Master 32

16/11/2005

Serial No. 04/042408/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
(PROBATE & MATRIMONIAL OFFICE)

IN THE ESTATE OF PATRICIA ROSE CAMPBELL (DECEASED)

Between

William Swann

Applicant

And

Brian Gillan
Ellen Hannon

Respondents

Master Ellison

[1] This is an application by William Swann, the sole principal in the firm Holmes & Swann, solicitors, and the administrator of the estate of the above-named deceased under a grant dated 6 December 2004 of letters of administration ad colligenda bona (an emergency grant limited until a further grant of representation is made), for an order permitting him to make a return of the assets of the above estate to the Capital Taxes Office and to discharge all capital taxes due in relation to this estate when assessed, and for costs.

[2] The present application was made on an ex-parte basis but when it came into my list for hearing I adjourned and directed that the relevant papers be served on the First Respondent Mr Gillan and on the Second Respondent Mrs Ellen Hannon. The

Respondents filed and served affidavit evidence contesting the application and disputing the appropriateness of the appointment of the applicant as administrator under the grant ad colligenda bona ('the emergency grant") and his involvement generally in the estate's affairs.

[3] Although following the death (apparently intestate) on 14 February 2004 of the late Patricia Rose Campbell ('the deceased') Mr Swann has never received instructions to act in her estate from any member of her family, he appears to have been her solicitor for many years before her death and retains for safekeeping the title deeds of her home. The First Respondent, Mr Brian Gillan, is a first cousin of the deceased and is a child of an uncle of the deceased who predeceased her. The Second Respondent, the late Mrs Hannon, who regrettably died after the commencement of this application (having in the course of these proceedings renounced her right to a grant of representation), was an aunt of the deceased. Accordingly both Mr Gillan and Mrs Hannon were entitled in the same class under Order 97 Rule 20 (2) (ii) of the Rules of the Supreme Court (Northern Ireland) 1980 (set out later in this judgment) to apply for a grant of letters of administration in the event that the deceased died intestate.

[4] In Mr Swann's application filed 5 October 2004 for leave to apply for the emergency grant he did not disclose, either in his affidavit evidence grounding that application or in response to questions put by me at the hearing of the matter, that anybody other than Mrs Ellen Hannon appeared to be entitled to apply for a grant of letters of administration (intestate). In his affidavit sworn 29 September 2004 he says in that respect: -

> "4. Enquiries into the relatives of the deceased are ongoing and proving to be cumbersome. It appears the deceased was a member of a very large family. I have only, to date, been made aware of one aunt who I am told is 94 years of age, and would be unable to extract a grant of letters of administration, should it transpire that there is in fact no Will of the deceased."

[5] It appears, from a subsequent affidavit of Mr Swann filed in response to affidavit evidence of the Respondents in the present application, and from oral evidence given by him on 25 October 2005, that at the time of his ex parte application for leave to apply for an emergency grant he was in possession of the following: -

(a) a list of known relatives prepared by him in May 2004 with the assistance of Margaret Kelly who is a second cousin of the deceased, which list contained sufficient particulars to enable Mr Swann readily to identify and disclose to the court the names and addresses not only of the Respondents but also of other cousins of the deceased who appear to be in the same class of entitlement to a grant;

(b) awareness of a meeting he had with Mr Brian Gillan in June 2004 (according to Mr Gillan's own evidence in or about April 2004) during which Mr Gillan indicated concern about Mr Swann's involvement in the affairs of the deceased, and Mr Swann told him that the estate would 'take years' to administer but that he could not give him any details of the estate;

(c) a course of recent correspondence with Morrison and Broderick solicitors for Mr Gillan from which it appears that (at a time when Mr Swann was corresponding with the Probate Office with a view to lodging his ex parte application) Mr Gillan continued to be very concerned about Mr Swann's involvement in the affairs of the estate. This correspondence includes a

letter dated 1 September 2004 from that firm to Mr Swann including the following (the underlined explanatory words being mine):-

> "Re: Our client – Brian Gillan
> Patricia Campbell Deceased
>
> We refer to our letter of 12th August 2004 (requesting, inter alia, details of 'the name of the members of the family who indicated you in respect of this case and the date of being instructed. … Please advise if the Deceased left a will') to which we do note appear to have received a reply. Our client is most anxious that this matter be expedited. Our client has instructed us that unless we receive a reply by to our letter of 12 August 2004 before close of business on 3 September 2004 he intends reporting the matter to the Law Society of Northern Ireland".

[6] Had any of those matters been disclosed to me in the course of the ex parte application in October 2004 I am satisfied that the course and outcome of that application would have been quite different. (Later in this judgment I shall refer to a letter from Mr Swann to the Probate Office dated 2 August 2004 and relied on by him as evidence of disclosure, but he did not draw the letter to my attention during the earlier ex parte application and, while indicating there may be more that 50 'possible beneficiaries', the letter added nothing by way of disclosure of material facts. I am satisfied that at the hearing on 13 October 2004 Mr Swann's representations in this area were to the effect that while he thought there could be upwards of 50 "possible beneficiaries", from his inquiries to date he had only been able to ascertain the name and address of one person, namely Mrs Ellen Hannon, who would be entitled to a grant on intestacy.)

[7] Based on the limited information disclosed to me in Mr Swann's grounding affidavit and submissions and on undertakings given by Mr Swann to the Court (as

recited in the order), on 13 October 2004 I made an order permitting the applicant to apply for a grant of representation ad colligenda bona allowing him to get in the estate, including the deceased's dwelling, its contents and car, all of which he claimed to be at imminent risk in the event of further delay in what was represented as being very complex estate. At that hearing Mr Swann also appeared to be at pains to emphasise his difficulties in ascertaining whether there was a will and in identifying any member of the deceased's family who would be entitled to undertake the burden of administering the estate other than the very elderly and infirm Mrs Ellen Hannon, whom I directed should be served with a copy of the ex parte order.

[8] In any event, despite the concerns he had expressed about the risk to the contents of the deceased's dwelling, Mr Swann sold these in a single transaction for some £150 (despite, as he appears to have acknowledged in cross-examination, an estimated value of up to 10 times that figure) and I was persuaded at a hearing of this matter on 11 May 2005 to direct that he should not bind the estate contractually to a sale of the dwelling. (The car, incidentally, appears to have been sold for £3,000.)

[9] If the circumstances are appropriate a complete stranger to the estate (as Mr Swann most certainly was) may be given leave to apply for a grant ad colligenda bona; see Williams, Mortimer and Sunnucks: Executors, Administrators and Probate (18th Edition 2005), at page 340.

[10] However, it is incumbent upon any person who makes an application on an ex-parte basis to make full and frank disclosure of all material facts. I quote the

following extracts from paragraph 29/1A/24 of the Supreme Court Practice 1999, Volume 1: -

> "On any ex-parte application the applicant must proceed 'with the highest good faith'…The fact that the Court is asked to grant relief without the person against whom the relief is sought having an opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all material facts… otherwise the order may be set aside without regard to the merits. (Boyce –v- Gill [1891] 46 LT 824)… the duty of full disclosure has always been important… the material facts to be disclosed are all matters which are material for a judge to know and which are necessary to enable him to exercise his discretion properly…. Materiality is to be decided by the court and not by the assessment of applicants or their advisors. (Airmax Limited –v- Schott Industrial Glass Limited [1981] FSR289 at 295 per Browne – Robinson J)"

(Emphasis added.)

[11] It is clear that Mr Swann did not make full and frank disclosure of all material facts in the course of the ex parte application. His legal relationship to the estate was merely as a custodian of the title deeds of the deceased's home. Such moral responsibility he may have felt as the former solicitor of the deceased would have been discharged by co-operating sensibly and helpfully, as a professional person who might by reason of his dealings with the deceased during her lifetime have some knowledge about her estate, with any member of the deceased's family who appeared to be interested in the winding up of her estate. Instead, he has proved to be obdurately disdainful of such persons. His ex parte application was made without the knowledge, consent or support of Mrs Hannon, Mr Gillan or any other member of the deceased's family. He and Mr Brian Gillan had had a disputatious encounter and the latter had instructed solicitors who had entered into a course of very recent

correspondence from which it was manifestly clear that if Mr Gillan had been aware of the application for an emergency grant he would almost certainly have opposed it.

[12] Mr Swann denies Mr Gillan's allegation that the latter offered to 'take on' the administration of the estate in the course of their meeting. As for the reasons I have just stated Mr Swann failed to establish the existence of a triable issue, it does not fall to me to determine the accuracy of this allegation. However that may be, there is no evidence that Mr Gillan said that he would not want to be involved as a personal representative, and no evidence that Mr Swann pointed out to him that he (Mr Gillan) might be entitled to a grant of representation, or that he could seek independent legal advice if he believed he might be so entitled. Indeed, in his oral evidence on 25 October 2005 Mr Swann held very firmly to the nonsensical opinion that the 'only' person who was entitled to a grant on intestacy was the late Mrs Ellen Hannon. That opinion is entirely contrary to the provisions (already mentioned) of Order 97 rule 2 of the Rules of the Supreme Court (NI) 1980 which make abundantly clear that the following are entitled in the same order of priority:-

> "(ii) Uncles and aunts (whether of the whole or half blood); or the issue (taking per stirpes) of any uncle or aunt (whether of the whole or half-blood) who has died during the lifetime of the deceased."

[13] In his oral evidence Mr Swann said that if he had to make a similar application in identical circumstances in the future, he would make it in exactly the same way. In light of his experience down to and including the hearing of the present application, I find that an incredible statement. Had he abstained from involvement in the estate or at least co-operated with interested family members, including Mrs

Hannon's daughter Mrs Eileen McAuley and Mr Brian Gillan, who came forward in the first few months after the death of the deceased, the delays arising from his unwanted and unwarranted involvement are likely to have been obviated.

[14] In the course of these proceedings Mr Swann and his Counsel Mr Denvir have made much of the failure of the Respondents to either lodge a caveat or apply (until an application was lodged on Mr Gillan's behalf on 28 July 2005) for a grant of representation, and of the need to clarify whether the deceased died testate or intestate and to ascertain the precise identity of all relevant kin.

[15] Given all that has come to light since the making of the ex parte Order on 13 October 2004, I am bound to conclude that the concerns I have just mentioned are, fundamentally, none of Mr Swann's business. He has no client and no proper standing in relation to the estate. He claims to have acted as a 'gesture' to the deceased but she did not instruct him to make a will and any solicitor-client relationship between them would of course have ended with her death. The deceased did entrust Mr Swann with the deeds of her home for safekeeping purposes but that did not clothe him with any standing beyond that of a bailee. He most certainly was not an appropriate person to extract a grant of administration to this estate and the order I shall make will reflect that fact.

[16] I wish to draw attention to certain correspondence between Mr Swann and the Probate Office not all of which was opened to the Court on the hearing of this matter on 25 October 2005 (at which I delivered a concise statement of reasons, announced the order and indicated that this written judgement would also be made available).

[17] At that hearing Mr Swann by his Counsel Mr Denvir relied on the following extract from a letter dated 2 August 2004 from Holmes and Swann to the Probate Office: -

> "….early investigations would tend to show that there would be a great number of possible beneficiaries from each side of the family, probably in excess of fifty."

[18] Ms Mary Robinson, Probate and Matrimonial Officer, replied to Mr Swann's letter on behalf of Master McReynolds (as she then was) by letter dated 18 August 2004 which included the following indication and procedural ruling: -

> "The Master has indicated that she would be happy to hear your application for a Grant Ad Colligenda Bona, which <u>should be made by way of a summons and affidavit and served on all interested parties</u>. She advises that <u>a suitable next of kin should apply</u> and the Official Solicitor would only be appointed as a last resort."

(The emphasis is my own)

[19] In his reply of 20 August 2004 Mr Swann expressed disagreement with the Master's indication and ruling and complained (inter alia) about the Master's unavailability 'to speak to the writer of this letter in relation to this matter to try to sort out difficulties,' which he 'found to be unhelpful in the circumstances'.

[20] Master McReynolds' indication and ruling were perfectly proper and correct, as was her refusal to speak to Mr Swann on an informal basis. As a solicitor Mr Swann should be aware that, in the absence of a formal application for directions or other hearing in a proper case, a judicial officer should not be expected to provide guidance or directions to members of the legal profession and should never be

expected to provide advice or information otherwise available from library resources or Counsel. The same applies to staff of the Probate Office who are not permitted to give legal advice to applicants in person – see order 97 rule 3 (8) - a fortiori, legal advice to members of the legal profession. In my view it is open to a Master to elect in special circumstances to give a preliminary indication, direction or ruling (preferably in the context of a formal application) but that is entirely a matter within the discretion of the Master concerned and should not be the subject of any expectation on the part of legal practitioners. In this instance Master McReynolds gave a most helpful indication and ruling (for the purpose of avoiding the kind of scenario described in this judgement) which for his part Mr Swann elected, most unhelpfully, to disregard.

[21] The Order I shall make will require Mr Swann to pay all the funds in his hands or in the hands of others to his order or use but belonging to the estate of the deceased into court.

[22] The Order will also revoke the emergency grant and discharge the ex parte Order of 13 October 2004.

[23] Mr Swann's costs of and incidental to both the ex-parte application for that Order and the current application will not be allowed. Mr Swann will be required to pay the First Respondent his costs in this application to be taxed forthwith if not agreed and paid as soon as possible.

[24] Mr Swann will be allowed costs in respect of his involvement in the estate in other respects, but these shall be taxed as if he had been acting at all times in person and not as a practising solicitor. There will be liberty to apply.