in a number of courses in the local technical college including courses in English, catering and Indian head massage.

[5] In 1994 she gave up the flat in Cookstown. She said that she had always kept her bedroom at 257 and regarded that as her home. About the same time her brother Sean married and left that house for rented accommodation. I will turn to him in further detail later on. The plaintiff has lived ever since at 257. There were considerable differences between the plaintiff and defendant on affidavit which narrowed somewhat when their evidence was heard. One matter in dispute to which I will return later is whether the plaintiff was the main cook and housekeeper for her mother and her brothers and herself over this period or whether, on the contrary, as the defendant alleged, she was of extremely limited use to her mother.

[6] In May 2002 there was a visit to 257 by the defendant and two of his sons; a third has been born since. These were little boys of approximately 4 and 1 at the time. The plaintiff, either deliberately or accidentally, shoved against the younger of the children as she was coming through a door causing him to fall on to the ground. The defendant saw this, jumped up, put his son on a chair and then hit the plaintiff. According to her he punched her twice in the head but according to him he slapped her once on the back of the head. Although the police were called no prosecution followed. The plaintiff's mother had some sight of this incident and certainly saw her son hit her daughter. It seems to me inherently unlikely that the defendant punched his adult sister twice in the head in front of these small children and his mother. He was not boastful of having hit her although not repentant either as he felt she had provoked him. I accept that whatever was done was done in the heat of the moment. That he paused to pick up the boy does not vitiate that. I was inclined further, to prefer the evidence of Sean over Mary in their description of

the incident. Thirdly there are two notes of the general practitioner referring to this incident on 7 May 2002 and 14 May 2002 which refer to her being hit on the top of her head. I feel that if she was punched twice it is likely that that would have been said. It also seems more likely that the police would have prosecuted if the plaintiff was correct in her allegations although less weight is placed on that point than the previous three points.

[7] It is necessary to address that incident in this way because the plaintiff put considerable stress on it. Her evidence was that while she had been of considerable help to her mother from 1994 until then this event destroyed her life. She repeatedly referred to it in her evidence. Thereafter she was incapable of helping her mother. But the evidence of Dr Wray and the plaintiff's notes and records from the four doctor practice did not bear that out. Going back for some 20 years she had intermittently complained of anxiety and depression. It seemed to me looking at her records that even if she wasn't seen by the doctors more than anyone else she certainly seems to have been in contact with the surgery very frequently with a wide variety of complaints and often seeking treatment or advice about a range of matters. I readily accept that she was upset by the incident with her brother and that this did have a damaging effect on what was an already tense and fractious relationship. It is the case that the defendant Sean is the only one of the four children to have held down a steady full time job in life or married or had children. One could readily see that his next eldest sibling might well resent his relative success and the affection with which he seems to have been held by the mother. But her blaming of all her troubles on the incident where her brother slapped her is not borne out by the records. There is a paucity of any complaints about an alleged head injury or headaches between May 2002 and May 2005 when her mother died. She was, it is true, sent because of her complaints to the Mid Ulster Hospital for a CT brain scan but this was on 12 December 2005, 3 ½ years after the incident with the child and, significantly, months after the death of her mother. Happily the scan proved normal. She was considered unfit for work for some months in 2005 but thereafter was receiving income support rather than incapacity benefit. Oddly enough this changed in the course of the short hearing. I asked her to bring a letter setting out her benefit details to the court on the second day of hearing and she returned with a letter from the authorities, received that day, saying that she had been found to suffer from an incapacity for work and would now receive benefit of £61.00 a week under that heading and would cease to receive income support. This bore out her claim that she had been unfit for work in recent months. However I accept the evidence of Dr Wray that he and his colleagues had considered her fit for work for all but short periods in recent years.

[8] It is appropriate at this time to say something of the plaintiff's brothers. Her elder brother Dermot who is aged 59 had always lived at home and does so now. In his mother's lifetime he kept some cattle on the lands. About 30% of the land is arable with the rest largely bog or wet ground, said Sean

McKernan. Even the arable land is in poor heart and needs investment. Dermot grazed cattle on the land with his mother and calves would be sold each year. However although Dermot was left the stock after his mother's death and continues to graze them he has not actually bought or sold any cattle since May 2005. This would be part of a somewhat reclusive and depressed personality, it is agreed between the parties. His brother Francis is in his mid 50s and suffers from an illness. The plaintiff seemed a little sceptical about the diagnosis which was stated to me from the bar. However the fact of the matter is that he is in long term receipt of benefits for this illness which are sufficient to allow him to keep a car which, unlike his brother and sister, he is able to drive. Sean, as already mentioned, was the only sibling to marry. He has three sons aged 9, 6 and 3. He is in regular employment as an electrician earning £28,000 a year. In addition his wife is an administrative assistant in local government earning about £10,000 a year.

[9] He is clearly an active and hard working man. Following his father's death his mother gave to him a site of 1 acre about 1 minute's walk from 257 which is now known as 257a. On that site he built himself a house in the 18 months after his marriage. He now lives there with his family. Furthermore at some point between 1999 and 2003, probably the earlier, he persuaded his mother to apply for planning permission for a replacement dwelling for a derelict house on the farm close to the road and a further minute beyond his bungalow. This was obtained as was a Housing Executive grant. With this grant and a loan of £5,800 from Sean to his mother, which was evidenced in writing, the derelict house was demolished and a new bungalow built in its place. This is 255 Camlough Road. The subsequent history of that dwelling can be briefly stated. It has been let and not lived in by any member of the family although apparently that possibility was mentioned for both the deceased and the plaintiff. It is currently leased by a single mother, with her child, on foot of an agreement dated 22 September 2006. Mr McNamee cross examined Mr McKernan pointing out that his solicitors, or their predecessors, had written in August and September of 2006 threatening proceedings on behalf of Mary. Mr McKernan admitted that he had not gone back to his solicitor following those letters before entering into the lease with the lady who occupies the house. The lease is for 5 years. I find, on the balance of probabilities, that Mr McKernan did enter into a lease of that duration with the intention of seeking to frustrate his sister from moving or being moved into 255 as an option. The rent of £300 per month goes to Sean who uses it to support his mortgage and for the maintenance of that house and his own house. He has mortgage payments of £750 per month which he says is on a mortgage in excess of £140,000. Those figures might seem possibly inconsistent but he says that he has recently remortgaged the property and is close to the beginning of a 25 year term.

[10] It is against that context that Kathleen McKernan, who had suffered from osteoporosis for some time, developed cancer. She seems to have gone

into hospital with regard to that in April 2005. On the advice of the doctor and their priest the defendant asked Mr Brian McMahon of Messrs Doris & McMahon, solicitors, of Cookstown to visit his mother in hospital. He did so on 11 May 2005 and she made a Will on that occasion. Mr McMahon kept an attendance note which, although short, is helpful. He established the lady's address and her status as a widow and that she had four children who were named and their martial status. There was a brief description of the lands and her intentions which were then included in the Will. Briefly the terms of the Will were that she left her stock to her eldest son Dermot and devised the residue of her property of what ever nature to her sons and executors Dermot and Sean subject only to two things. Her son Francis was entitled to reside in the dwelling house at 257 Camlough Road for his lifetime. Her daughter Mary, the plaintiff, however was only given a right to reside in the same dwelling house for a period of six months (itself amended from three months initially). Mr McMahon recorded on his note:

> "You say that Mary has caused trouble in our house – particularly with Sean. There will be no peace if she stays at 257 – even though it is away from Sean's. Time for her to look after herself."

Having noted this and related matters Mr McMahon recorded:

> "BMM suggested legacy – Mrs McK said there wasn't much money about and that she had looked after Mary well in earlier years with money for trips, clothes, etc."

[11] There is no suggestion that the lady's mind was adversely affected at the time of this Will. Her son Sean was in the hospital but not in the room at the time, he said. I think it unlikely that a respectable solicitor would have permitted him to be in the room.

[12] It can be seen therefore that the testatrix was clear and firm in her mind that her eldest and youngest sons would effectively get all of the family property, her son Francis could live in the home all his life but the plaintiff was to get virtually nothing. She currently lives in the house, presumably with the consent of her brother Dermot. She and Sean are not on speaking terms and the brothers only meet either in Sean's house or when Mary is away from 257.

[13] As it is relevant to the court's later consideration it is appropriate at this time to mention that some more information about the deceased and the plaintiff can be garnered from the notes and records of the deceased at the hospital. On 27 April 2005 she told a Northern Ireland Hospice nurse (page 112 of the book):

> "Kathleen spoke to me about conflict between family members causing additional stress at present. Please do not involve Mary in Kathleen's care package for discharge as Kathleen feels that Mary is not "dependable"".

[14] At page 113-114 there is a note from the consultant oncologist, Dr J Robinson, saying that she understood that Mary had been telephoning the Ward alleging that she, the doctor, had been demanding money from her mother, which the doctor did not understand. She had had a conversation with Mary on 26 April about a care package for her mother –

> "Miss McKernan had difficulty accepting the medical diagnosis of metastatic cancer as she stated that she read health magazines and felt that doctors' diagnoses were often wrong. In relation to care after discharge from hospital she stated that she herself had poor health and would not be able to care for her (i.e. her mother)."

[15] A Palliative Care Progress Evaluation Sheet also of 27 April but in a different hand from the earlier sheet also records Kathleen as speaking at length of a poor relationship between her and her daughter and not wishing to rely on her daughter for any care needs. She advised the nurse to speak to her son Sean about such matters. A note, at page 121, records him as planning to take her home to reside with him although his wife was eight months pregnant at the time. Sadly these hopes of returning home were frustrated as the cancer spread to the lady's liver and she died on 26 May 2005.

[16] A Grant of Probate issued with respect to her estate on 6 April 2006, the estate being valued in the sum of £514,528. An up to date valuation was helpfully obtained by the plaintiff's legal advisers and dated 28 November 2007 (page 195 ff). The values had increased a little. Mr Aidan Quinn MIAVI valued the family home at 257 Camlough Road at £150,000 but the new bungalow, partly built by Sean, at £215,000. The farm of land was valued at £183,000. A farm map shows two-thirds of it to be on the same side of the road as the three dwellings with one-third approximately on the other side of the road. On 18 August 2006 the plaintiff's then solicitors wrote intimating a possible claim. Messrs Doris & McMahon replied and on 7 September 2006 the plaintiff's solicitors set out their case in a letter in accordance with the protocol relating to inheritance claims. I have already pointed out that the defendant then chose to let 255 a fortnight after that protocol letter without further consulting his solicitors. I might add that the rent of £300 per month seems rather modest when one hears of Mr Quinn's valuation of the bungalow i.e. a return of about 1 ½ % on the market value. It is true that Mr McKernan did say that the lessee was a friend of his wife's. The present proceedings were issued

on 17 October 2006. An application was made to extend time which was granted, the defendant not opposing that application.

[17] With regard to the instruction to Mr McMahon that Mary had been given money, the plaintiff said that these were small sums. She might be given £100 if she went away for the weekend or £10 or £20 if she went out for the night. However Sean McKernan said that he had not received such sums of money and that in any event his mother did not have large sums of money.

[18] The plaintiff said she only went away a few weekends a year whereas the defendant thought it was fifteen to twenty times a year. I do not find it necessary to resolve this issue although the truth may lie in between those two estimates. She denied getting money after her father's death when she went to Cookstown which Sean thought she did get but it is over 20 years ago and nothing turns on that.

[19] Considering all the evidence in the case I have concluded that the probability is that the plaintiff was of limited assistance to her mother from her return to living in the family home in 1994 until her death because of the plaintiff's own self perception of herself. I find that based partly on my assessment of the plaintiff's evidence as she gave it. This assessment was reinforced by the documents and by the evidence of Sean on this topic. It will be noted that neither of the other brothers swore affidavits or gave evidence in the case. That may be relevant to one possible relief in the case if relief were called for i.e. her continuing to reside at 257. Interestingly Mary helps manage the benefits of her brother and receives a fortnightly cheque for both of them. This is an indication that the state considers her capable of doing that. I cannot ignore the fact that at an earlier review hearing her former counsel raised a doubt about her capacity but that I was told at a subsequent hearing that her doctor had affirmed that she was of sufficient capacity to conduct her litigation without the assistance of the Official Solicitor. Having heard her I am entirely satisfied that that is so. Her brother Francis collects his own money but she helps him with his forms.

[20] I asked her what she would say to a right of residence in the new bungalow at 255 Camlough Road. She answered No to that unless it was transferred into her name. It was not that it was too close to Sean but that she may well move if the bungalow was in her name. When asked she said that it would not really suit her to live in a flat again. But when asked she could not think of any reasons for saying that. When asked about her relationship with Dermot and Francis she said she got on OK, fairly well with them. It would be OK for the time being to live with them but she would prefer a place of her own, a house or bungalow. This was partly because of Sean but for other reasons as well, including privacy. It should be noted that she is only 51 years of age and a lady, currently living with two older bachelor brothers.

[21] With regard to the evidence of Sean McKernan he was courteous in disagreeing with Mr McNamee when differences were put between the evidence of him and his sister. Apart from the matter of the lease of the bungalow I thought he was a frank witness. He accepted, after thinking about it, that there was no indication of difficulties existing between Mary, Dermot and Francis since their mother died. He accepted that all three of them had their own vulnerabilities and that they made the best of those. He accepted that the differences were really between him and Mary and that in the past his mother got caught in the middle between those differences which upset her. He himself had spent over £120,000 on his new house which would partly explain his substantial mortgage. He sees his brother Francis more than his brother Dermot but does see both of them. His mother would tell him about Mary's behaviour which in any event he sometimes witnessed himself and which he knew annoyed his mother. She was always begging money from her mother every time she went out to the shops. That aspect of matters was hearsay.

[22] That completes the factual background to this matter. I will now turn to the law.

The law

[23] Article 3(1) of the Inheritance (Provision for Family and Dependants) (NI) Order 1979 provides:

> "Where after the commencement of this Order a person dies domiciled in Northern Ireland and is survived by any of the following persons:-
>
> (a) the wife or husband of the deceased;
> (b) a former wife or former husband of the deceased who is not remarried;
> (c) a child of the deceased;
> (d) . . .
> (e) any person (not being a person included in sub paragraphs (a) to (d) who immediately before the death of the deceased was being maintained, either wholly or partly by the deceased;
>
> That person may apply to the court for an Order under Article 4 on the ground that the disposition of the deceased's estate effected by his Will or the law relating to intestacy, or the combination of his Will and that law, is not such as to make reasonable financial provision for the applicant."

[24] The definition of "reasonable financial provision" is different for a spouse from other claimants. For these purposes it is covered by Article 2(2)(b):

> "(6) in the case of any other application made by virtue of Article 3(1), means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for this maintenance."

[25] In Re Creeney (1984) NI 397 at 41, Carswell J cites with approval a passage from the judgment of Goff LJ In Re Coventry [1980] Ch. 461, 485, with which I also respectfully agree:

> "There have been a number of cases under the Inheritance (Family Provision) Act 1938 previously enforced, and also some cases from sister jurisdictions, which have dealt with the meaning of the word "maintenance". In particular, in this country there is In Re E deceased [1966] 1 WLR 709 in which Stamp J said that the purpose was not keep a person above the breadline but to provide reasonable maintenance in all the circumstances. If I may so, with respect, "breadline" there would be more accurately described as "subsistence level". Then there was Millward v. Shenton [1972] 1 WLR 711 in this court. I think I need only refer to one of the overseas reports, in Re Duranceau [1952] 3 DLR 714, 720, where, in somewhat poetic language the court said that the question is:
>
> > "Is the provision sufficient to enable the dependant to live neither luxuriously nor miserably, but decently and comfortably according to his or her station in life?"
>
> What is proper maintenance must in all cases depend upon all the facts and circumstances of the particular case being considered at the time but I think it is clear on the one hand 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 the general benefit or welfare."

[26] The court must therefore ask itself whether the decision of the deceased to make no financial provision for the plaintiff was reasonable in all the circumstances. In arriving at that decision the court must take into account Article 5(1) of the Order which provides as follows:

> "Where an application is made for an Order under Article 4, the court shall, in determining whether the disposition of the deceased's estate effected by his Will or the law relating to intestacy, or the combination of his Will and that law, is such as to make reasonable provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that Article, have regard to the following matters:
>
> (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
>
> (b) the financial resources and financial needs which any other applicant for an Order under Article 4 has or is likely to have in the foreseeable future;
>
> (c) the financial resources and financial needs which any beneficiary of the estate of the estate has or is likely to have in the foreseeable future;
>
> (d) any obligations and responsibilities which the deceased had towards any applicant for an Order under Article 4 or towards any beneficiary of the estate of the deceased;
>
> (e) the size and nature of the net estate of the deceased and the likely affect on any business undertaking included in the estate of an Order resulting in the division of property;
>
> (f) any physical or mental disability of any applicant for an Order under Article 4 or

any beneficiary of the estate of the deceased;

(g) 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."

[27] It is convenient to comment on these factors at this stage. Firstly one notes that these criteria apply both to the initial decision of the court as to whether the disposition under the Will did make reasonable financial provision for the applicant but also to what Order the court should make if it finds that the disposition under the Will was not reasonable. Criterion (a) is relevant here but counsel accept that (b) is not relevant. The only possible other applicant would be the plaintiff's brother Francis and he is long out of time to bring such an application nor shows any indication of desiring to do so. Criterion (c) is relevant i.e. if the court were making an Order what would its impact be on the plaintiff's three brothers or any of them. Criterion (d) is also relevant. It may be relevant to observe that it seems to me that the "obligations and responsibilities which the deceased had towards any applicant for an Order under Article 4" may include the fact of being the parent of the applicant. If the deceased was maintaining wholly or partly one other adult children but also some distant kinsman, out of charity, they may well feel that they had an obligation to their child but no obligation to make provision out of their estate for the kinsman to whom they have been kind although that person is entitled to bring a claim under Article 3(1)(e) of the Order. Criterion (e) is clearly relevant as to the first part i.e. the size of the estate but there is no business undertaking involved. I find on the evidence that the plaintiff is not suffering from a "physical or mental disability" although, by apparent coincidence, she received a letter in the course of the hearing finding her incapable for work but I take disability in this context to be of a more enduring or permanent character. Criterion (g) could be relevant in two respects, at least. Firstly the conduct of the applicant or her brother Sean. However both counsel were minded to say that the affect of the respective conduct is neutral i.e. than any failings of the plaintiff as a daughter towards her late mother was balanced by being struck by Sean. They submitted that in line with the interpretation of the statutory provisions in ancillary relief after divorce only gross conduct should be taken into account by the court. I do not propose to rule on that particular point in these circumstances. What is clear pursuant to (g) is that this would cover the express wishes of the testatrix. Those wishes would, if reasonable, take into account the conduct of the applicant or indeed other beneficiaries which encourages me in the reservation just expressed, that it might not be right to import the ancillary relief approach to this area of the law. Certainly it is clear that the deceased here was quite clear in her mind that she did not want to leave a legacy to her only daughter.

[28] It is perhaps also appropriate at this stage to note that the issue of maintenance is a very live one in two respects for this plaintiff. Firstly the state incapacity benefit of £61 per week now received by the plaintiff is likely to be at or close to the subsistence level envisaged by Goff LJ. Therefore it is open to the plaintiff to argue that she may have an entitlement to something over and above that. Secondly it is indisputable that she was living in her mother's house at the time of her death and for a decade previously and indeed for most of her life. The provision of a roof over her head is in my view partial maintenance.

[29] Counsel helpfully referred me to a number of authorities in the field of these claims with respect to adult children. They submitted, correctly it appears, that there were only two authorities in this jurisdiction that were relevant namely In Re McGarrell (1983) NIJB No. 8 (Hutton J) and In Re Creeney (1984) NI 397 (Carswell J). I have had the opportunity of reading these helpful decisions and also that of the English Court of Appeal In Re Coventry Op.cit. Mr Elliott for the defendant relied strongly on a further decision of that court namely Re Jennings (deceased) [1994] Ch 286, [1994] 3 All ER 27. This was a decision of the English Court of Appeal (Nourse, Henry LJJ, Sir John May) where the parents of the plaintiff were divorced when he was only 2 years old. The deceased father gave no assistance to him in his childhood. The judge at first instance ordered that £40,000 out of an estate worth about £300,000 net should be paid to the son under the equivalent English provisions. The appeal was successful on two grounds, one of which was that the award exceeded maintenance within the meaning of the Inheritance Act 1975. The other ground however was that the mere blood relationship between father and son should not impose a continuing moral obligation which could be a sufficient basis for an Order under the Act where, as here, the obligations were "defunct" and not as they should be relating to the period immediately before the death of the deceased.

[30] Mr Elliott relied on the following sentence in the judgment of Nourse LJ (at page 33 (j)):

> "It was established by the decisions of Oliver J and this court in Re Coventry, (deceased) that, on an application by an adult son of the deceased who is able to earn, and earns his own living there must be some special circumstance, typically a moral obligation of the deceased towards him, before the first question can be determined in his favour."

[31] I observe first of all that of course the plaintiff here is not earning and there is little indication, over recent years at least, that she is able to earn her own living. Henry LJ helpfully points out that the obligations and

responsibilities under criterion (d) may be either legal or moral, with which I respectfully agree. He also went on to say at page 39 (f):

> "It is not the purpose of the 1975 Act to punish or redress past bad or unfeeling parental behaviour where that behaviour does not still impinge on the applicant's present financial situation."

[32] On the obiter dictum relied on by Mr Elliott he expressed himself in the following terms with regard to what he considered the first of the relevant principles for the purpose of the case:

> "First, that though there are, as I said, under that Act powers now to order financial provision to those of full age in good health and economically self sufficient, those powers should be exercised by the court circumspectly and in relatively rare circumstances."

[33] Again I note that he refers to the "economically self sufficient". Nor do I think I would dissent from the view he expresses at that point, which can be seen to be somewhat different in its terms than that of Nourse LJ. The judgment of Sir John May agreed with that of Nourse LJ in general without addressing this particular issue. I would not therefore consider the decision of as much help to Mr Elliott as he seems to suggest. But in any event there is a later decision of the Court of Appeal in England upon which Mr McNamee relied, namely, Re Hancock (deceased) [1998] 2 FLR 346. The facts were rather unusual in that the claimant was before the court 13 years after her father had died leaving her nothing. Her mother had died in the interval too. A piece of land which the deceased had owned had subsequently been sold to a supermarket and the estate at the time of hearing was worth about £ 2/3 million. The judge at first instance made periodical payments of £3,000 per annum in favour of the plaintiff who was in a situation where her resources were extremely limited and not dissimilar to the plaintiff in this case. The court here held that an adult son or daughter seeking provision under the 1975 Act did not necessarily have to show that the deceased owed him or her a moral obligation or that there were other special circumstances. However, a claim made by an adult with an established earning capacity may in fact very well fail in the absence of such factors. (Per Judge LJ page 356 (b)). He also pointed out that Goff LJ in the Court of Appeal in Re Coventry had observed (at 487 (g):

> "Oliver J nowhere said that a moral obligation was a prerequisite of an application . . . nor did he mean any such thing. It is true that he said a moral obligation was required, but in my view that was on the facts of

> this particular case, because he found nothing else sufficient to produce unreasonableness."

[34] Butler Sloss LJ said at page 351 (f), having quoted the passage from Nourse LJ relied on by Mr Elliott:

> "I do not, for my part, extract from the decisions in Re Coventry and Re Jennings, the degree of support for the defendant's case that Mr Crawford has submitted. It is clear to me that the 1975 Act does not require, in an application under Section 1(1)(c), that an adult child (whether son or daughter) has in all cases to show moral obligation or other special circumstance. But on facts similar to those in Re Coventry and even more so with the comparatively affluent applicant in Re Jennings, if the facts disclose that the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in his application without some special circumstance such as a moral obligation."

[35] This decision, already of strongly persuasive authority before this court, also seems to me in accord with the approach of Hutton J and Carswell J in the Northern Ireland cases, and I propose to follow it. It may be as the author of Grattan: Succession Law in Northern Ireland (1996), suggests that the judiciary here has adopted a more generous approach to adult children applicants than in England but in this case the decision to which I come will be in accord with the decision of the Court of Appeal in Re Hancock (deceased). I need not comment further on the difference in emphasis in the cases as in my view the deceased had a moral obligation to make some provision for the housing of her daughter in these circumstances.

Conclusions

[36] In my view the plaintiff has established that reasonable financial provision was not made for her under the Will of her late mother. The mother's view, no doubt informed, and which I accept, that the plaintiff daughter was not a dependable provider of care to the mother and was viewed by her, as the plaintiff mentioned in an undertone herself at one point, as lazy did not justify making no provision at all for her in the Will, although it could justify a distinction being drawn. It is true to say that her brother Francis received no legacy but his benefits are apparently sufficiently generous for him to keep and drive a car as neither the plaintiff nor Dermot do. But the two other brothers were to receive under the Will approximately £ ¼ million each, although it may well be that the deceased was not aware that that was the value of her estate at the time of her death. There was no suggestion that there

had been a valuation and she may not have appreciated the rise in property values over recent years in this jurisdiction. As I have said above the plaintiff undoubtedly had had 257 Camlough Road as her home for her whole life save for nine years and even then she said she came home for many weekends. She was not otherwise economically self sufficient. In the language used by Oliver J in Coventry I consider that looked at objectively this was an unreasonable result. I take into account in arriving at that viewpoint the relevant criteria at Article 5(1) of the Order. I acknowledge that includes the obligations and responsibilities of the mother under (d) as just now indicated.

[37] I must now apply the same criteria in determining whether and in what manner the court should exercise its powers under Article 4. As the principal obligation here, it seems to me, was to the provision of a home for the plaintiff it is to that topic I turn my attention. Three alternatives in theory exist. Firstly, a right of residence in the family home where she currently lives. Secondly, a right of residence in the new bungalow close by. Thirdly, the award of a sufficiently large sum out of the estate for her to purchase a flat in Cookstown, which is the only other place she has ever lived in her life.

[38] If I take the second alternative first, as indicated, it seems to be that the defendant has tried to tie the hands of the court by the five year lease in 2006 to the present lessee. He did volunteer that she was a friend of his wife. He admitted that he had not consulted the solicitors after receiving the letters of claim and before entering into the lease. Thirdly given the up to date valuation of the property and the rent it would appear that he is getting a return of about 1 ½ % only on the value of the property. I am satisfied on the balance of probabilities that this is not an arm's length transaction at fair market value and that the defendant Sean McKernan would have to take the consequences of that if the court felt it necessary to bring that bungalow into effect. However it has to be said that when asked the plaintiff did not express enthusiasm for living there unless the value of the bungalow was transferred to her. I am clear that that should not happen. That would be far too high a proportion of the estate. The mother was entitled to exercise a preference amongst her children. She protected the son who has a recognised illness by giving him a right of residence. She was more generous to Dermot but he was her eldest son who would appear to have lived with her all her life and worked with her on the farm. She has preferred her youngest son but he has entered into a good and fruitful marriage. She will have seen his two small sons growing up beside her. She will have seen his energy in not only encouraging and assisting her in building the new bungalow which forms part of the estate but in building his own bungalow along side her. There is nothing unreasonable about her preferring these two brothers to the plaintiff and in my view it would be wrong to negate that reasonable preference by giving this apparently valuable bungalow to the plaintiff. The right of residence, leaving the lease apart, would deprive the estate of some income without providing the plaintiff with any income which also renders it a somewhat unattractive option.

[39] I have considered carefully the possibility of making a sufficiently large award to enable this lady to purchase a flat in Cookstown. I should say at the beginning that the court was not given evidence about the value of such premises. This may well be because the plaintiff herself expressed no enthusiasm for the prospect when I put it to her. This is clearly not her preferred option. Her preferred option is to be either given the bungalow outright or the price of such a house or bungalow. As I have indicated however that could not be right for the bungalow itself which is now valued at some £215,000. Taking that the valuation for the farmhouse is only £150,000, the court might venture to infer either now, or on the receipt of further evidence, that a sum in the region of £75,000-£100,000 might purchase a flat in Cookstown suitable for a single lady. That would have the attraction of ensuring that she has a roof over her head for the rest of her life as there was no evidence of a tendency to profligacy on her part. It would be much preferable to Mr Elliott's suggestion that she should be left to obtain housing benefit from the state. Such benefits may well vary from time to time. I am aware from other recent cases in this division that the Housing Executive itself acknowledges that housing benefit falls short of market rents charged by private landlords. This particular lady does not seem to have the resources to make up the difference between those figures. It is possible that such a decision would also remove the regrettable divisions between Mary and Sean McKernan by removing her from the scene. That is not an inevitable consequence of such an award, of course, as she may choose to remain in the house and could presumably do so if Dermot was agreeable to that course.

[39] In considering that possibility I acknowledge that it would meet criterion (a) of Article 5(1). But I conclude that it would not meet the combined effect of the other relevant criteria. Something would have to be sold to meet an award in the range £75,000-£100,000. The sale of the land across the road from the three dwellings making up about 9 acres would, on Mr Quinn's valuation, be less than the estimate I have formed for a flat. Basically the balance could be made up with increasing Mr Sean McKernan's mortgage. Mr Dermot McKernan only now exists on benefits. I am concerned that it might be viewed as inconsistent with a proper interpretation of (d) in this case as being too generous to the applicant in comparison to the two principal beneficiaries of the estate for the reasons outlined above. Furthermore the "nature of the net estate" is relevant under (e). Is it right to break up this small farm which is being used to some degree by Dermot and may one day provide a living or a basis of a living for one of the plaintiff's three nephews, one of three grandsons of the deceased? Independently of that would it depart too radically from the views expressed by the testatrix? I bear in mind the dictum of Goff LJ in Re Coventry at page 822 of the All England Reports:

> "Indeed, I think any view expressed by a deceased person that he wishes a particular person to benefit

> will generally be of little significance because the question is not subjective but objective. An express reason for rejecting the applicant is a different matter and may be very relevant to the problem."

Cf [1979] 3 All ER 815 at 822.

[40] I examine the first of my three alternatives by contrast. A right of residence in 257 Camlough Road would reflect the actual position that this lady had enjoyed until her mother's death. There was not the slightest suggestion that the mother tried to put her out even if at some times irritated by her. It would parallel the right of residence given to her brother Francis. It would not impose any burden on the estate. The defendant accepted in cross examination that there was no indication of difficulties between the plaintiff and Dermot and Francis. Indeed as mentioned she looks after the benefits of one of her brothers. Even if she is not the most energetic housekeeper in the world I am sure she is of some assistance to her brothers with regard to cooking and cleaning, as she herself contended. It seems to be therefore that when one analyses the matter in accordance with the statutory provision this may be the preferable course. I must ask myself whether standing alone it is sufficient to constitute reasonable financial provision for her in all the circumstances. Given her very limited means and the value of the estate I find that it is not in itself sufficient. It may well be that the mother had formed the view that the daughter should have done much more than she did do. She held that against the daughter but not against the son Dermot. The daughter clearly did visit her in hospital. To give her absolutely no money at all when the two defendants are receiving value in excess of £ ¼ million each does not seem reasonable to me. Even allowing for what has been said and even allowing for granting her the right of residence, which is valuable and important I feel that some financial adjustment is required

[43] I have concluded that I should not make a final order at this time. I say that for three reasons. First of all I note that Hutton J In Re McGarrell having found that reasonable financial provision had not been made appears to have then consulted the parties because the report records that the court ordered that the plaintiff should receive one quarter of the net estate of the deceased "by consent". Secondly in this case it may be that a small apartment in the locality is available at a lower price than the one which the court might have inferred from the very limited information available. Thirdly on looking at Article 4 I note that I have not had any express submissions from counsel as to whether the powers there under include the court making an order for a right of residence for life. I will therefore give the parties an opportunity to make further submissions, and possibly, call evidence, once they have had an opportunity of considering this judgement with a view to arriving at a consent order.