

## THE HIGH COURT

IN THE MATTER OF (1) THE TRUSTS OF:

- (a) A DECLARATION OF TRUST DATED THE 25TH DAY OF APRIL, 1919 AND MADE BETWEEN ERIC HENRY COOK ALLEN OF THE FIRST PART, AGNES AMY LEONORA ALLEN OF THE SECOND PART AND DAVID (DRENNAN) TREVOR ALLEN OF THE THIRD PART
- (b) A SETTLEMENT DATED THE 6TH DAY OF DECEMBER, 1923 AND MADE BETWEEN DAVID ALLEN OF THE ONE PART AND THE SAID ERIC HENRY COOK ALLEN, AGNES LEONORA ALLEN AND DAVID (DRENNAN) TREVOR ALLEN OF THE OTHER PART
- (c) A SETTLEMENT DATED THE 28TH DAY OF NOVEMBER, 1924 AND MADE BETWEEN THE SAME PERSONS AS ARE PARTIES TO THE SETTLEMENT AT (b) AND IN THE SAME ORDER
- (d) A DEED OF RELEASE AND VARIATION OF TRUST DATED THE 14TH DAY OF AUGUST, 1925 AND MADE BETWEEN THE SAME PERSONS AS ARE PARTIES TO THE DECLARATION OF TRUST AT (a) AND IN THE SAME ORDER

AND IN THE MATTER OF (2) THE WILL DATED THE 19TH DAY OF DECEMBER, 1924 AND A CODICIL THERETO DATED THE 10TH DAY OF AUGUST, 1925 OF DAVID ALLEN LATE OF MIRAMAR KILLINEY IN THE COUNTY OF DUBLIN DECEASED

BETWEEN:

NORTHERN BANK LIMITED, JOSEPH HUGH MURRAY  
AND BERNARD JAMES McCORMICK

Plaintiffs

and

SAMUEL CARSON F. ALLEN, DAPHNE JOAN MARSH,  
OWEN CHARLES COOK, MICHAEL CLIVE TYRONE  
ALLEN AND MARIE LILLIAN COOK

Defendants

Judgment of Mr. Justice Barrington delivered the 10th day of February, 1984

The plaintiffs are Trustees of the Declaration of Trust, Settlement and Deed of Release and Variation set out at (1) above. In these proceedings they seek to have determined certain questions and matters arising in relation to the distribution of the funds comprised in the Trusts and in the execution of the Trusts in the events which have happened, determined by this Court. Each defendant is a beneficiary or potential beneficiary or a member of a class of

beneficiaries or potential beneficiaries and the plaintiffs seek representati  
orders in respect of a number of the defendants and classes of beneficiaries  
or potential beneficiaries.

The principal issues arising on the administration of the said Trusts a  
Will have already been litigated in proceedings entitled The Northern Bank and  
Others Plaintiffs and Samuel Carson F. Allen and Others Defendants (1978 No.  
481 Sp). In his judgment in that case, which was delivered on the 18th day  
July, 1979, Mr. Justice Gannon dealt with all the main issues arising, in the  
events which have happened, in the administration of the Trusts of the said  
Settlements and Will and, by his order of the same date, answered the various  
questions which were put to him. These proceedings raise certain subsidiary  
issues which fall to be decided in the light of the said judgment and order.  
The said judgment sets out the background to the present case and reaches  
certain conclusions which I respectfully adopt. It is unnecessary for me  
to go into these matters in this judgment which should be regarded only as an  
addendum to the judgment of Mr. Justice Gannon.

It is however necessary to refer to certain background facts to make  
my judgment comprehensible.

The Trusts in respect of which the assistance of the Court was original  
sought are referred to in the title hereof and may, more simply, be referred

as -

(1) The Declaration of Trust, Settlements, and Deed of Release and Variation

comprised in -

(a) The David Allen 1919 settlement

(b) The David Allen 1923 settlement

(c) The David Allen 1924 settlement and

(d) The David Allen 1925 settlement and

(2) The Trusts of the Will of the late David Allen dated the 19th day

of December, 1924 and a Codicil thereto dated the 10th day of August,

1925.

The said David Allen died on the 29th day of September, 1926 and Probate

of his said Will issued forth of the Principal Probate Registry on the 29th day

of April, 1927.

The said David Allen left him surviving his widow, Ada Lillian Allen who

died on the 3rd day of March, 1938 and two sons Eric and David and one daughter

Amy. All of these children, of whom Amy was the last survivor, died without issue

David Junior and Amy being unmarried. Amy died on the 24th day of February,

David Allen Senior, and his wife, were both members of large families.

David Allen Senior was one of a family of seven children. Mrs Allen, whose

maiden name was Cook and who was an Australian, was one of fifteen children.

The first named defendant, Samuel Carson F. Allen, is the only child living at the date of Miss Amy Allen's death of predeceased brothers and sisters of David Allen Senior.

The second named defendant, Daphne Joan Marsh, is a daughter of Maurice T.W. Allen deceased, who was a son of Robert Henry Allen, a brother of the testator, and the Court made an Order appointing her to represent the grandchildren living at the date of the death of Miss Amy Allen, of deceased brothers and sisters of the testator.

The third named defendant, Owen Charles Cook, is a son of Charles Henry Cook deceased who is a son of Charles Cook deceased, a brother of Mrs Allen, and the Court made an Order allowing her to represent the grandchildren living at Miss Allen's death of deceased brothers and sisters of Mrs Allen.

The fourth named defendant, Michael Clive Tyrone Allen is a son of Geoffrey Michael Allen deceased, who is a son of the said Maurice T.W. Allen deceased, and the Court appointed him to represent the great-grandchildren living at the death of Miss Allen of the brothers and sisters of the testator or his wife.

The fifth named defendant, Marie Lillian Cook, is a daughter of John Valentine Cook deceased, who was a brother of Mrs Allen and the Court appointed her to represent the children living at Miss Allen's death of brothers and

sisters of Mrs Allen who predeceased Miss Allen.

The said Order of Mr. Justice Gannon answered the questions raised in the said special summons as follows -

- A. In relation to the funds subject to the trusts of the indentures mentioned in the title hereof, that twelve twentieths were to be distributed among the next-of-kin of David Allen deceased (the testator) who survived his daughter, Agnes Amy Leonora Allen (Miss Allen) who died on the 24th day of February, 1977; five twentieths among the next-of-kin of Mrs Allen, the wife of the testator, who were living at the date of death of Miss Allen; and three twentieths among the Charitable Institutions therein referred to.
- B. In relation to the funds comprised in the general residuary estate of the said David Allen deceased, that a share of four tenths was to be distributed among the children or grandchildren (living at Miss Allen's death) of the deceased testator; and that a share of three tenths was to be distributed among the children and grandchildren (living at Miss Allen's death) of the deceased brothers and sister of the deceased's wife.

The descendants of brothers and sisters of both the testator and his

wife entitled to the general residuary estate are thus  
of relationship, as at the date of Miss Allen's death on the 24th of February,  
1977, neither the deceased nor his wife had any brother or sister living.

It was further provided in the said Order that the testator included  
in his intentions all his brothers and sisters, and not only those alive at the  
time of his death, from whom entitlement might be traced, and the same considerations  
are to be applied in relation to persons claiming to benefit by relationship  
to his wife, although in both cases the date of Miss Allen's death, and not the  
date of the death of the deceased, is to be the date on which those persons  
are to be ascertained.

As previously stated the testator had three children, all of whom died  
without issue, the last surviving child Miss Allen having died on the 24th day of  
February, 1977 and the class of persons entitled to benefit is to be ascertained  
at that date.

David Allen Senior had three brothers and three sisters, all of whom  
predeceased Miss Allen, and only one brother, William Edward Allen, had a child  
surviving at the date of the death of Miss Allen, namely Samuel Carson F. Allen the  
named defendant herein. This case is principally concerned, not with the Trusts of the  
Will, of the said David Allen Senior but of the Trusts of the various settlements  
referred to in the title hereof. Mr. Justice Gannon was concerned with the  
Trusts of both Will and Settlement. The significance of the Will for the

purposes of this case is that David Allen Senior, who was a qualified Barrister, apparently drafted, or had a part in drafting, both his Will and some at least, of the various deeds of settlement.

At page 2 of his unreported judgment Mr. Justice Gannon states as follows

"The settlement deeds are five in number in three of which dated

respectively the 6th December, 1923, 28th November, 1924 and

14th August, 1925 the testator was the settlor with his three children

as trustees, and in the other two dated the 25th April, 1919 and the

14th August, 1925 the three children are themselves settlors. The Will

of the testator was executed on the 19th December, 1924 and one codicil

thereto executed on the 10th August, 1925. The wording and form of

drafting of the instruments executed in 1924 and 1925 seem to me to be

attributable to the one draftsman for all of them. The content and

nature of the dispositions in all these instruments executed in 1924

and 1925 seem to me to be attributable to the same mind having the same

intentions".

In his judgment and order Mr. Justice Gannon held that so far as the testator's general residuary estate was concerned that children and grandchildren, living at the death of Miss Allen, of deceased brothers and sisters of David Allen Senior and his wife were entitled, per stirpes, in certain

circumstances, to a share in the said general residuary estate.

It was submitted on behalf of the grandchildren of deceased brothers and sisters of David Allen Senior and his wife that the settlement and the judgment and order of Mr Justice Gannon affecting them should be interpreted to produce a similar result.

In his said order Mr. Justice Gannon held that, in the events which have happened, the funds governed by the said Deeds of Settlement are distributable as follows that is to say -

1. Twelve twentieths thereof among the next-of-kin of David Allen, who survived his daughter Agnes Amy Leonora Allen who died on the 24th day of February, 1977.
2. Five twentieths thereof among the next-of-kin of Mrs Ada Lillian Allen, the wife of the said David Allen, who were living at the date of the death of the said Miss Allen. and
3. Three twentieths thereof among the Charitable or Benevolent Objects of Institutions mentioned in the said Deed of release and variation.

At this stage it may be convenient to refer to the twelve twentieths of the fund which were to go to the next-of-kin of David Allen as the "Allen Estate" and to the five twentieths of the fund which were to go to the next-of



of Mrs Allen as the "Cook Estate".

As to the Allen estate it might be thought that the only problem remaining was to enquire who were the next-of-kin of David Allen who survived his daughter Agnes Amy Leonora Allen who died on the 24th February, 1977. The term "next-kin" is a term of law and, of course there are rules for ascertaining who are the next-of-kin in any particular situation. In this case Mr. Justice Gannon has held that the next-of-kin of David Allen are to be ascertained as at the 24th day of February, 1977.

The relevant part of the said Deed of Settlement of the 14th August, 1927 reads as follows -

"And in case all of them the said Eric Allen, Amy Allen and David Allen Junior shall die without leaving a child, children or grandchild or grandchildren (including posthumous children) then the said corpus or capital of or representing the said stocks, shares and investments securities and monies shall be in trust to pay and divide twelve twentieths thereof among the blood relations of the settlor and five twentieths thereof among the blood relations or (sic) his wife Lillian Allen in such shares and proportions as the survivor of them the said Eric Allen, Amy Allen and David Allen Junior shall by deed or deeds revocable or irrevocable or by Will or Codicil appoint and in default of

"and subject to any such appointment among the next-of-kin of the settlor and of the said Lillian Allen living at the date of the survivor of the said Eric Allen, Amy Allen and David Allen Junior in accordance with the Statutes for the distribution of the personal estates of intestates such next-of-kin if more than one to take as tenants in common the shares which they will have taken under the same Statutes".

The said Eric Allen, Amy Allen and David Allen Junior all died without exercising the said power of appointment. In the events which have happened therefore it appears to me that the next-of-kin of David Allen Senior are to be ascertained as of the 24th day of February, 1977 in accordance with the relevant rules for the distribution of the personal estate of intestate persons, and this, of course, is what Mr. Justice Gannon's Order means.

If this interpretation is correct then it is common case that the person entitled to the relevant twelve twentieths of the settled estate is Samuel Carson F. Allen as the only child living at the date of Miss Allen's death of predeceased brothers and sisters of David Allen Senior.

(See Succession Act 1965 Section 75 sub-section 2; 7 William III

Chapter 6; Pett v. Pett 1 Salk p.250; 1 Peere Williams p.25.)

I do not think one can criticise this result by reference to the testator's Will as the wording of the testator's Will is quite different and contains no reference to the Statute of Distributions.

The Cook Estate

The same line of reasoning must apply to ascertaining the next-of-kin of Mrs Allen living at the date of the death of her daughter Amy who died of the 24th day of February, 1977. They are the children living at Miss Allen's death of brothers and sisters of Mrs Allen who predeceased Miss Allen and who, in these proceedings, are represented by the fifth named defendant Marie Lillian Cook.

All Mrs Allen's brothers and sisters predeceased Miss Amy Allen but a problem arises in relation to Miss Edith Cook and Miss Elizabeth Cook who are children of Mrs Allen's brother Arthur Bertman Cook deceased.

All Mrs Allen's brothers and sisters resided in Australia but extensive enquiries made by the plaintiff's solicitors have failed to locate Edith and Elizabeth Cook. These ladies were last heard of as having moved from Eastern to Western Australia in the early 1950's but they have had no communication with any other members of their family since then. If they were now alive they would both be over 90 so that, if living, they would have been in the eighties at the date of the death of Miss Amy Allen on the 24th February, 1977. In the circumstances it appears to me to be safe to assume that both these ladies died, without issue, prior to the death of Miss Amy Allen on the 24th February, 1977.

Apparently the sums to which these two ladies, if living, would be entitled collectively under the settlements and the Will would not exceed the sum of £25,000. My decision to assume that both ladies died before the death of Miss Amy Allen is made easier by reason of the fact that the Trustees have, very properly, taken out a bond in the sum of £25,000 with the Hibernian Insurance Company Limited to indemnify the trustees in a sum not exceeding £25,000 against any claim brought on behalf of these ladies. As, however, this bond is for the protection of beneficiaries of the Cook estate I think it proper that the cost of the bond should be borne by the Cook Estate under the settlements and under the Will and not by the Allen Estate.

My answers to the various issues raised in the special indorsement of claims would therefore be as follows -

(a) As regards twelve twentieths of the Trust Funds comprised in the above mentioned Trust -

(a) Samuel Carson F. Allen is entitled as the only next-of-kin of David Allen deceased living at the death of Miss Agnes Allen and Leonora Allen to twelve twentieths of the trust fund comprised in the above mentioned trusts.

(b) As regards the five twentieths of the trust fund comprised in the above mentioned trusts -

(a) the plaintiffs are at liberty to distribute the said funds as if Edith Cook and Elizabeth Cooke had died without issue before the said Miss Allen.

(b) Children living at Miss Allen's death of brothers and sisters of Mrs. Allen who had died before Miss Allen, are entitled as next-of-kin of Mrs Allen to five twentieths of the said trust fund equally as tenants in common.

2. The plaintiffs are at liberty to distribute three tenths of the funds comprised in the general residuary estate of the Will and Codicil of the testator named in the title hereof as if Edith Cook and Elizabeth Cook had died unmarried prior to death of Miss Allen.

3. The Court makes the following orders -

(a) an Order that the defendant Owen Charles Cook be appointed to represent for the purpose of this matter and in this cause the grandchildren living at the death of Agnes Amy Leonora Allen (hereinbefore referred to as Miss Allen) who died on the 24th February, 1977 of brothers and sisters of Mrs Allen who predeceased

Miss Allen.

(b) An Order that the defendant Daphne Joan Marsh be appointed for like purposes to represent the grandchildren living at the death of Miss Allen of deceased brothers and sisters of the testator.

(c) An order that the defendant Michael Clive Tyrone Allen do represent for like purposes the grandchildren living at the death of Miss Allen of brothers and sisters of the testator or of the wife.

(d) An order that the defendant Marie Lillian Cook be appointed for like purposes to represent the children living at Miss Allen's death of brothers and sisters of Mrs Allen who predeceased Miss Allen.

4. Liberty to apply.

*Approved*

*Due Bay*

*30/4/84*