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Disclaimers: Recent Case Law Issues

Introduction

The law is not so absurd as to force a man to take an estate against his will (*Townson v Tickell* [1819] 3 B. & Ald. 31) is a well-known judicial pronouncement from the 19th century. This principle underpins the legal operation of disclaimers, which, along with deeds of family arrangements, are regularly encountered by advisers dealing with testate and intestate estates and their beneficiaries.

Although the taxation consequences of disclaimers have a statutory footing, the legal consequences are largely rooted in historical English case law and academic commentary. The recent decision of Twomey J in *Kieran Egan and Michael Egan Junior v Helen Egan and Alan Egan* [2023] IEHC 259 is therefore to be welcomed in that, for the first time in this jurisdiction, the High Court has considered the legal effect of a disclaimer in favour of a third party.[1]

1 There is a dearth of Irish case law on disclaimers generally. In *MIBI v Stanbridge & Ors* [2008] IEHC 389 Laffoy J does consider whether a disclaiming beneficiary had a benefit or right before the moment of disclaimer in the context of a claim by MIBI against monies in an estate to which certain beneficiaries were entitled before disclaiming to put them out of reach of creditors.

Facts of the Egan Case

Under the terms of a will dated 25 September 1975 Thomas Egan bequeathed a 36-acre family farm in Shannonbridge, Co. Offaly ("the farm"), to his nephew, Michael Egan Senior, for his life, with remainder to Michael Egan Senior's two oldest sons, Michael Egan Junior and Kieran Egan.

Michael Egan Senior was appointed sole executor and trustee of Thomas Egan's estate.

Thomas Egan died on 13 December 1984.

Under the terms of a will dated 4 February 2014 Michael Egan Senior bequeathed the farm to his youngest son, Alan Egan, absolutely. Alan Egan and Michael Egan Senior's wife, Helen Egan, were appointed executors of Michael Egan Senior's estate.

Michael Egan Senior died on 22 January 2015.

Notwithstanding that Michael Egan Senior only had a life interest in the farm, Alan Egan, as executor of his late father's estate, assented to the registration of the farm in his own name as absolute freehold owner on foot of the bequest contained in his father's will.

Alan Egan's justification for accepting a bequest of the full freehold interest in the farm from his father's estate was the existence of a one-sentence document, which the court in its judgment described as "the release", which Michael Egan Junior and Kieran Egan had signed, it was claimed, back in 1990.

The release signed by Michael Egan Junior, which is reproduced here in full, read as follows:

> "Thomas Egan Deceased
>
> I, MICHAEL EGAN of Currnavarna, Banagher, County Offaly hereby **release my claim to a remainder share in the residue of the estate of the above deceased, in favour** of my father Michael Egan.
>
> Dated the day of **1990**
>
> Signed.....MCIHAEL (sic) EGAN [emphasis added by Twomey J]."

The same form of release was also signed by Kieran Egan.

Michael Egan Junior and Kieran Egan brought proceedings shortly after their father's death and the registration of their brother as owner of the farm.

They claimed that they became aware of the terms of their uncle's will, in which they were left the remainder interest in the farm, only shortly after their father's death in 2015, which was more than 30 years after their uncle's death. They also denied that they signed the release or, if they had, argued that the release was invalid and of no legal effect.

Much of Twomey J's judgment focussed on the curious nature of the release. He scrutinised its form and content, and his comments in this regard should make salutary reading for advisers when it comes to ensuring that certain basic formalities are always complied with when drafting legal documents.

Some of the curious features of the release that Twomey J highlighted in his judgment were:

- No recitals were included in such a significant document.
- A one-sentence document only was being used to achieve a significant release and a transfer.
- The document did not include the language that one would expect in such a document.
- The document included no direct reference to the transfer of the farm, which was the purpose of the release.
- The release was not dated or witnessed.
- The release was not stated to be a deed or stamped or sealed even though dealing with land.

After considering these issues Twomey J moved on in his judgment to deal with the substantive legal effect of the release on the basis that the determining factor in the case was the substance of what the release was purporting to achieve as a matter of law.

Before we consider this part of the decision it is worthwhile reviewing the tax effect of a disclaimer, which is what the court concluded that the release was.

Tax Effect of a Disclaimer

Disclaimers, and deeds of family arrangement, are the main post-death planning tools in an adviser's armoury when it comes to dealing with testate or intestate estates. The tax issues associated with disclaimers have a statutory footing and, it would seem fair to say, are generally well known and understood. Section 12 CATCA 2003, which deals with disclaimers, confirms two important things.

- If a benefit under a will or an intestacy is disclaimed, any liability to tax in respect of such benefit ceases as if the benefit had not existed.
- The disclaimer is itself not a disposition for gift or inheritance tax purposes.

The provision serves two purposes. It absolves the person disclaiming from any liability to gift tax or inheritance tax while making clear that the act of disclaiming, in and of itself, is not a gift or inheritance.

Section 12 goes on to clarify one more scenario. Sub-section (3) makes an exception to the general rule that no tax arises for the original beneficiary where they receive consideration for the disclaimer. In such a case the consideration received is taxable as a gift or an inheritance received by the original beneficiary and is treated as having been received from the disponer who provided the property being disclaimed.

In such a case the second, or subsequent, beneficiary who ends up receiving the benefit as a result of the original beneficiary's act of disclaiming is also liable to tax thereon but as if they had received the benefit from the original disponer. Two instances of tax therefore arise, with each beneficiary deemed to have received the benefit from the original disponer and not from anyone else.

What s12 does not expressly address is the tax treatment that should apply where a person disclaims a benefit in favour of a third party (whether for consideration or not). Up until this point, before the *Egan* decision, first principles have been applied to treat such an act as, in effect, not being a disclaimer, so that for CAT purposes two benefits arise, first on the gift or inheritance received by the original beneficiary, who is the person disclaiming (from the original disponer), and then on the onward gift from the original beneficiary in favour of the third party (from the person disclaiming, not the original disponer). Section 12 does not apply to determine the tax treatment of what is occurring in this scenario as, in practice, what the beneficiary is doing is not recognised as a disclaimer regardless of how they describe it.

The Revenue Tax and Duty Manual "Disclaimers of Benefits"[2] gives the following example to illustrate the above scenario:

> "Paula inherits a house under her aunt Nora's will but disclaims the inheritance of the house in favour of her brother Tom. As it is not possible to disclaim a benefit in favour of somebody else, this is an inheritance taken by Paula from Nora and then a separate gift of the house by Paula to Tom. Both the inheritance and the later gift are taxable."

Any tax on the inheritance and the subsequent gift is not relieved by s12 as in this scenario it is generally understood that whatever Paula may be doing, it is not disclaiming in the legal sense, based on general principles.

Of note is that the tax consequences that we apply where one person disclaims in favour of another are predicated on our understanding of what is, and what is not, a disclaimer under general principles, without any legal precedent to rely on. It is therefore welcome that this issue has now been considered by Twomey J in the *Egan* case, and it is helpful to look in closer detail at what he said on the legal effect of a disclaimer in favour of a third party.

2 See https://www.revenue.ie/en/tax-professionals/tdm/capital-acquisitions-tax/cat-part06.pdf.

Legal Effect of the Disclaimer in the Egan case

Twomey J considered the substantive effect of the release in his judgment insofar as it affected Michael Egan Junior, as Kieran Egan ceased to have an involvement in the proceedings in 2019. He pointed out that Michael Egan Junior was a beneficiary of his great uncle's will and thus entitled to a 50% share of the farm, subject to his father's life interest.

However, rather than his becoming registered owner of the farm (subject to a life interest) and dealing with it as he chose, the court determined that the only conclusion that could be drawn from the release that was entered into by Michael Egan Junior and his brother was that it purported to be a disclaimer by them of their 50% share in the farm in favour of their father.

Having concluded that the release was a disclaimer, Twomey J went on to consider what Brian E. Spierin and Dr Albert J. Keating each has to say on the subject in their respective textbooks. This is in circumstances where Twomey J states in his judgment that no Irish case law was opened to the court on the issue.

Twomey J referred to Brian E. Spierin's *Succession Act 1965 and Related Legislation: A Commentary* (London: Bloomsbury, 5th ed., 2017) and his statement at para. 512 that:

> "A disclaimer will give rise to an effect by operation of law. In other words certain unavoidable consequences flow from disclaimer, the consequences cannot be dictated…It is not possible to disclaim 'in favour' of someone else as is sometimes thought."

While noting that the above statement was made in relation to disclaimers on intestacy, Twomey J found that the "unavoidable consequences" of a disclaimer are equally applicable to a disclaimer of a testate bequest.

When considering the unavoidable consequences further, Twomey J turned to Dr Albert J. Keating's *Succession Law in Ireland* (Dublin: Clarus, 2015), which states at para. 10.44 that:

> "Where a beneficiary of a will disclaims a gift it automatically falls into the residue (and so is not available for the beneficiary to re-direct to someone else)."

Based on these unavoidable consequences, the court found that it was not open to Michael Egan Junior to disclaim his bequest and at the same time decide that his bequest should go instead to his father Michael Egan Senior. Instead, the bequest reverted to the residue of the estate. On the basis of first principles, the court was satisfied that it is not possible to disclaim in favour of someone else.

Going further, Twomey J stated in his judgment that any decision other than voiding the release would "in effect, **re-write a testator's will, after his death** [emphasis added]". This is because if a disclaimer such as the one in the case were to be valid, Twomey J was of the view that this is exactly what would happen, because it would have the effect of thwarting the intention of a testator to leave an asset to a beneficiary by permitting that beneficiary, after the testator's death, to decide that the testator should instead have bequeathed that very same asset to another person.

Twomey J in his judgment stated:

> "If what occurred in this case were lawful, it would mean that a parent could get a child to sign a one sentence document and thereby have a bequest intended for that child, from say a grandparent or an uncle/aunt, re-directed to the parent and thereby have the will, in effect, changed. This cannot be correct.
>
> For all these reasons, it seems clear to this Court that a beneficiary of an asset

> under a will cannot disclaim that asset in favour of someone else. For this reason, the Release in this case is not valid as a matter of law and so is void *ab initio*."

The fundamental issue that Twomey J seems to have with the release in the case is that it changes the will. An after-death variation of this kind is not acceptable to the court.

The fact that a disclaimer (not in favour of anyone) also changes a will is not considered by Twomey J. Although a beneficiary in such a case does not direct the benefit to a particular person, they will have full knowledge of who will benefit as a result of their action. In practice, beneficiaries do not enter into disclaimers unless they understand the legal consequences of their actions and are satisfied regarding the identity of the person who, by operation of law, will ultimately benefit by their act of disclaiming, which may be tantamount to the same result that Twomey J was looking to nullify in the *Egan* case.

The reluctance of the court in the *Egan* case to countenance a "re-writing of a deceased's will after his death" appears to be consistent with the thinking of Stack J in another recent High Court decision (*In the Estate of William John Murphy* [2023] IEHC 383), in which she was asked to consider conflicting clauses in a template will that had been downloaded from the internet. In that case Stack J determined that she could come to a decision on the issue of the correct interpretation of the conflicting clauses in the template will "**without doing any violence to the language of the Will** [emphasis added]".[3]

Conclusion

The decision in the *Egan* case is helpful in that it confirms the up-to-now generally understood legal principle that a disclaimer in favour of a third party is not valid owing to the unavoidable consequences that flow from a disclaimer. Advisers looking to implement post-death variations need to take care with the language and form of the documentation that they use.

At the same time, it is hoped that the *Egan* case does not have a chilling effect when it comes to implementing post-death variations. Although the primacy of the testator's will goes without saying, this should not preclude beneficiaries from taking actions after a deceased's death where the legal and taxation effects of same are clear to all and all are fully and independently advised.

UK authorities on this issue are helpful in that they make clear that any post-death variations are not a writing-back of a testator's will. Such mis categorisations seem to stem from the tax treatment of such variations in the UK, which does not change the underlying legal position. In the UK a variation does not and cannot operate to alter the rules applying to the devolution of assets when an individual dies; to be able to make a variation, the original beneficiary must have some interest in the estate initially, and that interest can have come to them only by the operation of those rules, whether they derive from the terms of the will or rules governing intestacy, nomination or survivorship.[4]

After the decision in the *Egan* case it may now be time to update the 19th-century legal maxim that applies to disclaimers to the present day, as follows:

> *"The law is not so absurd as to force a person to take an estate against their will, nor is the law so absurd as to allow that same person to decide who shall take the estate in their place."*

3 This decision is also of note in that Stack J seems to confirm that "no contest" type clauses, if included in an Irish will, would likely be void as contrary to public policy.
4 See *Wells and Another (Personal representatives of Mrs Glowacki deceased) v HMRC* [2007] Sp C 631.