Dealing with Debts in Estates – Legal Issues

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Introduction

We are all familiar with the expression that there are two certainties in life – death and taxes. Well now perhaps in an Irish context at least in the current environment, it might be argued that for many individuals there are three – death, taxes and debt.

More often than not, the experience of most practitioners has been that the profile of those estates which they administered were definitively solvent. As a result, debts recognised as payable were usually repaid as soon as the Grant of Representation issued.

Against a background of unprecedented lending in the last decade in this country, the issue of debts in estates has become more relevant. In addition, stand alone debts are no longer the only concern, a material issue is dealing with those estates where liabilities exceed assets. I will endeavour to explore both scenarios is this commentary today.

Debts and Limitation Periods

Invariably most members of the audience today will be advising the personal representatives in an estate. Whether advising the personal representatives or advising the creditor of a deceased's estate, one must look specifically at the provisions of the Civil Liability Act 1961 (the "Civil Liability Act") and in particular, Section 8 and 9.

The survival of a cause of action against a deceased's estate is set forth in Section 8 of the Civil Liability Act as follows:

> *"8(1) …….on the death of a person on or after the date of the passing of this Act, all causes of action (other than excepted causes of action) subsisting against him shall survive against the deceased's estate."*

Section 8 provides that previous existing causes of action against a deceased survive.

For the definition of the relevant period, one must look to Section 9(1) which notes in this section *"the relevant period"* means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.

Section 9(2) then imposes a limitation period in the following terms:

> *"9(2) …. No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either –*
>
> (a) *proceedings against him in respect of that cause of action will commence within the relevant period or appending at the date of his death, and*
>
> (b) *proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his date of death or after his death, whichever period first expires."*

In keeping with the provisions of Section 8, Section 9(2) is expressly confined only to causes of action which have *"survived against the estate of the deceased".*

It is clear from the above that a cause of action must exist at the date of death in order for the provision in Section 8 to operate. As a result of the provision in Section 8 operating, the further provision in Section 9(2), operates to effect a limitation period.

The inference is that if no cause of action was subsisting at the date of death, then the ordinary statutory limitation period as prescribed by the Statute of Limitations Act 1957 (the "1957 Act") (Section 11) will apply, which is a period of six years from the date the cause of action accrued for actions founded on contract. The limitation period is six years also for actions founded on tort save and except an action claiming damages for negligence, nuisance or breach of duty (where the duty exists by virtue of a contract for or of a provision made under statute) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or includes damages in respect of personal injuries to any person, which shall not be brought after the expiration of three years from the date on which course of action accrued (Section 11(2)(b)).

Event of Default/Security Documentation

It is the event of default that gives rise to the cause of action.

Simply stated, in relation to unsecured debt, in the event of there being a default giving rise to a cause of action before death, the limitation period is a strict two year period from the date of death (or possibly shorter if the default has already continued for more than four years prior to death).

On the other hand, in the event of the first default occurring after the death of the customer, the standard six years applies. Case law bears out this distinction. In *The Governor & Company of the Bank of Ireland v O'Keeffe* (1987) IIR 47 the deceased guaranteed during his lifetime to pay on demand the debts of a limited company Ballinwillin Development Company Limited. The deceased died on 11 February 1982. Proceedings were issued in February 1985, therefore, more than two years after the date of death of the deceased.

An application by the defendant to have the proceedings stayed on the basis they were statute barred, not having commenced within two years of the date of death was rejected by the court on the basis that the cause of action did not accrue until after demand was made. The first demand for payment in this case was made on 6 May 1982. On the basis that no cause of action was subsisting against the deceased at his date of death, Section 8 did not apply and consequently, the limitation period in Section 9(2) does not apply. The ordinary limitation period applied by the 1957 Act consequently applied.

If demand is a pre-requisite to enforcement of security, then a demand must invariably be made during the deceased's lifetime. However, if it is only the deceased's death which results in a breach of covenants under the security documentation or a demand made after the deceased's date of death, then invariably no cause of action is subsisting against the deceased at date of death and the ordinary statutory limitation periods applied by Section 11 of the 1957 Act will apply.

A case which distinguished the *O'Keeffe* case is the *AIB v Phillip English* 1993 II ILT 208 case. In that case, the deceased guaranteed sums due or to become due and owing by his son to the limit of £3,000. A demand was made on 12 April 1985, but the Bank never sought to enforce the guarantee while the deceased was alive. The deceased died on 18 February 1987 and proceedings were issued on 28 September 1989. Whilst the decision was more relevant in the terms of independent legal advice surrounding the guarantee, Judge Sheridan did state that the present case was distinguishable from the *O'Keeffe* decision as the demand in the present case was made during the lifetime of the deceased, therefore a cause of action was subsisting at the date of death.

It is crucial therefore, that the executors closely examine the security documentation to see when exactly the cause of action accrues. If the event giving rise to the cause of action has accrued prior to the death of the deceased, then the creditor will only have the lesser of the two periods specified in Section 9(2) of the Civil Liability Act 1961 (the "Civil Liability Act").

One of the fundamental tenets of the role of the executors is that they have a duty to preserve and protect the value of the estate. Therefore, the duty must extend to protecting against any claims which might be statute barred by virtue of the application of the provisions in Sections 8 and 9. In these circumstances, it would be incumbent upon the executors to challenge any proceedings issued two years after date of death, if they could credibly sustain an argument that the event of default occurred during the lifetime of the deceased.

Secured v Unsecured Debt

It is clear from the commentary above that in relation to unsecured debt or straightforward *"money claims"* in the event of there being a default giving rise to a cause of action before death, the limitation period is a strict two years from the date of death (or possibly shorter if the default has already continued for more than four years prior to death).

On the other hand, in the event of the first default appearing on or after the death of the customer, the standard six years applies.

One interesting issue which remains is whether there is a distinction in treatment where you have unsecured debt versus secured debt. The classic example of secured debt is where a bank is suing to enforce its security, say a mortgage. The question is does Section 9 impose a potential restriction of the banks entitlement to sue for possession on foot of the mortgage ("claims for possession") where there has been default in the payment of instalments prior to the death of the mortgagor. By virtue of the definition in Section 8, I have seen the argument that causes of action are limited to causes of action in personam, namely to the deceased person only. It could be argued, therefore, that it does not apply to actions in rem, which concerns rights to an asset or object.

Specifically, I have received Senior Counsel's opinion on this point in a case where a bank, in addition to seeking recovery of its debt, was also seeking possession of a property pursuant to a mortgage deed. While it might be argued that Section 8 was only intended to address actions in personam, the matter is confused by Section 9. Section 9(2) commences by noting that no proceedings shall be maintainable in respect of *"any cause of action whatsoever*, *which has survived against the estate of a deceased person."*

The Opinion noted that the language is clearly more embracing, than the language in Section 8. Therefore, while there is no judicial pronouncement on this, the Opinion noted that there is always the risk that in an appropriate case, a court would hold that the incorporation of the word *"whatsoever"* in Section 9(2) was intended to apply to all causes of action. The prudent view therefore, must be that if acting for a bank or other creditor of secured property, that proceedings should be issued within a period of two years from date of death.

This view is to be adopted notwithstanding, perhaps arguments on the other side that if Section 9(2) was intended to apply in these circumstances and have such far reaching effects then why was a limitation period of twelve years included in Section 13(2) of the 1957 in relation to *"an action to recover land"* defined at Section 2(1) as including proceedings by a mortgagee for delivery of possession.

Impact of an Acknowledgment

The statutory provisions in the 1957 Act dealing with the acknowledgment are in Chapter 3 of Part III. In particular Section 52 provides:

> *"where –*
>
> (a) *the right of a mortgagee of land to bring an action to recover the land has accrued; and*
>
> (b) *either (i) the person in possession of the land acknowledges the mortgagee's title to the land, or (ii) the person in possession of the land or the person liable to the mortgage debt acknowledges the debt, the right of action shall be deemed to have accrued on, and not before, the date of the acknowledgment."*

All acknowledgements must be in writing and this is provided by Section 58 of the 1957 Act. In addition the position with part payment has the same effect as acknowledgment and this is provided in Section 62.

Therefore, while the position in the 1957 Act is quite clear, the 1961 Act provided no saver in relation to Section 9 and so the question arises as to whether an acknowledgment or part-payment can be

effective in stopping the statute in respect of a claim against the estate of a deceased person which accrued prior to their death. Obiter comments made by Barron J in the case of Bank of Ireland v O'Keeffe are unhelpful in this regard. He indicated:

> *"The Plaintiff had contended that if the defence of the section was a good one, that nevertheless there was a valid acknowledgement on behalf of the estate which stopped the statute from running. I do not think it is necessary to deal with this point in any great depth. However, it does seem quite clear from the provisions of Section 9 that the relevant period referred to Section 9(1) includes not only the basic period of limitation laid down by the statute but also the extension of such basic period by reason of such matters as acknowledgments in writing, mistake, etc. For this reason, had the section applied to the fact that there might or might not have been an acknowledgment in writing by the estate, would not have availed the Plaintiff*."

Barron J's comments would seem to imply that acknowledgment or part payment by the estate of a deceased person could not stop the statute running. However, it is worth noting that this view was not shared by Judge Sheridan in the Circuit Court in the *AIB v Philip English*. In that case, it was noted that entry of a debt in a deceased's schedule of assets could be construed as an acknowledgment which would have the effect of stopping the statute. The logical interpretation of Section 9 it would seem should be that the shortening of the limitation period as applies therein was never intended to preclude acknowledgement to the cause of action pursuant to Chapter 3 of Part III the 1957 Act.

Unfortunately, however, in the light of any judicial pronouncement on this issue and considering the observations of Judge Barron, one must again err on the side of caution. If acting for the creditor, one should institute proceedings within the two year period. On the other hand as rule of thumb, executors should be wary of acknowledging any debt, where otherwise that debt might possibly fall away.

Exceptions to Section 9(2)

Section 1048 Taxes Consolidation Act 1997 ("TCA 1997") deals with the assessment of taxes on executors and administrators.

Section 1048(2) provides that no assessment under the section should be made later than three years after the expiration of the year of assessment, in which the deceased person died where the Grant of Probate or Letters of Administration issues in that year. Alternatively, no assessment should be made later two years after the expiration of the year in which the Grant was made in any other case. The issue is to whether this section has priority over Section 9(2) of the Civil Liability Act.

No clear judicial pronouncement has been made in this matter, and Lorna Gallagher in her paper will review on an ex tempore judgement of Judge Dunne's on this matter approximately two years ago holding Section 1048 takes precedence.

Another legislative provision which trumps Section 9 is that found in Section 341(4) of Social Welfare (Consolidation) Act 2005 (the "Social Welfare Act"). It provides that Section 9 shall not apply to an action for the recovery of debt due to the Minister for Social Community of Family Affairs. Accordingly, the possibility of a claim by the Minister should be investigated in all cases by the personal representative where a deceased is at time in receipt of assistance as defined in Social Welfare legislation.

Again, personal representatives should be aware failure to pay any such debt out of the estate could result in personal liability.

This special position of social welfare debt we will note again in the context of social insurance contributions and their priority in an insolvent estate/estate administered in bankruptcy.

Creditors Grants/Appointment of An Administrator Ad Litem

The importance of issuing proceedings within the two year period is apparent from the discussion above.

Where a Grant of Representation has issued, prudent practice would be to issue proceedings against all of the executors or administrators duly appointed by the High Court. In the case of an intestate estate, unlike the position of an executor, the administrator's right and title to the estate does not arise until such time as the Grant of the Letters of Administration Intestate has issued in the deceased's estate. As per Section 13 of the Succession Act 1965 (the "Succession Act") which provides that where a person dies intestate, until administration is granted, his estate vests in the President of the High Court (see also *Gaffney v Faughnan [2005] 1 EHL 367)*. This might be relevant where an alternative to the issuing of proceedings is being investigated such as a surrender of possession by the intending administrators, rather than the Bank suing for order for possession.

One issue that may arise is against whom should proceedings be issued against in the event that there are executors appointed but no formal Grant has issued. In such circumstances, the creditor can proceed against any named executor where they have indicated that they intend to take out a Grant.

All that is necessary is that the Grant has been extracted at the time that the proceedings go to trial. What if the person who advised that they intended to take out a Grant in response to a claim on behalf of the creditor did not proceed to extract the Grant? Undoubtedly, in those circumstances, that person would be regarded as having intermeddled in the estate.

By virtue of that intermeddling, they would most likely be held liable as executor de son tort (of his own wrong) so as to be liable in the event that the creditor was subsequently disadvantaged if as per the example, the executors subsequently renounced or reserved their rights to take out the Grant.

It is notable that potential liability as an executor de son tort does not simply apply to appointed executors. Intermeddling with the assets of the deceased is sufficient to render any person liable as executor de son tort. An executor de son tort may be liable under Section 23 Succession Act to the extent of the estate coming into his hands.

Section 23(1) of the Succession Act provides:

> *"If any person, to the defaulting of creditors or without full valuable consideration, obtains, receives or holds any part of the estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the estate received or coming to his hands, for the debt of liability released."*

The provision does go on to provide some protection for an executor de son tort who acts bona fide in his dealings with the estate of a deceased person, in that it allows him to deduct any monies owing and due to him by the deceased, to make other payments which the lawfully appointed executor would have been entitled to make and to deduct them also from the estate for the deceased.

Where the executors do not give any acknowledgment and seek to resile from taking out a Grant in a deceased's estate, then the creditors can apply to take out a Grant of Administration.

A creditor for the deceased may apply for a Grant under Order 79 rule 5(4) and rule 6(g) of the Rules of the Superior Courts. Order 79 rule 5(4) provides that a creditor or indeed the personal representative of a creditor, may apply for Grant of Administration Intestate where all other persons entitled to such a Grant have first been cleared off. Order 79, rule 6(g) entitles the creditor for the purpose of ensuring payment of this debt to apply for a Grant of Letters of Administration with the Will annexed.

Where, an attempt is made by a creditor to enforce payment of his debt but is frustrated by the behaviour of the person entitled to apply for the Grant, he may apply for A Grant under Section 27(4) Succession Act. It is worthwhile quoting the relevant extract from the statutory provision;

> *"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 other person as it thinks fit."*

I referred above to the specific limitations on the statutory period outlined in Section 9(2) of the Succession Act. In order to be valid, the proceedings need to be properly issued. The courts jurisdiction in this regard to grant such an order to somebody who ranks in priority to the applicant is based on a wide ranging jurisdiction of the court if it *"feels that it is necessary or expedient to do so"*. The discretionary power of the court allows it to make a Grant to such person as it thinks fit.

If in a testate situation, where the appointed executors have not taken any steps to extract the Grant or if an intestacy situation a Grant has not yet issued, the prudent thing for a creditor to do to avoid his claim becoming statute barred, is to apply to court under Section 27(4) to have someone appointed as an administrator ad litem.

An administrator ad litem is appointed *"for the purpose of the legal action only".* Accordingly, under a Section 27(4) application, the function of the administrator ad litem is simply to accept the service of proceedings and defend the proceedings brought against the estate. Their function in the administration is limited to this specific purpose.

Procedural Requirements

An application under Section 27(4) is by way of Special Summons based on a grounding affidavit accompanying a Notice of Motion which must state the special circumstances attending the application. There is no need to recite persons with prior title in order to apply for a Grant.

It is notable that even where a Grant has already been made to an executor or administrator, the court can still entertain an application under Section 27(4). Where however, there is a validly appointed personal representative, the application under Section 27(4) should be accompanied by an application under Section 26(2) or Section 27(2) revoking the original Grant and requiring removal of the current personal representative.

Lorna Gallagher in her paper and discussion later this afternoon will elaborate on these procedural issues in further detail.

Solvent and Insolvent Estates

The next section of the paper will explore the treatment of debts in two different situations, one where their presence is not significant enough to alter the solvency of the estate and the other where the level of debts is such that the estate is insolvent.

In this regard, it is important for practitioners to be familiar, not alone with the terms of the Succession Act, but also provisions enshrined in Bankruptcy Act of 1988 (the "Bankruptcy Act").

Part V (Sections 45-49) and Parts I and II of the First Schedule of the Succession Act might be described as the practitioner's reference point in this regard. As I will explore in a little further later, it is incumbent upon the personal representatives to ensure that they administer the estate assets in accordance with the requirements of Part V.

The starting point is Section 45 which notes that the estate of a deceased is for the payment of debts and any legal right. Any disposition by will inconsistent with this section is void, as against the creditors and any person entitled to a legal right. This section takes effect without prejudice to the right of incumbrancers. It is therefore important for a personal representatives to look at the totality of assets that may fall to the deceased's estate.

Debts in a Solvent Estate

As suggested by Brian Spierin in his text on the Succession Act, the question in a solvent estate is

> *"not the order in which creditors are to be paid, but from which parts of the estate the deceased's debts are ultimately met and which of the beneficiaries suffer as a result. There is no concern in other words, that the estate will not be sufficient to discharge debts."*

There are separate and distinct rules in Section 46(3) of the Succession Act which deal with the payment of debts in a solvent estate and how the assets are applied. It refers us to Part II of Schedule 1 of the Succession Act. It indicates the order as to which assets are applied, as follows:

1. property indisposed of by the will;

2. the residue;

3. property specifically appropriated for the payment of debts;

4. property charged with the payment of debts;

5. pecuniary legacies;

6. specific legacies and devises;

7. property appointed by the will under a general power; and

8. the order of application may be varied by the will.

Where a particular asset is applied out of order the person entitled to that asset has a right to have the assets *"marshalled"* so that he may get full value for his legacy and the burden falls on another legacy which is liable before his own (Section 46(5)).

Section 47 deals with liability to pay a charge as between beneficiaries. It provides that charges on property of a deceased bequeathed are paid primarily out of the property charged unless a contrary intention is expressed in the Will. The rights of a chargee are not affected. He may seek to have payment out of the general assets of the deceased, if the deceased was personally liable. The doctrine of marshalling then applies as between the beneficiaries to make the debt fall on property charged.

The key issue is to ensure that the estate thought to be solvent, is not in fact insolvent. In this regard, the executors must tread carefully and prudence should dictate if there is a concern as to solvency, that executors should proceed on the basis that they are dealing with insolvent estates and give priority to the debts and liabilities in the order set out in Schedule 1 Part I of the Succession Act (as set out in Section 46(1)).

Administration of an Insolvent Estate

The order of priority of debts in an insolvent estate are set out in Section 46(1) of the Succession Act. It in turn refers the personal representative to the First Schedule of the Succession Act, Part I.

I have set out below the text of Part I of the First Schedule;

> *"Rules as to payment of debts where the estate is insolvent;*
>
> *1. The funeral, testamentary and administration expenses have priority.*
>
> *2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.*
>
> *3. In the application of the said rules the date of death shall be substituted for the date of adjudication in bankruptcy."*

The clear implication is that in the administration of an insolvent estate, the bankruptcy code comes into focus. It is only the general creditors who rank equally in terms of the division of the assets.

Funeral, testamentary and administration expenses are given priority. Testamentary and administration expenses include costs involved in extracting a Grant and any legal fees involved in the cost of realising and safe-guarding the assets of the deceased and any payments which have been made as a pre-requisite to obtaining representation.

Section 46 is a new provision in the Succession Act. Before that, there was a different procedure for dealing with the death of a person leaving an insolvent estate. The order of priority of debts depended on whether the estate was administered by the personal representative out of court, or through the administration in bankruptcy procedure which I will note further below.

The new order prescribed by the rules set out in Part I of the First Schedule to the Succession Act, gives funeral, testamentary and administration expenses priority and then provides that the same rules shall prevail as the respective rights of secured and also unsecured creditors as may be enforced under the law of bankruptcy, with respect to the rights of assets of a person adjudged bankrupt.

In this regard, the date of death is substituted for the date of adjudication of bankruptcy.

In terms of Part I of the First Schedule, it should be noted that this governs only the order of priority of debts and liabilities, the rights of creditors, the proving of debts and not the special rules of bankruptcy, such as reputed ownership and fraudulent preferences and fraudulent conveyances/voluntary settlements which are not applicable. Although a personal representative/creditor would be unlikely to succeed in a challenge to any such fraudulent conveyances based on the relevant sections in the Bankruptcy Act 1988, it may be possible to apply to set such transactions aside based on section 74 of the 2009 Land and Conveyancing Law Reform Act 2009. Notably, this was possible in the UK deceased of *In re Eichholz* where a deceased had conducted a fraudulent conveyance during his life which was set aside on the basis it was contrary to Section 172 of UK Law of Property Act 1925.

Administration in Bankruptcy

To understand conceptually the principles involved in administration of an insolvent estate, one should understand the analogous provisions which apply under the bankruptcy code.

Where a bankrupt individual dies, the court can proceed with a bankruptcy as if the person was still alive. It has been said therefore, that death does not impact as to how the insolvent estate would be administered.

Alternatively, a person may not die a bankrupt, but his estate may have been insolvent. Strictly speaking, the definition of insolvency is an inability to pay one's debts as they fall due *Re Creation Printing Company Limited, Crowley v Northern Bank Finance Corporate Limited [1981] IR40* However, if the liabilities exceed the assets, it would be wise to proceed in my opinion, as if one was administering an insolvent estate. My later comments on the personal liability of executors highlight this.

The position regarding the estates of persons who die insolvent is dealt with in Part VI of the Bankruptcy Act (Sections 115 to 121).

A key provision under Part VI is Section 120. This notes that the provisions of the Bankruptcy Act shall so far as they are applicable and with appropriate modifications apply in the case of an order of administration under Part VI, as they apply in the case of an order of adjudication, except that certain provisions in the Bankruptcy Act do not apply, including Sections 50, 57, 58 and 59. This conforms with the position of an estate administered out of court noted above.

A petition to have an estate administered in bankruptcy may be presented by the deceased's personal representatives in the same way that a declaration of insolvency procedure applies if a debtor has not died. The petition may also be presented by any creditor of the deceased, provided his debt would have supported a bankruptcy petition if the debtor was still alive.

Once notice of the petition is served on the personal representative, he may not make any further payments or transfers of property from the estate and any such disposition will not operate to

discharge him vis-à-vis the Assignee in Bankruptcy pursuant to Section 116 of the Bankruptcy Act. This does not invalidate any payment made or any act or thing done in good faith by the personal representative before the bankruptcy commenced (Section 116(2)).

If, on hearing the petition it seems to the court that "*there is reasonable probability that the estate will be sufficient for the payment of the deceased debts*" it will not make that order. But it may so order if the estate appears to be insolvent. If cause is shown why such an order should not be made, the court may dismiss the position with or without costs. An administration order can be made even though the deceased does not have a personal representative.

The effects of making an administration order are similar to those following adjudication. The deceased's estate vests in the Official Assignee to be realised and for distribution. Once an administration order is made, the deceased's personal representative must file in the Examiner's office and lodge duplicates with the Official Assignee duly stamped with the date of filing, a statement of affairs regarding the deceased's estate and an account of the representatives dealings with the estate, in such form and verified in such manner as the Asignee may require. He may also require the representatives to supply other particulars of the deceased's affairs from time to time.

The Link between the Succession Act and the Bankruptcy Act

It is possible to have an insolvent estate which is administered by the personal representative out of court (Section 46(3) of the Succession Act Part 1 of the First Schedule). Part 1 of the First Schedule in turn notes that the order of priority of debts in an insolvent estate the rules as to the valuation of liabilities and respective rights of creditors is to be governed under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

In many respects, the position of the personal representative when administering an insolvent estate out of court is analogous to the position of the Official Assignee. The fundamental duty of the Official Assignee is to gather in all of the bankrupts property, to realise the property, to ascertain the debts and liabilities and to distribute the assets in accordance with the Bankruptcy Act.

Alternatively, if the Official Assignee does not act which where, for example, the creditors appoint a Trustee in Bankruptcy, the Trustee in Bankruptcy has similar powers and a similar mandate.

Priority of Payments

The priority of payments is set out in Part III of the Bankruptcy Act. Specifically, Section 81 identifies the preferential debts.

We know already an insolvent estate is not being administered in bankruptcy, the rules regarding priority of payment as set out in the Succession Act, indicate that the payment of funeral, testamentary and administration expenses have priority. This priority of such funeral and administration expenses apply also to an administration in bankruptcy by virtue of Section 119. Thereafter, the personal representatives must apply the assets in payment of preferential debts as laid down by the Bankruptcy Act.

Such preferential debts include;

- rates and taxes;
- wages or salary of a clerk or servant or labourer or workman for services rendered during the four months prior to death.

These preferential debts were originally provided in the Preferential payments in Bankruptcy (Ireland) Act 1998 (the "Bankruptcy (Ireland) Act") and Section 81 has expanded that list further.

Section 81(2) of the Bankruptcy (Ireland) Act notes that the foregoing debts are to rank equally between themselves and be paid in full unless the property is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

Legislation in the form of the Social Welfare Act has identified a particular type of debt which has given a preferential status ranking before the usual preferential status ranking, thus the designation "super preferential".

These are the unpaid employment contributions under the Social Welfare Act that should be paid to the Social Insurance Fund which the bankrupt employer has deducted from an employee's remuneration. Section 19(3) of the Social Welfare Act notes in relation to such sums that they

> *"shall not form part of the property of the bankrupt or of the arranging debtor so as to be included among the [preferential] debts…."*

Rights/Duties of Personal Representative

There is a right for personal representatives to prefer creditors, ie, to pay one creditor in preference to other creditors who have debts of equal, but not of superior quality. (Section 46(2))

Unlike the right of retainer (whereby a personal representative is entitled to retain his own debt out of the assets of an estate) the right to prefer creditors continues to be exercisable where the estate is insolvent. Again, it should be exercised cautiously, such that a personal representative does not potentially become personally liable to any creditor.

The first duty of the personal representative as we know is to gather in/quantify the extent of the assets that comprise the estate. These assets consist of any legal and equitable interest of the deceased at his date of death and they must firstly applied towards the discharge of debts, funeral and testamentary expenses liabilities and any legal right (Section 45 Succession Act). Any disposition inconsistent with this will be void as against creditors.

It is important therefore, that personal representatives fully investigate all of the deceased's assets which may be required to meet liabilities. Once they do so, they should identify if an estate is solvent. If there is any doubt in this regard, they should proceed as if administering an insolvent estate.

Personal Representative Protection

The personal representatives remain personally liable for the debts of the deceased to the extent of the available assets notwithstanding they may have distributed the estate without notice of any outstanding debts.

As the personal representatives may not know the full extent of the deceased's indebtedness at the time of his death, to protect themselves from liability for unknown debts, they should furnish notice to creditors in the form of a Section 49 notice.

It is important that the notice under Section 49 consistent with the terms of the Succession Act. It is one which

> *"in the opinion of the court in which the personal representatives is sought to be charged, would have been given by the court in administration."*

Although the personal representatives are not personally liable for debts in respect of assets they have distributed without notice of a claim, they do remain liable in respect of claims which they were aware of when they distributed, even though the claimant did not respond to the advertisement.

The rights of a creditor to follow any assets distributed by the personal representative are not prejudiced by the statutory protection afforded to personal representatives.

Application to Court

The Section 49 notice does not bestow definitive protection. No further comfort is given in the Succession Act as to the quality of the notices that should be furnished. The usual practice is two notices at one week intervals in national and local newspaper. Where there is a doubt, an application

should be made to the court, otherwise, benefit of section may be lost. A Section 49 notice does not for example, give protection against a contingent liability such as an insurance claim or a guarantee.

The most robust form of protection for a creditor would be an application to court for leave to distribute the estate. In those circumstances the personal representatives will be protected against further liability to the extent that made full disclosure to the court and followed the instructions of the court.

An order called a Benjamin Order can be made permitting distribution on an assumed basis that certain advertisements are made or permitting distribution on terms where provision is made for a known contingency such as a potential insurance claim or potential liability under a guarantee.

As regards the proving of debts, it is also worthwhile noting that even when an estate is being administered out of court in an insolvency situation, that the personal representatives must apply the rules in relation to the proving of debts. There are specific rules in the Bankruptcy Act as to how a creditor goes about the proving of debts to the Official Assignee which I do not propose to deal with in this paper suffice to say that this in turn, shall create its own issue for creditors.

Practitioners however, should be aware that where personal representatives have misinterpreted the priority of debts or have made a distribution in a situation where an estate which they thought to be solvent was in fact later proved to be insolvent, that they may suffer personal ability to the extent of those estate assets which were previously available to discharge those creditors claims.

In summary, if in doubt, proceed with the utmost caution. Proceed as if administering an insolvent estate if in any doubt, follow the rules in Schedule 1 and Section 81 of the Bankruptcy Act.

Implications for Will Drafting

While it may seem an obvious issue, it is important to note that any liabilities that are in an estate remain effectively as estate liabilities.

It may be that for whatever reason, creditors including banks may seek to come to an arrangement with the personal representatives to ensure the commitment to repay is not limited to the estate asset, but also to any personal assets of the succeeding beneficiary in the estate.

It is very clear that there is no such reason for succeeding beneficiaries of an estate to take on such liability. However, it is also worthwhile noting that because of the sense of commercial issues involved, that the executors that should be provided for in such a Will would be independent and robust to deal with any such creditor claims.

It would also be important to include a power of partial disclaimer such that beneficiaries might be able to effectively elect for some part of the estate to transfer to them leaving the part encumbered with the debt remaining in the estate.

Conclusion

The area of debts in estates is fraught with potential difficulties for unerring personal representatives. Likewise, creditors would be well served to proceed on the basis that if in doubt, issue and find out.

In taking on the role, few personal representatives are conscious of the potential for personal liability. As advisors, it is important to bridge that knowledge deficit by pointing out the potential risks and how to proceed accordingly.