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Judgment: approved by the Court for handing down | *Delivered:* **20/03/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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2011/33486

CHANCERY DIVISION

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DEIRDRE MUCKIAN
and
MARY McCANN

-v-

ALBINA HOEY AS PERSONAL REPRESENTATIVE
OF MICHAEL HOEY (DECEASED)
JOHN HOEY
MICHAEL HOEY
PAUL HOEY
ALBINA McARDLE NEE HOEY

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DEENY J

[1] The court has before it an application brought by originating summons of 15 March 2011 and it was brought by Mrs Deirdre Muckian and Mrs Mary McCann and they are the daughters of the late Michael Hoey deceased. It is brought on their behalf by Messrs Fitzsimmons Mallon who have instructed Mr Sands and Mr Patrick Good QC in the matter.

[2] The defendants are as follows. Firstly, Mrs Albina Hoey, the widow of the deceased and the administratrix and personal representative of his estate. The other four defendants are her four other children (as well as the two plaintiffs) John Hoey, Michael Hoey, Paul Hoey and Albina her daughter who was named in the proceedings as Albina Hoey but whose proper name is Albina McArdle by marriage nee Hoey and I gave leave today to amend the title of the action to that effect.

[3] The originating summons sought an Order pursuant to Article 35 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 to remove

the defendant as executor (sic) of the estate of Michael Hoey deceased. She was neither the executor nor the executrix because Mr Hoey had not made a Will, but I think I can safely amend the proceedings as it has been conducted on the basis she should be removed as the administratrix of the estate. I pause there to say that I think that is really the nub of the problem that has arisen here. Apparently the late Mr Hoey died quite suddenly and he had not made a Will and the administratrix has chosen to administer the estate in a way that seemed right to her, possibly, as she indicated briefly at one point in her evidence, in accordance with her late husband's instructions, but not, as I find, in accordance with law.

[4] The relevant statutory provision permits an application to the court for an order appointing a substituted personal representative or terminating the appointment of an existing personal representative and both are sought here. All the existing personal representatives and all other persons having a beneficial interest in the estate must be made parties to the application and that is relevant to what may be a difficult enough decision which I will have to make in due course, but I mention that as a marker at the moment.

[5] The statutory provision as can be seen is in broad terms and it is indisputable that it has left to the court discretion as to how the decision is to be made. The court has had the benefit of helpful legal submissions on the relevant case law, particularly from Mr John Coyle's skeleton argument and for completeness I propose to refer to it for that case law. It is helpfully summarised by Lewison J of the Chancery Division in Thomas and Agnes Carvill Foundation v Carvill and Another [2007] 4 All ER 81; [2007] EWHC 1314. The facts of that case are somewhat unusual but I think I need not trouble to include them in this judgment. What the judge says on the law is to be found beginning at paragraph [44] of his judgment:

> "It is common ground that, in the case of removal of a trustee, the court should act on the principles laid down by Lord Blackburn in Letterstedt v Broers (1884) 9 App Cas 371 and that in the case of removing a personal representative similar principles should apply. Whether I am right in concluding that Pamela is a trustee or whether she is no more than a personal representative the principles are therefore the same. Lord Blackburn referred with evident approval to a passage in Story's Equity Jurisdiction (s1287):
>
> "But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce

> Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the Trust's property or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity."

I pause there to say that there are particularly here grounds for being concerned at a want of proper capacity to execute the duties, although the plaintiff might put it further than that.

[6] At [45] Lewison J said, quoting Lord Blackburn:

> "It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out or were greatly exaggerated so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed the trustee might be removed. It must also be borne in mind that trustees exist for the benefit of those to whom the creator of the trustee has given the trust estate."

I pause again to say those concluding sentences seem to me of particular relevance here. Is this estate being properly administered and is it being properly administered for the benefit of the beneficiaries? His Lordship went on at [46]:

> "The overriding consideration is, therefore, whether the trusts are being properly executed; or as [Lord Blackburn] put it in a later passage, the main guide must be 'the welfare of the beneficiaries'."

He quotes again from Lord Blackburn:

> "As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent

> those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign and does so. If, without any reasonable ground he refused to do so, it seems to their Lordships that the court might think it proper to remove them; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported."

Lord Blackburn added at paragraph [47]:

> "It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust is being administered, where it has been caused wholly or partly by substantial overcharges against the trust estate it is certainly not to be disregarded."

[7] Now it seems to me, if I may be forgiven for saying so in this ex tempore judgment, that it is helpful for Lewison J, as he then was, to go back to that judgment of that distinguished 19th century judge to assist a court in a situation like that and it seems to me properly applicable here. Neither Lord Blackburn nor I think Mr Justice Lewison with the unusual facts before him were seeking to draw a limit around the factors that might influence a court in setting aside a personal representative and substituting someone else in their place. For my own part, it seems to me, for example, that a pronounced delay on the part of the personal representative in the administration of this estate might be and indeed is a legitimate factor to take into account, although not expressly referred to in those decisions. It might be viewed as an example of a want of proper capacity to execute the duties. What is indisputable, I consider, is that a misunderstanding of the role of a personal representative of an estate so that the estate is not being distributed according to law but according to some concept of fairness quite different from the law on the part of the personal representative clearly is a ground for removal of the personal representative.

[8] Having set out the law and made those brief observations I will now turn to the facts of this case. Mr Hoey died on 13 October 2003 and little seems to have been done for a considerable period of time. Mr Hoey was obviously an energetic man and while he had inherited some farmland he had also acquired other land and he ended up with property at Culloville in County Armagh and Inniskeen in County Monaghan and over the border in County Louth and with

retail premises at Dublin Road in the town of Dundalk. He had also in his name in the Agricultural Credit Corporation, a banking institution in the Republic of Ireland at that time, a very considerable sum of money in excess of €750,000. So there were substantial businesses and assets to be distributed. While the Inland Revenue have accepted a valuation of the estate of a little in excess of £1m the first plaintiff gave sworn evidence of her sister, the fifth defendant's belief that the estate was in fact worth £5m. A report prepared by Mr Martin Mallon on behalf of KOSI Forensic Accounting puts the value of the estate somewhere between those two parameters.

[9] Now the points made by counsel for the plaintiffs I propose to take seriatim for convenience. The first point is that it is now 10½ years since this man died and although there was a purported distribution account following an express order from this court it is clearly a very draft document. Mrs Hoey, the administratrix, who came to give evidence, would lay the blame for that in part at the feet of her two daughters, the plaintiffs in this action. But it seems to me that that is somewhat unfair and I do not accept that contention. The mere fact of a 10½ year delay counts against the competence of the personal representative, although not necessarily determinative in itself as there can be many reasons for delay. However, there is a separate heading of delay to which senior counsel drew attention. The plaintiffs, and as I said the first plaintiff gave evidence, were asked to wait some time while matters were put in hand after their father's death and they did wait for more than three years before they wrote asking for details of the administration of the estate from Messrs Tiernan, solicitors, of Newry who were charged with that administration by the first defendant. It is recorded that they received no reply to that. An inheritance tax account was apparently only submitted to HMRC as late as January 2009, more than five years after the death of Mr Hoey and Letters of Administration were granted only in March 2009. The plaintiffs, understandably in my view, became restless and unhappy about this situation and registered cautions against the lands in the name of the deceased in Northern Ireland on or about 18 September 2009.

[10] Coincidentally, or, more likely, not coincidentally, this did prompt some activity on the part of the first and other defendants. In regard to this the other defendants were by no means onlookers, because the three sons of the family had been given, it would appear, a farm each to farm as well as the use of yards adjoining one of the family's business premises, namely that at Concession Road, Culloville and they were conducting business there of a sort previously carried on by their father in the sale of, certainly, coal and meal and, perhaps later, oil. The fact that on 28 October 2009, about five weeks after the plaintiffs had registered cautions, they were offered money in respect of two of these properties shows that or certainly indicates that the matter was not being conducted with expedition until they took steps. They were dissatisfied with these cheques which were reported to be their one sixth shares after the mother's share of the sale of two of the properties mentioned. The properties were being sold to their brothers and I will return to this topic in a moment. Following that

they rejected the cheques and on 25 March 2010 issued these proceedings. On 7 May 2010 they obtained an order from Master Ellison requiring the first defendant to file an affidavit. Further exchanges and steps then did take place, somewhat interrupted by pleas of ill-health on the part of the administratrix. She may well have been unwell. She told me in her evidence that she has had two hip operations, but happily, as her counsel agrees, she seemed not only well today but an articulate woman. Insofar as there was any suggestion before that she was physically unfit to carry out the duties of a personal representative I am not persuaded of that. She is 74 years of age but if it was just a question of age and health I would be satisfied she could continue.

[11] However, Mr Good draws attention to a further relevant factor under the general rubric of delay that although she was ordered by the Master to provide a full inventory regarding the estate, as is customary in such matters, on 7 May 2010, it took her 11 months it would seem in which to do that. Further orders were sought from this court and she, with an extension of time for ill-health finally disclosed a distribution account, so-called, in 23 January of this year. But it was a document that perhaps raised as many questions as it answered. One of the things that has by now become clear is that there is no personal representative's bank account contrary to what one might have thought was the normal course of events. She opened no account into which to put the estate as she realised it and from which she could then distribute it; nor did her solicitors expressly do so but their client account was apparently used for those purposes. It seems to me that that is a falling below the standards to be adopted particularly in the case of a large estate like this. When the plaintiffs and their advisors sought to consider matters they found they needed answers to a number of questions. There was a claim, for example, as to the sale of the properties. There was the assertion by Mrs Hoey in a document exhibited to her affidavit in compliance with the court that the lands at Silverbridge had been sold for £250,000, but there was no equivalent entry in the ledger account, the client account or any of the records of Tiernans and when Mrs Hoey came to give evidence it turned out she had <u>never</u> been paid that money and her admission of that is an admission of this case against her. Her primary duty is to get in the estate and distribute it. She must address the legal duties upon her and distribute the estate. What she seems to be saying now is that that money was not paid to her but she determined that the son who bought that would only have to pay his two sisters, the plaintiffs their purported share of the matter and that they should be happy with that. She justifies that by claiming that there was a waiver in relation to that. Now there is no waiver in regard to Silverbridge. There are two purported waivers in regard to the money in the ACC account and another in regard to the property at 58 Concession Road, Crossmaglen, purported waivers being the operative words as it transpires, and none in regard to Silverbridge. So there is a complete admission here that this lady failed to discharge her duty of getting in the money. There is a proposed sale of the property of Culloville which has not gone through because of these proceedings. There is the receipt by her of €732,650.08 from the ACC Bank, but we find from

the ledger account that over €600,000 of that was simply paid out to Mrs Hoey herself without any clear distribution or any evidence of distribution at all. And really when I recite these facts it seems astonishing to me that these proceedings have continued to be defended in the light of these facts. Likewise there is a claim that there was a sale of the Dublin Street, Dundalk property for €400,000, but again the administratrix did not trouble to collect the money from the son to whom she had sold it. There is no waiver that I can see in regard to that. There is a purported waiver about the ACC bank account in Dundalk, but it is a very curious document that has been given a designation Exhibit D1B in this case and as Mr Good of counsel pointed out, quite astonishingly, it appeared on the second day of this case. There is no hint of it in the first defendant's affidavits. There is no reference to it in the correspondence from Tiernans and nor was Mr Mallon the plaintiff's accountant told of it by the defendants' accountants. But the claim now is as follows:

> "We release and transfer our share of the money held in ACC Bank total €732,690.08 to our mother Albina Hoey dated 22 June 2009 signed Michael Hoey, Paul Hoey, John Hoey and Albina McArdle."

[12] This is put forward by Mrs Hoey to justify her retention of the money. It does not explain why she did not pass on to the plaintiffs their share of the money if four other beneficiaries had purported to waive it. In the event Mr John Hoey having been a fellow client of Tiernans shortly before these proceedings commenced in this court in March 2014 took separate advice from Messrs Luke Curran of Newry who entered an appearance on 19 March 2014 on his behalf and had instructed Mr Richard Shields of counsel. Yesterday, the first day of the hearing, they instructed him to say that he was no longer opposing the application, but was neutral and Mr Shields today said that rather than neutrality his client had moved to the position of supporting the plaintiffs' application to remove their mother as the administratrix. Furthermore, he gave evidence that he had not intended by signing this document, which he agreed he had signed, to waive any rights to the money, but he thought it was may be to facilitate his mother's administration of the estate, because he himself was a signatory of this bank account which he had operated to some extent in co-operation with father during the latter's life. Mrs Hoey Senior's account of this document is a very unsatisfactory one. I do not think I need reach a final conclusion about it now. But the evidence about how this came to be taken is deeply unsatisfactory and in any event, as I said, does not explain why the two plaintiffs were not given their share of the cash, so far as I can see.

[13] I could go through a number of other instances here. One which we heard about in evidence yesterday and today was the remarkable fact that the agricultural land has yielded no benefit to the estate for some ten years, neither by way of subsidies, nor single farm payments, nor conacre rent. Anything that came in went into Mrs Hoey Senior's estate in the sense of her own bank account

and she says that it was returned by her to Her Majesty's Revenue over her name but that it was really covered by rates and other charges on the land. Well it is very remarkable that over 100 acres of land yielded no benefit for such a period of time, but in any event it is clearly a breach of her duty to fail to account to the plaintiffs for those earning. Furthermore, it is a breach of her duty not to collect from her three sons before they became the owners of this land, some mesne profits or rent from lands to the benefit of the estate. These are, as I say, admissions of failure on her part. The court heard some frankly preposterous cross-examination about the number of cattle suggesting that Mrs Muckian, the first plaintiff, was wrong in saying that there were more than 30 cattle [in the estate]. Of course, Mrs Hoey's own affidavit exhibited a letter in which it was clear she had admitted to Her Majesty's Revenue and Customs that there were 58 cattle because the official in HMRC said that seemed exceptionally small given the land holdings. I reject this evidence of 30 cattle as clearly untrue.

[14] I heard the evidence of Mr Mallon on behalf of the plaintiffs which helped to secure the points which had been advanced by counsel and which I accept. It was in the course of cross-examination of him that the plaintiffs first heard of this suggestion of waiver and I find it utterly discreditable that any party, let alone one advised by solicitors and counsel, should be producing documents that are a key part of their defence to an action at the trial of the action, let alone on the second day, and that will be one of the factors I take into account when I come award costs in this matter. I think in the circumstances I need not go into the matter further. As I say it is clear this lady does not understand her duties as a personal representative. She has not discharged them. She has not properly protected the welfare of the beneficiaries and by her own admission she is not a proper person to administer this estate further. I therefore order that she be removed pursuant to Article 35 as administratrix of the estate of Michael Hoey deceased. As no other personal representative has been put forward I appoint Cleaver, Fulton and Rankin Trustee Limited as the administrator of the estate. I commend the plaintiffs in choosing a professional neutral person to perform this task. Mr Coyle says it will be costly, he may well be right, but his client has brought that on herself. Very well, gentlemen, that is the order of court.