NON CONTENTIOUS PROBATE APPLICATIONS

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INTRODUCTION:

Non contentious probate applications arise prior to the issue of the Grant of Representation to the estate of a deceased person. They arise for a variety of reasons but mainly in circumstances where there is some technical legal reason preventing the Probate Office or the District Probate Registry from issuing the Grant of Representation to an applicant. Applications of this nature also tend to arise where there are disputes amongst the persons entitled to apply for and extract the Grant of Representation to the estate of the Deceased person.

From a practical point of view it is to be noted that the High Court is vested with the jurisdiction to hear and determine non-contentious probate applications. The Circuit Court does not have jurisdiction to determine such matters.

A Judge of the High Court is assigned by the President to hear non contentious probate applications. The judge so assigned hears these applications each Monday at 10.30 am during term. In the legal diary non-contentious probate applications are listed as “Probate List” each Monday.

PROCEDURE:

The procedure for making application to the Probate Judge in non-contentious probate matters is governed by the provisions of Order 79 of the Superior Court Rules 1986. Order 79 rules 87-89 are the relevant rules and provide as follows:-

‘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 on 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.*

Rule 88. *Motion papers in probate causes and matters shall set forth the style and object of, and the names and descriptions of the parties*

to the cause or proceeding before the Court, the proceedings already had in the cause, and the dates of the same, the prayer of the party on whose behalf the motion is made and briefly the circumstances on which it is founded. If the motion paper tendered is deficient in any of the above particulars, it shall not be received without the permission of the Probate Officer. On depositing the motion paper in the Probate Office, the affidavits in support of the motion and a copy of any testamentary paper writing therein referred to and, if required by the Probate Officer, any original documents referred to in such affidavits or to be referred to on the hearing of the motion shall also be left in the Probate Office; or in the case of such affidavits or documents have been already filed or deposited the same shall be searched for, looked up, and deposited with the proper officer , to be sent with the motion paper to the Court.

Rule 89 (1). An appearance in matters to which this Order relates shall be entered in the Probate Office.

(2) Every order of the Court in such matters shall be issued out of the Probate Office.'

All non contentious probate motions are lodged in the Rules Office of the Probate Office. When the motion is lodged it will receive or be issued with a return date before the Probate Judge. At the time of lodging of the Motion, the grounding affidavit must also be filed, together with copies of all exhibits and documents referred to in the grounding affidavit as "when produced". The motion paper will not be accepted without the grounding documentation.

Non contentious probate applications are commenced by originating Notice of Motion or Originating Motion Paper and not by means of a summons or petition. The notice of motion or motion paper in respect of non-contentious applications to the Probate Judge must comply with the provisions of Order 79 rules 87 and 88. It must contain and set out a short statement of the principal facts or circumstances upon which the application to the court will be made - these facts are called *"recitals"*. The recitals are followed by the terms in which the motion is brought. Therefore the motion is in form different to a regular notice of motion found in interlocutory applications.

The facts relied upon must then be deposed to in a grounding affidavit to be sworn by the applicant. All necessary documentary evidence must be properly exhibited in the grounding affidavit. The normal rules relating to Affidavits apply equally to affidavits grounding a probate motion. As a general rule of thumb there are certain matters which will be deposed to in every grounding affidavit which are:-

1. The name address of the deceased;
2. The date and place of death of the deceased and the death certificate will be exhibited;
3. Whether the deceased died testate or intestate;
4. If the deceased died testate the original will of the deceased will be exhibited by placing it in an envelope and marking the envelope with the necessary identification as an exhibit.
5. The next of kin of the deceased and their relationship to the deceased;

6. The value of the estate of the deceased at the date of death and a copy of the schedule of assets will be exhibited;
7. The details of the applicant and his/her relationship to the deceased, if any.

The distinction between a Motion Paper and Notice of Motion is simple. A Motion Paper is the correct document where no other party has to be put on notice of the application being made to the Court. This arises where there are no notice parties involved or affected or where the notice parties affected are consenting to being bound by the decision of the Court without intervening in the matter before the Court.

A Notice of Motion is the correct document where there is some party other than the application interested in the issue and where that party will intervene and be heard before the Court in opposition to the motion.

After the Motion is issued and the grounding affidavit and exhibits and documents filed, copies of the documents will be served by the Solicitor for the moving party upon the notice parties to the motion (if any). If there has been correspondence between solicitors it is normal and regular that copies are served upon the solicitor if he/she confirms authority to accept service. An affidavit of service will be required for court on the return date and should be stamped and filed in advance of the court date in the probate office.

On the return date, if the notice party seeks an opportunity to file a replying affidavit, an adjournment for that purpose will normally be granted. The

application will be heard and determined by the Probate Judge in the Monday Probate List, once the affidavits have closed.

The practice is that the Probate Judge has an opportunity to read the probate court papers in advance of the Monday list. Therefore, if any matter is not proceeding to hearing on the return date or the adjourned date the Probate Office should be informed in advance of the Monday list so that the Judge will be saved reading papers for an application which will not proceed on that day. It is for the solicitor to ensure that the Probate Office is informed in sufficient time to save duplication and unnecessary work.

THE TYPES OF ISSUES WHICH ARE DEALT WITH AS NON CONTENTIOUS PROBATE APPLICATIONS

The most common non-contentious probate applications are the following:-

1. Applications pursuant to section 27 (4) of the Succession Act 1965;

2. Applications to prove wills in terms of a copy where the original will is lost but a copy or a reconstructed copy is available;

3. Rival applications for Grants of Representation;

4. Applications to set aside caveats;

5. Applications to admit wills to proof by presumption of due execution.

Less commons applications before the Probate Judge are:-

6. Applications entitling an executor to renounce as executor and for the revocation of a Grant of Probate.

7. Applications for grants where leave is sought to presume death on information and belief;

8. Simultaneous deaths – section 5 of the Succession Act 1965;

9. Applications for grants for a particular purpose or for a particular portion of the estate of the deceased;

1. APPLICATIONS PURSUANT TO SECTION 27 (4) OF THE SUCCESSION ACT 1965

Part IV of the Succession Act 1965 deals with Grants of Representation.

Section 26 provides as follows:-

"26. (1) The High Court shall have power to grant probate to one or more of the executors of a deceased person, and a Grant may be limited in any way the Court thinks fit.

(2) The High Court shall have power to revoke, cancel or recall any Grant of Probate."

Insofar as the entitlement to extract a Grant of Letters of Administration intestate or with will annexed is concerned, section 27 of the Succession Act 1965 provides:-

'27(1) The High Court shall have power to grant administration (with or without will annexed) of any estate of a deceased person, and a grant may be limited in any way the Court thinks fit.

(2) The High Court shall have power to revoke, cancel or recall any grant of administration.

(3) Subject to subsection (4), the person or persons to whom administration is to be granted shall be determined in accordance with the rules of the High Court.

(4) Where by reason of any special circumstance it appears to the High Court (or, in any 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.

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(5) On administration being granted, no person shall be or become entitled without a Grant to administer any estate to which the administration relates.

(6) Every person to whom administration is granted shall, subject to any limitations contained in the Grant, have the same rights and liabilities and be accountable in like manner as if you were the executor of the Deceased.

(7) Where any legal proceedings are pending, touching the validity of the Will of a deceased person, or for obtaining, recalling or revoking any Grant,

the High Court may grant administration of the estate of the Deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate of the Deceased, and every person to whom such administration is granted shall be subject to the immediate control of the Court and act under its direction.

(8) The Court may, out of the estate of a deceased person, assign to an administrator appointed under sub-section (7) such reasonable remuneration as the Court thinks fit.

(9) This section applies whether the deceased died before or after the commencement of this Act".

The rules referred to in section 27 of the Succession Act 1965, are the Superior Courts 1986 (as amended). Order 79 rules 5 (1) and (6) sets out the priority of entitlement to extract Grants of Letters of Administration Intestate and with Will annexed to the estate of a person, domiciled in Ireland who died after the 1st January 1967. It is to be noted that as of yet the rules have not been amended to take into account the amendments to the Succession Act 1965 by the enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010.

Order 79 rule 5 (8) sets out the entitlement to extract a Grant of Administration or with will annexed to the estate of a deceased person who died on or after the 1st January 1967, domiciled outside of Ireland.

The provisions of section 27 (4) of the Succession Act 1965 give the Court a discretion to depart from the rules, where there are special circumstances and if it appears to the High Court that it is just and equitable to depart from the rules of priority.

Applications to the Court under the section can arise for a variety of reason such as:-

1. The person entitled to extract the grant may be missing and therefore cannot be cleared off;

2. The person entitled to extract the grant may be unable to do so by reason of legal disability and therefore unable to renounce his/her entitlement;

3. The person entitled to extract the Grant may be unwilling to act;

4. There may be an urgency that a grant is extracted and the person entitled has failed, neglected and/or refused to extract the Grant despite being called upon to do so;

5. The entitlement to extract the grant under the laws of domicile of the deceased maybe different to the entitlement under Irish Law and therefore the Court will have to appoint an administrator where a conflict of laws arises;

6. The Applicant must establish to the Court that special circumstances arise for the Court to exercise its jurisdiction and the Court must also be satisfied on the application that it is necessary or expedient for the Court to order that administration is to be granted to a person other than the person entitled by law. The affidavit must clearly set out and demonstrate that there is a cogent reason for the Court to make the Order. The Probate Judge requires the reasons to be set out clearly and in detail in the affidavits before the Court grounding the application. Therefore the affidavit will set out:-

- The name, address, date and place of death of the Deceased;
- Whether the Deceased died testate or intestate;
- Who the persons entitled to administer the estate of the Deceased are;
- Who the next-of-kin of the Deceased are;
- The value of the estate of the Deceased;
- The circumstances giving rise to the necessity for the application;
- Why it is necessary or expedient that the Court exercise its discretionary jurisdiction pursuant to Section 27(4);
- The reason why those entitled to extract the Grant are unable / unwilling / incapable of doing so.

If the application is properly made and if the Probate Judge is satisfied that there are special circumstances and it is either necessary or expedient to make the Order, the Probate Judge will make the Order. The person so appointed by the Court will usually be a person with an interest in the administration and distribution of the estate of the Deceased. The exception to this is where a Grant is sought for the purpose of defending proceedings. In those circumstances the Court will make an Order that administration be granted to an independent person and for the purpose of defending the intended proceedings, as described in the application before the Court and limited for that purpose. The Probate Judge will usually order the costs of the application to be discharged from the estate of the Deceased.

Applications by financial institutions for the appointment of independent administrators for the purpose of issuing proceedings and suing the estate of a deceased person are currently very common applications before the Probate Judge.

2. APPLICATIONS TO PROVE A WILL IN TERMS OF A COPY

As you will be aware, in any application for a Grant of Probate or Letters of Administration with Will annexed, it is necessary to bring in the original Will and any codicil and lodge the same in the Probate Office as part of the application to lead to the issue of the Grant. The original Will and Codicils are then retained by the Probate Office and the engrossment thereof is incorporated into the Grant of Probate.

Applications to the Probate Judge for an Order giving liberty to prove a Will in terms of a copy, arises where the original Will is lost or mislaid and is not forthcoming at the date of death of the Deceased. If an original Will can be traced to the custody of the Deceased prior to his death and is not forthcoming following the death of the Deceased, the legal presumption is that the Will has been revoked by the Deceased. The presumption can be rebutted by evidence on affidavit which clearly shows that the Will was not revoked. The basic proofs required to successfully apply to the Probate Judge for liberty to prove a Will in terms of a copy are:-

(a) That the original Will was in existence unrevoked at the date of death;
(b) That the copy Will sought to be proved is an authentic and genuine copy of the original;
(c) That the Will and Codicils (if any) were duly executed in accordance with the provisions of the Succession Act 1965.

A. In order to establish that the original Will was in existence unrevoked at the date of death, there must be an Affidavit from some person establishing that the Will was held in the solicitor's office and therefore not in the possession of the Deceased at the date of his death, or that if it was in the possession of the Deceased, that some person saw the Will following the death of the Deceased and can swear positively that

the original Will was in existence after the death of the Deceased. At times it has also arisen where the original Will has been traced to the possession of the Deceased prior to death, but evidence has been put before the Court to show that the Deceased could not have destroyed the Will for the purpose of revoking it by reason of incapacity. An Affidavit will have to be sworn by the appropriate person setting out these facts.

B. That the copy Will before the Court sought to be proved is an authentic copy of the original Will which has been lost. In order to satisfy the Court in relation to this essential proof, it is necessary to have an affidavit from the person who prepared the copy of the Will confirming that they prepared the copy of the Will and that it is a true copy of the Will and that the contents of the original Will and the copy accord. It is possible to prove a Will in terms of a reconstructed copy, where the Court can be satisfied that the content of the reconstructed copy accords exactly with the original Will.

C. That the Will was executed in accordance with the provisions of the Succession Act 1965. In order to satisfy the Judge that the original Will was in fact executed in accordance with law, it is necessary to have an Affidavit of Attesting Witness confirming due execution and where necessary testamentary capacity. If the witnesses to the Will are deceased, then the copies of their Death Certificates should be exhibited in the Grounding Affidavit. If the witnesses to the Will cannot be traced, then the Grounding Affidavit will have to set out all efforts that were made to locate the witnesses. Even where the Will is regular on its face and no question of execution arises, the Court must still be satisfied that the provisions of the Succession Act 1965 have been complied with and that the Will was executed in accordance with the legal formalities. If primary evidence is not available, the Court will

accept secondary evidence on affidavit by some person who can swear positively as to the identity of the signatures of the witnesses and the testator, as the names of the persons set out on the copy Will sought to be proved.

D. As a necessary proof, if the original Will cannot be traced finally to the solicitor's office, the Court will normally require that advertisements have been placed in the Law Society Gazette and if necessary in the national press seeking information with regard to the original Will. Copies of the advertisements would be exhibited in the Grounding Affidavit.

E. It is normal that the persons who would be entitled to inherit in the event of the Deceased having died intestate are put on notice of the application. If all of those persons are in agreement, then their written consents should be exhibited in the Grounding Affidavit. If they are all consenting in writing, then there will not be a necessity to serve them with copies of the application. The consent signed by the next-of-kin must be worded in such a manner that it is clear that they are aware of the essential facts of the application and the implications of the Court making an Order.

F. The Grounding Affidavit will, as with all Grounding Affidavits, establish the formal proofs, being the details of the Deceased and the fact of death and the copy of the Will sought to be proved will be exhibited. The Grounding Affidavit will set out in detail the facts and circumstances giving rise to the application. The Grounding Affidavit will refer to such other affidavit evidence as is before the Court. As in most probate applications, the Grounding Affidavit will exhibit a Schedule of Assets of the estate of the Deceased.

G. If the Notices Parties are not consenting to the application, it will be necessary to serve them with copies of the application, and as with all court applications, Affidavits of Service will be required.

H. The Probate Judge will only admit a Will or a codicil to proof in terms of a copy if the Court is satisfied that the essential proofs have been met. If the Court is not satisfied, it will normally adjourn the application in order to give the applicant an opportunity to endeavour to comply with the necessary legal proofs. If the proofs are not met, the Court will not make the Order.

I. The question of costs is at the discretion of the Judge. The circumstances giving rise to the application will determine whether or not the Court will award the costs of the application to be discharged from the estate of the Deceased. As a general rule, if the affidavits establish that the original Will has been lost due to an error at the solicitor's office, the Probate Judge will, as a general rule, not order the costs of the application to be discharged by the estate of the Deceased. If however the Court takes the view that it was the Deceased who gave rise to the necessity for the application, then as a general rule costs will be awarded out of the estate of the Deceased.

3. RIVAL APPLICATIONS FOR GRANTS OF REPRESENTATION

Superior Court Rules - Order 79 rule 5 (3) provides:-

"Where there are conflicting claims for a Grant among the members of a class entitled to administration, the Grant shall be made to such of the claimants as the Probate Officer shall select, having given not less than 21 days notice to the rival claimants, or on objection made in writing within the said period, to such person as the Court shall select".

“Members of a class” means a group of persons who have an equal entitlement to extract a Grant of Representation.

The significance of this Rule arises where there is more than one application for a Grant of Administration to the Estate of a deceased Intestate. Where two or more persons being members of a class entitled to administration make individual applications for a Grant, they do so as against each other and not jointly. Unless the matter can be resolved between the parties then in order to remove the rival application and thereby allow the Grant to issue, one of the parties must apply to the Probate Officer by Affidavit, asking the Probate Officer to issue a statutory twenty-one day Notice to the rival claimant. The application to the Probate Officer is by Affidavit sworn by the Applicant and the Affidavit must set out the entitlement of the Deponent to extract the Grant of Administration to the Estate of the deceased Intestate. The Affidavit must also set out fully the details of the rival claimant, including: -

(i) The name and address of the rival applicant;
(ii) The rival applicant’s relationship to the deceased intestate;
(iii) The date of the application by the rival applicant;
(iv) The details of the Solicitor acting on behalf of the rival applicant (if any)

The Affidavit should also contain a prayer to the Probate Officer, requesting the Probate Officer to issue a twenty-one day Notice to the rival applicant. Once the twenty-one day statutory notice is prepared by the Probate Officer and served by the party seeking to have the application set aside, an Affidavit of Service of the Notice should be sworn and filed in the Probate Office.

If the rival claimant has not lodged an objection in writing in the Probate Office within the twenty-one day period, then the party seeking to extract the Grant will request that the Probate Officer make an Order allowing the applicant to proceed with his or her application. If the Affidavit of Service of the twenty-one day Notice is in order and is filed in the Probate Office and no objection has been filed in writing, the Probate Officer will make the Order.

If the rival claimant for the Grant files an objection in writing in the Probate Office within the twenty-one day period, then the Probate Officer has no jurisdiction to adjudicate between the rival claimants for the Grant. Either claimant will then have to make an application to the Probate Judge for the Probate Judge to select between the rival claimants for the Grant of Administration.

Such applications are made to the High Court by means of an originating notice of motion grounded upon an affidavit of the person seeking the Order, namely the applicant.

The relief sought on the notice of motion is an Order pursuant to Order 79 rule 5 (3) of the Superior Court Rules 1986, permitting the applicant to extract the grant instead of the rival claimant and setting aside the application of the rival claimant together with costs.

The rival claimant for the Grant must be on notice of the application and must be served with the documents which have been lodged for court and the court will require an affidavit of service to ensure that service has been properly effected on the notice party (the rival claimant).

On the return date, if there is no appearance by the rival claimant for the Grant and if service can be proved, the Court will normally grant the relief sought and deal with the question of costs.

If, however, the notice party (rival claimant) attends in Court and opposes the application the Judge will either adjudicate between the parties or else the Judge will adjourn the motion to permit the rival claimant to set out his or her objections in an affidavit to be served on the applicant.

The Judge will adjudicate between the parties on the adjourned hearing date. It is to be noted that the Probate Judge takes a practical approach to such applications and if it appears that one is *bona fides* and the other is a nuisance type application, in those circumstances the person properly making the claim will more than likely be permitted to extract the Grant.

It is to be noted, that in appropriate cases, the court will not select between the rival claimants but will appoint some independent person to administer the estate, where it appears to be in the best interests of the beneficiaries to do so in order to prevent further disputes and allow the estate of the deceased to be properly administered.

4. APPLICATIONS TO SET ASIDE CAVEATS

Section 38 of the Succession Act 1965 is the statutory basis for the lodgement of a Caveat. The section states as follows:-

'38. (1) A caveat against a grant may be entered in the Probate Office or in any district probate registry.

(2) On a caveat being entered in a district probate registry, the district probate registry shall immediately send a copy thereof to the Probate Office to be entered among the caveats in that Office.'

A caveat is a formal warning lodged in the Probate Office or any one of the District Probate Registries that nothing is to happen in relation to the issue of a grant of representation to the estate of the deceased person named on the caveat, without notice to the Caveator- the person who lodged the caveat.

The provisions dealing with caveats as set out in Order 79 of the Superior Court Rules 1986 (as amended), are to be found at rules 41 – 51 which deal with caveats, warnings and appearance to caveat.

A caveat can be disposed of as follows:-

- By lapse of time- 6 months- if not warned;

- By the Caveator voluntarily withdrawing the caveat;

- By Order of the Court setting aside the Caveat either in non-contentious proceedings before the Probate Judge or in contentious proceedings proving the will in solemn form of law;

- By order of the Probate Officer if all of the parties consent in writing to the removal of the Caveat;

- By non appearance to a warning and then obtaining a side bar order from the Probate Officer setting aside the Caveat.

If a caveat is not removed under the statutory procedure set out in Order 79 and if it appears that the Caveator had either:-

(a) No interest in the estate of the deceased; or
(b) The caveat has been improperly lodged,

then an application can be made to the Probate Judge on notice to the Caveator asking the court to set aside the caveat. Again the application is made by originating notice of motion grounded upon an affidavit sworn by the person seeking the issue of the grant, setting out all of the relevant facts and the issues between the parties and setting out clearly why the caveat should be set aside. The person seeking the issue of the grant will be the applicant on the motion and the Caveator will be the notice party to the motion.

If the Judge is satisfied that the lodgement of the caveat was without cause, frivolous and/or vexatious or inappropriate or improper then the Judge will order that the caveat is set aside and that the Caveator discharge the costs of the court application.

The Probate Judge will not set aside a caveat if it appears that the caveat was properly lodged and that it is for the parties to litigate the dispute as a contentious action to determine the validity of a will. In those cases the Probate Judge will normally reserve the costs of the application to be determined at the trial of the action relating to the will of the deceased person.

The Probate Judge is very clear in his rulings on improperly lodged caveats and will make costs orders against the Caveator in such cases.

5. APPLICATIONS TO ADMIT WILLS TO PROOF BY PRESUMPTION OF DUE EXECUTION

These applications arise from time to time in circumstances where there is a defect in the attestation clause contained in the Will, or there is no attestation clause. There is the presumption *omnia praesumunter rite esse acta*, [that everything necessary is presumed to have been done that ought to have been done, see *Clarke v. Earley* [1980] IR 223], but without the inclusion of a proper attestation clause there is no evidence to satisfy the Probate Officer that the formalities of due execution have been complied with. If evidence is available from one of the attesting witnesses, a court application will not be necessary. It is in circumstances where the attesting witnesses are not available to provide the necessary Affidavit of Attesting Witness that a court application will arise.

As in every application before the Probate Judge on the non-contentious side, the factual matters and necessary proofs must be set out on affidavit. Therefore the affidavit will again depose to the details of the Deceased, the death of the Deceased, the value of the estate, the fact that the Deceased died testate, who the next-of-kin of the Deceased are and their relationship to the Deceased. It will also be necessary to put on affidavit such evidence as might establish for the satisfaction of the Court that the Will was duly executed.

Section 78 of the Succession Act 1965 sets out as follows:-

"*To be valid a Will shall be in writing and be executed in accordance with the following rules:-*

(1) It shall be signed at the foot or end thereof by the Testator or by some person in his presence and by his direction;

(2) Such signature shall be made or acknowledged by the Testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the signature of the Testator in the presence of the Testator, but no form of attestation shall be necessary nor shall it be necessary for the witnesses to sign in the presence of each other."

The Court will require evidence of due execution. The best evidence is that of a witness to the Will and that should be put before the Court if the witness is available. If the witness is not available, then secondary evidence identifying the signatures of all of the parties would be necessary. In the decision in the case of *Clarke v. Earley* [1980] IR 223, both attesting witnesses were dead. The wife of one of the attesting witnesses was able to verify the signature of her late husband as one of the witnesses on the copy document. She was also able to identify that the other attesting witness was a near neighbour who had known the Deceased all of his life. The Supreme Court however held that in the absence of any evidence to support or verify that the signature of the testator was a genuine signature of the testator, there was insufficient evidence to justify proving the Will.

In such applications, it is again normal and usual and a requirement of the Probate Judge that the persons entitled to inherit on intestacy, namely the next-of-kin of the Deceased would be put on notice of the application. Again, if those persons were consenting and the consent was an informed consent, those written consents could be exhibited in the affidavit of the Applicant. The Applicant in this circumstance will be the person entitled by law to prove the Will.

6. APPLICATIONS BY EXECUTORS TO RENOUNCE AND REVOCATION OF GRANT

An application by an executor seeking liberty to renounce his/her rights notwithstanding acts of intermeddling is an application made to the Probate Judge- non-contentious probate list, commenced by a Motion Paper grounded upon an Affidavit sworn by the applicant executor. As well as setting out the principal facts relating to the deceased in the Affidavit, the Applicant, will set out the acts of the executor which might be deemed as intermeddling in the estate of the deceased. This information should be set out in detail so that the Probate Judge has all of the information necessary in order to determine how to exercise his discretion with regard to the application. There is no absolute entitlement to be permitted to renounce where there have been acts of intermeddling and the Order is at the discretion of the High Court Judge hearing the application. In an appropriate case the Probate Judge will permit an executor or a next of kin who has intermeddled but decided not to extract the Grant, to renounce his/her rights notwithstanding the acts of intermeddling. In other circumstances the Probate Judge may determine that the intermeddler should be not be permitted to renounce and should be compelled to fulfil the role of such personal representative.

There may also be circumstances where the Grant has issued to the personal representative who is no longer able or willing to act. In those circumstances the personal representative can make an application to have the grant revoked. This may arise in circumstances where the personal representative is suffering from ill heath and unable to act further. As well as the grounding affidavit, an affidavit will be required from the Doctor of the personal representative setting out the reason for the inability to act.

In such applications it is again normal and usual to put the persons affected by the making of the Order on notice. If the Probate Judge is satisfied that it is appropriate then he will permit the personal representative to renounce and he will make an order cancelling the Grant.

7. APPLICATIONS FOR A GRANT WHERE LEAVE IS SOUGHT TO PRESUME DEATH ON INFORMATION AND BELIEF

This application arises in rare circumstances, but they do arise from time to time where the Deceased person cannot be located and no positive averment can be made as to the death of that person. No Death Certificate is available to prove the death of the Deceased and therefore in those circumstances the Probate Officer or District Probate Registry cannot issue a Grant in respect of the estate of that person. As everybody knows, the essential proof to be entitled to a Grant of Probate is that the person is dead and that it is proved by producing a copy of the Death Certificate.

In these very rare circumstances, it is possible to apply to the Probate Judge for leave to presume death on the information and belief for the purpose of extracting the Grant. The application is made by either the executor named in the Will of the Deceased or by the next-of-kin entitled on intestacy. The Applicant will swear a very detailed affidavit setting out the circumstances giving rise to the application. The affidavit will set out the information available to the Applicant and the Applicant's belief that the person named in the application is dead and died on or about a particular date. The affidavit must be full and complete and set out in detail the circumstances relating to the disappearance of the deceased person. The affidavit would also set out the reasons why the remains of the Deceased have not been located. It is sometimes necessary to include affidavit evidence from An Garda Siochana or

other search or rescue organisations who were involved in searching for the person presumed to be dead. The Court will require a reason for the issue of a Grant of Representation to the estate of the Deceased.

This should not be confused with a Benjamin Application and it is not the same. There is no necessity to wait for seven years before making the application. If some third party is likely to be affected by the making of the application, it would be usual to put that third party on notice. Third parties might be life assurance companies holding a policy in respect of the Deceased or Trustees of a pension fund where the purpose of extracting the Grant is to claim a benefit under the fund.

8. SIMULTANEOUS DEATHS – SECTION 5 OF THE SUCCESSION ACT 1965

Section 5 of the Succession Act 1965 provides as follows:-

"*5(1) Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously;*

(2) Where immediately prior to the death of two or more persons they held any property as joint tenants and they died, or under subsection (1), were deemed to have died, simultaneously, they shall be deemed to

have held the property immediately prior to their death as tenants in common in equal shares.

(3) Property deemed under sub-section (2) to have been held by persons as tenants in common shall form part of their respective estates".

Section 5 of the Succession Act 1965 has been amended by the Civil Law (Miscellaneous Provisions) Act 2008.

Where persons die simultaneously, this normally gives rise to difficulties in relation to extracting Grants to the estate of those persons or any one of them. If that occurs, an application will have to be made to the Probate Judge for a Declaration pursuant to Section 5 of the Act declaring the deceased persons to have died simultaneously. Again, the application is by means of an Originating Notice of Motion grounded upon an affidavit or such affidavits as are necessary to swear positively in relation to the facts which the Court will have to consider. The application will be made on notice to any person or party who will be affected or may be affected by the Order of the Court. The affidavit should clearly set out the evidence which will allow the Court to make the Declaration that the named persons died simultaneously. In that regard, it will or may be necessary to obtain evidence from a pathologist, a doctor, or a member of An Garda Siochana. The High Court must be satisfied on the information before it that it has sufficient evidence to make the Order. The Court will not make the Order if there is any uncertainty.

9. APPLICATIONS FOR GRANTS FOR PARTICULAR PURPOSES OR FOR PARTICULAR PORTIONS OF THE ESTATE OF THE DECEASED

Examples of these applications are as follows:-

- An application for a Grant *ad colligenda bona;*

  These applications are not very common, but are used in circumstances where it is necessary for some person to be appointed to extract a Grant to the estate of the Deceased for the sole purpose of the preservation and safekeeping of the estate, property or any part thereof. As the application again is by means of Originating Notice of Motion / Motion Paper grounded on an affidavit setting out all of the relevant facts in detail and the circumstances giving rise to the application.

- An application to appoint an administrator *ad litem*;

  This application arises in circumstances where a person has a claim against the estate of a deceased person and none of the next-of-kin or the persons entitled to extract a Grant to the estate has done so. The preliminary step normally necessary is to issue a Citation under the provisions of Order 79 and serve the same on the persons entitled to extract the Grant to the estate of the Deceased in order to give them an opportunity to extract the Grant. If the persons cited do not appear to the Citation, then it is possible to apply to the Probate Officer to deem those persons to have renounced. Once that is done, the application is then made to the Probate Judge asking the Probate Judge to appoint an administrator *ad litem* to extract the Grant for the purpose of defending the proceedings intended to be taken by the Applicant. In

these types of applications, time may be of the essence. It is important to bear in mind the provisions of Section 9 of the Civil Liability Act 1961. It is also important to note that the Probate Judge gives liberty to some person or appoints some person to extract the Grant. Until the Grant is extracted, having been issued by the Probate Office, the proceedings cannot be issued against the estate of the Deceased.

- Applications can also be made in relation to a particular asset where it is necessary to appoint some person to represent the estate for the purpose of vesting the legal estate in the person entitled by law. Again, the affidavit will clearly set out the circumstances in which the application arises and why the Court should make the Order sought.

CONCLUSION

I hope that the paper has put some matters in context when non-contentious probate applications arise. While I have not covered every application that might arise as a non-contentious probate application, I hope that I have dealt with the most frequent types of applications and the basis proofs required. Each application and the proofs therefore will of course depend on the circumstance of each case. It is important to remember that the affidavit grounding the application should set out in a clear and concise manner all of the information necessary and the circumstances giving rise to the application.

Rita Considine

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