199S 02480
IN THE HIGH COURT OF JUSTICE
IN THE CHANCERY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 8th February, 2001

B e f o r e:

MR JUSTICE LLOYD

- - - - - - -

MRS MURPHY

Claimant

- v -

1) MR MCGLYNN
2) MARTIN SHEPHERD & CO

Defendants

- - - - - - - - -

Transcript by Smith Bernal Reporting Limited
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(Official Shorthand Writers to the Court)

MR BLACKETT-ORD (Instructed by Messrs Chewman & Co) appeared on behalf of the Claimant
MR D. LIGHTMAN (Instructed by Messrs Griffin Gough & Archer) appeared on behalf of the Defendant

J U D G M E N T
(Approved)

MR JUSTICE LLOYD: I have before me a probate action relating to the estate of one, Mary McGarrigle, who died on the 24th May 1994. She left two step-sisters, the claimant being one of them, and the other being a Mrs. McCoe who, I am told, died shortly after the deceased. She also left a brother, Patrick, who himself has since died and whose place has been taken in the litigation by his son, the first defendant.

Mrs. McGarrigle appears to have made a will on the 2nd September 1987 appointing her sister, Mrs. Murphy, and Mrs. McCoe as her sole executors and beneficiaries. Later in her life she went into a nursing home and in April 1992 she appears to have made a further will, by which she left the whole of her estate to her brother, Patrick, this will having been, on the face of it, professionally prepared and naming as executors her brother and the partners as at the date of her death in the firm of Martin Shepherd and Co, those partners being the second defendants.

The action was brought by Mrs. Murphy to propound the 1987 will and is defended by Mr. McGlynn, the first defendant, following the line taken by his father on the basis that that will, if valid, was revoked by the 1992 will. The reply to that was that the 1992 will was not valid because at that time the deceased lacked sound mind memory and understanding. There is therefore a dispute between those interested under the 1987 will and Mr. McGlynn, the first defendant, who is the person interested under the 1992 will and who says, and I daresay he is right, he is also the only person who would be interested on an intestacy if neither of the two wills was valid.

The proceedings have taken rather a long time, as I understand, because there have been efforts to settle which have ultimately been fruitful. The deceased's house is apparently

the only asset in the estate. It is said to be worth something in the order of £100,000 but it is subject to debts, including a debt to the local authority in respect of the charges due for Mrs. McGarrigle's time in the nursing home. At all events, the matter has now been agreed as the subject of a compromise between Mrs. Murphy and Mr. McGlynn, the terms of which are essentially that the 1987 will will be put forward to be proved in solemn form, but that Mr. McGlynn will be paid one-third of the net value of the estate.

The difficulty that has been drawn to my attention is that contrary to the guidance provided by the Practice Direction in relation to contentious probate proceedings, notice of the proceedings was not given to all persons who might be affected by the probate claim and who were not joined as parties to the probate claim, namely to those interested in the estate of Mrs. McCoe as a 50 per cent beneficiary under the 1987 will.

It is said in evidence before me that Mrs. McCoe died in July 1994; that her next of kin was her son, Desmond; that some three years ago Desmond was divorced from his wife and, following that event, left the matrimonial home and his whereabouts are now unknown and, indeed, it is thought that he has no fixed place of abode. That is in evidence before me but there is not a great deal of evidence as to the efforts that have been made to find him and there is no formal evidence as to either Mrs. McCoe's death, let alone the succession to her estate.

In those circumstances, no order can be made without more, that directly binds all persons who might be interested in the 1987 will. What I am asked to do is to make a representation order to appoint Mrs. Murphy to represent all persons who may be interested under that will. That is an order which I can make under CPR 19.7.2(d). It is

put forward by Mr. Blackett-Ord on the basis that the son, Desmond, is someone who cannot be found and that therefore the class of persons in question consisting, on the face of it, of Mrs. Murphy and Desmond McCoe, are a class of persons who have the same interest in the claim and one or more members of that class is within subparagraph (b) of paragraph 2 of rule 19.7. Even if I were not satisfied with that, and there is an indication that that may be the case, I have power to make a representation order, given that the class has the same interest in the claim if, to appoint a representative would further the overriding objective under 19.7(2)(d)(ii). It seems to me reasonably clear that in the case of a small estate such as this is, to appoint a representative rather than to require time to be taken and expense incurred in ascertaining the position before making any order, would indeed satisfy the overriding objective in terms of saving expense and dealing with the case in ways that are proportionate to the matters set out in CPR.1.1.2(c). So I am satisfied I can, and should, appoint Mrs. Murphy to represent all those persons who are interested under the 1987 will.

That being so, under CPR.19.7.5, if the claim is to be settled the Court's approval has to be given, and that approval can only be given where the Court is satisfied that the settlement is for the benefit of all the represented persons.

As I say, the terms of the settlement involve giving up one-third of the estate in favour of the 1992 will beneficiary and the question is whether that is a reasonable compromise which is for the benefit of the estate.

This is an action which, if it were not settled, would be due for trial I think in the near future and was at one stage the subject of a three day estimate. It would depend on

evidence of the deceased's mental state in April 1992 and maybe on evidence of her mental state at other times, including, possibly, the time of the 1987 will. I say that because although on the pleadings it is not said the 1987 will is invalid I have seen, I think, a draft affidavit but it is clearly a draft of an affidavit of the first defendant which indicates that he would wish to argue that if she was not in a state to make a will in 1992, the same applied in 1987, which would lead to an intestacy. It seems to me that is something I can bear in mind.

There is evidence which I have seen both from Mrs. Murphy and from her son, as well as from a medical practitioner, which suggests that in 1992 Mrs. McGarrigle was not of sound mind, memory and understanding. The medical evidence dates a little bit after the date of the will so maybe that does not by itself prove that she was not of sound mind on the date that the will appears to have been executed. It seems to me that while it is not a matter which is the subject of great analysis, in the circumstances of a small-ish estate, faced with three day litigation and the uncertainties involved in an assessment of the position as regards what the deceased's state of mind was in 1992 and possibly at other dates, it is a perfectly reasonable compromise to divide the estate as to one-third to Mr. McGlynn claiming under the 1992 will, and two-thirds to the 1987 will, and thereby to avoid the incurring of costs, a considerable amount of which might in any event have to come out of the estate, and to avoid the uncertainties of litigation. I am therefore able to express myself satisfied that the terms of compromise which will be set out in a schedule to the order are for the benefit of the persons whom the claimant will represent.

I am then asked to pronounce for the validity of the 1987 will and for that purpose I have before me an affidavit sworn by one of the two attesting witnesses which, in its terms, deposes to unimpeachable due execution of the 1987 will and in those circumstances, and having regard to the evidence that I have mentioned as to the mental state of the deceased in 1992 which, whatever might have been the conclusion of the Court following a trial, certainly indicates that she was far gone and, at any rate, as the matter goes before me, that she was not of sound mind, memory and understanding, and accordingly I am satisfied to the necessary extent that I ought to pronounce for the validity of the 1987 will. Accordingly I do so and I therefore make an order appointing the claimant as a representative of those interested under the 1987 will. I will express the Court's satisfaction of the terms set out in the schedule are for the benefit of all such persons aforesaid and I will pronounce for the validity of the 1987 will. I will stay the claim and the counterclaim on the agreed terms set out in the schedule, a revised version of which has been put before me this morning, and I will make no order for costs except as to the detailed assessment for the purposes of legal aid legislation of the costs of the claimant and the costs of the first defendant as named in the proceedings before they were amended.
