Neutral Citation Number: [2006] IEHC 104

THE HIGH COURT
DUBLIN

457 SP/2004

IN THE MATTER OF TIMOTHY BUTLER, DECEASED, OF RAHEENDUFF, THE ROWER, IN THE COUNTY OF KILLKENNY
IN THE MATTER OF THE SUCCESSION ACT, 1965

BETWEEN

MARTIN BUTLER

PLAINTIFFS

AND
THOMAS BUTLER, TIMOTHY BUTLER AND MARY HOWLIN

DEFENDANTS

Judgment delivered by Mr. Justice T.C. Smyth on Friday 24th March 2006

Introduction:
1. The proceedings are brought by the Plaintiff in his capacity as the legal personal representative of Timothy Butler, Most Senior, (hereinafter referred to as "the Deceased") pursuant to a grant of administration (with will annexed) *de bonis non* issued to him on 29th September 2003. The Deceased lived at Raheenduff, The Rower, Co. Kilkenny. He made his last will and testament on 2nd November 1956, in which he appointed his sons, Martin Butler Senior and Thomas Butler Senior, as executors and trustees of his will. The Deceased died a widower aged 86 years of age on 18th May 1963 (accordingly, the provisions of the Succession Act 1965 which came into effect on 1st January 1967 do not apply, (S.9(4) of the Act of 1965). On 28th January 1964, a Grant of Probate to the estate of the Deceased issued to Martin Butler Senior and Thomas Butler Senior.

2. The will of the Deceased contained a Power of Appointment. Thomas Butler Senior died intestate on 10th December 1966 without exercising the Power of Appointment contained in the will of the Deceased. The death of Thomas Butler Senior was untimely - he was only 53. If he was the donee of the Power, then the default provisions would take effect and all of the objects of the Power would take equally. The Defendants (and the independent witness from 1977 to 1992) say that that was the understanding of the entire family throughout all of the period 1956 - 2002.

3. Martin Butler Senior made his last will and testament dated 11th April 1996 and he died aged 85 years of age (described in his death certificate as a 'Retired Publican') on 24th May 2002. He purported to exercise the Power of Appointment in the will of the Deceased, in the will, he (Martin Butler Senior) made in favour of the Plaintiff subject to a right of residence in favour of Maureen Butler, wife of Martin Butler Senior, for her life.

4. The parties to these proceedings are the only children of Thomas Butler Senior who was, as stated, a son of the Deceased. The position of the Plaintiff is complicated by the fact that while in his capacity he is required to put all relevant matters before the Court in an impartial manner, he in fact also advanced arguments in relation to the construction of the will of the Deceased that were to his own advantage. The proceedings seek the construction of the following clause contained in the will of the late Timothy Butler, Deceased:

> "I give, devise and bequeath the lands of Ballynunnery, purchased by me from the representatives of the late Patrick Butler to my son Thomas Butler for his own use and benefit absolutely. As to all the rest, residue and remainder of my property of every kind and nature, whether real or personal and wheresoever situated, including my licensed premises at Raheenduff and the lands of Raheenduff and Ballynunnery, I give devise and bequeath the same to my son Martin Butler for and during the term of his natural life and after his death to such of the children of my said son Thomas Butler as he shall by Deed or Will appoint and in default of appointment to all of the children of my said son Thomas Butler as tenants in common in equal shares."

5. The Special Summons poses the following questions:

> i. To whom was the Power of Appointment referred to in the will of the Deceased granted?
>
> ii. Further or in the alternative, was the power granted to Martin Butler Senior or to Thomas Butler?

6. The summons also seeks certain declaratory relief in favour of the Plaintiff which would not seem to be altogether appropriate given the capacity in relation to which the Plaintiff brings the proceedings.

7. While the two questions posed in the summons most definitely arise, the questions are incomplete and the replying affidavit of the First-Named Defendant at paragraph 17 sets out the additional questions that arise:

> (iii) whether in all the circumstances it is unclear from the terms of the will upon whom the Power of Appointment was conferred.
>
> (iv) If the answer to (iii) above is in the affirmative whether the objects of the power take equally?
>
> (v) Whether the Plaintiff is estopped by his conduct or otherwise from denying the Power of Appointment was conferred on Thomas Butler? [The Plaintiff contends that the question of estoppel does not arise.]
>
> (vi) If the Power of Appointment was conferred on Thomas Butler or the answer to (iii) is in the affirmative, whether in default of the exercise of the power, which is common case, the property falls to the objects of the power equally?
>
> (vii) Whether the purported exercise of the Power of Appointment by Martin Butler Senior is valid?
>
> (viii) Whether the purported exercise of the Power of Appointment by Martin Butler Senior was *ultra vires* and void and liable to be set aside?
>
> (ix) If the power was conferred on Martin Butler Senior whether it was validly exercised?
>
> (x) The answer to such further or other questions as to the Honourable Court seems just.

8. At the opening of the hearing, Ms. Laverty, who appeared for the Plaintiff, indicated that she was not pursuing some of the declaratory relief.

The Facts
9. There are conflicts of fact on the affidavits as to the belief of the children of Thomas Butler Senior as to upon whom they believed the Power of Appointment was conferred. The Defendants and an independent witness (Ms. Carmel Kelly), a Solicitor who acted for the family, contend that all parties believed that the power was conferred on Thomas Butler Senior. The Plaintiff on the other hand contends now that the Power of Appointment was conferred on Martin Butler Senior. I am satisfied and find as a fact on the evidence that at no time prior to the death of Martin Butler Senior did the Plaintiff ever convey or suggest to his solicitor or his brothers or sister that Martin Butler Senior had the Power of Appointment even though there were two express written family arrangements in which the issue may not have been central, but to which such belief was relevant.

10. The Defendants and the solicitor say that insofar as the lack of certainty was expressed in relation to upon whom the power was conferred that this was expressed to satisfy the requirements of a finance house (when the Plaintiff was raising the finance to develop a site on part of the lands in 1979/1980) and did not compromise their belief that the Power of Appointment was conferred on Thomas Butler Senior. As at the date of the making of his will by the Deceased in November 1956, the position in the family was as follows:-

> 1. Martin Senior was married for about eight years, but had no family. The Plaintiff's evidence was that he thought his uncle was in his early 40's at the time and that his aunt by marriage (Martin Senior's wife) was about 36 years old. It seemed unlikely that there would be any children in the family of Martin Senior.
>
> 2. Thomas Senior was a few years younger than his brother, Martin Senior. In the family of Thomas Senior was his wife and four children whose approximate ages at the time were Mary (8), Tim (5) and the Plaintiff, Martin, and the Defendant, Tom, who were twins aged about 2 years old.

11. In broad terms, the scheme of the will was that Thomas Senior was given certain lands outright. Martin Senior was given the residue, including a licensed premises and certain lands for his life. After the death of Martin Senior, the properties in which Martin Senior had a life interest was, subject to a default of a deed or a will exercising a Power of Appointment, to go to the four children of Thomas Senior as tenants in common in equal shares. However, there was also an in-built protection in the will for the wife of Michael Senior, who was given a right of residence and support and maintenance in the dwelling house at Raheenduff, and for a weekly sum to be paid to his daughter-in-law if she went to live elsewhere. In short, the Deceased seemed concerned that both his sons, Martin Senior and Thomas Senior, and their respective dependents were provided for.

12. While certain events occurred after the coming into effect of the will of the Deceased on his death, to which I will refer to briefly, the factual context in which the will was 'made' is where most if not all assistance in the construction of the will is to be obtained. In short, the will must be looked at and construed as at the date of its making and at the date of death.

13. The first replying affidavit of Thomas Butler states that the reason the estate of the Deceased was not administered in 1964 was because of the non-cooperation of Martin Senior, who was disappointed that he was only left a life interest in certain properties of the will of the Deceased. The Plaintiff in oral evidence said that he was not aware of this, even though he was the closest of his siblings to his uncle. Even allowing that Martin Senior 'kept himself to himself', I find it difficult to accept that the Plaintiff, in whose favour his uncle purported to exercise the Power of Appointment and who was closest, knew nothing of what could be understood as a possible disappointment. In the same affidavit, the Defendant, Thomas, avers as follows:

> "I believe that the Power of Appointment was conferred on my late father and not on my uncle, Martin Butler, because the objects of the power were myself and my siblings, and my father would have been the best placed to decide who, from amongst his children, might benefit or, alternatively, if we should benefit equally or in particular shares and proportions."

14. When giving evidence on affidavit or orally, the Plaintiff did not take issue with this proposition that the person best placed to decide concerning the parties to this action would have been Thomas Butler Senior.

15. In 1979/1980, the Plaintiff was in course of getting married and a site was identified on the lands in which his uncle, Martin Senior, had a life interest. The Plaintiff required a mortgage from a lending institution to achieve his objective. I am satisfied and find as a fact on the evidence of Ms. Carmel Kelly, Solicitor, that doubt had been expressed by the lending institution as to the title to the plot upon which the premises were to be built and for the avoidance of that doubt and no other, and as a comfort to the lending institution, the Defendants ensured the Plaintiff could pursue the sale by consenting to the vesting of the plot of ground in which they and the Plaintiff had a contingent interest. If the Defendants had no interest in the property, their consent would have been unnecessary. The averment for the Defendants is that their action was predicated on the firm belief of all involved, including the Plaintiff, that the entitlement to all the property, subject of the life interest of their uncle, Martin (which included the plot expressly referred to in the written agreement) vested equally in all of them.

16. On being questioned about this transaction, the Plaintiff tried to convey the impression that the Defendants did not confer any benefit on him and that he merely agreed to the arrangement because there was a doubt as to who could exercise the Power of Appointment. I find his evidence unconvincing and I find as a fact that if he had a doubt of any kind, either as to who could exercise the Power of Appointment or not understanding or being ad idem with his siblings on the equal entitlement, he did not convey this to his solicitor or siblings. In short, he was prepared to take a benefit and if they proceeded on a false assumption, that was to be their own misfortune.

17. Contracts or family arrangements are amongst the few to which the doctrine of *uberrimae fidei applies,* (*Gordon -v- Gordon* (1816), 3 Swanst 400). In my judgment, there was either a lack of good faith on the part of the Plaintiff at the time or the Plaintiff is confused now in 2006 as to his belief in 1980 as opposed to a belief at first articulated in 2002 after his uncles's death. I would in charity prefer to give him the benefit of having acted in good faith but fault his memory as unreliable.

18. I accept the evidence of the Defendants as consistent and reliable on this transaction. Regretfully, this relevant transaction, as to its being consistent or inconsistent with the positions taken up in correspondence in 2002, only emerged in the replying affidavit of the Defendants. The land involved in the 1980 transaction was registered land and there were delays encountered in registration. The Plaintiff reported his solicitor to the Incorporated Law Society of Ireland but the administrative or bureaucratic difficulties, I am satisfied, caused the delay and not the solicitor. However, in that context, notwithstanding that Ms. Kelly in evidence admitted to having on occasions limited knowledge of the family affairs, it seems to me, having been reported to the Incorporated Law Society,

she would have been most likely to check all dealings with this family with persons in her office.

19. In 1987, Martin Butler Senior sought the consent of all his nephews and his niece to the sale of a site on lands in which he had a life interest to one Dermot Kavanagh. The Plaintiff agreed to the sale. However, Thomas Butler, the Defendant, gave oral evidence that his mother said that she would disown him if he agreed to the sale. In the events, none of the Defendants would consent and the proposed sale did not proceed. It is averred for the Defendants that consequent to that refusal, relations between the Defendants and their uncle deteriorated to a very significant extent but the Plaintiff was not subject to the same degree of change of deterioration in relations.

20. In 1992, the wife of Thomas Butler Senior and mother to the parties of this, Mrs. Bridget Butler, was suffering from a terminal illness. She had made a will leaving her dwelling house to her daughter, Mary, lands to Thomas, (the Defendant) and Tim (the Defendant) and the residue, (monies and investments), to the Plaintiff. On 14th January 1992, a deed of family arrangement was entered into whereby all parties agreed that the cash monies would be applied to the hospital maintenance of the mother and that those who had a real prospect of inheriting the fixed assets (lands and premises) would agree to these being sold on the mother's death and all four children would share in the mother's estate as tenants in common in equal shares. The mother died on 22nd January 1992, approximately just a week later.

21. Again, while this has no bearing on the construction of the will, it is consistent with the family acting on the basis of tenants in common in equal shares. Again, this document and the facts surrounding it only came to light in the Defendants referring to it in the replying affidavits. In giving evidence on the first day of the trial, the Plaintiff acknowledged that the arrangement was of benefit to him as he would receive one quarter of the entire estate rather than just the residue. On the second day of the trial on re-examination in relation to this arrangement, he said: "I saw no advantage in it."

22. The administration of the estate of the mother, Bridget Butler, Deceased, was carried out with commendable promptitude, the Grant of Probate having issued on the 14th July 1992, distribution and solicitors' bills, etc., being signed off for on 21st December 1992. A letter of that date was written to both the Plaintiff and to his sister (who was the executrix of Bridget Butler Deceased). The letter to the executrix does refer to the unresolved matter arising from the Deceased's will. No action was taken at that time. However, it is important to bear in mind that only a short while (some five years) previously, the uncle appears to have fallen out with his nephews and niece (i.e. the Defendant nephews and niece) over the sale of the land to which they had refused.

23. On 7th December 1995, Martin Butler Senior, accompanied by his wife Maureen, attended on Mr. Martin G. Lawlor, Solicitor, for the purpose of making a will. Mr. Lawlor in his affidavit notes that his client wished to appoint the farm and public house to his nephew, Martin Butler, the Plaintiff, subject to a right of residence in favour of his wife, Maureen, in such property "for her own use and benefit absolutely." He further averred that:

> "(vii) I say that in the course of the discussions regarding this matter that Martin Butler explained to me that the will was the subject matter of a trust. He also explained to me that the trust had been created by his late father, Tim Butler, who had died in May 1963."

24. In fact, no trust was created in the will of the Deceased.

> (Viii) I say that there was some discussion at the time concerning the Power of Appointment given to Martin Butler by his father. I did make a note that for the purpose of advising him fully regarding the situation, that I would need a copy of the Grant of Probate which was subsequently obtained and I say that having obtained a copy of the Grant of Probate that the will was duly executed on 11th April 1996."

25. Martin Butler Senior purported in his will to exercise the Power of Appointment contained in the will of the Deceased. Martin Butler Senior died on 24th May 2002 and probate of his will issued to his executrix, Catherine Kavanagh, on 8th July 2003.

26. There is dispute as to what happened after the death of Martin Butler Senior. The Plaintiff averred in paragraph 11 of his affidavit sworn on 8th July 2005 that there was a meeting "immediately after the funeral." In oral evidence, he said that the meeting took place before the funeral. In his affidavit, the Plaintiff avers that there was pressure put on him to sign an agreement that all four siblings shared the life estate of the uncle equally. He said he felt bullied. The Defendant, Thomas, put the meeting as of 26th May 2002 in paragraph 12 of the affidavit of on 8th April 2005, which accords with a letter of 11th June 2002 addressed to the Defendant by Kelly Colfer Son & Poyntz being part of Exhibit "F" in the Plaintiff's affidavit of 19th November

27. 2004. The letter *inter alia* states:

> 2005.
>
> > "We are instructed that on the 26th May 2002, at a meeting of yourself and your three siblings, it was agreed by all four of you that all of the property at Ballynunnery and the property at Raheenduff would vest in all four of you (Mary Howlin, Timothy Butler, Thomas Butler and Martin Butler) as tenants in common in equal shares."
>
> The reply to that letter is 17th June 2002 and while it deals with the purported exercise of the power, it does not challenge the assertion of the agreement of 26th May 2002.

28. I can accept that there may have been an insistence by one or all of the Defendants at the time of funeral of their uncle, Martin, to establish agreement on where they stood on the distribution of their grandfather's estate now that their uncle had died. The Defendant, Tim, lived in Cork and this was an opportunity to agree and resolve how things would proceed. In all the circumstances, it was an understandable concern. It was not put to the Defendant, Thomas, in cross-examination, that the Plaintiff was bullied or that, subsequent to 30th May 2002, that the Plaintiff was abused or intimidated in any way by the Defendants as alleged in paragraph 12 of the Plaintiff's affidavit sworn on 8th July 2005 and I am satisfied that that did not occur.

29. If the Defendant requested a written agreement, or any of the Defendants requested a written agreement, of which there was no firm evidence, as opposed to a verbal agreement, it would be understandable in the light of events that were later to emerge.

30. In the Plaintiff's affidavit of 8th July 2005, paragraph (3), he avers *inter alia* as follows:

> "At all times from date of death of my father, Thomas Butler Senior, to the date of swearing hereof, my understanding was that the will of the Deceased, Timothy Butler Senior, was such as to grant a Power of Appointment to Martin Butler

Senior. It was never my understanding that this Power of Appointment was vested in my father, Thomas Butler Senior."

31. The Plaintiff's oral evidence was that he had a doubt as to who had the Power of Appointment and specifically sought to ascribe that doubt to the doubt referred to in Clause D on the second page of the agreement of 18th April 1980. This inconsistency again points to the reliability of the evidence of the Plaintiff.

32. When the Plaintiff was asked in cross-examination about his knowledge of the contents of his uncle's will as at the meeting on 26th May 2002, the Plaintiff evaded the question and said that the first time he saw the will was after that date, i.e. after 26th May 2002. That answer was consistent with his affidavit evidence but not an answer to the question put to him. On the Plaintiff's own oral and affidavit evidence, he was closer to his uncle, Martin Butler Senior, than any of his siblings and while it is possible that he did not know that his uncle purportedly exercised the Power of Appointment in his own favour in the period 1995 to 2002, I found the evidence and the giving of it unconvincing. So far as the Defendants were concerned, there was a common understanding and agreement (as there was in 1980 and 1992) that all shared as tenants in common in equal shares. The correspondence in mid 2002 highlighted the difference between the Plaintiff and the Defendants. In my judgment, the issues now before the Court should have been brought to the attention of the Court at that time. I am satisfied and find as an undisputed fact that the Defendants were shocked in mid June 2002 to find that what they had all understood as agreed in late May was not being accepted by the Plaintiff.

33. In September 2002 an *ad-interim* transfer of the licence attached to the public house was sought and obtained by the Defendant in his proposed capacity as personal representative of the Deceased. Consequent on court application, draft accounts in respect of the licensed premises for the period 17th March 2002 to 31st May 2003 were given to the Defendants. There were representations made at the annual licensing session of the District Court which were effectively withdrawn in the interests of preserving the licence. These, it appears, related to the capacity in which the Plaintiff sought the transfer of the licence to him, because as of 24th September 2003, he was the legal personal representative of the Deceased. In that capacity, he held the estate as trustee for the persons by law entitled thereto.

34. All the foregoing can have no bearing on the construction of the will of the Deceased. The events, however, are wholly consistent with the understanding and agreements of the parties, including the Plaintiff, up to and including 26th May 2002. I am satisfied that seeking to operate on the primitive shibboleth 'possession is nine points of the law' is not the underlying legal principle applicable to arrangements for the settlement of family property.

35. While appreciating the emotional distress of the litigants and the anxieties of giving oral evidence, I am nonetheless satisfied that the equivocation and evasive evidence of the Plaintiff testified to me the unreliability of his evidence of events. I note this with regret in a case of a family with differences and I have erred, I hope, with charity on the impression conveyed to me.

The Law and the Legal Submissions

36. Section 90 of the Succession Act 1965 provides for the admissibility of extrinsic evidence to construe a will. The Supreme Court in *Rowe -v- Law* [1978] IR 55 and In re *Collins O'Connell -V- The Governor and Company of the Bank of Ireland,* [1998] 2 I.R. 596, it was held that the Section requires two conditions for admissibility:

(i) There must be an ambiguity or contradiction on the face of the will, and

(ii) It must be necessary to ascertain the intention of the testator.

37. Unfortunately, the will was made 50 years ago and there is no extrinsic evidence available. There is contextual factual information available about the state of the families and the members in the families.

38. Section 99 of the Succession Act 1965 provides that there if there are two constructions open to a Court, one of which renders a clause in a will operative and another which renders a clause inoperative, the one which renders the clause operative shall apply. While accepting that the point taken by Ms. Laverty and also by Ms. Stack in submission is correct, that the Succession Act was not operable as of the date of the Deceased's death, nonetheless, the principle enshrined in Section 99 is merely an expression of long settled law. Accordingly, Section 99 qua Section 99 has specific but limited application to the proceedings. It has no application to the identity of the donee of the power because whichever of the two possible donees is the correct one, the clause will be operative. If the Court is to chose Thomas Butler Senior as the correct donee, then, as he did not exercise the power and all of his children take in equal shares (as contended for by the Defendants) and the clause of the will is not rendered inoperative. If the Court were to chose Martin Butler Senior, the clause is equally operative.

39. This is not a case where one or other construction of who the donee was intended to be, would render the clause operative or inoperative; it would be operative in both eventualities but with different results.

40. In my judgment, the base level intention of the testator was that the objects of the power were to take equally.

41. In this context, the Court can have regard to Section 99, or, more particularly, the underlying settled law in it and save the clause and give effect to the intention of the Deceased by providing that the property passes to the children of Thomas Butler equally (which, of course, includes the Plaintiff).

A. The Construction of a Will.

42. The Supreme Court in the case of *Curtin -v- O'Mahony* [1991] 2 I.R. 566 stated that the task of a court in constructing a will was to give effect to the intention of the testator or 'to place oneself in the armchair of the testator.' The Court in Curtin's case prevented a substantial partial intestacy by rectifying a poorly drafted will. The testator in that case had provided that if he sold his dwelling house (which was bequeathed to a niece) during his lifetime he would divide his estate in a certain percentage (which when added up amounted to 100.5%). He did not sell his house. He had a substantial residue. Because the bequest of the residue was contingent on the sale of his house, on the face of things there would be an intestacy in relation to the residue and Lardner J. so held in the High Court. The Supreme Court held that this could not have been the intention of the meticulous testator and so rectified the will to give effect to the residuary clause. While such a situation does not arise here, in this case the intention of the testator is said be to unclear as to who the donee of the power was to be, but the object of the testator's bounty is clear, i.e. the children of Thomas Butler Senior (the Plaintiff and the Defendants). If the Court was in a position to identify the donee of the power, whichever person it chooses, there would be no failure or partial intestacy in respect of the estate of Timothy Butler Senior. In my judgment, the intention of the testator is clear and can be given effect to, even if the donee of the power cannot be identified with certainty.

43. In his submissions for the Defendants Mr. Spierin referred to the case of *Howell -v- Howell* [1992] 1 IR 290 in which Ms. Justice Carroll approved the guidelines of Lowry C.J. in H*eron -v- Ulster Bank* [1974] NI 44 wherein he sets out at page 52 of the judgement

guidelines to assist in the construction of a will.

44. This approach was also applied by Macken J. in the *Bank of Ireland -v- Gaynor & Others* (Unreported High Court 29th June 1999).

B. The Guidelines
45. The Guidelines adumbrated by Lowry L.C.J. were as follows:-

> "1. Read the immediately relevant portion of the will as a piece of English and decide if possible what it means.
>
> 2. Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole or, alternatively, whether an ambiguity in the immediately relevant portion can be resolved.
>
> 3. If ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.
>
> 4. One may at this stage have resort to rules of construction, where applicable, and aids such as the presumption of early vesting and the presumption against intestacy and in favour of equality.
>
> 5. Then see whether any rule of law prevents a particular interpretation from being adopted.
>
> 6. Finally, and I suggest not until the disputed passage has been exhaustively studied, one may get help from the opinions of other Courts and Judges on similar words, various binding precedents, since it has been well said that "no will has a twin brother" (per Warner J. in the matter of *King* 200 N.Y. 189, 192 [1910]), but more often as example (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts."

Guideline 1:-
46. This requires the Court to have regard to the immediately relevant portion of the will. In the case of *Howell -v- Howell*, the Court concentrated on the very specific part of the will that had given rise to the difficulty. In the Howell case, the clause being construed was:

> "I devise and bequeath my farm of land in the townlands of Drumpeak, Corinshigo, together with the furniture and machinery thereon, to my brother Joseph. I give, devise and bequeath all my stock and any other assets that I may have to my brother Richard."

47. The Court considered that the immediately relevant portion of the will was the words "any other assets I may have."

48. It was submitted by Mr. Spierin in the instant case, therefore, that the immediately relevant portion of the will of the Deceased is not the entirety of the clause quoted in the Special Summons but is that portion which actually confers the special power, i.e.:-

> "...to such children of my said son Thomas as he shall, by Deed Or Will, appoint and in default of appointment to all of the children of the said Thomas Butler as tenants in common in equal shares."

49. It was submitted that there is no ambiguity in the immediate relevant portion. If one considers same as a piece of English, it is clear, and it was submitted by Mr. Spierin that the power was conferred on Thomas Butler, Senior.

50. On the other hand, I have had the benefit of the evidence tendered on behalf of the Plaintiff by Prof. Nicholas Daly of UCD, who deals with the matter on the basis of the information given to him on the face of the affidavit as a piece of English. I will return to this matter in due course, suffice it to say that the factual context under which the Deceased made his will does not appear to have been transmitted to Prof. Daly, who actually simply was asked to carry out an exercise and quite specifically addressed his mind to it. Accordingly, the position about Thomas Butler Senior and his family and Martin Butler Senior and his family do not appear to have been any part of the consideration of the Professor.

51. Accordingly, if the Court considers that the immediately relevant portion of the will of Timothy Butler Senior is the entirety of the clause set out in the summons that it is not possible to ascertain the intention of the testator as to identify the donee of the power by considering the entire clause as a piece of English, but by their repeated use of the pronoun "he", the testator could have been referring to either of his sons.

Guideline 2:-
52. This suggests that the Court have regard to other material parts of the will only if there is an inability to find meaning of the will in the immediately relevant part of the will in order to make "harmonious sense" of the whole. It was submitted by the Defendants that there is no disharmony in identifying Thomas Butler Senior as the donee of the power. This was vigorously challenged by the Plaintiff. It was submitted that it would be most harmonious if the parent of the objects of the power should exercise the power because, as was referred to in another case under the Succession Act by Kearns J. In re *ABC Deceased XC & Others -v- R.T. & Others,* [2003] 2 IR 250): 'Parents must be presumed to know their children better than anyone else.'

53. Counsel for the Plaintiff took issue with reference to this authority as being applicable in a particular legal context only. However, it seems to me as a matter of ordinary common sense that the person best placed to know their own children is generally the parent of that child rather than their uncle. Equally so, though it did not happen, immediately after the Deceased died Thomas Butler Senior could have by deed made an appointment. Unfortunately, his untimely death did not bring that about and there may also have been differences between himself and his brother and matters were left in abeyance.

54. If one then has regard to Guideline 3 and to the scheme of the will as a whole, to decide what the testator was trying to do, it seems to me that he was ultimately trying to benefit the children of Thomas Butler Senior. A Court in seeking to resolve the apparent ambiguity, if such exists, in favour of Thomas Butler, being the person with the power, it seems to me that the parent of the objects of the power would be the person best placed to decide how the power was to be exercised. It fits in with what the testator in my judgement was trying to do and the testator would not have anticipated the untimely death of his son, Thomas Butler Senior.

55. The submission that the donee of the power was to be Martin Butler Senior because, in the events that have happened, the purported exercise by Martin Butler Senior in favour of the Plaintiff has brought about a position where the nephew closest to Martin

Butler Senior would be the person most likely to have been appointed by him and would look after Martin Butler Senior's widow. This is, however, to proceed on the basis of the argument post hoc ergo propter hoc. The Deceased was a farmer, not a clairvoyant, and it is a matter of pure conjecture that matters have emerged as they have.

56. In my judgement, the determination that Thomas Butler was the intended donee of the power accords with what the entire family believe to be the case as did their solicitor over a long period of time. I think it unnecessary to retrace here what I have said earlier about the general factual background of affairs between the death of the Deceased and the intimation in June 2002 of the understanding of the Plaintiff.

57. In my judgement, the construction which identifies Thomas as the donee of the power does no violence to the intention of the testator. Further, it accords with Guideline 4, which refers to the application of the presumption of equality and against intestacy. I cannot with any certainty say that the Deceased intended to confer the power on Martin Butler Senior and there is nothing in the immediately relevant portion of his will or in the scheme as a whole that would tend to resolve the suggested ambiguity in his favour.

58. I would hold that the objects of the power have taken equally. By severing the portion of the clause which contains the alleged ambiguity and bracketing the expression "(such of the children of my said son, Thomas Butler, as he shall, by Deed Or Will appoint, and in default of appointment to) all of my children of my said son Thomas Butler as tenants in common in equal shares" the same result ensues the Court is rendering the bequest operative and in accordance with settled law (as expressed in the Succession Act 1965) in giving effect to the intention of the testator in accordance with *Curtin -v- O'Mahony* earlier referred to.

C. Uncertainty In Powers of Appointment

59. In my judgement, there is no uncertainty as to who had the Power of Appointment, it was Thomas Butler Senior; but even if there was an uncertainty, I would approach the matter in this way. There are some passages in the textbooks and indeed in some of the older case law which are of assistance in this regard. I have been referred to certain passages in both *Delaney Equity and the Law of Trusts in Ireland*, 3rd ed., at pages 85 to 88, and also *Farwell on Powers*, 3rd ed. (1916) at page 132 et al.

60. In the case of *Earl of Bandon -v- Moreland* [1910] 1 IR 220, the position was that a power was granted under a settlement to 'A. and his heirs and assigns' to 'select' part of the settled lands which were thereupon conveyed to 'A., and his heirs or assigns' forever, or as he or they shall direct.' It was held that, as A. was a person ascertained within the period, he might validly exercise the power and that, though the power was bad so far as given to his 'heirs or assigns' since they were donees not necessarily ascertainable within the period, the invalid portion was severable.

61. The words 'heirs or assigns' could not, in the context in which they were used have effect as words of limitation, since a power was not a hereditament. The words "heirs and assigns" is dealt with specifically in the report at page 288 in the judgment of Pimm J.. In my judgment, in the will of the Deceased, after the words "I give, devise and bequeath same to my son Martin Butler for and during the term of his natural life", the words "and after his death" are superfluous and tautologous because at the end of his natural life, death was the inevitable and it was quite unnecessary to conjunct "and after his death to", and accordingly in my judgment, the immediately relevant clause is that identified by Mr. Spierin.

D. The Power of Appointment purported to be exercised by Martin Butler Senior

62. Martin Butler Senior, by his will, appears to have attempted to exercise the Power of Appointment in favour of the Plaintiff. If he honestly believed he had a power by deed or will to so appoint, it is strange that the difficulties in 1980 arose at all, on the basis that he could have carried out his wishes at that time without any question of waiting for a will and avoided, on that version of affairs, the apparently unnecessary joinder in the deed of 1980 of the Defendants in this case. The position in this case is that the Deceased, the grandfather, left to Thomas Butler Senior to deal with matters as he saw fit as between his own children rather than confer on the childless brother, Martin Senior, the entitlement to distribute amongst the siblings that have appeared before me. The purported exercise, though questioned by Mr. Spierin, had as its answer, if it were a valid exercise, the reply from Ms. Stack, that it accorded with what was laid out in Williams 6th ed. 1987 at page 414 (which sets out the essentials for the exercise of a special power by will) *viz*:

> "To exercise a special power, there must be either (1) a reference to the power or (2) a reference to the property the subject of the power or (3) an intention otherwise expressed in the will to exercise the power."

63. Now while undoubtedly there is an error in the information given to the solicitor, Mr. Lawlor, because the property was not subject to a trust, that, in my view, is a serious error, but in the circumstances of this case, it is *nihil ad rem* because I am satisfied that the donee of the power was Thomas Butler Senior.

64. That determination effectively should resolve the matters in issue between the parties.

E. ESTOPPEL:

64. However, there remains outstanding the question of estoppel, and I embark upon a determination of this with reluctance and merely for completion. I accept the submissions of the Plaintiff that essentially that it has nothing to do with the construction of the will. However, if I were wrong in either my approach to the application of the guidelines, then it might fall to be determined. Accordingly it would leave a situation in which the exercise by the power or purported exercise by Martin Butler Senior would be *ultra vires* and, accordingly, it is necessary to proceed to consider estoppel.

65. Mindful that it is a family dispute I do not want to say any more than is necessary and I err on the side of charity. The evidence of the parties is in conflict on the point as to the entitlement of Thomas Butler Senior to appoint, the case of the Defendants was that it was always the belief of the Plaintiff and the Defendants that the Power of Appointment had been conferred on their father, Thomas Butler Senior. It was only after the death of Michael Butler Senior when the Plaintiff had, as he perceived, I presume, the benefit of the purported exercise in his favour that he contended that his uncle, Martin Butler Senior, had the Power of Appointment. This might have been viewed by the Defendants as disingenuous or opportunistic or otherwise. I am content to merely follow the findings of fact I have made in the judgment without attaching such expressions (however justified) to his position.

66. The Defendants, amongst themselves, throughout the entire period until they receive the correspondence in mid 2002, understood that the Plaintiff was *ad idem* with them and that their father was the donee of the power. It is perhaps nihil ad rem and perhaps merely looking with the benefit of hindsight that they would have acted differently if the Plaintiff had said to them, or to his solicitor, Ms. Kelly, that he believed that his uncle, Martin Butler, at all times was the donee of the power. They conferred benefit both in the document of 1980 and 1992 to which I have referred and he was content to accept the benefits. If he did know, he refrained from conveying to them frankly what his understanding and agreement was.

67. However, notwithstanding that Ms. Kelly did say that she did not deal with all and every last detail of all the transactions of the family over the period in which she was dealing with them, she did act as the family solicitor over a long period. She had no axe to grind. She was a professional person, independent, and her understanding from dealing with the family and each of its members (and she dealt with them, including the Plaintiff as an individual client) was that at all times the parties understood that Thomas Butler Senior was the donee of the power.

68. Now the fact that the finance house expressed the doubt in 1980 (and that the Defendants signed the document) that is the only doubt that was ever conveyed to the Defendants or to the solicitor who was dealing with the matter. Whatever views the building society or lending institution had are *nihil ad rem*. They were laid to rest by everyone joining in the deed. It seems to me that except from family loyalty and filial disposition towards their mother in 1992 that the Defendants in these proceedings, who had specific assets conferred to them by the will of their mother, had no reason to relinquish that certainty and throw the entire lot into a mixed fund with the Plaintiff in the absence of a belief that as they were sharing equally with him, so also he would with them in their grandfather's estate. The property comprised in the mother's estate has been let and the Plaintiff has always been paid and has accepted his share of the rent, again another indicator. These do not, however, go to the determination of the construction of the will but rather to the conduct of the parties.

69. It seems to me, accordingly, that the Defendants acted to their detriment in the certain belief that their brother, the Plaintiff, accepted that the property comprised in the estate of their grandfather would pass equally to all of them. They conferred the benefit on their brother from the estate of their mother, to which he was not entitled and they did so in the belief that the brother accepted, as represented to them, that the estate of Timothy Butler, Deceased, would pass to all of them equally. The ingredients of an estoppel are present.

70. I do, however, accept that the certainty of fact does create a difficulty but if that difficulty of certainty of fact arises, it arises from either the Plaintiff in bad faith not disclosing what he says in one of his affidavits he believes and believed throughout that Martin Butler Senior was the donee or that he did not so believe and was quite happy to go along with them, so long as benefit was available to him, but when it appeared that the scales had tilted in his favour by the purported exercise by his uncle, he was prepared to stand and take advantage of that position.

71. It seems to me that (1) there was a belief fostered and encouraged by the Plaintiff, which belief is independently confirmed by Ms. Kelly.

> (2) There were detrimental acts on the part of his siblings in relation to the estate of their mother predicated on the basis that the estate of Timothy Butler would pass equally and, indeed, in the case of the 1980 document. Whatever benefit in 1980 Thomas received by way of a right-of-way and Martin receiving the site with good title, the two other siblings had nothing whatsoever to gain by appending their name or agreeing to the arrangement. They had no benefit in any shape whatsoever.

72. Furthermore there was an acceptance also by the Plaintiff of the benefit of the estate from his mother and this is a continued acceptance in the form of rental income, albeit directed through the solicitors, and I can understand that, given the fact that matters became disputatious as between the Plaintiff and the Defendants.