

Neutral Citation No. (2002) NICH 1

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Ref: WEAF3569

Delivered: 11/1/2002

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

**IN THE MATTER OF THE ESTATE OF ROBERT PERRY MOORHEAD
DECEASED**

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

BETWEEN:

ELIZABETH MOORHEAD

Plaintiff;

-and-

**RICHARD THOMAS HUGH MORROW
(as personal representative of Robert Perry Moorhead , deceased)
and
JEFFREY MOORHEAD
and
HEATHER MOORHEAD
and
ANNE VAN den HERIK (nee MOORHEAD)**

Defendants.

WEATHERUP J

The Application

1. This is an application by the plaintiff as the widow of Robert Perry

Moorhead deceased ("the deceased") under Article 4 of the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 on the ground that the disposition of the deceased's estate effected by his will does not make reasonable financial provision for the plaintiff. The deceased died on 20 October 2000, aged 80 years, survived by the plaintiff, then aged 79 years, and without children. The second defendant is a nephew of the deceased and the third and fourth defendants are nieces of the deceased.

The Will

2. Probate of the will of the deceased dated 27 June 2000 was granted to the first defendant on 4 January 2001. By his will the deceased made the following provision-

- (i) £1000 to the farm labourer.
- (ii) A Blackshaw painting to the second defendant.
- (iii) Personal chattels to the plaintiff.
- (iv) The home farm at 12 Drumreagh Road, Ballygowan in trust for the plaintiff for life and thereafter to the second defendant (with the use of the "bottom yard" to the second defendant).
- (v) The out-farm known as "Slevins Farm" to the second defendant absolutely.
- (vi) Two-thirds of the residue in trust for the plaintiff for life and thereafter to the third and four defendants jointly.

(vii) The remaining one third of residue to the second, third and fourth defendants jointly.

(If either the second, third or fourth defendants do not survive the plaintiff then any children take their parents share at age 21)

The Estate

3. The estate of the deceased comprised the following assets and estimated valuations -

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|--|-----------|
| (a) Farmhouse and outbuildings with 64 acres of land at 12 Drumreagh Road, Ballygowan which had been the matrimonial home and where the plaintiff still lived. | £400,000. |
| (b) The out farm known as Slevins Farm comprising 37 acres. | £55,000. |
| (c) Personal chattels. | £12,000. |
| (d) Livestock , plant and equipment. | £13,000. |
| (e) Various investments (including an account in the Isle of Man containing approximately £18,000), after allowance for liabilities, including the costs of these proceedings. | £100,000. |

The Statutory Approach

4. In considering an application under Article 4 of the 1979 Order the Court is engaged in a two stage process which first of all requires that it to be established that the disposition of the deceased's estate effected by the will is not such as to make reasonable provision for the plaintiff. If so satisfied the second step is for the Court to determine whether, and in what manner, the Court is to exercise its power to effect reasonable financial provision. In the

case of a spouse reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance (Article 2(2)).

In the present case the defendants concede that the disposition of the deceased's estate does not make reasonable financial provision for the plaintiff, to the extent that it does not make adequate capital provision for the plaintiff. Miss Walsh, on behalf of the defendants, submitted that such reasonable provision would be achieved by a payment of £30,000 to the plaintiff from the residue of the estate. Mr Horner Q.C., who appeared with Mr Robinson for the plaintiff, submitted that the house and farm buildings and an area comprising 4.5 acres should be transferred to the plaintiff absolutely. In considering whether, and in what manner, the Court should exercise its powers, the Court is required by Article 5 of the 1979 Order to have regard to a list of matters.

The Statutory Factors

5. The first statutory factor concerns the financial resources and financial needs which the plaintiff has or is likely to have in the foreseeable future. Other than in the interests arising from the deceased's estate the plaintiff has capital in the form of investments valued at approximately £20,000. By way of income she has a pension of £4,500 per annum and the income from the investments. From the estate she has a life interest in the farm which provides a home and is capable of yielding conacre lettings of approximately £4,500 per

annum, although at present she continues to use the land to graze a flock of sheep. In addition she would have an estimated return of £4,000 on the income from two-thirds of the residue of the estate. Accordingly the plaintiff has the potential to achieve an income estimated in the region of £14,000 gross per annum. This capital and income would be sufficient to meet her present modest financial needs. However the capital and income may not be sufficient to meet the plaintiff's future financial needs were she to become less active and require housekeeping or nursing assistance through age or infirmity.

The second statutory factor concerns the financial resources and financial needs which any other applicant has or is likely to have in the foreseeable future. There are no other applicants under the 1979 Order.

The third statutory factors concerns the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future. The second defendant is in employment and has some investments and is the joint owner with his wife of the dwelling house where he resides beside the farm at Drumreagh Road. The third defendant is not married and is in employment and owns her dwelling house as well as another property which has been rented out. The fourth defendant is married and owns her dwelling house jointly with her husband, which property is subject to a mortgage and she has a significant holding of stocks and shares. Each of the beneficiaries has financial resources

which are more than sufficient to meet their present financial needs and there are no indications that this is likely to change in the foreseeable future.

The fourth statutory factor concerns any obligations and responsibilities which the deceased had towards the applicant or towards any beneficiary. The deceased had obligations and responsibilities to the plaintiff who had been his wife for almost 37 years. Upon their marriage on 7 December 1963 the plaintiff had given up her employment as a theatre nurse and looked after the deceased and the matrimonial home and assisted in the running of the farm and in the caring for the deceased's mother who lived in the matrimonial home for some ten years. The deceased received particular care from the plaintiff in his later years as his health deteriorated. The deceased had no obligations or responsibilities to any of the defendants.

The fifth statutory factor concerns the size and nature of the nett estate of the deceased and the likely effect on any business undertaking included in the estate of an order resulting in the division of property. The nett estate has a value of some £600,000 with the principal asset being the farm of 64 acres. The deceased operated the farm as a business undertaking, although to a lesser extent in later years when illness restricted his activities. The plaintiff has continued to maintain a flock of sheep on the lands and she employs a labourer on a permanent basis and his son on an occasional basis. An order in the terms proposed by the plaintiff involving a transfer of the house and farm buildings and 4.5 acres to the plaintiff absolutely would impact on any future business undertaking on the farm with the house and outbuildings

being liable to be separated from the lands upon the termination of the plaintiff's life interest. However, I would not propose to allow that consideration to prevent an order resulting in a division of the farm if to do so would be required to effect reasonable financial provision for the plaintiff.

The sixth statutory factor concerns any physical or mental disability of any applicant or any beneficiary. Neither the applicant nor any of the beneficiaries has any physical or mental disability.

The seventh statutory factor concerns 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 this case the plaintiff was a supportive and devoted wife during a long marriage. Other relevant matters include the wishes of the deceased, which are said to have been that the farm should remain "Moorhead" lands and that they should ultimately pass to the second defendant. Also relevant would be the plaintiff's wishes for privacy and independence and financial security as well as a stated preference for the lands ultimately passing to the second defendant.

Further statutory factors arise in the case of a widow, as Article 5(2) of the 1979 Order requires the Court to have regard to three additional matters. First, the age of the plaintiff and the duration of the marriage. She is now 80 years old and was married to the deceased for almost 37 years. Secondly, the contribution made by the plaintiff to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family. As will be apparent from the matters referred to above the plaintiff

has made a very substantial contribution in this regard. Thirdly, the provision which the plaintiff might reasonably have expected to receive if, on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce. The approach to this factor requires more extensive consideration.

Financial Provision On Divorce

6. The approach to the comparison with financial provision on divorce has prompted much judicial discussion and is not without difficulty. The English courts, in dealing with the equivalent matrimonial and inheritance legislation, have recently reassessed the position in two respects. First, they have reaffirmed the status of the comparison with divorce provision as being one important factor to which regard must be had and rejected suggestions that divorce provision should be a starting point or a yardstick for inheritance provision. Secondly, there has been a review by the House of Lords of the principles to be applied in cases of divorce provision which has resulted in a reiteration of fairness as the objective and a rejection of the former yardstick of reasonable requirements.

7. First, the status of the comparison with divorce provision. As appears from the outline above such a comparison is but one of several statutory factors to which regard must be had.

In Re Besterman Deceased (1984) FLR 503at 512H Oliver LJ noted -

"In an application under (the matrimonial legislation) the court is directed, so far as it is practicable and is just to do so, to put the parties in the same financial position as they would have been if the marriage had

not broken down. In that calculation the concept of what is 'reasonable' is nowhere mentioned, although the parties financial needs - which have been construed to mean 'reasonable requirements'- constitute one element to be considered. In an application under (the inheritance legislation) however, the figure resulting from the (matrimonial) exercise is merely one of the factors to which the court is to 'have regard' and the overriding consideration is what is 'reasonable' in all the circumstances. It is, however, obviously a very important consideration and one which the statute goes out of its way to bring to the court's attention."

In Moody -v- Stevenson (1992) 1 FLR 494 the emphasis was different.

Waite J stated (at page 505D):

"The (inheritance legislation) does not, in laying down the lengthy catalogue of matters to which the judge is bound (by Article 5) to have regard, specify in which order he should tackle them. Nevertheless, in cases where the applicant is a surviving spouse, the logical starting point, as it seems to us, would be an appraisal of the claimant's notional entitlement under the (matrimonial legislation), assuming that there had been a decree of divorce at the date of death and treating the assets of the deceased's estate as if they had been matrimonial assets valued as at the date of the hearing.

The result of that appraisal will then provide the judge with a yardstick by which, after taking into account any other (Article 5 matters) to which he is required to have regard which have not already been considered by him in the appraising process, he will first determine, at stage one, whether the dispositions of the deceased's estate were such as to make reasonable provision for the applicant, and (if he finds that they were not), secondly determine, at stage two, which order should be made in his discretion under (Article 4 of the Order)).

This issue was revisited by the English Court of Appeal in Re Krubert (deceased) (1997) 1 FLR 42. Having referred to Re Besterman and Moody -v- Stevenson Nourse LJ stated (at page 47A):

"Having considering the question afresh, I think there is indeed a conflict between the two decisions, if only one of emphasis. However conflict of emphasis can often cause problems at first instance for busy district and circuit judges. Moreover we have some anecdotal evidence that the approach adopted in Moody -v- Stevenson may indeed have caused confusion at that level, especially in the cases of small estates. I can understand that, if only because on a divorce there are two parties to be provided for, whereas on an application under the (inheritance legislation) there is only one. In my view Oliver LJ's approach is preferable, being more in accordance with the intention of the act when read as a whole. I think it should be adopted accordingly."

I agree that the approach of Oliver LJ in Re Besterman (Deceased) more accurately reflects the legislative scheme for inheritance provision and that a consideration of what might have been the financial provision on divorce is but one of the factors to which the court is to have regard, and although a very important factor it is not to be treated as a starting point or a yardstick for reasonable financial provision in inheritance claims.

7. The second reassessment by the English courts involved the House of Lords review of the principles of divorce provision in White -v- White (2000) 2 FLR 891. A number of matters emerge from the judgment of Lord Nicholls-

(i) The general observations contained in the judgment were made in the context of so called "big money" cases ie. where the assets available exceed the parties financial needs for housing and incomes, and further

where the approach involved a “clean break” between the parties. Two other features were noted namely, the importance of the equality of contribution made by the husband and wife over a long marriage and further, and of less importance, that the available assets did not derive wholly from the efforts of the parties (pages 986-987).

(ii) The court must apply the statutory criteria and by implication the objective must be to achieve fairness between the parties (pages 987-989).

(iii) “In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles ... If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money earner and against the homemaker and the child carer. Before reaching a firm conclusion and making an order that one party will receive a bigger share than the other a judge should check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.” (page 989)

(iv) In matrimonial proceedings the judicially developed concept of “reasonable requirements” had been treated as a determinative, and limiting, factor on the amount of the award but the statutory provisions lend no support to such an approach (page 992).

(v) Some jurisdictions recognise two classes of property which should not necessarily be treated in the same way. Property acquired before

married and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. However, in the ordinary course, this factor can be expected to carry little, if any weight in a case where the claimants financial needs cannot be met without recourse to this property (page 994).

8. The impact of White v White on inheritance claims was considered in Adams -v- Lewis (2001) WTLR 493. This was a widow's claim contested by three daughters where the widow received a specific legacy and the will gave trustees a power to apply any part of the residue during the lifetime of the widow to provide and maintain a suitable residence. The court reduced the specific legacy and made an order transferring the matrimonial home to the widow absolutely, thereby awarding her approximately one half of the value of the estate. The court accepted that the amount that the widow would have received on divorce was only one factor to be taken into account but it was described as "a most important factor in a case such as this". Further the court stated that the observations of Lord Nicholls in White v White apply just as much to an inheritance claim by a widow or widower as to an application for financial provision after divorce. Having noted that there were sufficient assets in the estate to have provided for both parties on a divorce and that on divorce the court would have been looking for a clean break and that the case did not involve inherited assets there was stated to be no apparent reason why the court should depart from an equal division of the

assets. It was stated that whether the divorce court would have awarded the applicant the matrimonial home or whether it would have sought to achieve equal division by some different route would have depended upon the needs and wishes of the parties.

9. The Court of Appeal in England has given further consideration to financial provision on divorce in Cowan -v- Cowan (2001) 2 FLR 192. This was another “big money” case where the assets substantially exceeded the amount required for the parties financial needs in terms of a home and income for each of them and involved a clean break and an equal contribution to the welfare of the family. Thorpe LJ assessed the effect of White v White as follows (page 212) -

“The decision in White clearly does not introduce a rule of equality. The yardstick of equality is a cross-check against discrimination. Fairness is the rule and in its pursuit the reasons for departure from equality would inevitably prove to be too legion and too varied to permit of listing or classification. They will range from the substantial to the faint but that range can be reflected in the percentage of departure.”

As to the present state of the law Thorpe LJ stated (page 206) -

“But after more than 30 years of judicial tinkering it is evident to me that there is a pressing need for legislative review since reforms to match social shifts since the late 1960s cannot be achieved by the judges without trespassing beyond their legitimate junction.”

10. In all the circumstances of the present case I would not consider that fairness in financial provision on divorce would have required equal division of the property. The principal asset, being the home farm, was inherited by the husband and was a business undertaking which would have had to be

broken up to achieve equality. A clean break approach on divorce providing fair financial provision for both parties may have involved the sale of part of the home farm without ending the business undertaking and without involving equality of division.

The comparison between divorce provision and inheritance provision is necessarily inexact as the former involves fairness for both husband and wife while the latter may admit of greater flexibility as it involves the same property being available to make reasonable provision for only one spouse.

Conclusion

11. Taking all the above considerations into account I consider that reasonable financial provision would be achieved by the following alterations to the will of the deceased -

(a) The farm at 12 Drumreagh Road, Ballygowan to be held by the trustee in trust for the plaintiff during her lifetime and thereafter to the second defendant absolutely, subject to two variations. The first is to remove from the second defendant the provision for the use of the "bottom yard" belonging to the farm during the plaintiff's life interest. The second is to exclude an area of the farm from the plaintiff's life interest so that that area passes immediately to the second defendant absolutely. The area in question is to the rear of the second defendant's premises at 10a Drumreagh Road, Ballygowan and is bounded to the south by the laneway to the farm and to the east by the River Blackwater. This will provide the plaintiff with the privacy she wishes by enabling her to secure the gate at the bridge over the

River Blackwater and to control access to the farm and the use of the bottom yard.

- (b) The out-farm known as "Slevin's Farm" to be transferred to the plaintiff absolutely. This will provide the plaintiff with some financial independence and future security should she require additional capital in the future. This out-farm was purchased during the marriage and I accept that the plaintiff contributed approximately 10% of the purchase price from a superannuation fund which she had retained from her previous employment.
- (c) The livestock, motor car, tractor and crops to the plaintiff absolutely, so that she may continue the farming enterprise with the existing equipment and flock of sheep.
- (d) From the residue of the estate the plaintiff is to receive the sum of £40,000. This, together with the other available assets, should provide immediate financial independence and security to the plaintiff. The residue, after discharge of expenses and the costs of these proceedings, has been estimated at £100,000, and the balance of the residue will become available for immediate distribution to the respondents in the proportions set out in the will.

During the course of the hearing the parties proceeded on the assumption that all costs would be ordered out of the estate. I will hear counsel on the terms of any final order as to costs.