Society of Trust and Estate Practitioners
(Ireland Branch)

Locating missing beneficiaries in Estate Administration – Legal and Practical Issues

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INTRODUCTION

The Succession Act 1965

Section 62

1. The personal representatives of a deceased person shall distribute his estate as soon after his death as is reasonably practicable having regard to the nature of the estate, the manner in which it is required to be distributed and all other relevant circumstances, but proceedings against the personal representatives in respect of their failure to distribute shall not, without leave of the court, be brought before the expiration of one year from the date of the death of the deceased.

2. Nothing in this section shall prejudice or affect the rights of creditors of a deceased person to bring proceedings against his personal representatives before the expiration of one year from his death.

Section 27 (4)

Where by reason of any special circumstances it appears to the High Court (or, in a case within the jurisdiction of the Circuit Court, that Court) to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.

Section 117

1. Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

2. An order under this section shall not be made expect on an application made within six months[1] from the first taking out of representation of the deceased's estate.

Section 125

1. Where each of two or more persons is entitled to any share in land comprised in the estate of a deceased person, whether such shares are equal or unequal, and any or all of them enter into possession of the land, then, notwithstanding any rule of law to the contrary, those who enter shall (as between themselves and as between themselves and those (if any) who do not enter) be deemed, for the purposes of the Statute of Limitations 1957, to have entered and to acquire title by possession as joint tenants (and not as tenants in common) as regards the respective shares of those (if any) who do not enter.

[1] Reduced from 12 months by the Family Law (Divorce) Act 1996, s 46; will apply to all cases regardless of the date of death because time limit relates to date upon with grant was issued.

2. Subsection (1) shall apply whether or not any such person entered into possession as personal representative of the deceased, or having entered, was subsequently granted representation to the estate of the deceased.

Under **section 9 (2) of the Civil Liability Act 1961**, all causes of action whatsoever subsisting against a deceased at date of death ceases **after 2 years** and there is no extension for "disability", fraud, acknowledgment, mistake or part payment.

In contrast under **section 45 of the Statue of Limitations as inserted by section 126** of the **Succession Act** the period that a beneficiary can sue the estate is **6 years** from the accrual of the right to receive the share or interest. In other words a beneficiary can sue the personal representative or person to whom has received an incorrect benefit 6 years from the date of death.

Section 126

The statute of limitations 1957, is hereby amended by the substitution of the following section for **section 45**:

1. Subject to **section 71**, no action in respect of any claim to the estate of a deceased person or to any share or interest in such estate, whether under a will, on intestacy or under **section 111 of the Succession Act 1965**, shall be brought after the expiration of six years from the date when the right to receive the share or interest accrued.

2. No action to recover arrears of interest in respect of any legacy or damages in respect of such arrears shall be brought after the expiration of three years from the date on which the interest became due.

Section 127

Section 49 of the Statute of Limitations 1957, which extends the periods of limitation fixed by that Act where the person to whom a right of action accrued was under a disability, shall have effect in relation to an action in respect of a claim to the estate of a deceased person or to any share in such estate, whether under a will, on intestacy or as a legal right, as if the period of three years were substituted for the period of six years mentioned in subsection (1) of that section.

Points Concerning Section 45:-

1. An action by a personal representative to recover estate property is 12 years, ***Drohan v Drohan*** (1984) IR 311 and ***Gleeson v Freehan*** (1993) 2IR 113.

2. A beneficiary can rely on the period to 6 years being extended for fraud or acknowledgement and part payment (section 66).

3. Section 127 above extends the period by 3 years from date of cessation of disability.

Section 49 Registration of Title Act 1964:-

a) Subject to the provisions of this section, the Statute of Limitations, 1957 , shall apply to registered land as it applies to unregistered land.

b) Where any person claims to have acquired a title by possession to registered land, he may apply to the Registrar to be registered as owner of the land and the Registrar, if satisfied that the applicant has acquired the title, may cause the applicant to be registered as owner of the land with an absolute, good leasehold, possessory or qualified title, as the case may require, but without prejudice to any right not extinguished by such possession.

c) Upon such registration, the title of the person whose right of action to recover the land has expired shall be extinguished.

d) Section 24 of the Statute of Limitations, 1957 , is hereby amended by the substitution, for "section 52 of the Act of 1891", of "section 49 of the Registration of Title Act, 1964 (RTA)".

Property Registration Authority Rule Re: Section 49 of RTA 1964

Form 5 of the Land Registry Rules (application for registration were title is based on possession) (rules 17 and 46) together with form 16 (Affidavit of Discovery) (Rule 47).

Points Concerning Section 49 of RTA 1964:-

1. For a full discussion of this see Wylie Irish Land Law chapter 23 (3rd edition) page 1096-110.

2. In the context of the lecture today the net issue is that it was common practice in rural areas (particularly the West of Ireland) that a child went into occupation of the property without taking out a Grant of Probate or Administration and that other children had emigrated. Eventually the child in occupation of the property applies for adverse possession to the estate of the deceased parent/registered owner.

3. The next of kin in possession of the property at the date of death claims adverse possession to the personal representative (legal ownership) and the beneficial interest (beneficiary owner). There are difficulties in tracing siblings but it is important to show that in any application under section 49 of the Registration of Title Act 1964 that efforts have been made to locate where the missing beneficiaries are. However applications have been accepted where a sibling has simply disappeared upwards of 12 years and it is not possible to ascertain his or her whereabouts.

Presumption of Death

The presumption of death arises on the lapse of 7 years without the party having being heard of although mere circumstances not sufficient.

For a fuller discussion on this area of law see ***Miller Irish Probate Practice (1900)*** chapter xxxiii page 387 – 393.

Grants on Presumption of Death[2]

Cases frequently arise where it is impossible to arrive at direct evidence of the death of a party and consequently it is impossible to swear positively to the fact or the time of death. In such cases, grants may be made upon the presumption of death, but it is necessary to apply by motion to the court for an Order of liberty to state the death on belief. The application may be made ex-parte. In a case where there are insurance policies the court may require that notice is given to the insurance company.

Contents of Affidavit to Grounding Application

The affidavit in support of the motion must show sufficient grounds to raise such presumption and must set out fully and distinctly the circumstances about the person supposed to be dead, when he left the country, where he intended to go or did not in fact go, the several places and especially the last place he is known to have visited and the several persons who, if he is dead, would be of next-of-kin and entitled in distribution to his effects and the correspondence (if any) he had with his family or friends and any other circumstances that may exist that will increase the probability of his death having occurred. The applicant should depose of his own belief in the death of the deceased and if possible the affidavit should be corroborated by some member of the supposed deceased's family or by some person acquainted with him who should also swear to his person belief in the death.

Advertisements generally required

In almost all cases advertisements in newspapers circulated at the place where the deceased was last heard of or might be supposed (if alive) probably to be found, are required.

Presumption of death arises

The presumption of death arises on the lapse of 7 years without the party having been heard of, though the mere circumstances is not sufficient. In the absence of special circumstances until a person has been unaccounted for 7 years, there is no presumption of law that he is alive or dead. After the expiration of that period there is a presumption of law that he is dead. There is no presumption that the death took place at any particular time in that 7 years, and the onus of proving either before or after the lapse of such period that a person was alive or dead within that period is upon the person alleging the fact.

Presumption of death without regard to lapse of time

[2] See Probate Practice Seminar 3 – Probate Actions Law Society of Ireland – CLE Course 26th May 2000 by Brain Speirin S.C. and John O'Connor Solicitor, pages 15-16.

Where an individual has disappeared and satisfactory evidence that every means by advertisement or otherwise have been made (without success) to ascertain his whereabouts and where there is every reason to believe that he is dead, the court may presume his death without regard to the length of time that may have elapsed since his disappearance. But the lapse of time is often an important element.

Donnegan Deceased

On the 5th May 2000 Mr. Justice Kearns (as he then was) in the High Court allowed an Order presuming the death of a Mr. Brendan Donnegan under the following circumstances.

Mr. Donnegan, his wife and three friends went on a mountaineering expedition in the Andes on July 4th 1999. The object was to climb a number of peaks culminating in an attempt on Huscran, the highest peak. On the morning of July 27th 1999 Mr. Donnegan and two of his colleagues set out to reach the summit of Huscran at 1am. His two colleagues got into difficulty and turned back. Mr. Donnegan went on and it is believed that he reached the summit. On the descent it was presumed that he tripped on one of the crampons and fell 1,200 feet. A report from the Peruvian Mountain Rescue Team concluded that it was more likely that he had fallen and was trapped in a deep crevasse. Mr. Justice Kearns said that he had viewed a video of the location of the incident. He noted that certain items belonging to Mr. Donnegan had been found. Mr. Donnegan made a will in 1976 bequeathing his entire estate to his wife and a number of insurance policies. In an affidavit Mrs. Donnegan says that she got a message from the Department of Foreign Affairs on July 30th last informing her that her husband was missing. The Rescue Team concluded that Mr. Donnegan fell 80 metres, rolled 150 metres and fell vertically from an ice cliff into a crevasse. The retrieval of his body would have been impossible given the dangers to rescuers.

Notwithstanding that Mr. Donnegan was not dead 7 years, Mr. Justice Kearns said he was satisfied that this was a proper application brought with great care and sensitivity and a Court Order was made presuming the death of Mr. Donnegan.

Professional Liability

The general standard of care is what an ordinary competent practitioner would do in that particular field. An error of judgement would not automatically amount to an actionable negligence. However, an error of judgement could cause negligence. A solicitors current duty of care exists along the contractual duty and the question in so far as this talk is to consider the solicitors duty to intended beneficiaries under a Will.

Following ***Ross v Caunters*** (1980) CH297 and ***Wall v Hegarty and Callnan*** [1980] ILRM and ***Finlay v. Murtagh*** (1979) IR249, it is accepted that there is duty in contract and Tort to carry out professional skill in attending to clients affairs and that beneficiaries can have a cause of action.

Did ***White v Jones*** (1995) AC 207 open the flood gates or not? In a paper submitted to Trinity College on the 15th May 2010 Dr. Des Ryan submitted that the case law in relation to ***White v Jones*** and its applicability in Ireland is as follows:-

"However, it is submitted that it is preferable to regard this area of potential liability not as being based on some strained extension of Hedley Byrne, but on a simple application of the

three stage test for the duty of care approved in ***Glencar Exploration plc v Mayo County Council (No. 2)*** 2002 1 IR84.[3]

It is clear that ***White v Jones*** is best regarded as an application of the three-stage Caparo test, that there is a close and direct relationship characterised by the law as proximity or neighbourhood, and that the situation is one where it is fair, just and reasonable that the law should impose the duty of the given scope upon the one party for the benefit of the other."

Dr. Ryan submitted that "***White v Jones*** has not resulted in the flood gates being opened and referred to the case of ***Reader v Molesworths Bright Cleg*** (207) EWCA Civ 169. He concluded by stating "that the judgement in that case confirms that while there is no firm rule that a solicitor cannot owe a duty unless he has been instructed by that person alleging such a duty existed, it will be unusual for a duty of care to be recognised in the absence of such a retainer."

Darby v Shanley & Co. (209) IEHC 459, is an interesting recent case although it refers to a case of drafting a Will (as many of the negligence cases relate to).

I haven't come across a case where a solicitor has been deemed to be negligent for failing to locate a missing beneficiary in Ireland.

Missing Beneficiary

There are 4 ways in which a personal representative will seek to protect themselves against a missing beneficiary:-

1. A personal representative sets aside and retains a part of the estate for as much as the beneficiary would be entitled to until such time as it becomes clear that the beneficiary is in fact dead. The disadvantage for this is that it ties up a portion of the estate for a considerable period.

2. The beneficiary is presumed alive but location is not known. In these circumstances an advertisement could be placed in a newspaper (e.g. one of the tabloid newspapers circulated in the area where the beneficiary was last seen) or enquires could be made with the Registrar of Electors, local Gardai (or police) station, Registrar of Births and Deaths, trawl through local newspapers for example the Irish Time archives or engage a genealogist.

3. Obtaining a missing beneficiary insurance policy. This is often regarded as the most pragmatic way of proceeding.

4. Court Order - The most usual type of Court Order is what's know as a Benjamin Order after the case of Re ***Benjamin*** (1902) ICH 723 although an application in this regard could be included in an application under section 27 (4) of the Succession Act where a Court appointed administrator is being sought.

[3] Ibid., at, 255

Case Law

Nevill & Benjamin (1900 B. 5435)

In September in 1892 P. who was then 24 years of age, disappeared and he had never been heard of. Under his fathers will he was entitled to a share of the residuary estate in the event of his surviving the testator. The testator died in June 1893. Upon a summons taken out by the trustees in 1900 to have it determined how P share ought to be dealt with it was:-

a) Held that P must be presumed to be dead, and the absence of proof that he had survived the testator, the Court without making any declaration as to the death of P death, gave the trustees liberty to distribute his share on the footing that he had predeceased the testator.

b) Although the Court accepted that the Rule of Court is to presume life unless there is good reason to suppose the contrary, a disappearance unaccounted for was necessary to rebut the assumption of life. It also stated where there was a good motive for disappearance, the presumption of death does not arise.

Green's Wills Trust Attorney-General and others (1985) 3 All ER 455

In this case in January 1943 the testatrix's son went missing while on a war time bombing raid and was subsequently certified by the Air Ministry as presumed for official purposes to have died in January 1943. The testatrix continued to believe that her son was alive, and by her Will dated the 10th February 1972 she bequeathed by clause 5(b) the residue of her estate to trustees to invest the capital and accumulate the income for her son absolutely but with power to apply such part of the residue as they thought fit to trace the whereabouts of her son. By clause 5(c) she directed that if the son had not come forward to claim the capital and accumulated income by the 1st January 2020 the trustees were to establish a charitable foundation, having as its principal object the rescue, maintenance and benefit of cruelly treated animals and as a subsidiary objects the prevention of cruelty to animals and other similar charitable objects. The testatrix died on the 1st February 1976.

Held that in view of the evidence before the Court, it would not be right to incur the expense and additional delay of formal enquiry by the Court into whether the son had died. The court would presume that the son had died in January 1943. The Court did state however that whether such an order should be made did not depend on whether there would be administrative inconvenience caused by the trustees retaining the fund but on whether in all the circumstances the trustees ought to be allowed to distribute and the beneficiaries to enjoy their apparent interest in the present time rather than the future.

Naunton v Elton and another (1998] All ER (D) 661

The testator died in 1944 and left property for life to his son with a contingent gift for "my Brother, my three Sisters and my three nephews or such of them as shall be living at the date of death of my said son.....and if more than one in equal shares." At the time the will was made in 1941 the testator had in fact five nephews, but only 1 of them outlived the son who died in 1993. The testator died in 1995. The plaintiff, the executor of the last surviving will trust sought the Courts guidance as to whether he the nephew who died in 1993 was one of "my three nephews". If he was, then the fund passed to his estate. If he was not, the gift failed

and the fund would fall into the residue. Four possible contentions were put to the Court on the meaning on "my three nephews":-

1. That it meant three nephews whose parents were dead in 1941;
2. That it meant three nephews who were resident in England in 1941;
3. The my three nephews was a mistake and the testator simply meant my nephews; and
4. The provision failed for uncertainty.

The Court held that a finding provision failed for uncertainly was something of a last resort and held that the fund passed to the nephew who outlived the son and died in 1993.

Evans Deceased - *Evans V Westcombe* (1999) 2 All ER 767

The plaintiff was the son and the defendant was the daughter of the deceased who died intestate on the 18th October 1987. Letters of Administration to the deceased estate were granted to the defendant on the 24th May 1988. It was common ground that subject to administration, the defendant held the deceased estate upon a statutory trust for the deceased issue and that the relevant issue were the plaintiff and defendant and that they were therefore entitled to the shares to the deceased residuary estate. When the time came for distribution of the deceased estate in 1990 at the conclusion of the administration the plaintiff was assumed by the defendant to be no longer living and bought a missing beneficiary policy for approximately half the capital value of the assets at the time (some €21,000). The estate was distributed to the defendant. The plaintiff re-appeared in 1994 and by Summons issued in May 1996 he claimed accounts and inquiry in respect of the administration of the deceased estate.

In addition to the proceeds of this policy the plaintiff claimed compensation for loss of interest and took issue with 4 items of expenditure by the defendant in the administration.

The Court ruled:-

1. Personal representative particularly of a small estate should not be discouraged from seeking practical solutions from difficult administration problems without the expense or resort to the Court.

2. The missing beneficiary policy provided at relatively small cost a practical answer to such problems. The policy was to the advantage of all and was to some extent more effective their then limited protection provided by a costly application for a Benjamin Order. It was deemed the policy was a practical solution for the estate particularly as the beneficiary had been unheard of for nearly 30 years.

3. It also said that fairness decreed that in this case the defendant took a practical solution to the problem.

What is a Benjamin Order?

Williams, Mortimer and Sunnucks (1993) in their work on "Executors and Administrator and Probate at chapter 60 page 821 states:-

"Where problems or disputes arise in the course of administration between creditors, beneficiaries or representatives, the Court will normally be approached by writ or originating summons, for the purpose of resolving the difficulty and getting the estate properly administered. Such proceedings are known as **administration proceedings** and are to be distinguished from litigation adverse to the estate in which the personal representative are involved as plaintiffs or defendants representing the deceased. A representative is always entitled to the guidance of the Court in matters of difficulty and will normally be protected in costs both in obtaining such guidance and in its implementation."

Court Procedures

In the Circuit Court all proceedings are by way of Equity Civil Bill but in the High Court an application for a Benjamin Order would normally be taken by way of Special Summons (although as previously stated it may be part of another application sought in a different Court procedure).

The Special Summons procedure is different to a Plenary Summons and is set out in Rules of the Superior Court (RSC) **order 3**. It operates on the assumption that the matter would be heard on Affidavit evidence only (not oral evidence before the Court).

Such proceedings are commenced by way of Special Summons in the High Court. When a Special Summons is issued, it is given a return date by the Central Office before the Master of the High Court.

The Masters duty is to check the Affidavits.

In a Benjamin Order it is not possible to effect service but in normal circumstances if service is required an Appearance would be entered by the defendant or would be adjourned to allow for the filing of Affidavits.

Once the Master is satisfied with jurisdiction the case is transferred to the Chancery Motion List usually heard on a Monday morning (Special Summons are generally listed separately within that list). The Chancery Motion List can be dealt with on the day if the application is quite short but if it is in anyway complex or lengthy the application will be transferred to a fixed date.

RSA Rules

Ex – Parte Application

General motion applications are contained in order 52 of RSA but there are special rules for probate applications contained in order 79, rule 87.

"On ex-parte applications in probate causes and matters, a motion paper shall be lodged with the Probate Officer two clear days before the day on which such motion or application shall be moved or made, with an affidavit or affidavits of any facts to be brought under the notice of the Court in support of the same. The motion paper shall contain a short statement of the principal facts upon which the motion or application is grounded, and conclude with the

terms in which the motion is to be made. This statement shall comprise no facts which are not supported by affidavit or official documents, and any rule made by the Probate Officer on the subject of the motion or application shall be mentioned in the motion paper."

Therefore 2 matters are essential:-

1. Grounding Affidavit containing all the facts of the case; and
2. A Motion Paper containing a brief statement of facts.

Circuit Court Rules

Order 50 – Statutory Instrument Number 313 of 2007

Attached to this lecture I give an example of an application for a Benjamin Order in the Circuit Court which is in fact based on an application I made a number of years ago which at least at that time was successful.

You will note that there are following documents:-

1. Equity Civil Bill;
2. An Affidavit; and
3. Ex-Parte Application.

The reason why an Ex-Parte Application is required is that it is obviously not possible to serve the Equity Civil Bill on the missing beneficiary.

Thank you.