Neutral Citation Number: [2010] IEHC 505

THE HIGH COURT

2010 376 SP

IN THE MATTER OF AN APPLICATION UNDER THE LAND AND CONVEYANCING LAW REFORM ACT 2009

BETWEEN

W

PLAINTIFF

AND

M AND D

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 30th day of July, 2010.

1. The proceedings

1.1 These proceedings, which were initiated by special summons which issued on 3rd June, 2010, seek an order pursuant to s. 24 of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) approving the Scheme of Arrangement annexed to the special summons in respect of a declaration of trust made on 18th July, 1997 (the trust document) the contents of which will be set out *in extenso* below. The plaintiff also seeks ancillary relief.

1.2 Section 24 of the Act of 2009 is contained in Part 5, which is headed "Variation of Trusts". There are only two sections in Part 5, s. 23, which is the interpretation section, and s. 24, which sets out the jurisdiction of the Court to vary trusts. In broad terms, Part 5 implements the recommendations of the Law Reform Commission in its report on *The Variation of Trusts* published in December 2000 (LRC 63 – 2000), although the Oireachtas departed from the recommendations in certain instances. Part 5 confers a novel jurisdiction on the Court. As far as I am aware, this is the first application to come before the High Court under Part 5.

1.3 Section 24 envisages the manner in which an application is brought to this Court being regulated by rules of court. For instance, subs. (2) provides that the Court shall not hear an application made to it under subs. (1) unless it is satisfied that the applicant has given notice in writing of the application, *inter alia*, "to such persons as may be prescribed by rules of court" at least two weeks before the hearing of the application. The only provision which has been made in the Rules of the Superior Courts (the Rules) regulating applications under s. 24 is the provision in the Rules of the Superior Courts (Land and Conveyancing Law Reform Act 2009) 2010 (S.I. No. 149 of 2010) that an application for an order under s. 24 may be brought by way of special summons. There is no specific provision prescribing the giving of notice. The plaintiff in these proceedings has utilised the special summons procedure. Therefore, the application has been properly brought in accordance with Order 3(11B) of the Rules. By way of general observation, notwithstanding the difficulties which the application raises, the plaintiff's legal advisers are to be commended in relation to the comprehensive manner in which the matter has been presented to the Court.

2. Section 24 in outline

Sub-section (1) of s. 24 provides:

> "An appropriate person may make, in respect of a relevant trust, an application to the court for an order to approve an arrangement specified in the application for the benefit of a relevant person specified in the application if the arrangement has been assented to in writing by each other person (if any) who –
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> (a) is not a relevant person,
>
> (b) is beneficially interested in the trust, and
>
> (c) is capable of assenting to the arrangement."

Throughout s. 24 it is made clear that "the relevant person" whose benefit is at issue must be specified in the application. The expressions "appropriate person", "relevant person" and "relevant trust" are defined in s. 23, as is the word "arrangement", which, in relation to a relevant trust, is defined as meaning –

> "an arrangement –
>
> (a) varying, revoking or resettling the trust, or
>
> (b) varying, enlarging, adding to or restricting the powers of the trustees under the trust to manage or administer the property the subject of the trust."

2.1 In s. 23 "relevant person" is defined, in relation to a relevant trust, as meaning any of the following:

> (a) a person who has a vested or contingent interest under the trust but who is incapable of assenting to an arrangement by reason of lack of capacity (whether by reason of minority or absence of mental capacity),

(b) an unborn person,

(c) a person whose identity, existence or whereabouts cannot be established by taking reasonable measures, or

(d) a person who has a contingent interest under the trust but who does not fall within *paragraph (a).*"

2.2 I am satisfied that the trust created by the trust document is a "relevant trust" within the meaning of that expression in s. 23. Accordingly, in accordance with subs. (1) of s. 24 the Court has jurisdiction to entertain an application for an order to approve an arrangement to vary, revoke or resettle the trust which is for the benefit of a relevant person, provided the arrangement has been assented to by all of the persons beneficially interested in the trust who, in broad terms, are identifiable and capable of assenting.

2.3 By virtue of subs. (4) of s. 24 the Court has two options as to the manner in which it shall determine the application, which are set out as follows:

> "(a) subject to *paragraph (b),* by making an order approving the arrangement specified in the application if it is satisfied that the carrying out of the arrangement would be for the benefit of –
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> (i) the relevant person specified in the application, and
>
> (ii) any other relevant person,
>
> (b) by refusing to make such an order in any case where –
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> (i) the court is not satisfied as referred to in *paragraph (a)*, or
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> (ii) the Revenue Commissioners have satisfied the court that the application is substantially motivated by a desire to avoid, or reduce the incidence of, tax."

Sub-section (5) elaborates on what constitutes "an arrangement … for the benefit of a relevant person" by providing that, in making a determination under subs. (4) –

> "… the court may have regard to any benefit or detriment, financial or otherwise, that may accrue to that person directly or indirectly in consequence of the arrangement."

2.4 The relevant trust in this case, which was created by the trust document, related to a life assurance policy. It is necessary to consider the provisions of the policy and of the trust document in considerable detail.

3. The policy and the trust document

3.1 The policy was issued by Irish Progressive Life Assurance Company Limited (Irish Progressive) on 15th July, 1997. It was what was described as a "Term 100 Plan" policy. The lives assured were F, to whom I will refer as "the father", and his wife, M, who is named as the first defendant in these proceedings, and to whom I will refer as "the mother". At the time, the father was over 77 years of age and the mother was over 70 years of age. The sum assured under the policy is a very substantial sum. The yearly premiums, which have been paid since 1997 and are still being paid, are correspondingly substantial. The policy provided that the death benefit would be payable on the last death, that is to say, the survivor of the father and the mother. There was only one special condition in the policy document, which provided that the policy was issued subject to the terms of the trust document.

3.2 The trust document was based on a standard form issued by Irish Progressive, which I note was designated a "Flexible Trust Dual or Joint Life". I also note that it contained a disclaimer that, while every care had been taken in its drafting, Irish Progressive did not accept any responsibility for its suitability in any case, and that, in case of doubt, the policyholders should consult their professional adviser. The problem which has arisen in this case might have been avoided if they had done so.

3.3 At the commencement of the trust document, the father and the mother are referred to as "the Settlors" and there is reference to the policy. The operative part provides as follows:

> "The Settlors request and authorise [Irish Progressive] to issue the policy to the Settlors as trustees upon the trusts hereinafter expressed:".

That provision is succeeded by five clauses numbered 1 to 5. Clause 1 contains the beneficial provisions in relation to the proceeds of the policy. In an effort to understand clause 1, I propose to break it down into five segments.

3.4 In segment I, the trustee or trustees for the time being are referred to as "the Trustee" and the monies payable under the policy are referred to as "the Trust Fund". In segment I, insofar as is relevant in the events which have happened, it is provided that the Trustee shall hold the Trust Fund –

> "upon trust, if and only if the benefit under the policy shall become payable in consequence of the death of the survivor of the Settlors … for the benefit of all such one or more exclusively of the others or other of all the children and remoter issue of either of the Settlors (including children and remoter issue adopted whether before or after the date hereof), the parents, brothers, sisters, uncles, aunts, nephews and nieces of either of the Settlors who are now living or shall hereafter be born during the lifetime of either of the Settlors and the additional beneficiary or beneficiaries (if any) named later in this clause in such shares and subject to such conditions as the Settlors, or the survivor of the Settlor's (sic) in their absolute discretion shall be (sic) deed or deeds revocable or irrevocable appoint."

The effect of the foregoing was that the primary trust was a discretionary trust to be exercised by the father and the mother, or the survivor, among three classes of beneficiaries: children and remoter issue; other close relations; and the "additional" named beneficiaries. A notable exception from the classes of beneficiaries are spouses of children of the settlors.

3.5 Segment II is a proviso which regulates the exercise of the power of appointment, for example, by stipulating that no appointment

shall be made nor any power of revocation exercised after the death of the survivor of the settlors, which seems to me to be stating the obvious.

3.6 Segment III is crucial in the context of the problem which arises in this case and it provides as follows:

> "and in default of and subject to any such appointment for the absolute benefit of
>
> C as to 50% of the Trust Fund,
>
> D as to 50% of the Trust Fund."

In the margin opposite that segment there is an instruction: "Insert initial beneficiaries and their share of policy proceeds". The names and the percentages which appear in segment III were entered in manuscript.

3.7 Segment IV is another proviso in the following terms:

> "provided that if any of the said beneficiaries shall predecease such one of the Settlors in consequence of whose death a benefit under the policy shall become payable then (in default of and subject to any appointment as aforesaid) that beneficiary's share of the Trust Fund shall be held upon trust for the legal personal representatives of such one of the Settlors."

It is that proviso which has given rise to the problem which it is sought to redress on this application.

3.8 Segment V contains yet another proviso, which is in the following terms:

> "PROVIDED ALWAYS that any benefit which shall become payable under the policy in consequence of the death of the first to die of the Settlors shall be held by the Trustee upon trust for the absolute benefit of the survivor of the Settlors and any benefit which shall become payable otherwise than in consequence of the death of either or both of the Settlors shall be held by the Trustee upon trust for the absolute benefit of the Settlors in equal shares."

3.9 Clause 2 deals with the appointment of new or additional trustees, such power being reposed in the Settlors or the survivor and, after the death of the survivor, in a nominated person, N, whose name was inserted in manuscript in the trust document.

4. The problem

4.1 The father and the mother had five children: C, who is named in segment III of clause 1 of the trust document; D, who is the second defendant in these proceedings and is also named in segment III of the trust document; A; B; and E. E died on 27th November, 2008. He was not married and he had no children. The evidence is that his estate remains unadministered, which I understand to mean that representation has not been raised to his estate.

4.2 The father died on 7th February, 1998. He was survived by the mother. The power of appointment contained in the trust document has not been exercised. The evidence before the Court, in the form of a medical report of a Consultant Psychiatrist, is that the mother has a diagnosis of dementia and that, as a result, she does not have the capacity to understand the problem which these proceedings are intended to redress and the solution proposed. Her lack of capacity is likely to remain permanent. Accordingly, I think it is reasonable to infer that the power of appointment will never be exercised.

4.3 C died at the age of 42 on 29th October, 2003. He was survived by his widow, the plaintiff, and by two children, who are now aged 11 and just under 9. C died intestate and letters of administration to his estate have been extracted by the plaintiff.

4.4 During the lifetime of C, the premiums payable under the policy were discharged by C and D in equal shares, as had been the intention when the policy was taken out. Since the death of C the premiums have been discharged by D and the plaintiff in equal shares. It has been a source of hardship to the plaintiff to bear a half share of the yearly premium.

4.5 After the death of C, the plaintiff and her then legal adviser sought to clarify the ultimate destination of the 50% of the proceeds of the policy opposite C's name in segment III of clause 1 of the trust document. The proceeds of the policy will become payable on the death of the mother. The evidence before the Court indicates that from the outset in 1997 the intention of the parties was that C and D would fund the premiums equally and that they would become entitled to the proceeds of the policy equally in due course. However, following inquiries in the first half of 2004, Irish Life Assurance Plc. (Irish Life), the successor of Irish Progressive, on the basis of external legal advice, indicated that, under the terms of the trust document, where a beneficiary predeceased a settlor, that beneficiary's share "reverts to the estate of the Settlor". Therefore, the position adopted was that the 50% of the trust fund opposite the name of C in segment III has reverted to the surviving settlor, the mother, or, more correctly, her estate. The definitive position of Irish Life was that on the death of the mother that 50% of the proceeds of the policy will go to a trustee appointed by the nominee referred to in clause 2 of the trust document upon trust for the estate of the mother.

4.6 The problem, accordingly, as identified in the middle of 2004 was that, in default of appointment, 50% of the proceeds of the policy would go to the estate of the mother on her death and would not go to the plaintiff and her two children, who are entitled to the estate of C on his death intestate. From mid-2004 onwards various solutions to rectify the problem were canvassed and it appears from the documentation before the Court that the mother was agreeable to "amend" the trust document so that the 50% share which it was understood would go to C could go to his estate in due course. I do not consider it necessary or appropriate to comment on the various advices given by lawyers and accountants for the various parties involved in relation to the solution of the problem. However, it is necessary that I should attempt to construe the trust document in the light of the events which have happened and, in particular, to identify the ultimate destination of the proceeds of the policy. Before doing so, I propose to outline how the arrangement proposed by the plaintiff is designed to rectify the problem.

5. The proposed solution/variation

5.1 It is proposed that, with the approval of the Court, clause 1 of the trust document be replaced by a provision which embodies the following variations:

(a) in segment I the insertion of the words "the spouses of the children of the Settlors" between the class comprising children and remoter issue and the class comprising parents, brothers and sisters, etc.;

(b) that there be inserted in segment III after the name of C "or the personal representatives or estate of C" and after the name of D "or the personal representatives or estate of D".

(c) that there be deleted from segment V the words "survivor of the Settlors" and that there be substituted therefor the words "estate of the deceased beneficiary".

5.2 The following persons have assented in writing to the proposed variations:

(a) the plaintiff on her own behalf and on behalf of her infant children;

(b) D;

(c) B, who is prepared to assent on behalf of the mother, as well as on her own behalf; and

(d) A.

Both B and D have sworn affidavits in support of the plaintiff's application and have confirmed the veracity of the facts put before the Court.

5.3 What is not evidentially clear is who would become beneficially entitled to 50% of the proceeds of the policy in the event that it formed part of the estate of the mother following her death, although I note that the plaintiff has averred in her affidavit that "all non-minor family beneficiaries of [the mother's] estate" are parties to the arrangement, and counsel in his submissions referred to a will. In other words, the evidence does not establish whether the mother will die testate and, if so, who will be the beneficiaries of her estate under her will, or, alternatively, whether she will die intestate. If the mother dies intestate, on the evidence before the Court, her estate will devolve on her children, B, D, and A as to one fourth each and the remaining one fourth will devolve on the children of C equally, assuming all of those persons are alive at the date of her death. However, even if the family members of the mother are aware that she made a will and its terms are known, an issue must arise as to whether it could be definitively determined that it will be the last will and testament of the mother, and whether the beneficiaries thereunder are identifiable at this point in time.

6. Conclusions on construction/variation of the trust document

6.1 The mother, as surviving settlor, even if she had the capacity to do so and wished to do so, could not make an appointment under the power of appointment contained in segment I of clause 1 in favour of the plaintiff, because the plaintiff does not come within any of the classes of beneficiaries in whose favour such an appointment may be made. The inclusion of the words "the spouses of the children of the Settlors", as proposed under the arrangement, would certainly empower the mother, as the surviving settlor, to exercise the power of appointment in favour of the plaintiff. However, as I understand it, because of her lack of capacity, the mother is no longer in a position to exercise the power of appointment. The power of appointment cannot be exercised, revoked or interfered with in any way after the death of the mother. Therefore, the inclusion of "the spouses of the children of the Settlors" as a class in favour of whom the power of appointment may be exercised achieves nothing.

6.2 As regards the default position, the inclusion of the respective personal representatives and estates of C and D as regards the 50% of the trust fund to which each is entitled under the default provision is definitely a meaningful variation. Moreover, it seems to represent what was the intention of the settlors and of C and D from the outset and would recognise that C and, since his death, his estate and D have equally discharged the premiums due under the policy from the outset.

6.3 Under the arrangement as presented to the Court no amendment is proposed to segment IV. As to its proper construction, the first question which arises is the identity of "any of the said beneficiaries". It must mean more than a potential beneficiary because the purpose of the proviso is to deal with "that beneficiary's share". Looking at clause 1 as a whole, I would construe "beneficiaries" as including not only the default beneficiaries named in segment III, but also beneficiaries as a result of the exercise of an appointment under Segment I. What I cannot understand is why there should be provision that the share of a beneficiary who predeceased the surviving settlor should be held on trust for the personal representative of the surviving settlor in the circumstances which were intended to prevail, and have prevailed, in this case, namely, that the policy was to be funded by the named default beneficiaries, C and D.

6.4 There are two distinct scenarios covered by the proviso in segment V. It seems to me that neither has arisen, nor can arise, in the events which have happened. The first limb relates to "any benefit which has become payable under the policy in consequence of the death of the first to die of the Settlors". As I understand it, under the policy no benefit arose on the death of the first to die, that is to say, the father. Accordingly, it seems to me that the variation proposed to the first limb of segment V is unnecessary. In relation to the second limb, it relates to "any benefit which shall become payable otherwise than in consequence of the death of either or both of the Settlors". Again, as I understand the position, the only benefit which becomes payable under the policy is the death benefit which arises on the last death, that is to say, in the events which have happened, the death of the mother.

6.5 The objective of the variations proposed to clause 1 is to ensure that, on the death of the mother, 50% of the proceeds of the policy will go to the plaintiff to be distributed as part of the estate of C in accordance with the provisions of the Succession Act 1965. I am doubtful as to whether the amendments which have been assented to in writing by the plaintiff, B, D and A, will achieve that objective. As I have indicated earlier, I do not think that the amendment proposed to segment I advances matters at all. The amendment proposed to segment III, if it was not inconsistent with any other provision of clause 1 as varied, would certainly achieve the objective. However, it seems to me that if the arrangement as proposed was approved by the Court, there would be an inconsistency between segment III, as varied, and segment IV. As I have already indicated the variation to segment V is superfluous, because neither limb of that proviso has any application. What I do think would achieve the objective of the assenting parties would be the proposed variation of segment III coupled with a variation of segment IV which substituted for the words "of such one of the Settlors" at the end of that segment the following words: "of such beneficiary".

7. Application of s. 24

7.1 As I have stated in outlining the provisions of s. 24, on an application under s. 24 the Court has two options, namely, to make an

order approving the arrangement or, alternatively, to refuse to make such an order. In my view, it is not open to the Court to approve of the arrangement subject to alteration or modification. However, I believe that it is open to the Court to permit an applicant to apply to amend an application. With a view to ensuring that there is no unnecessary wastage or escalation of legal costs in this matter, I propose to consider, in so far as it is possible to do so, whether, if the arrangement which the plaintiff seeks to have approved achieved the object which she seeks to achieve, the arrangement would be an appropriate arrangement for the Court to approve of under s. 24. However, for reasons which will be obvious, the views expressed cannot be definitive.

7.2 In her capacity as personal representative of C, I consider that the plaintiff is an appropriate person to bring an application under s. 24.

7.3 At the hearing of the application, counsel for the plaintiff made it clear that the "relevant person" for whose benefit the plaintiff is seeking to have the arrangement approved is the mother. That is not specified in the application, as required by subs. (1) of s. 24. Where the special summons procedure is utilised in accordance with the Rules in relation to applications under s. 24, I would suggest that the special endorsement of claim on the special summons should, in the narrative, specify the relevant person. In this case, the special summons would require to be amended to specify the "relevant person".

7.4 The difficult issue in this matter is whether a variation of the trust created by the trust document to provide that 50% of the proceeds of the policy will be held on trust after the death of the mother for the estate of C can be shown to be for the benefit of the mother. In essence, the submission made by counsel for the plaintiff was that the arrangement is for the benefit of the mother, in that it gives effect to the intentions of the father and the mother in executing the declaration of trust and it reverses the unintended difficult consequence to which the trust document in its existing form gives rise. In other words, the plaintiff's position is that the mother was prepared to rectify the trust document if she could, but in the current circumstances she does not have the capacity to do so. I express no view on whether, while she had capacity, she could have done so validly and it is not to be inferred that I consider she could have.

7.5 Counsel for the plaintiff referred the Court to one authority of the High Court of England and Wales in support of the submission that the proposed arrangement is for the benefit of the mother within the meaning of s. 24: *In re C.L.* [1969] 1 Ch. 587. Before considering the decision of Cross J. in the *C.L.* case it is instructive to consider the jurisdiction conferred on the English courts by the Variation of Trusts Act 1958 as outlined in *Snell's Equity* (31st Ed., 2005). In dealing with the concept of "benefit", the editors state (at p. 662):

> "The court cannot approve an arrangement on behalf of any person 'unless the carrying out thereof would be for the benefit of that person', *i.e.* in all reasonable circumstances, though not necessarily in every remote contingency. The court may 'have to take a broad view, but not a galloping, gambling view'. …
>
> 'Benefit' is not confined to financial benefit, e.g. where the beneficiary is an irresponsible minor. Thus a provision forfeiting benefits on 'practising Roman Catholicism' has been removed. It may also be a benefit to a mentally incapable person to give away his property where the gift is one which he would have made if of sound mind. But it is not for A's benefit to take from him property mistakenly given to him and give it to B, even if B is a member of the same family."

As authority for the proposition in the last sentence, the editors cite *In re Tinker's Settlement* [1960] 1 W.L.R. 1011. As authority for the proposition in the second last sentence, they cite the *C.L.* case, in which the *Tinker* case was considered.

7.6 In the *C.L.* case (at p. 598) Cross J. quoted from the headnote of the report of the *Tinker* case, which summarised the facts and the decision as follows:

> "By a settlement dated April 4, 1951, it was provided that certain funds should be held by the trustees for the settlor's son and daughter in equal shares. Clause 1(3) provided that if the son attained the age of 30, he should become absolutely entitled to his share, and clause 1(5) that if he should die before attaining that age, then his share was to accrue to the daughter's share. The settlement provided that if the daughter should attain the age of 30 the income of her share should be payable to her during her life and after her death the capital was to be held on trust for her children. The settlor applied to the court under section 1 of the Variation of Trusts Act, 1958 for approval on behalf of unborn persons interested in the settled funds of a variation of the trusts of the son's share whereby, should the son die before attaining the age of 30, leaving a child or children who attained the age of 21 one-half of the son's share should be held on trust for such child or children, and that clause 1(5) should be made subject to a new clause to that effect. At the date of these proceedings, the son and daughter were both unmarried and under 30 years of age:- *Held*, that the court could not sanction the proposed variation, which was, in fact, a claim for rectification of the settlement, unless it was satisfied that it would be for the benefit of the unborn children of the daughter; that this proposal to give away half of that to which those children would be entitled if the son died under 30 years of age could not possibly be said to be for their benefit; and that, therefore, the variation would not be approved."

Cross J. then quoted from the judgment of Russell J. in the *Tinker* case which related to the point, which was as follows:

> "It is quite clear that I must be satisfied before I sanction that arrangement, which involves half of the son's half being given, so to speak, in the particular event to his children and not over to the daughter's family, that such an arrangement is beneficial to the unborn children of the daughter. It seems to me that it is about one of the thinnest and weakest claims for rectification that I have seen … and I cannot think I would be benefiting the daughter's children if I gave away half of that which they would come into if the son dies under 30. [Counsel for the settlor applicant] has said that one can look at this sort of thing in two ways and ultimately combine the two. First, that this is a sensible and fair thing to do because somebody has blundered – somebody has forgotten about the son's children – and it would seem very hard that this half of this substantial settlement should go away from his children to his sister and her children, and, secondly, that it would in a broad sense be beneficial to the sister's children as members of this whole family. I cannot apply the jurisdiction under the Variation of Trusts Act in that broad way. Although it may very well be that one can throw that kind of consideration into the scale in order to increase a financial benefit which is already established, yet one cannot regard it as a benefit in its own right. I would be only too pleased if I were able so to hold, but, having regard to the type of claim for rectification which is adumbrated, I do not find myself able to approve a compromise or arrangement or variation under the Act as is sought …"

7.7 Cross J. stated that he agreed entirely with the decision in the *Tinker* case, commenting that obviously one could not say that the daughter's children, if they had been in existence and of full age, would in all probability have consented to the proposed change in the settlement. However, he went on to distinguish the decision in the *Tinker* case, and I will return to the relevant passage,

having set out the substantive issue in the *C.L.* case.

7.8 In the *C.L.* case the substantive issue under the Act of 1958 concerned the estate of a widow who was subject to the jurisdiction of the Court of Protection. The estate comprised, *inter alia*, a protected life interest in a trust fund settled by her husband, which, on her death, would be added to a fund settled by him on their two adopted daughters, and in certain events, to the daughters' children, with an ultimate trust to the widow. The adopted daughters sought approval of an arrangement by which the widow gave up for no consideration her protected life interest in the settlement made to her and her contingent interest in remainder in the settlement, in each case in favour of the adopted daughters. In relation to the factual situation, Cross J. commented on the widow's assets and her income and noted that she had to pay very large sums by way of income tax and surtax, but even so her spending income was substantially in excess of her requirements. He also noted that the ultimate trust in her favour was highly unlikely ever to take effect. As regards the effect of the proposed variations, he stated (at p. 593):

> "If the protected life interest of the patient in the settlement is got rid of, there will be a great saving in estate duty if she lives for a few more years and, having regard to the income tax and surtax which she has to pay, the reduction in her spending income will be trifling – less than £500 a year. If she were capable of managing her affairs, it is almost certain that her legal advisers would advise her to consent to the arrangement for the benefit of her adopted children and highly probable that she would accept that advice."

7.9 Returning to the manner in which Cross J. distinguished the *Tinker* case, he stated (at p. 599):

> "But if and so far as the judge was saying that there must always be some element of financial advantage to the infant or otherwise incapable person in question before an arrangement can be said to be for his benefit, I think that he went too far. Suppose a young man of 18 to be entitled to a great fortune; suppose some comparatively small part of it to have come to him by reason of some such blunder in drafting as occurred in the *Tinker* case; suppose the persons to whom that part ought to have come to be in straitened circumstances; and suppose finally that the young man feels a strong moral obligation to right what he considers to be a wrong as soon as possible and says to his trustees 'Cannot something be done for these cousins of mine now? Must I really wait until I am 21?' In such circumstances, the trustees could properly pay part of the trust fund to the cousins as an advancement for the young man's benefit (see *In re Clore's Settlement Trusts* [[1966] 2 All ER 272]), and if it was more convenient to achieve the desired result by an arrangement under the Variation of Trusts Act, I see no reason why the carrying out of the arrangement could not be considered as being for his benefit although it was financially to his detriment. It would be odd if the word 'benefit' had a narrower meaning in the context of a variation than it has in the context of an advancement. For these reasons I propose to make an order under section 1(3) of the Variation of Trusts Act in this case."

7.10 Of course, under s. 24 of the Act of 2009, as I have already outlined, subs. (5) envisages a benefit being "financial or otherwise". However, by the combined operation of subss. (4) and (5), the Court must have regard to any benefit or detriment, financial or otherwise, that may accrue to the relevant person and any other relevant person. Even if an arrangement which would have the effect which the plaintiff seeks to bring about were before the Court, there would be a difficulty in relation to making a determination under s. 24 because, on the evidence, it is not possible to determine to whose detriment it would be if such arrangement were approved of, because it is not clear whether the mother's personal representative will be distributing her estate in accordance with a will or on an intestacy. If it were to be distributed on an intestacy, the children of the plaintiff would be relevant persons, to whom a benefit would accrue under the arrangement, as they would receive a greater share of the trust funds on a distribution on the intestacy of their father, C, than they would on the intestacy of their grandmother, the mother. As I have already indicated, there is no evidence as to who the beneficiaries of the mother's estate would be if she died testate.

8. Determination

8.1 It is not possible to make a determination in accordance with subs. (4)(a) of s. 24 for the reasons which have been explored earlier in this judgment. The primary reason is that I have come to the conclusion that the variations proposed to clause 1 of the trust document will not have the intended effect. Apart from that, on the basis of the evidence before the Court, it is not possible to determine to whose detriment it would be to vary the trust document to provide that 50% of the trust funds would not pass to the legal personal representative of the mother when the policy matures on her death. The endorsement on the special summons needs to be amended to include the identification of the relevant person, whom I understand to be the mother, and to specify the basis on which she is a "relevant person" within the meaning of s. 23. It is not possible to determine whether or not an arrangement which would have the intended effect, if it were before the Court, would be for the benefit of the mother within the meaning of s. 24.

8.2 However, I do not propose to make a determination under subs. (4)(b) of s. 24 refusing to approve the arrangement at this juncture, so as to afford the plaintiff's legal advisers an opportunity to consider whether they wish to apply to amend the application.

9. Observations

9.1 I have some further observations in relation to this application.

9.2 The first relates to the incapacity of the mother and the fact that she is not a ward of court and does not have a committee. As I read Part 5 of the Act of 2009, it is intended that the High Court should have jurisdiction where an adult is incapable of assenting to an arrangement by reason of absence of mental capacity, notwithstanding that the adult has not been taken into wardship.

9.3 Secondly, the Oireachtas gave the Revenue Commissioners an important role in relation to s. 24 applications. In this case, while I am satisfied that the plaintiff gave notice to the Revenue Commissioners in accordance with the requirements of s. 24, there is no evidence before the Court of the attitude of the Revenue Commissioners, although counsel informed the Court that his instructing solicitor was aware from a telephone conversation with an official of the Revenue Commissioners that they had received the notice and that they had no formal objection to the application. However, it seems to me that on applications under s. 24 the Revenue Commissioners should apprise the Court in some way, although not necessarily by appearing on the application, of their attitude to the application. The solicitor for the plaintiff should furnish the Revenue Commissioners with a copy of this judgment.

9.4 Finally, in the special endorsement of claim an order has been sought providing that the mother shall cease to be a trustee of the trust established by the trust document and substituting B as trustee in her place. However, I note that in the final affidavit sworn in the matter by D, it is suggested that the person nominated to appoint new trustees in clause 2 of the trust document, N, be appointed a trustee with immediate effect. The plaintiff will have to clarify for the Court which order is sought. An affidavit of fitness of the proposed new trustee sworn by an independent person should be filed.