TRUST AND ESTATE LITIGATION - UPDATE

Introduction

In this paper I have considered recent cases in the probate and trust area and also, importantly, I have examined whether there are any new guidelines for solicitors in taking instructions for a will. The cases I have examined involve challenges to wills based on lack of testamentary capacity and knowledge and approval of the contents. In the UK, there has been what one might call a development of the law on testamentary capacity following the decision in Re Key, which also sets out specifically what is required of a solicitor taking instructions from a testator. Then, in a recent case on 'knowledge and approval', the court set out what is required of a testator when he is executing his will, and accordingly what you, the solicitor, should look for in terms of capacity.

Avoid delay in getting the will executed remains the advice, but be careful, ensure the will is properly executed and executed by the right person! As the court said recently in a case the estate of deceased husband who had executed his wife's will, and she his - "As much as I regret a blunder, I cannot repair it"

I have also considered some developments relevant for the administration of the estate - a recent case which involved an application to court for directions as to the proper date for the valuation of the legal right share and how to recover assets disposed of by the testator before his death, which are properly estate assets. The Land and Convincing Law Reform Act 2009 introduced new extensive provisions for the variation of trusts which applies to trusts whenever created.

1. Challenge to the Validity of the last Will and Testament

A. Testamentary Capacity

The time honoured test applied by the courts in this and other common law jurisdictions as to whether the testator enjoys testamentary capacity is found in the 1870 case **Banks v Goodfellow** in the following terms:-
"It is essential that a testator shall understand the nature of the act and its effects: shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties:- that no insane delusion shall influence his willing disposing of his property and bring about a disposal of it which, if the mind has been sound, would not have been made".

Thus, there are three parts to the test:
1. The nature of the act of will-making and its effects. Here the testator must be able to demonstrate a broad lay view of the process, not a precise knowledge of legal technicalities;
2. The extent of the property he is disposing. The testator is not required to show an awareness of every detail of his property; a broad recollection is sufficient.
3. The claims to which he ought to give effect.

By all means, the test and the principles derived therefrom, have served us well and have assisted solicitors taking instructions as to what is required of their testator. However, "Psychiatric medicine has come a long way since 1870" – this was the view expressed by Briggs J in his judgment delivered in 2010 in **Re Key**[1]. Briggs J is clear that he is not in any way detracting from the continuing authority of Banks v Goodfellow, however in view of the developments in psychiatric medicine sine 1870, that we must recognise the ever widening range of circumstances, now regarded as sufficient, at least to give rise to a risk of mental disorder sufficient, to deprive a patient of the power of rational decision-making, quite distinctly from old age and infirmity. In that case the testator and his wife had been married for 65 years and had two sons and two daughters. In November 2006 the testator's wife died and the testator who was aged 89 and in psychiatric terms, infirm, had little or no warning of his wife's impending death and he had been totally dependent on her for his domestic care. One week after her death, at the request of the testator's daughters, a solicitor attended the testator's home to take instructions for a new will. Two days later, the same daughter took the testator to the solicitor's office where he duly executed the new will. The new will provided for the bulk of the testator's estate, to be divided equally, between the two daughters in contrast to the previous will of December 2001, by which the bulk of the estate was subject to life interests in favour of his wife, to be divided equally between the two sons. After the testator's death in July 2008 the deceased's sons brought proceedings challenging the 2006 will on the grounds, inter alia, of want of testamentary capacity.

Briggs J held *"the mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists…Although I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the Banks v Goodfellow test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century. Banks v Goodfellow was itself mainly a case about alleged insane delusions. Many of the cases which have followed it, are about cognitive impairment brought on by old age and dementia. The test which has emerged, is primarily about the mental capacity to understand or comprehend. The evidence of the experts in the present case shows, as I shall later describe, that affective disorder such as depression, including that caused by bereavement, is more likely to affect powers of decision-making than comprehension. A person in that condition, may have the capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit."*

Briggs J considered the factors in favour of the later will as including, that it was eminently rational, which he described as a "powerful factor in favour of the defendant's case". The testator had during his lifetime made significant gifts to his sons. The factors weighing against the finding of testamentary capacity included, that the evidence about the deceased's behaviour, after the death of his wife, was probative of a conclusion, that he was devastated by the bereavement, which Briggs J described as a "*severe affective disorder*, perhaps insufficient on its own, to have deprived him of testamentary capacity, but probably sufficient in combination with his mild pre-existing cognitive impairment. Briggs J accepted the evidence that affective disorder including depression which included bereavement, may lead to an increased suggestibility, in the mind of the patient, so

[1] (2010) 1 WLR 2020

that he simply assents to suggestions from others, as to what is, or is not fair, not caring to form his own view on the subject. Briggs J concluded that the testator Mr Key was "incompetent to the exertion required" for the purpose of making an important decision as to the disposition of his property upon his death.

In relation to test laid down in Banks v Goodfellow he stated *"This not one of those cases in which it is possible to point simply to a conspicuous inability of the deceased to satisfy one of the distinct limbs of the Banks v Goodfellow test. Rather it is a case, in which I have been persuaded, taking the evidence as a whole, that Mr Key was simply unable during the week following his wife's death to exercise the decision-making powers required of a testator. In any event, the defendants have not discharged the burden of proving that he was. To the extent that such a conclusion involves a slight development of the Banks v Goodfellow test, taking into account decision making powers rather than just comprehension, I consider that it is necessitated by the greater understanding of the mind now available from modern psychiatric medicine, in particular in relation to affective disorder."*

The issue as to testamentary capacity is from first to last for the decision of the court. However, the expert evidence proffered for or against the will is usually of great assistance to the court. The evidence from the solicitor who drafted the will, will be crucial in assisting the court to assess the testator's capacity and in this regard the solicitor's attendance notes will be of significance. If for example, the attending solicitor is aware of any condition affecting the deceased, reference should be made to it in the attendance note. The medical evidence witnesses, will usually include, the deceased's medical practitioner and any consultants who attended the deceased. The evidence from those directly involved in the deceased's care, will carry the most weight, and while there may have been no assessment of the deceased's testamentary capacity at the time the will was executed, the medical witnesses can usually assist the court by setting out the deceased's medical history (which will be important if an assessment has to be made) and if the deceased was being treated for any particular condition, the doctor can usually give evidence, of how that particular condition affected the deceased, and how he was being treated. The evidence presented to the court will be considered in the context of this three part test. It is usual to present evidence from family members, medical practitioners and from the solicitor who drafted the will.

Briggs J considered the evidence from the solicitor who took instructions, which Briggs J considered on their face appeared to demonstrate all three of the positive Banks v Goodfellow requirements however, Briggs J stated that he was unable to place reliance upon the detail of the solicitor's evidence in that regard and indeed the solicitor came in for severe criticism from the judge in this case.

Before considering the role of the solicitor who took instructions in the case, and indeed the views expressed by the court in that regard, it might be appropriate to make reference to "the Golden rule" which was first stated from **Kenward v Adams[2].** Briggs J in Re Key describe the rule as follows:

> *"The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical*

[2] (1975) CLY 359.

> *practitioner first to satisfy himself as to the capacity and understanding of the testator and to make a contemporaneous record of his examination and findings."*

It is the case, as was stated by Briggs J, that compliance with the golden rule does not ensure the validity of the will nor does non-compliance demonstrate its invalidity however the purpose of the rule is to assist in the avoidance of disputes and/or to minimise their scope.

It is worth recording in full, the finding made by Briggs J, in relation to the involvement of Mr. Cadge (the solicitor who took instructions) in Re Key.

> "As will appear, a significant element of responsibility for this tragic state of affairs lies with Mr. Cadge. Contrary to the clearest guidance, in well known cases, academic texts and from the Law Society, Mr Cadge accepted instructions for the preparation of the 2006 will, from an 89 year old testator whose wife of 65 years' standing had been dead for only a week, without taking any proper steps to satisfy himself of Mr. Key's testamentary capacity, and without even making an attendance note of his meeting with Mr Key and Mary, at which the instructions were taken. Mr. Cadge's failure to comply with what has come to be well known in the profession as the golden rule has greatly increased the difficulties to which this dispute has given rise and aggravated the depths of mistrust into which his client's children have subsequently fallen."

Briggs J found that the solicitor displayed no visible partiality when giving evidence and he must have appreciated that the claims being made in the proceedings would be likely to reflect very poorly upon his professional competence – Briggs J stated that this factor may have caused him to have a rather more positive recollection of Mr. Key's apparent mental ability than was truly the case.

Mr Cadge was contacted by Mr Key's daughter and offered to deliver a copy of Mr. Key's will observing that the death of Mrs Key presented a good opportunity for Mr Key to review his will. Briggs J stated he had tried without success, to understand how, without a proper enquiry as to how he was taking the death of his wife, Mr Cadge thought this was good advice.
Mr. Cadge made no enquiry of anyone as to Mr Key's fitness to make a will.

The only notes he made of the meeting with the testator consisted of a few lines of manuscript hastily scribbled on the back of a letter. These manuscript notes were called into question and he accepted it was by no means an accurate reflection of what he had been instructed to do. The solicitor also claims to have prepared a memorandum seeking to set out the thinking behind the will, and in particular that he had given to his two sons 100 acres each and "I have valued each of those gifts at £300,000 on current values". Mr Cadge accepted that he rather than Mr Key carried out by way of guesstimate the valuation analysis. Briggs J states

> "the memorandum is a curious document. It begins by putting into Mr. Key's own mouth the valuation analysis of the gifts".

Briggs J concludes that the serious disparities between Mr Cadge's contemporaneous notes taken at the meeting and his written and oral evidence leads to the conclusion that the account of the meeting contains a large amount of after the event reconstruction, working backwards from the terms of the will itself, rather than from reliable recollection.

These were seriously damaging findings against this solicitor. The English Journal **"New Law Journal**" reported in its edition on the 16th of July 2010, that Briggs J had indicated in the case, that he may exercise his discretionary power to order that the draftsman or his firm pay some of the costs of the probate action and that the decision of the court is awaited in that respect. I have been unable to find whether any decision has been made on costs.

In any event, the duties of the solicitor arising out of the Golden rule are clear – that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to prepare a contemporaneous record of his examination and findings.

Solicitors instructing GPs to prepare a report on capacity should be explicit in referring to the Banks v Goodfellow test and set out what the test entails. It is also often helpful if the GP carries out the MMSE (mini-mental state examination), however even when the MMSE is undertaking the scores can be open to differing interpretation. The tests are however useful evidence to place in the metaphorical scales when weighing up the arguments for and against capacity.

Capacity is time and event specific. It is well established that the evidence from the doctor who has actually assessed the testator will be given greater weight in court than one who has not. Where there is any indication that a testator's capacity may be questioned, it is good practice to invoke the golden rule. At the very least, solicitors taking instructions for, and preparing a will, should take detailed attendance notes, and not to do so is really unforgivable. In terms of explaining to a testator, the requirement for a medical report, they should be advised of the pitfalls of executing a will, where it is possible their capacity may be questioned later, and that a medical report is advisable to minimise the risk of a later action.

Even with the best will in the world, the solicitor who takes all the proper steps when taking instructions from his client, obtains the medical report and prepares detailed contemporaneous notes and proper attendance notes, sometimes a testamentary challenge is inevitable and it may be difficult to predict the outcome of the challenge – it is for the court to decide and as observed by Lord Carnworth[3] there is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine.

That said, a solicitor who has contemporaneous notes and medical reports can take the step of making an early disclosure of the evidence upon which he intends to rely which can have implications for the ultimate costs order to be made by the court. This practice was encouraged by the Judge Kearns in the judgment delivered in the Supreme court in **Elliott v Stamp** where he stated *"While it may be reasonable to commence and bring proceedings, and to bring them bona fide, a point may arrive where, as a result of disclosure made by the defence, the further maintenance of the claim can no longer be seen as reasonable. In such circumstances, it seems to me the trial judge should not be fettered in the exercise of his discretion as to costs and should be free both to decline costs from the estate to an unsuccessful litigant or even to award costs against such a litigant from the time of disclosure".*

[3] New Law Journal 20/2/09

The High Court delivered judgment in **Scally v Rhatigan**[4] which involved a challenge to the last will and testament of Brian Rhatigan on the basis of lack of testamentary capacity. The deceased started displaying symptoms around 2001 which ultimately led to a diagnosis of motor neurone disease and he made his last will on the 19th of May 2005. Laffoy J delivering judgment made reference to the Golden Rule and that when a solicitor is instructed to prepare a will for an aged testator or for one who has been seriously ill he should arrange for a medical practitioner first to satisfy himself as to capacity and make contemporaneous records of the findings. Laffoy J restated this principle and the principle that compliance with the Golden Rule does not operate as a touchtone of the validity of the will. Laffoy J makes specific reference to the comment by Briggs J in Re Key that the purpose of the golden rule is to assist in the avoidance of disputes or at least in the minimization of their scope.

Laffoy J continued that it is a question of fact haring regard to all of the evidence and by applying the evidential standard of the balance of probabilities whether a testator was of sound disposing mind when the testamentary document which is being propounded was executed.

B. Burden of Proof

As regards the burden of proof when a will is being challenged, it had been argued in Scally v Rhatigan, on behalf of the defendant, relying on the authorities of Re Key and the Irish case of Re Glynn[5], that in cases where a testator is suffering from an illness which may affect his capacity, the onus may be on the party propounding the will. Judge Laffoy stated that she is satisfied she must decide "on the basis of the entirety of the evidence, whether, on the balance of probabilities, the deceased had testamentary capacity by reference to the Banks v Goodfellow test". She referred to the authority of Williams, Mortimer and Sunnocks on Executors, Administrators and Probate[6], "when the whole evidence is before the court, the decision must be made against the validity of the will, unless it is affirmatively established that the deceased was of sound mind when he executed it".

C. Did the Testator know and approve the contents of the Will

The issue of whether the testator knew and approved of her last will is often considered in tandem with the question of capacity and there is a certain amount of overlap. However, as to what is precisely required of the testator in terms of his capacity was considered last year in the Court of Appeal in the case Gill v Woodall[7]. In that case, the Mr and Mrs Gill had made wills in favour of each other and on the death of the survivor, the entirety was to pass to the RSPCA. They had one daughter, to whom Mrs. Gill was very close. Each will provided that, no provision was being made for their daughter because she had been well provided by them over a long period of time. Mrs. Gill survived her husband and on her death, her will was challenged by her daughter on the basis of lack of knowledge and approval and/or that it was obtained through undue influence on the part of Mr. G. There was expert evidence that Mrs Gill had suffered from severe agoraphobia and that Mr

[4] (2010) IEHC 475
[5] 1990) 2 IR 326
[6] (18th ed) at para 13-19
[7] (2010) All ER (D) 167

G had a domineering and capricious personality. The court approached the issue of knowledge and approval on a two stage basis, asking firstly, whether the claimant had established sufficient facts to excite the suspicion of the court, namely a prima facie case that Mrs. G did not in fact know and approve the contents of the will. The court considered the evidence which included that Mrs Gill was always very appreciative of her daughter's help; there had not been significant provision made for Mrs. Gill throughout her life; Mrs. Gill had wanted the farm to be enjoyed by future generations; Mrs. Gill condition made it difficult for her concentrate and absorb information and it was unlikely she could have taken in, the contents of the will, if read over to her. The court concluded that these were suspicious facts to establish a prima facie case.

The second limb of the test was whether the prime facie case had been rebutted. The trial judge held that the prime facie case had been rebutted for three reasons, and the COA did not agree:

a) Mr and Mrs Gill attended at the solicitor's office for the purpose of instructing him to prepare their wills. The COA found there was no direct evidence of any meeting with the solicitor prior to the preparation of the wills and in the circumstances it seemed more probably that Mr Gill might have telephoned with the instructions particularly as Mrs Gill was very reluctant to leave the farm.

b) When Mr and Mrs Gill went to the solicitor's office he "did not simply read out the will from top to bottom" he read each clause separately and broke the will down into separate bits of information and checked whether Mrs. Gill had any queries. However, the COA found that this finding by the trial judge was plainly contrary to the evidence and the solicitor's evidence was that it was his normal practice to read out a will in one go, and then to ask the testatrix if she had any questions. The COA noted that if the will had been read in one go, that in the light of the medical evidence, it was unlikely Mrs. Gill would have understood its provisions.

c) That following the initial meeting between the solicitor and Mr and Mrs Gill, (COA did not believe this took place), that the solicitor then sent the draft will to Mr and Mrs Gill at the farm and Mrs Gill saw and read the draft will in her home before she went to the solicitor's office to sign it. The COA held that it was in a normal case, a fair assumption to make that if a draft will is sent to a prospective testatrix that she had read it, however this was not a usual case and that in view of Mrs. Gill's fragile mental state and her fears and concerns it is by no means likely that she would have opened the envelop and if she did so, that she would have read the draft will. The evidence was she said nothing to her daughter about the RSPCA and the COA thought it unlikely she would have misled her daughter and the only conclusion was that she did not know at the time what was in her will.

The will was set aside on the basis that the testatrix did not know and approve of the contents. The COA also noted however that it is preferable to approach the question of knowledge and approval as a single issue rather than dividing it up into two issues and that this particularly so in a case with a large number of witnesses heard over many days. The court stated that it was not wise to consider an issue in two stages, when those stages ultimately involve the same question, namely, given the effect of the factual and expert evidence, did Mrs Gill appreciate what was in the Will when she signed it.

This approach is in some ways similar to the approach adopted by Judge Laffoy in Scally v Rhatigan where she stated that the court must consider the question of whether the deceased had testamentary capacity based on the entirety of the evidence.

It has often been debated and indeed considered by the courts whether testamentary capacity is a pre-requisite to the requirement of knowledge and approval.(Hoff v Atherton). The law on what is required the will is executed was stated as follows in Parker v Felgate:

> *"If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out."*

It was suggested to the court in the recent case of **Perrins v Holland and Others**[8] that Parker v Felgate should be overturned, in as much as it imputes to the deceased testamentary capacity, that the testator did not enjoy at the time he executed the will, and an understanding and approval of the effect of the document which, by reason of this very lack of capacity, he was incapable of forming.

Moore Bick LJ in the case Perrins v Holland, was clear that it is important to note that the decision in Parker v Felgate does not displace the requirement for full testamentary capacity; it merely displaces the ordinary requirement that the deceased should have had such capacity at the time he executed the will. He stated that unless there is reason to question it, proof of testamentary capacity and the execution of the will are sufficient to establish knowledge and approval of its contents. He stated that where the testator loses some of his faculties between giving instructions and executing the will, one must ask (i) whether at the time he gave the instructions he had the ability to understand and give proper consideration to the various matters which are called for, that is, whether he had testamentary capacity (i) whether the document gives effect to his instructions, (iii) whether those instructions continued to reflect his intentions and (iv) whether at the time he executed the will he knew what he was doing and thus had sufficient mental capacity to carry out the juristic act which that involves. If all those questions can be answered in the affirmative, one can be satisfied that the will accurately reflects the deceased's intentions formed at a time when he was capable of making fully informed decisions.

It is worthwhile considering the questions which were put by the Judge to the jury in Parker v Felgate, which are repeated and relied upon by the Court of Appeal in Perrins v Holland, and which prove a useful aid to understanding what are the requirements of 'knowledge and approval'.

At the outset the Judge stated

> "Do you believe that she was so far capable of understanding that was going on? Did she at that time know and recollect all that she had done with Mr. Parker? That would be one state of mind. But if you should come to the conclusion that she did not at that time

[8] (2011) 2 ALL ER 174.

> recollect in every detail all that had passed between them, do you think that she was in a condition, if each clause of this will had been put to her, and she had been asked, "Do you wish to leave so-and-so so much" or do you wish to do this, she would have been able to answer intelligently "Yes" to each question? That would be another condition of mind. It would not be so strong as the first, viz, that in which she recollected all that she had done, but it would be sufficient. There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, "I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it". It is not of course necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient.".

When formulating the questions for the jury he said

> "First, tell me, whether you think that at the time when the will was executed the deceased recollected all the provisions that she desired to make by her will? If you come to the conclusion that she did, then it will not be necessary to consider the other questions, but supposing you think that she did not, then do you consider that she was capable of understanding that she was executing the will which she had given Mr, Parker instructions to make?

The questions were then answered by the Jury as follows:

Q. Did the deceased when the will was executed remember and understand the instructions she had given Mr Parker?

The foreman: No

Q. Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her?

The foreman: No

Q. Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr. Parker?

The Foreman. Yes

On the basis of those answers the court pronounced in favour of the will and did so on the grounds that it was sufficient that the deceased had had testamentary capacity at the time she gave the instructions, that she believed (correctly) that the document reflected those instructions and that she approved it by signing her intention to execute a document in those terms.

Moore Brick LJ cautioned that the use of the expression '*knowledge and approval'* is liable to give the impression that the court is concerned with whether at the time he executed the will the testator must be able to reconsider all the dispositions he had made. That would require testamentary

capacity, but that is not what is meant by the convenient expression 'knowledge and approval'. Modern authorities recognize that a clear distinction is to be drawn between testamentary capacity and knowledge and approval. He referred to the observation in the case before him, that testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. Moore Brick LJ noted that Chadwick LJ in Hoffer v Atherton expressed himself in terms which might be taken to suggest that full testamentary capacity is required for there to be knowledge and approval but he did not think that Chadwick LJ was intending to say more than that testamentary capacity is proof of knowledge and approval of the contents.

It was suggested to the court in Perrins v Holland that if the principles in Parker v Felgate are to be applied it is necessary for the testator to have given settled instructions in relation to his property at a time when he had testamentary capacity, and that in the instant case, the testator had not done so, evidenced by the fact that following his receipt of the draft will, his partner told his solicitors that there were some matters which were not clear or satisfactory and also by the testator's himself having delayed over a year before executing the will. Moore Brick LJ confirmed that in order to be able to invoke the principles in Parker v Felgate, that it must be possible to establish the testator's original intentions in a form sufficiently certain to be capable of being embodied in a draft and of being compared with the document which is said to carry them into effect. He stated that provided the deceased was capable at the time of execution of understanding that he had given instructions and intended to implement them, then changes of mind in the meantime do not matter.

Sir Andrew Morrritt C. delivering judgment in the same case referred to some authorities supporting the principles in Parker v Felgate, including Theobald on Wills where it is stated

> "But a will prepared in accordance with the testator's instructions is valid, though at the time of execution the testator remembers only that he has given instructions and believes the will to be in accordance with them."

Sir Andrew Morritt stated that what is required is due execution of a will which the court can be satisfied, expressed the wishes of a testator, at a time when he did have full testamentary capacity and has not been revoked.

One ground of appeal in this case was that the High Court had failed to consider whether at the time the testator gave instructions to the solicitor such instructions were 'settled' and that if the judge had done so, he would have been bound to conclude that the settled nature of those instructions had not been established. The solicitor had attended upon the testator on the 5th of April 2000 to make a will. The testator was unable to read or write and was confined to a wheelchair due to multiple sclerosis. The solicitor prepared a will and sent a copy of the will to the testator suggesting that an appointment be made for execution of the will. On the 31st May 2000 the solicitor write to the testator inviting him to consider his will. On the 27th of June 2000 a partner in the firm attended on the testator in connection with his matrimonial matters and he was told by the testator's partner that there were one or two matters in the will which were not clear but she would speak with Mr. Ferguson who drafted the will. On the 6th July 2000 Mr Ferguson wrote to the testator suggesting that if there were queries he should be contacted. On the 25th of June 2001 Mr Ferguson sent a bill to the testator and the testator's partner then called Mr Ferguson and the will was executed by the Testator on the 26th of September 2001. The court of appeal found that

while the trial judge might not have described the instructions as settled when given, he was satisfied that the testator's wishes had not changed in the period of time between giving instructions and executing the will.

Thus, it is important to recognize the clear distinction between the testamentary capacity which is required when instructions are taken, and knowledge and approval when the will is executed. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. This might be important in a case where a testator had testamentary capacity when he gave instructions for his will but no longer enjoys that testamentary capacity when the time comes to execute the will, and the solicitor has to make the decision whether the testator can execute the will. It might be a mistake for a solicitor not to allow a testator to execute a will, even where there are doubts over testamentary capacity at the time of execution, as the intended beneficiaries under that will might have a claim against that solicitor. A solicitor does of course have to be satisfied that the instructions were 'settled instructions' and as such there was no indication that the testator wanted to haven those instructions changed. Clearly, it is preferable that will is executed as soon after instructions are taken which can avoid or minimize any issue in relation to capacity and indeed any allegation of delays.

2. Duty to the Intended Legatee of a Will

It is well established that a solicitor owes an intended legatee a duty of care *"to ensure that the wishes of the testator are not frustrated and the expectancy of the legatee defeated…."*

This means ensuring that the will is prepared and executed without delay and that the will reflects the testator's instructions. In terms of delay, the question of what is undue delay will vary with the circumstances of each case. In ***White v Jones***[9], the testator had had an argument, with two of his daughters, and in March 1986 he had executed a will which did not include them as beneficiaries. However 3 months later, in June 1986, the testator sent a letter instructing his solicitor to prepare a new will with a bequest of £9,000 to each of his two daughters. However the testator died on the 4th September 1986, and the solicitor had not, by that time, prepared the new will and it was held, that the intended beneficiaries under the will, were reasonably foreseeable deprived of a legacy by the solicitor's negligence, and the solicitors were liable to the beneficiaries for the loss of that legacy.

Similarly in **X v Wollcombe Young**[10], the testatrix was suffering from terminal cancer and she asked a solicitor to attend her to make changes to her will, to substitute her grand niece, X, as a residuary beneficiary in place of the existing charity. The instruction was taken on the 26th June, however the will was not started by the solicitor, as his probate clerk was away. The will was not started until Monday 30th June, and it was intended the will would be ready for signature on July 3rd, however the testatrix died on July 1st. The grand niece alleged, that she had suffered loss as a result of a failure of the solicitor to prepare a codicil substituting her as a beneficiary, as an interim measure, and secondly that the new will should have been presented for signature by 30 June at the latest. The Court noted that the amount of time taken would be considered to be short

[9] (1995) 1 ALL ER 691
[10] 2001, WLTR 308

in most cases (7 days), however where the client is *"elderly or likely to die anything other than a handwritten rough codicil prepared on the spot for signature may be negligent. It is a question of the solicitor's judgment based on his assessment of the client's age and health"*

The court of appeal in the UK in **Martin v Triggs Truner Bartons (a firm**)[11] dealt with the issue of the solicitor's duty of care to ensure the will is drawn up in accordance with the testator's instructions.
In that case the principal allegation of negligence against the solicitors was that the power of advancement was drafted negligently in that the instead of being drafted as a maximum of around £100,00 that the testator's spouse could receive, it should have provided that the trustees could advance everything except €100,000. Firstly, Dr. Martin initiated a claim for rectification of the will against the executors and the charities entitled in remainder. The action was compromised which resulted in partition of the fund 66.6% to Dr Martin and the balance to the charities and the parties paid their own costs and the costs of the executors came from the fund. Dr Martin then sued the solicitors who drafted her husband's will claiming that if the power of advancement had been drafted in the manner contended for by her, she would have been able to ensure a more favorable settlement of the rectification action. The court held that Dr Martin had a good claim in negligence against the defendant firm for her loss and that as far as her own costs were concerned, these had to be viewed as reasonable costs of mitigating her loss. The court held that as regards the trustee's costs, these costs had depleted the estate and were recoverable against the defendants.

3. Rectification of a Will

"As much as I regret a blunder, I cannot repair it"

These were the words spoken by Proudman J when he refused an application by the principal beneficiary of a will seeking rectification of that will in the 2011 case of **Marley v Rawlings**[12].
The deceased testator and her husband had made wills in simple mirror form, leaving the other their entire estate and if a spouse failed to survive, to Terry Marley who was treated as their adopted son. However, due to an unfortunate mistake at the time of execution, where their solicitor handed to each of them the wrong wills, Mr. Rawlings executed the will meant for Mrs Rawlings and Mrs Rawlings executed the will meant for Mr Rawlings. Both signatures were attested by the solicitor and his secretary and no one noticed the error. The judgment records that upon the death of Mrs Rawlings probate was unnecessary as all the assets were jointly owned. It was only after Mr. Rawlings death that the mistake came to light and the application was made by Terry Marley for rectification of the wills. However the application failed. Proundman J determined that the testator did not intend by his signature to give effect to the will he signed and stated "as much as I regret the blunder I cannot repair it" and refused the application. The judgment of the Court was delivered last month (April 2011) and an appeal has been lodged.

[11] 31 July 2009
[12] (2011)EWHC 161

4. A Reformulation of the rule in Hastings Bass

The Court of Appeal in the UK have 'reined in' considerably the extent to which trustees can rely upon the rule in Hastings Bass to set aside their mistaken actions on the grounds that those actions were a breach of trustees' duties. The rule has proven an important tool enabling trustees to undo transactions and that turned out to have undesirable consequences.

The rule in Hastings Bass provides

> "Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account."

As such, the principle provides, that where a trustee acts in good faith, and in exercise of its express powers, has taken an action, which on the face of it, falls within the letter of the power, the action may nevertheless be held, to have been ineffective if (1) the trustees fail to take into account something which they ought to have taken into account; or (2) the trustees take into account something which they ought not to have taken into account, and (3) in either case, the trustees would not have taken the action, if they had not failed, as in (1), to take into account, what they ought to have taken into account, or had taken into account, as in (2), what they ought, not to have taken into account. An important development in the UK has been the setting aside of transactions where the trustees have failed to appreciate the fiscal consequences of the transaction and that a material difference between the intended and the actual fiscal consequences of the act seems to be sufficient to bring the principle into play.

There had been some interesting recent cases in the UK which have developed the principle but the judiciary had also noted that the principle must have its limitations. In **Green v Cobham**[13], the trustees executed a deed of appointment doing precisely what they intended the deed to achieve in benefiting the persons specified therein. However some time later, the trustees appreciated the disastrous consequences of their action and there was no doubt that they would have acted differently if they had appreciated their mistake when about to execute the deed. The trustees had appointed a trustee which had the effect that there was no longer a majority of trustees of the composite settlement who were non-resident with disastrous CGT consequences. The trustees sought to have the appointment by the will trustees declared void The court held the appointments void under the Hastings-Bass principle so undoing what the trustees had done and was satisfied that the trustees would not have made the appointment if they had directed their minds to the CGT tax consequences. It was not suggested that there was an unintended feature of the terms of the trusts themselves. Plainly there was an unintended effect as regards the fiscal effects of the operation on the will trust itself.

[13] (2000) WLTR 1101

In **Sief and Others v Fox and Others (2005)**[14], the claimants were the trustees of a discretionary trust created by a settlement. In 2001 the trustees received advice concerning the potential inheritance and CGT liabilities under the terms of the trusts and decided to exercise their power of appointment in favour of the second defendant and did so with his consent. In 2002 the claimants discovered that the advice they had been given regarding CGT was incorrect and the second defendant was liable for a substantial sum of capital gains tax. The trustees sought a declaration as to the validity of the appointment and claimed it was not effective, on the basis, that at the time, they were not aware, of the tax consequences, which the appointment would create, and had they known, the true position, they would not have executed the appointment. Lloyd LJ held that the appointment by the trustees, was vitiated by the failure, of the trustees, to take into account, the true consequences of the appointment as regards CGT, which they failed to take into account, because they had been wrongly advised, and that if they had received the correct advice, they would not have made the appointment.

Some of the matters that might be considered relevant to the trustees' consideration have included, information as to the value of the fund and the implications of its value in relation to future contributions **(The Stannard Case)**[15]**.**
The Irish Courts have been very silent on this principle and there are few references to the principle, or to its application. In the decision of Mr. Justice Kelly **Irish Pensions Trust Limited v Central Remedial Clinic & Others**[16], an issue arose in relation to a pension scheme of which the plaintiff was a trustee. Provision was made for the escalation of pension payments to members and the question was whether the increase was subject to the CPI cap. If the special rules adopted in July 1993, allowed for an increase, without the CPI, it was claimed that, the rules should be set aside. The trustees claimed, that they would not have agreed to the special rule, if it had been aware of, and taken into consideration, the implications of that rule, for the funding of the scheme and the attitude of the CRC. The application to set aside the rule was sought, on the basis of, the rule in Hastings-Bass, and the principle is recited in full in the judgment. Mr. Justice Kelly stated, that he did not have to decide the issue having already decided the case on the grounds of rectification, but had he not done so, he stated that he would have been much inclined, to set aside, or declare void, special rule 10, on the basis of the principle in Hastings-Bass.

Thus, it appears to be open to trustees, who have made a decision which it transpires, is not in the best interests of the trust, to apply to have the decision set aside. It has been widely accepted certainly in the UK that the Revenue have suffered a significant loss of revenue from successful Hasting-Bass actions. However, the HM Revenue & Customs won an appeal on the 9th of March 2011 in two related cases **Pitt v Holt and Futter v Futter**[17] in which the High Court had set aside trustees' actions. The case was not presented on the basis that the trustees had committed any breach of fiduciary duty in making certain advancements in question but rather the case made was that the trustees had all proceeded on the assumption that particular tax losses could be used in the desired way, and that no charge to CGT would arise as a consequence", and that if the true position had been realized the trustees would not have made the enlargement or the advancements. It was clamed that "*in failing to take account of the correct tax consequences we neglected to take into*

[14] (2005) 1 WLR 3811
[15] (1990) 1 PLR 179
[16] Delivered the 18th March 2005
[17] (2011) (EWCA Div 197)

account a highly relevant factor which, had we considered it, would have led us not to adopt the course that we did". The court noted that this presentation of the case was entirely orthodox in terms of the Hastings-Bass rule.

Lloyd J delivering judgment stated

> "The cases which I am now considering concern acts which are within the powers of the trustees but are said to be vitiated by the failure of the trustees to take into account a relevant factor to which they should have had regard – usually tax consequences – or by their taking into account some irrelevant matter. It seems to me that the principled and correct approach to these cases is, first, that the trustees' act is not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the court's discretion. The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. Fiscal considerations will often be among the relevant matters which ought to be taken into account. However, if the trustees seek advice (in general or in specific terms) from apparently competent advisers as to the implications of the course they are considering taking, and follow the advice so obtained, then, in the absence of any other basis for a challenge, I would hold that the trustees are not in breach of their fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to them was materially wrong. Accordingly, in such a case I would not regard the trustees' act, done in reliance on that advice, as being vitiated by the error and therefore voidable."

He stated that two types of cases must be distinguished:

> "i) On the one hand there may be a case in which, for example because of an inadvertent misunderstanding of the position, an act done by trustees in the exercise of a dispositive discretion is not within the scope of the relevant power. If so it is void. That was the case in *Re Abrahams' Will Trusts*, as it was interpreted in *Re Hastings-Bass*. It would have been the case in *Re Hastings-Bass* but for the Court of Appeal having allowed the appeal by the trustees.
>
> ii) On the other hand, the case may be one in which the trustees' act in exercise of their discretion is within the terms of their power, but is said to have been vitiated by their failure to take into account a relevant matter, or their taking something irrelevant into account, when deciding to exercise, and exercising, the discretion. The correct approach to such cases is dealt with at para 127 above. The trustees' act is not void; it may be voidable. To be voidable it must be shown to have been done in breach of a fiduciary duty of the trustees. The duty to take relevant, and no irrelevant, matters into account is a fiduciary duty. Relevant matters may include fiscal consequences of the act in question. However, if the trustees fulfil their duty of skill and care by seeking professional advice (whether in general or in specific terms) from a proper source, and act on the advice so obtained, then (in the absence of any other basis for a challenge) they do not commit a breach of trust even if, because of inadequacies of the advice

given, they act under a mistake as to a relevant matter, such as tax consequences. In the absence of a breach of trust, the trustees' act is not voidable. Even if it is voidable, it cannot be avoided unless a beneficiary seeks to have it avoided, and a claim to that effect will be subject to the discretion of the court and to the usual range of equitable defences."

I understand that leave to appeal was refused in the cases but the trustees intend to take a case to the Supreme Court.

5. The Legal Right Share – Date of Valuation

The High Court in **Strong v Holmes**[18] dealt the relevant date to value the legal right share of the surviving spouse. This case was heard in the context of an estate, the value of which had dropped by almost 50% to 6M from the date of death to the date of the hearing.
In this case the deceased died testate on the 12th of April 2007 without issue and leaving him surviving his widow, who was the first defendant to the proceedings. The residuary legatees were also joined in the proceedings. The proceedings were brought by the executor who sought the directions of the court as to the right of the deceased's spouse to require an appropriation pursuant to section 56 of the Succession Act, 1965 of the dwelling house in Westmeath forming part of the estate of the deceased given that the dwelling house is one to which section 56(6) applied.
The effect of section 56(6) is that if the dwelling:

a) forms part of a building, and an estate or interest in the whole building forms part of the estate;
b) where the dwelling is held with agricultural land an estate or interest in which forms part of the estate;
c) where the whole or a part of the dwelling was, at the time of the death, used as a hotel, guest house or boarding house;
d) where a part of the dwelling was, at the time of the death, used for purposes other than domestic purposes;

In any of the above circumstances, the right conferred to the surviving spouse to require the personal representative to appropriate the dwelling house under section 55 in or towards satisfaction of any share of the surviving spouse, shall not be exercisable unless the court, on application made by the personal representative or the surviving spouse, is satisfied that the exercise of that right is unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in due course of administration and authorize its exercise.

In this case, the deceased devised all his lands to his trustees and to his spouse he devised a right of residence in the dwelling house together with the rental income from all the lands for her lifetime. The deceased gave a one tenth share of his residuary estate to pay the income for life to his wife and the remaining nine tenths to his trustees for the second and third named defendants with remainder over to whoever of the second and third named defendants should be living at a future date. On the 18th of June 2007 the deceased's spouse elected to take her legal right share and the

[18] (2010) IEHC 79

executor served a notice of right of appropriation upon her pursuant to section 56. Her solicitors then informed the executor that she wished to appropriate the family home together with the lawns, yard and the avenue and the balance of the personal assets and a sufficient portion of the land absolutely in order to satisfy the balance of her legal right share.

It was a major issue in this case that the estate was valued at date of death at approximately €11M and it had felled to approximately €6M at the date of the proceedings.

The executor in the proceedings sought court direction as to inter alia:

a) her right to appropriate and
b) the extent of the property that might be appropriated.

The parties agreed in the course of the hearing as to the extent of the appropriation of the lands to include the dwelling house and certain of the lands. The court was satisfied that such appropriation was proper and permissible.
The personal representatives then pursuant to section 55 of the Succession Act, ascertained and fixed the values of the said lands.

The court then had to decide on the date of valuation of the deceased's spouse's legal right share.
It was argued on behalf of the executor that the date of valuation should be the date of distribution and not the date of the testator's death and in this regard where appropriation is permitted by the court, the date of appropriation is the date of the order of the court which should be as close as possible to the date of distribution and it is the current market value of the estate on that date which is relevant. It was argued on behalf of the spouse that the valuation date for a legal right should be the date that the legal right share vests which is the date when it is accepted that the spouse elected to take her legal right share.

Judge Murphy stated firstly that the personal representatives hold the estate under section 10(3) of the Succession Act, 1965 as trustees fro the persons by law entitled thereto. He stated:

> "The obligation of trusteeship is critical in relation to the valuation date in a fluctuating market and in particular in the steep decline in property values from the date of death to the date of the proposed appropriation. (If) it is the court's duty to prohibit the appropriation if it is calculated to operate unjustly or inequitably by unduly benefiting one beneficiary at the expense of another. Where there is no settled law as to the date of valuation, such consideration is paramount."

Judge Murphy noted that under the conditions prevailing in the 1960s when the Succession Act was debated and passed, markets were not fluctuating. He stated that it was incumbent on personal representatives to administer the estate as soon after the death as was reasonably practicable having regard to the nature of the estate, the manner in which it was required to be distributed and all other relevant circumstances referred to in section 62. He noted in this case what while the election was made by the spouse promptly, some time passed until notice of appropriation was made under section 56 and the effect of such election and appropriation required an application to court which he noted was dealt with promptly by the personal representative.

Murphy J noted that in order to ensure that the appropriation was calculated to operate justly and equitably it cannot unduly benefit one beneficiary at the expense of another. If for example, the date of valuation were to be the date of death then the half share of the estate then valued at €11M approximately would almost exhaust its present value of €6M.

Judge Murphy rejected the submission made on behalf of the surviving spouse that the date of death should be valuation date of the legal right share, on the basis that if parliament had intended that the appropriation should take effect retrospectively as at the date of death, one would have expected this result to be achieved by plain words.

Judge Murphy determined that the:

> "The only operative and practical date for valuation is the date of distribution since it is the only date on which the true nature and extent of half of the net estate of the deceased can be determined".

He states further in the judgment that the valuation date is the actual date of appropriation. There appears to have been some confusion about whether the valuation date is the date of appropriation or the date of distribution however Judge Murphy concludes in his judgment that where there is a right of appropriation, the valuation date is at the date of the exercise of that appropriation, which has been taken to mean, the date of distribution.

6. Recovering Estate Assets – Section 121 Succession Act, 1965

Section 121 of the Succession Act deals with dispositions which are made during the lifetime of the deceased for the purpose of disinheriting his spouse and children. The section applies to a disposition of property under which the beneficial ownership of the property vests in possession in the donee within three years before the death of the person who made it or on his death or later.

The court must be satisfied that the disposition was made for the purpose of defeating or substantially diminishing the share of the disposer's spouse, whether as a legal right or intestacy, or the intestate share of any of his children, or of leaving any of his children insufficiently provided for, then, whether the disposer died testate or intestate, the court may order that the disposition shall in whole or in part be deemed to be a devise or bequest made by him by will and to form part of his estate.
An Order may be made (a) in the interests of the spouse, on the application of the spouse or the personal representative of the deceased, made within one year from the first taking out of representation.
(b) in the interest of a child, on an application under section 117.
In that regard, firstly, the personal representative may apply to the court in the interests of the spouse although there is no duty on them to do so. The application by a child or children must be made concurrently with an application under section 117.

The time limits applicable to a section 121 application were considered in **D & Ors v D**[19]. Two summonses were issued concerning the estate of the deceased. One was an application under Section 117 of the Succession Act 1965 on behalf of the four surviving children of the deceased. The other proceedings concerned an application by the widow, as plaintiff on her own behalf, and on behalf of her children for a declaration under Section 121 of the Succession Act 1965 that certain dispositions made by the deceased within three years of his death were made for the purpose of defeating or substantially diminishing her share and the share of her four children and should be deemed a devise or bequest made by the deceased. Both summonses were issued more than a year after the date of the issue of the Grant of Probate. It was argued on behalf of the spouse that her right under section 121 is dependent on her having been served with notice of her right to elect under Section 115 and that as no notice has been served in this case, therefore time must be extended beyond one year from taking out representation. This was rejected by the court and Carroll J held that an application in the interests of the widow is not dependent on or to be postponed until a notice has been served under Section 115 (4) of a right of election - They are two separate rights - One is the right to apply to the Court to have the estate increased artificially by including property which the deceased had disposed of before his death. The other is a right to elect between a legal right and rights under a will or a partial intestacy.

It was also argued on behalf of the widow that because an application in the interest of the spouse may be made by the personal representative of the deceased, therefore the defendant as personal representative, having failed to make such application, cannot invoke the time limit laid down in Section (5) (a). The defendant did not apply for a declaration in the interest of the widow in this case and the court noted that this was for obvious reasons as the dispositions in question were dispositions made to her but Carroll J noted that that while a personal representative is empowered to make an application the interest of a spouse, there is no duty imposed on the personal representative to do so.

Judge Carroll held that in so far as the application under Section 121 is made in the interests of the widow, that she was barred from making such application because it was not made within one year from the first taking out of representation to the estate of the deceased. She held that in so far as the application under section 121 is made in the interest of the children, she stated that it appears Section 121 (5) (b) infers that unless a claim lies under Section 117, no application can be made by or on behalf of a child for an order under Section 121. Accordingly where a child's interest is concerned, the appropriate course is to make an application under Section 117 and join with that application a claim for an order under Section 121. Only one application, i.e. one set .of proceedings, is necessary. Carroll J stated that there might at first appear to be an anomaly where there is a claim by a child in respect of a diminished intestate share, which is allowed under Section 121, while an applicant can only be made under Section 117 where the deceased died wholly or partly testate. However, this is not really so, because if the application under Section 121 is successful, the disposition is deemed to be a devise or bequest made by the deceased by will, which would bring the child's claim within the ambit of Section 117. (NB the time limit for a section 117 claim is now six months from the first taking out of representation)

[19] (1982 WJSC-HC) 166

7. Power of personal representative to compromise proceedings

The power of the personal representative to compromise proceedings was considered by the High Court **in the matter of the estate of M.K. Deceased**[20] where the personal representatives brought an application to the High Court seeking directions in relation to the administration of the estate and in particular the Court's approval of the settlement of the proceedings subject to the ruling in respect of a settlement of a claim by one of the Plaintiffs who was a person of unsound mind. The personal representatives brought the application on notice to the plaintiffs and to the principal beneficiary who was the partner of the Deceased. The Application was being contested by the Deceased's partner (P) on the basis that the personal representatives do not have jurisdiction to settle the Plaintiffs Section 117 application to the detriment and contrary to the wishes of P as a beneficiary and that the Court did not have jurisdiction to approve of such a settlement. Judge Laffoy stated at the outset that there was no doubt but that personal representatives have jurisdiction to settle Section 117 applications with applicants who are of full age and have capacity with the concurrence of the beneficiary affected who is of full age and has capacity all of course subject to the ruling by the Court. Judge Laffoy noted that this application raised very fundamental issue as to the powers of personal representatives to settle Section 117 applications and the Court's function to approve of such a settlement which had not been considered previously. The personal representatives relied principally on subsection 8 of Section 60 of the Succession Act, 1965 which deals with the administration of assets. Section 60(8)(e) provides that the personal representatives of a Deceased person may compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim or other matter relating to the estate of the Deceased. Judge Laffoy noted that the crucial question in her view was whether in light of the manner in which the Court's statutory obligation under Section 117 must be performed, a claim by a child under Section 117 can be regarded as a "claim or other matter relating to the estate of the testator" which may be compromised by the executors in accordance with Section 60(8)(e).

The Judge concluded that the trustees do not have power to compromise the Plaintiff's claim under Section 117 either under the Succession Act, or by common law and that the Court had no jurisdiction to give directions in relation to the proposed settlement. She held that as a matter of construction of Section 117, the discretion as to the determination of whether the testator has failed in his moral duty to make proper provision for the child in accordance with his means is vested in the court solely. The personal representatives have no discretion in that regard.

She stated that it is apparent that the application by the personal representatives involved the exercise of the type of discretion which it would be inappropriate to repose in personal representatives whose function is to administer the estate in accordance with the testator's wishes, not to override them and that where the court exercises its discretion in favour of making just provision for a child under section 117, by doing so, it is overriding the testator's wishes. Judge Laffoy concluded that, this is not to say, that all of the parties cannot consensually compromise a claim under section 117 and have the compromise ruled by the court. However, where the effect of the settlement with the section 117 applicant is to diminish the share of the estate of another beneficiary and that beneficiary objects, Judge Laffoy stated that it was her view, that the personal representative has no jurisdiction to compromise the claim. She stated that in short, given that the

[20] 16th April 2010

discretion under section 117 is given to the court solely, section 60(8)(e) which deals with the powers of the personal representative, has no application to a claim under section 117.

8. Removal of Executors and Trustees – Rights of Beneficiaries

Once the executor is appointed he is entitled to proceed to administer the estate. If the beneficiaries are dissatisfied with the manner in which the estate is being administered, an application can be made to have an executor removed and to have an alternative administrator appointed pursuant to section 27(4) of the Succession Act, 1965.

Where an application is made by a beneficiary in a will to have the executor of the will removed and to have him replaced by another person two matters are required to be established. First, the beneficiary must justify the removal of the executor under Section 26(2) of the Succession Act, which states simply, that the High Court has the power to revoke a Grant of Probate, and secondly he must show that because of the special circumstances of the case, it is expedient and necessary to appoint a new administrator under Section 27(4) of the same act.

To justify such the step of removing an executor, the beneficiary seeking the removal must show, that the executor was guilty of serious misconduct and/or that there are serious special circumstances requiring his removal. If a beneficiary succeeds, in showing to the satisfaction of the Court that the executor has indeed been guilty of serious misconduct or has established serious special circumstances requiring his removal, the Court will remove him under Section 26(2) and appoint an administrator under Section 27(4).

An application to remove the executor was made in the case **Dunne v Heffernan** [21]where the Plaintiff sought to remove the Defendant, as the executor of their mother's will. The Defendant had valued shares at a particular value in the Inland Revenue affidavit, which the Plaintiff did not agree with and was concerned, that it would expose him to significant capital gains tax. It was also alleged, that the Defendant, as executor, was in a position of fundamental conflict of interest as an executrix of the estate, having regard to her position of a shareholder in and director of Dunnes Holding Company, and as a beneficiary of the trust. The Supreme Court found, that it was a matter between the Defendant and the Revenue as to whether or not the Revenue accepted her contention in relation to the values of the shares, just as it was, a matter between the Plaintiff and the Revenue, as to what capital gains tax arose. Mr. Justice Lynch in delivering the judgment, stated that he found it difficult to discern the conflict of interest alleged, and that there was nothing to suggest any impropriety on the part of the Defendant, or to justify her removal. It was also alleged that as a result of all or any of the matters which had developed, a situation had arisen, in which the Plaintiff with justification, deeply distrusted the Defendant as the executor, and had no faith or confidence in her ability, to properly or fairly, administer the estate and that the due and proper administration of the estate required the removal of the Defendant as the executor. The Supreme Court found that there was no justification for the Plaintiff, distrusting the Defendant or losing faith or confidence in her ability. In essence, that case set out, that there must be evidence of serious misconduct and or special circumstances, which require the removal of the executor.

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The matter of the removal of an executor, arose again in the case of **Flood v Flood 1999 2 IR page 234** where the Plaintiffs claim that the Defendant who was the appointed executor, had borrowed monies from the Deceased, which he was now refusing to pay back to the estate. The Plaintiff claimed that this caused or created a conflict of interest, between the Defendant's role as executor of the estate and as a possible Debtor to the estate. The Defendant as the executor denied that the monies were owing to the estate and claimed that if any such monies were owing the Plaintiff's claim was statute barred. Ms Justice Macken held in the High Court, in removing the Defendant as executor that there was a sufficient question mark, over the transfer of the monies in question to justify considering the appointment of an alternative person as administrator to the estate of the Deceased. That, as it was not possible, at this stage of the proceedings to determine the questions regarding status of the monies at issue and the relevant limitation period applicable to any claim in respect thereof, it was not possible to accept the Defendant's argument, that no cause of action could exist. She confirmed the removal of an executor was only justified, where there was serious misconduct on the part of the executor, and or some other special serious circumstances. She stated, that although the Court would be reluctant to take steps, which might have the effect of depleting the value of the estate, the issues between the parties regarding the monies in question, constituted sufficiently serious circumstances which justified the removal of the Defendant from his position as executor.

There have been a number of cases where an executor's removal is sought on the basis of a conflict of interest.

Mr Justice O'Neill considered the fiduciary duties owed by an executor to the beneficiaries of an estate and how those duties can be breached where an executrix resolves a conflict of interest between his own interests and the duty owed to the beneficiaries, in favour of his himself, in **Kennedy v Kennedy & O'Riordan**[22]" where he stated as follows:

> *"A first, and indeed principal, matter to be focused on is the status of the three parties to these proceedings and the obligations and duties and rights that attach to each of them. All three of the parties were named as executors in the will of the testator, and all three were granted probate of that will from this court. Therefore pursuant to section 10 of the Succession Act 1965, they were constituted as trustees of the estate of the testator. In my view it is beyond argument that as executors they owed fiduciary duties to the estate and to its beneficiaries. Those duties may be summarized by saying that they were under an unavoidable duty to maximize the value of the estate for the benefit of the beneficiaries and to ensure a correct and just distribution of the estate in accordance with the will of the testator and in accordance with the lawful election of the first named defendant pursuant to section 115 of the Act of 1965…….. In this case, the three parties as executors had a duty to maximize the value of the estate for the benefit of all of the beneficiaries. The maximization of the value of the estate was obviously of crucial importance to the benefit to be derived by the first named defendant from the election to take her legal right share. Also, but to a much lesser extent, the maximization of the value of the estate affected the amount to be paid to the legatees. The maximization of the value of the estate had mixed effects in so far as the plaintiff was concerned. On the one hand, the greater the value attributed to the land, the greater the value of the asset going to him, but on the other*

[22] IEHC 2007 77

hand, it increased the amount he would have to pay into the estate to avoid a sale of the land. This latter aspect clearly gave rise to an interest in the plaintiff personally, in keeping the valuation on the land as low as possible; but the lower the valuation of the house and lands, the greater the diminution in the benefit accruing to the first named defendants to whom the plaintiff as executor, owed trustee duties. Clearly therefore there was a manifest conflict of interest between the plaintiff's undoubted personal interest in keeping the valuation as low as possible and the interests of the estate in general and of the other beneficiaries in achieving the maximum possible value for the house and lands."

The court also noted that the plaintiff who was an executor and a beneficiary did not want a sale of the lands in question on the open market but wanted to have the lands vested in him, on the basis of a particular valuation, subject to the payment of legacies charged and the legal right share of the first named defendant. Mr. Justice O'Neill noted that as one of the executors, the plaintiff had the power to prevent the sale and his power could only be overcome by an application to remove him as an executor. The court found the plaintiff executor to have been in gross breach of his fiduciary duty to the estate and to the other beneficiaries and that he resolved the conflict of interest between his personal interest as a beneficiary and his duties as a trustee by favoring his own personal interest and the court overruled him, by ordering a sale of the land.

The jurisdiction of the Irish Court, applying the principles in Dunne v Heffernan, to remove an executrix where there exists some serious special circumstances was applied in the case Flood v Flood **In the Matter of an estate of Christopher Flood, Deceased**[23] arising out of the executor's conflict of interest. Ms. Justice Macken was satisfied that the plaintiffs "had set out and established sufficient facts to suggest that there is a serious matter to be considered". She held that there was a sufficient question mark over whether a transfer of money by the deceased to the defendant executor was a gift or a loan repayable to the estate, and this justified the appointment of an alternative person as administrator to the estate of the deceased. The plaintiffs claimed the defendant had borrowed money from the deceased and his refusal to repay the money to the deceased's estate created a conflict of interest between his role as executor and as a possible debtor to the estate. The defendant claimed the money had been given as a gift. Ms. Justice Macken noted that she could not decide the outcome of the conflict at that time, but that on the facts, it appeared that the defendant was in a complete conflict between his role as executor and his role as possible debtor to the estate and she was satisfied that :

"The plaintiffs have set out and established sufficient facts to suggest that there is a serious matter to be considered".

It can be argued that a beneficiary need not stand by until the fiduciary has actually breached his duty and can restrain him from doing so on the basis that once the defendant has established that there are sufficient facts to suggest that there is a serious matter to be considered, regarding the executor's conflict of interest, then the court need not decide the outcome of that conflict; the beneficiary need only establish prima facie inferences of fiduciary obligations and their breach. This is consistent with principle that a beneficiary need not stand by until the fiduciary has actually breached his duty but can restrain the fiduciary and is consistent with the principle that the welfare of the beneficiaries is paramount.

[23] (1999) 2 IR 234

In the case of **E,L,O and R Trusts** the court noted that the court may remove a trustee where he has failed to recognise a conflict of interest. In this case, the trustee had repeatedly asserted that as there had been no criticism of its trusteeship, there was no reason for it to retire. The court noted that this was to miss the point "Verite was not being asked to retire because it had done anything wrong; it was being asked to retire simply because, for reasons wholly outside its control and for which it bore no responsibility, it found itself in a position of conflict such that it could not properly continue as trustee of both the H and J family trusts. The fact, that there had been no criticism of Verite's performance as a trustee is simply irrelevant"
It was stated in **Kershaw v Micklethwaite & Others (2010)**[24] that similar principles should apply to the removal of a personal repetitive as apply to the removal of a trustee.

9. Variation of Trusts - Land and Conveyancing Law Reform Act 2009

Part 5 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") introduced a statutory jurisdiction in the court to sanction variations of trusts. It is important to note that part 5 rules out a variation where the Revenue Commissioners have satisfied the court that the variation *"is substantially motivated by a desire to avoid, or reduce the incidence of tax".* Prior to the enactment of the 2009 Act, the beneficiaries jointly with the trustees could alter the trust but only if the beneficiaries were sui juris (of full age) and capacity and together entitled to the entire beneficial interest under the trust. The Court was also considered to have an inherent jurisdiction to sanction a variation of the trusts on behalf of beneficiaries who are not sui juris in an emergency situation, for example, if it was necessary to salvage the trust from destruction.

Part 5 of the 2009 Act now provides for the court's jurisdiction to vary a trust by enabling an 'appropriate person' to apply to court for approval of an arrangement 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 (a) is not a relevant person, (b) is beneficially interested in the trust, and (c) is capable of assenting to the arrangement.

The 'appropriate person' means a trustee of, or a beneficiary under the trust, or any other person that the court, to which the application concerned under section 24 is made, considers appropriate.

A 'relevant person' is defined in section 23, as meaning a person incapable of assenting to the arrangements, by reason of lack of capacity, an unborn person, a person whose identity or existence or whereabouts cannot be established by taking reasonable measures, or a person who has an interest in the trust but does not fall within paragraph (a) i.e. a fully competent adult beneficiary.

The court must be satisfied that the carrying out of the arrangements would be for the 'benefit' of the relevant person and any other relevant person prior to approving the application. In doing so, 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 (section 24(5).

[24] (2010) EWHC 506 CH

Wylie in his text on Land Law (fourth edition) notes that the Law Reform Commission recognized that a 'thorny' issue was how far a variation application could be motivated by tax avoidance and that the majority of applications in England and Wales are so motivated. In this regard, section 24(2) expressly provides that the court shall not hear an application made to under subsection (1) unless it is satisfied that the applicant has given notice in writing of the application to the Revenue Commissioners and such other person as may be prescribed by rules of court.