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[CPD Event]

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TIME LIMITS IN PROBATE

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INTRODUCTION

In contemplating this paper, it occurred to me that the topic I had selected was so boring that I ought to rename the entire event before it started in case I ended up sounding like the really boring priest in Fr. Ted whom I think was Fr Austin Purcell. Fr Purcell was so boring that Ted claimed that an entire village in Nigeria once sailed to their deaths across a crocodile infested lake to escape him!

I thought about calling it something far more interesting like, *'From California to Key Largo by Canoe'* or *'Chevy Days'* but gloomily, the best sub-title I could come up with was *'Global Warming for Lawyers'*. Now if there was ever anything to overcome the boredom of a group of lawyers on a Friday afternoon and to penetrate into any last signs of consciousness or life that might remain in our heads or indeed elsewhere after a long week, it is the thought of being sued by some disappointed beneficiary or enterprising chancer who spotted a soft hundred thousand on the back of our insurance premiums!

It is with that in mind that I intend to start with the shortest periods.

SECTION 117

This is now well known but was once not well known and it was bizarrely reduced from twelve months to six months under Section 46 of the Family Law (Divorce) Act, 1996 (which simply substituted six months for twelve months). At the time, and for a number of years afterwards, it caused a good deal of consternation and comment and it appears that there was never really any justification or indeed demand for this change but, in any event, it remains at six months from the raising of representation to the estate. The actual wording of Section 117(6) is worth bearing in mind: -

'An Order under this Section shall not be made except on an application made within six months from the first taking out of representation to the deceased's estate.'

Therefore, time does not begin to run until the Grant of Administration has issued. There is nothing to stop a party issuing the proceedings before the Grant is administered and it often happens. The proceedings can be issued in advance where there are executors named in the Will because the executors get their power from the Will. So, where an executor might have died, the proceedings could not be properly constituted. There is no provision for the extension of the time limit in cases of minority or unsoundness of mind and in the case of *N.P.D. v. M.D.*,¹ the Court held that once the time limit has passed the Court has no jurisdiction to hear the proceedings and they must be dismissed of the Court's own Motion.

This Section has also been criticised by Spierin² for failing to allow some kind of a notice procedure, which would allow or indeed require such a child, as may be thinking about bringing an action, of his or her right to do so.

SECTION 111 AND SECTION 111(A)

These Sections deal with the legal right share of a spouse traditionally and now also under Section 111(a) the legal right share of a civil partner (Section 111(a) was inserted by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010, Section 81).

Section 115(4) is the key provision which provides: -

'It shall be the duty of the personal representatives to notify the spouse [or civil partner] in writing of the right of election conferred by this Section. The right shall not be exercisable after the expiration of six months from the receipt by the spouse [or civil partner] of such notification or one year from the first taking out of representation of the deceased's estate, whichever is the later.'

It sometimes happens that the Personal Representatives fail to notify the spouse or civil partner and therefore the right to assert and elect through the legal right share

¹ [1981] ILRM 179.

² See Spierin, B.E., *The Succession Act 1965 and Related Legislation: A Commentary* (4th ed., Bloomsbury Professional) at 429.

remains in existence and, in one extreme case, which I saw in this Circuit, I think a period of approximately twenty years passed before the Notice was given in writing and an action then followed, which was ultimately settled as there were major doubts about laches and delay notwithstanding the failure to notify. Importantly, Section 115(5) provides: -³

'Where the surviving spouse [or civil partner] is a person of unsound mind, the right of election conferred by this Section may, if there is a committee of the spouse's [or civil partner's] estate, be exercised on behalf of the spouse [or civil partner] by the committee or by leave of the court which has appointed the committee or, if there is no committee, be exercised by the High Court or, in a case within the jurisdiction of the Circuit Court, by that Court.'

The above scenario did arise on one occasion in my experience where it was necessary to go before Ryan J. in the High Court in a case where the spouse was not in any mental condition to make an election and was not compos mentis and was in a nursing home and Judge Ryan made the Order without any difficulty, exercising the right of election and the lady in question died a short time thereafter. It is to be noted that whilst on that occasion, due to extreme time pressure, it was done on a Plenary Summons, the more proper procedure is by way of Special Summons.

It is also worth bearing in mind under Section 115(4) that there is a mandatory duty on the Personal Representatives to notify the spouse or civil partner.

ACTIONS BY BENEFICIARIES

It is sometimes overlooked but the time limit for an action by a beneficiary to claim their share or interest in an estate has been reduced to six years from the previous twelve years and although this has been on the Statute books since 1965, it still tends to get overlooked.

Section 126 of the Succession Act, 1965 provides: -

³ Quoted here to include provisions of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010.

'The Statute of Limitations, 1957, is hereby amended by the substitution of the following section for Section 45: -

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

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

Section 45(1), as originally enacted, had provided: -

'Subject to Section 46 of this Act, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a Will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued.'

Therefore, Section 45 as amended: -

- (a) Reduces the period to six years; and

- (b) Doesn't just limit the limitation period to personal estate.

Incidentally, subsection 2 initially provided a period of six years for claiming interest and this was then reduced to three years.

The right of a beneficiary to recover land under the old Section 45 was not caught by this Section and instead fell to be determined under Section 13(2) of the Statute of Limitations, 1957 being twelve years to recover land. However, the period of limitation for beneficiaries is now reduced to six years, even for land, as the application of the new Section 45 does not simply relate to claims to personalty but also extends to realty.

ACTIONS BY PERSONAL REPRESENTATIVES

The Supreme Court in *Gleeson v. Feehan* (No.1)⁴ confirmed that Section 126 of the Succession Act (or the new Section 45 of the 1957 Statute of Limitations) does not apply to actions brought by a Personal Representative to recover land from someone in possession and therefore the Personal Representative continues to have twelve years to recover land under Section 13(2) of the 1957 Statute of Limitations.

This leaves the somewhat bizarre situation whereby the Personal Representative can recover the land at any time within twelve years from a stranger but the beneficiary has only six years to recover it from the Personal Representative.

PERSONS UNDER A DISABILITY

This is provided for in Section 127 of the 1965 Act and Section 49 of the Statute of Limitations, 1957 which effectively prevents time from running while the person entitled is under a disability provided that: -

- (i) The disability was present when the right of action accrued; and
- (ii) The disability is continuous and therefore time does not begin to run until the disability ends or the person labouring under it dies.⁵

FRAUD

As is common in most areas of law, where there is fraud Section 46 of the Statute of Limitations, 1957 provides that no limitation period is applicable to actions against Personal Representatives in the case of fraud. This Section was originally enacted to provide this but has since been repealed.

⁴ [1991] ILRM 783.

⁵ See Spierin, B.E., *The Succession Act 1965 and Related Legislation: A Commentary* (4th ed., Bloomsbury Professional) at 446.

However, as pointed out by Spierin: -

'The general provisions of Section 71 of the Statute of Limitations relating to fraud, however, continue to be applicable. That Section provides that where an action is based on the fraud of the Defendant, or the right of action has been concealed by the Defendant's fraud, time does not run until the Plaintiff has discovered, or could with reasonable diligence, have discovered, the fraud.'

It has been held in some cases that there are different categories of fraud and that in particular the idea of concealment can arise without the usual moral turpitude associated with the word 'fraud'. I have seen this argued in a solicitor's negligence action where concealment was raised as a way of getting around a plea in the Statute of Limitations, i.e. an allegation that the solicitor concealed his own negligence in order to defeat any claim – a last ditch argument but one which relied on the lack of necessity to show the usual moral repugnance associated with fraud. This is discussed more fully by Canny.⁶

SECTION 9(2)(B) OF THE CIVIL LIABILITY ACT, 1961

This is a little nugget that has developed over the years to become something of a monster lying in wait for practitioners. Section 9 provides: -

- '(1) In this Section 'the relevant period' means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.*
- (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 were commenced within the relevant period and were pending at the date of his death; or*

⁶ See Canny, M., *Limitation of Actions* (Thomson Reuters Round Hall, October 2010).

(b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires.

As can be seen, there are a number of prerequisites for the application of this Section, namely: -

1. Either the proceedings were already in existence while the testator or deceased person was alive and were pending at the date of death; or
2. Proceedings were commenced in respect of that particular cause of action within the normal limitation period or within two years of the date of death.

It is hard to envisage any proceedings which have a limitation period shorter than two years from the date of death. However, a personal injuries action might be a good example. People can get caught on the short stop scenario. If, for example, a deceased was involved in a road traffic accident on the 1st January, 2011 one normally has until New Year's Eve 2012 to lodge with PIAB. However, if the deceased died on New Year's Eve 2011, this would mean that the Plaintiff would have to get into PIAB within the normal two year period because that period would expire before the two years from the date of death test.

The jurisprudence in respect of Section 9(2)(b) has been fairly strict and people have had difficulty with it. It obviously does not apply to beneficiaries or to people claiming under Section 117 but applies in situations where third parties wish to make a claim against the estate and examples of such claims that come to mind might be: -

- (a) Works done and services rendered for a deceased where the normal six year period will be jettisoned by Section 9(2)(b);
- (b) Perhaps a claim for goods supplied to the deceased and, in one case, I can recall a query coming in about bales of hay and/or silage that were supplied to a deceased and were not paid for. This could just as easily have been livestock;

- (c) Banks are also paranoid about this Section as they can get caught up in it and this is why we see Banks going into Court taking out Grants of Administration under Section 27(4) in order to get in before Section 9(2)(b) kicks in. However, one may take it that it is very wide in its scope and has to be watched carefully.

The Supreme Court have held that the policy consideration of a guillotine cut-off whereby estates are protected thereafter is a strong one; strong enough even to withstand a claim by a minor against whom time would normally not run until his or her eighteenth birthday. It was held that Section 9(2)(b) trumped that in *Moynihan v. Greensmyth*.⁷ O'Higgins, C.J. pointed out in that case: -

'When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in S. 9, subsection 2(b), of the Civil Liability Act, 1961 and ... bearing in mind the State's duty to others, in particular those who represent the estate of the deceased, and the beneficiaries, some reasonable limitation on actions against the estate was obviously required. The danger of stale claims [is] very real and could constitute a serious threat to the rights of beneficiaries of the estate of the deceased.'

Therefore, the Court held that the two year period could not be avoided, even in the event of an infant or disability. Likewise even an acknowledgment within the two years appears to be ineffective – *Bank of Ireland v. O'Keefe*, [1987] I.R. 47.

DEFAMATION ACTIONS

It is worth bearing in mind that since the Defamation Act, 2009 a defamation action now also survives and can be pursued by the estate provided that the Act complained of occurred prior to its commencement (1st January, 2010). Section 39 that where a person who dies after the commencement of the Act had a cause of action for defamation vested in him before death that cause of action survives for the benefit of the estate (General Damages excluded). Likewise a person who had a cause of action against a party who defamed him can continue it against the estate.

⁷ [1977] IR 55 at 72.

EXECUTORS

Section 62 of the 1965 Act set out the duty on the Personal Representatives to distribute the estate as soon after the death as is reasonably practicable having regard to the nature of the estate and other relevant circumstances. However, proceedings to force the Personal Representatives to do so or to challenge them about a failure to distribute cannot be brought without leave of the Court before the expiration of one year from the date of death of the deceased. Notwithstanding this, time limits generally run from the date of death so even though the beneficiaries cannot bring an action without leave of the Court, time could still run against them. It is certainly safer to assume that it runs from the date of death. Creditors are not affected by Section 62.

APPROPRIATION TIME LIMIT

The rights to appropriate conferred on a surviving spouse under Section 56 of the Act, i.e. the right of the surviving spouse to require the dwelling and household chattels to be appropriated.

Note: This arises where the spouse is ordinarily resident at the time of the deceased's death in the house and gives a right to require their Personal Representatives in writing to appropriate the dwelling 'in or towards satisfaction of any share of the surviving spouse.'

There is a duty on the Personal Representative under Section 56(4) to notify the surviving spouse of the rights conferred under this Section and the time limit thereafter for the surviving spouse or civil partner to exercise the rights is ***'six months from receipt by the surviving spouse (or civil partner) of such notification or one year from the first taking out of representation of the deceased's estate, whichever is the later.'***

Like the legal right share provisions, the time limit does not run until the Notice is served.

EQUITABLE RELIEF

It is to be borne in mind that equitable factors may still influence a Court's discretion and where there has been delay, principles of laches and acquiescence can and will be argued with varying degrees of success. These matters will always go to the discretion of a Court, particularly where there is prejudice caused by the delay.

Statutory time limits do not apply to equitable claims such as estoppel but the Courts generally apply the same time limits nonetheless and so the 'short stop' of two years is likely to be applied. (see Dowling paper on probate given to GSBA at p. 31). No time limit applies to an action to have a will condemned on grounds of undue influence, fraud, duress etc. because it is an equitable action. As a matter of prudence proceedings should issue within the two years.

CAVEATS

A caveat may be entered in the Probate Office or in any District Probate Registry.

It remains in effect for six months unless and until it is withdrawn.

If it is not renewed it lapses.

If proceedings are issued on foot of the caveat, the caveat will remain until the proceedings are determined and a Grant cannot be obtained.

The procedure to get rid of the caveat is a Warning and an Appearance has to be entered to the Warning. Where there is no Appearance entered to the Warning, it may be set aside by side-bar Order.

This Notice to the caveator (which is a warning) is issued out of the Probate Office and served on the caveator or confirmed by post.

The caveator then has 14 days (or a longer time if allowed in the warning) to enter an Appearance. [Excludes days when Probate Office is lawfully closed – O79 r 82] If an Appearance is not entered, the caveat may be cleared off once an Affidavit of Service is produced. Where a caveat cannot be justified, there is likely to be an exposure to costs if an application has to be made to the High Court to have it removed.

The High Court may set aside the Caveat where a caveator has no interest or has lodged the Caveat vexatiously. Caveats although at one stage necessary before issuing Section 117 proceedings are not and never really were appropriate to Section 117 where it is the contents of the Will rather than the making of the Will which is under scrutiny and the basis for the claim.

A person who knowingly lodges or or causes a caveat to be lodged in the name of a fictitious person or with a false address of a person on whose behalf it is purported to be lodged shall be guilty of contempt of Court. (O 79 r 44).

For a full consideration of the caveat procedure and indeed for procedure as to citations and rival applications for a Grant, it is advisable to consult the Rules of the Superior Courts including Order 79, Rule 5(3) and Order 80, Rule 48 as well as Order 79, Rule 43 and the provisions generally of Order 79 and Order 80 of the Rules of the Superior Courts as well as Statutory Instrument 512/2009 for the Circuit Court and Order 50 of the Circuit Court Rules.

DISPOSITIONS MADE TO DISINHERIT A SPOUSE OR CHILD – SECTION 121

This covers offloading of assets within three years of death with the effect of disinheriting a spouse or child or otherwise undermining their rights. Court can treat it simply as a devise by will and treat those assets as part of the estate. A person who derived title under the challenged disposition will be treated as a creditor for such amount as the Court may direct. It doesn't apply if the property is purchased but will apply to the proceeds.

A spouse has one year from the taking out of representation to the estate to claim under this section. A child should apply under Section 117 as the two sections will travel together and so the 6 months time-limit applies there.

ACTIONS FOR BREACH OF TRUST

Six years unless there is fraud however Section 123 of the 1965 Act says that a Personal representative is not a trustee for the purposes of the Statute of Limitations.

CONCLUSION

If all else fails and as the clouds regroup and temperatures plunge around Galway Bay remember it never ever rains in Southern California!

Michael C. O'Connor B.L.

SOME CASES OF NOTE

- *In the matter of the Estate of F Deceased* [2013] IEHC 407 – Laffoy J – Section 117 – 6 months runs from date of extraction of a full Grant not from date of obtaining a limited Grant.
- *Rojack v. Taylor & Buchalter* [2005] I.R. 416 – The Court held that a Solicitor administering an estate could actually be guilty of negligence by simply advising a child of the deceased of their rights under the Succession Act.
- *Gleeson v. Feehan (No 2)* [1997] 1 I.L.R.M. 522 – still a key case on beneficiaries squatting and nature of title acquired.
- *Darby v. Shanley & Anor* [2009] IEHC 459 – duties owed to beneficiaries by solicitor drafting the Will. – SIX YEARS ONLY RAN FROM WHEN LOSS WAS SUSTAINED OWING TO THE NEGLIGENCE. IRVINE J.

TIMELINE

WILL	1997
DEED OF TRANSFER	1998 (CERTAIN LAND)
DEATH	1999
PROCEEDINGS AROSE	

POINT MADE THAT TIME SHOULD HAVE RUN FROM MOMENT WIDOWER CLAIMED HIS LEGAL RIGHT SHARE IN 1999 – REJECTED BY IRVINE J

COURT HELD TIME ONLY RAN FROM DATE WHEN LOSS INFLICTED ON BENEFICIARIES BY VIRTUE OF A SETTLEMENT THAT REDUCED HIS INTEREST.

Kearns v. McCann Fitzgerald [2008] IEHC 85, Peart J.

On a preliminary issue found for McCann's on the basis that letter telling beneficiaries estate was complete dated back to 1981 but beneficiaries say they were only aware in 2002 of a long dormant account which was not

included in the I.R.A and they were without their money all those years. Their previous lack of knowledge was not contested. Peart J rejected discoverability and ECHR arguments.

Peart J. agreed cause of action had accrued in 1981.

1. *Cavey v. Cavey* [2014] IESC 16.

Death: 18/12/06

Probate: 13/3/08

Section 117 proceedings launched – dismissed. Appealed to Supreme Court – Withdrew appeal. Four days later – 27/7/10 – second set of proceedings which claimed estoppel. Representations by parents he would get their house.

Motion to dismiss under Section 9(2)(b). Herbert J. dismissed under Section 9(2)(b).

Appeal: Held it was a claim which survived against estate of deceased person (a failure to act during deceased's lifetime gave rise to cause of action), i.e. failure by deceased as opposed to failure by personal representatives.

Supreme Court [Murray, Clarke + Dunne] upheld Herbert J.

2. *McHugh v. McHugh* [2012] IEHC 75.

Murphy J. – Will had left lands to Plaintiff

Deceased's Deed to Defendant of 1990 challenged on the grounds of incapacity and undue influence. The deceased died in January 1998. Proceedings were issued in 2004.

Motion to dismiss in 2012 on the grounds of inordinate delay etc.

[Previous solicitors had never taken out a Grant even though proceedings were ongoing since 2004].

Conflicting claims in Statement of Claim for and against the estate.

Murphy J. relied on Section 9(2)(b): -

- Wrongfully focussed on two year window
- A better basis would have been to simply look for laches, delay and acquiescence.

Divorcees

- Section 18 of the Family Law (Divorce) Act, 1996
- Court may make Order for provision out of the other divorcee's estate.
- 6 months from date of representation being taken out.