[2020] IEHC 650

THE HIGH COURT

PROBATE

[Record No. 20/2339]

IN THE MATTER OF THE ESTATE OF CONOR O'DONNELL LATE OF BALLYLEA, BALLINGARRY, RATHKEALE, COUNTY LIMERICK, DECEASED

AND IN THE MATTER OF SECTIONS 26 AND 27 OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF AN APPLICATION BY MICHAEL O'DONNELL TO REMOVE JOSIE AHERN AND JOHN CHAWKE AS EXECUTORS AND TO PROVIDE FOR THEIR REPLACEMENT WITH A SINGLE INDEPENDENT ADMINISTRATOR

JUDGMENT of Mr. Justice Allen delivered on the 14th day of December, 2020

1. Conor O'Donnell, late of Ballylea, Ballingarry, Rathkeale, County Limerick, died on 19th April, 2014. He was survived by three sisters, a brother, and six children of a predeceased sister.

2. The deceased made a homemade will on a printed will form on 18th May, 2012 by which he appointed Josie Ahern and John Chawke his executors. He devised certain lands at Loughill and ten dry stock to his nephew Ivan O'Donnell; his lands and dwelling at Ballylea, his single farm payments and all livestock and machinery to his nephew Neville O'Donnell; and certain lands at Lower Ballylea "*and any prize bonds and Kerry Co-Op shares in [his] name at the time of [his] death*" to his nephew Michael O'Donnell. He made a number of charitable bequests and gave small pecuniary legacies to his three surviving sisters, his brother, and the children of his predeceased sister, and left the residue of his estate to Neville.

3. On 23rd June, 2014 the deceased's three sisters entered a caveat and on 7th November, 2014 the executors issued a testamentary civil bill in which the caveators were named as defendants to prove the will in solemn form of law. That action was heard before His Honour Judge O'Callaghan who, for the reasons given in a written judgment on 12th May, 2017, made an order admitting the will to probate in solemn form of law, and dismissing a counterclaim for a declaration that the deceased had died intestate. The judgment of Judge O'Callaghan shows that issues in the probate action were whether the will was a complete fabrication created by the witnesses without the knowledge of the deceased and possibly in collusion with one or more of the nephews; whether the will had been completed on the deceased's instructions but improperly signed on his behalf; and (more mundanely) whether the document had been validly executed in compliance with the requirements of s. 78 of the Succession Act, 1965.

4. The judgment of Judge O'Callaghan shows that his provisional view in relation to costs was that there should be no order as to costs, but the perfected order shows that he was persuaded to allow the defendants two thirds of their costs, including senior counsel's fees, from the estate. An appeal by the defendants to the High Court on Circuit was settled on 27th October, 2017 upon terms that the defendants should have all of their costs of the Circuit Court proceedings, including senior counsel's fees, from the estate.

5. In accordance with the order of the Circuit Court, a grant of probate was issued to the executors from the District Probate Registry at Limerick on 7th March, 2018. The grant shows a gross value of the estate of €1,154,679 and a net value of €1,094,195.

6. In his judgment of 12th May, 2017 Judge O'Callaghan observed that the deceased would no doubt have been disappointed to see the parties in court. Casey & Company, solicitors, who acted for the executors in the probate action, have submitted a bill for €82,719.32. C. N. Doherty & Company, solicitors, who acted for the defendants in the probate action, have submitted a bill for €104,434.24. In addition, Casey & Company, who it was took out the grant, have sent the executors a fee note for €14,883 for "*Professional fee in relation to all work done*", which appears to be for work done in the administration.

7. In circumstances which are unclear, Casey & Company, after they had applied for the grant of probate, ceased to act for the executors. Mr. Chawke has sworn that Casey & Company decided that they could no longer act but does not say whether a reason was given, or if it was, what the reason was. Mr. Chawke has deposed that he and Ms. Ahern both approached Cadogan O'Regan, solicitors, to act and that on 16th April, 2018 they both signed an authority for the transfer of the files, title deeds and any money to that firm. That form of authority has not been exhibited but what has been exhibited is a letter dated 25th May, 2018 from Cadogan O'Regan to each of the executors enclosing a form of Client Authority Agreement which was eventually signed by Mr. Chawke on 6th September, 2018 but which Ms. Ahern refused to sign.

8. In 2018 Ms. Ahern's health deteriorated to the point that she felt unable to continue as an executor. In late September or early October, 2018, at Mr. Cadogan's request, Ms. Ahern wrote a short note giving him "*permission to get me taken off of the late Conor O'Donnell's will as executor due to health reasons on my doctor's advice*". Mr. Cadogan instructed counsel to draft an application to the High Court and on 15th November, 2018 sent Ms. Ahern a draft affidavit but Ms. Ahern refused to sign it. In a letter of 12th September, 2018 Mr. Cadogan had asked both executors for details of all monies collected and paid out and for details of the Bank of Ireland account in which the executors' account was maintained. I will need to return to the question of the executors' account but for the moment I note that the absence of such an account does not appear to have been – or at least does not appear to have been recognised as having been – an impediment to the proposed court application. In his letter of 24th September, 2018 to Ms. Ahern's daughter, all that Mr. Cadogan asked for was her written authority to make the court application and details of the bank account so that he could draw down the monies from the bank.

9. On 30th November, 2018 Mr. Cadogan wrote a stern letter to Ms. Ahern. He had, he said, been told by Mr. Chawke that she had told Mr. Chawke that she would sign nothing. "*To me*", he said, "*this makes no sense, but so be it*." He asked that Ms. Ahern should re-consider signing the affidavit and exhibit slips (*sic*.) failing which "*we*" would make a different form of application to the High Court. That application, he said, would be an

application to remove Ms. Ahern on the ground that she was unable or unwilling to continue to act as executor and would be made by Mr. Chawke alone. He also then asked for all documentation which Ms. Ahern held in the estate and in particular the monies held in the bank account which, Mr. Cadogan said, he understood had been operated by Ms. Ahern.

10. By notice of motion issued on 26th February, 2019 Mr. Chawke applied to the High Court for an order removing Ms. Ahern. He then deposed that little had been done in respect of the administration of the estate save that Ms. Ahern had "*gathered one or two small assets and paid some bills*". He deposed that Ms. Ahern had lodged some funds to an account in their joint names and had made some payments out of that account and that he needed to know the details of that account, of which, he said, he knew nothing. That application was initially returnable for 1st April, 2019 and on the application of counsel for Ms. Ahern was adjourned to allow her to file a replying affidavit. On Friday 29th March, 2019 an appearance had been entered on behalf of Ms. Ahern by Cunnane & Kiely, solicitors, and a short affidavit had been filed on her behalf, but this did not address her previously declared wish to resign or the matter of the bank account. On 15th July, 2019 Jordan J. directed that Ms. Ahern file and serve an affidavit by no later than 30th August, 2019 exhibiting the bank statements and explaining the transactions on the account. On 1st November, 2019, which was the Friday before Monday 4th November, 2019 when the matter was next to come into the list, an affidavit of Ms. Ahern was filed which was plainly unsatisfactory. An undertaking was then given to Haughton J. that a full reconciliation would be provided within three weeks from that date and the application was adjourned generally.

11. In her affidavit of 1st November, 2019 Ms. Ahern deposed that there was an impasse between her and Mr. Chawke as to the appointment of a solicitor to act of behalf of the estate. She said that she was willing to stand aside and allow an agreed independent solicitor or such a solicitor appointed by the court to administer the estate: provided Mr. Chawke stood aside also. Mr. Chawke was not willing to step aside and was not agreeable to the appointment of an independent solicitor on the ground that it would add to the cost of the administration.

12. The correspondence went back and forth but went nowhere. Ms. Ahern, by Cunnane & Kiely, kept saying that she could and would provide a reconciliation, but never did. Mr. Chawke, by Mr. Cadogan, repeatedly protested that Ms. Ahern had failed to provide an account of receipts and disbursements but did nothing about it.

13. On 11th November, 2014 an executors' account was opened in Bank of Ireland, Rathkeale. Mr. Chawke's position is that this account was opened by Ms. Ahern, although he does acknowledge that he signed some paperwork. The plain fact is that this was a joint executors' account in the joint names of Ms. Ahern and Mr. Chawke. Mr. Chawke has consistently complained that Ms. Ahern made repeated withdrawals of cash from this account and has failed to sufficiently vouch the disbursement of the money. To a very large extent the only record of the purpose of the withdrawals is a manuscript note on the

counterfoils of the withdrawal dockets and in some instances, there is not even that. Mr. Chawke's criticism of the record keeping is absolutely justified but he fails to recognise that as joint executor he shares the responsibility to account for the receipts and disbursements. He now protests loudly that there is no sufficient record of where the money went but the fact is that he countersigned all of the withdrawals without ensuring that Ms. Ahern was keeping, or without himself keeping, a proper record and vouching documentation. The last lodgement to that account was a lodgement of €4,558.25 made on 30th October, 2018 and the last transaction was a cash withdrawal of €756.32 made on 20th November, 2018. Since then Mr. Chawke has acted as if he is the sole executor and has paid various sums received for the estate into the client account of Cadogan O'Regan.

14. In an e-mail of 6th February, 2020 to Cunnane & Kiely, Mr. Cadogan wrote "*Our instructions from our client are that we should continue to administer the estate, particularly given your client's breach of the undertaking, which she gave to the High Court over three months ago to furnish all information and documentation within three weeks.*"

15. In the meantime the beneficiaries were becoming frustrated. By special summons issued on 18th April, 2019 Mr. Michael O'Donnell issued proceedings against the executors claiming an order directing the executors, in particular Mr. Chawke, to administer the estate and to "*transfer*" to him the lands at Lower Ballylea and the Kerry Co-Op shares and prize bonds which had been devised to him. That summons was grounded on an affidavit of Michael O'Donnell and was originally returnable before the Master for 21st May, 2019. It appears to have made its way into the probate list without any replying affidavit having been filed. In any event, Mr. Michael O'Donnell, who is a solicitor, deposed to the fact of the will; the specific devise and bequest to him of the lands at Lower Ballylea and the Kerry Co-Op shares; and to his anxiety that the estate be administered. He gave a summary breakdown of the estate as real property valued at €700,000 and bank accounts and prize bonds amounting to €30,000, with debts and liabilities of €10,000, and exhibited the grant of probate which showed a valuation of the net estate at over €1 million. Mr. Michael O'Donnell exhibited a form of assent signed by Ms. Ahern and dated 30th November, 2018 to the vesting in him of the lands in Folio 5217F, County Limerick; a form of transfer to him of 306 ordinary shares in Kerry Co-Operative Creameries Limited and an indemnity for a lost certificate for those shares, signed by Ms. Ahern; and an undated form of transfer and indemnity for a lost certificate for 3,185 shares in Kerry Group plc, signed by Ms. Ahern. According to the notice of motion now before the court, that summons found its way into the probate list for 15th July, 2019 and was adjourned by Jordan J. to 4th November, 2019 when it was adjourned generally by Haughton J.

16. The affidavit grounding the special summons did not disclose the circumstances in which the assent and transfers came to be signed by Ms. Ahern, but the date coincides with the date on which Mr. Cadogan recorded his instruction from Mr. Chawke that she would sign nothing. Apart from the fact that the arithmetic was obviously wrong, those proceedings

failed to engage with two issues which by then must have been obvious. The first issue was whether the bequest to Michael of "*my Kerry Co-Op shares*" carried the shares in Kerry Group plc as well as those in Kerry Co-Operative Creameries Limited, which otherwise would go to Neville as part of the residue. The second issue was that unless, and probably even if, the Kerry Group plc shares were part of the residue, the specific devises and bequests would almost certainly have to abate to pay the costs of the probate action.

17. By the motion now before the court, which was issued on 11th March, 2020, on notice to Mr. Chawke, Ms. Ahern, Mr. Neville O'Donnell and Mr. Ivan O'Donnell, Mr. Michael O'Donnell seeks:-

    (a) An order pursuant to s. 26(2) of the Succession Act, 1965 removing Ms. Ahern and Mr. Chawke as executors;

    (b) An order pursuant to s. 27(4) of the Succession Act, 1965 appointing Mr. James Lucey, solicitor, as administrator with will annexed;

    (c) An order re-entering Mr. Chawke's application to remove Ms. Ahern, which was adjourned generally by Haughton J. on 4th November, 2019;

    (d) An order re-entering Mr. O'Donnell's special summons proceeding against Ms. Ahern and Mr. Chawke, which was adjourned generally by Haughton J. on 4th November, 2019;

    (e) Further and other relief, including costs.

18. The motion is grounded on a short affidavit of Mr. O'Donnell who refers to the Circuit Court action, the previous application by Mr. Chawke to remove Ms. Ahern, and his special summons. Mr. O'Donnell says that it was in the course of those earlier High Court proceedings that the issue of the construction of the gift of the Kerry Co-Op shares arose and he says that the executors have adopted contrary positions on that issue which cannot be reconciled. He recalls that Haughton J. encouraged the parties to discuss the appointment of an independent solicitor as administrator and commented that the entire dispute at that time appeared to relate to the Kerry shares. Mr. O'Donnell exhibited a couple of letters which he says his solicitors wrote to the solicitors for both executors – but he means the solicitors for each of the executors – asking that they would agree to the appointment of Mr. James Lucey, an independent solicitor, who had agreed to act.

19. Mr. Chawke, in response, strenuously opposed his removal; opposed the appointment of an independent solicitor; and supported the application for the re-entry of his motion to have Ms. Ahern removed, suggesting, in the alternative, that the court might invite the parties to mediate. He acknowledged that there had been delay in the administration and laid the blame for this at the door of Ms. Ahern. Mr. Chawke set out the history of his application to have Ms. Ahern removed and heaped criticism on her for her failure to provide a full reconciliation of the Bank of Ireland account. He exhibited the counterfoils

of the withdrawal dockets and criticised the absence of supporting documentation and such reconciliation as had by then been provided by Ms. Ahern. Mr. Chawke declared that he was unsettled by the fact that so many of the withdrawals were in cash and professed that he did not understand why suppliers could not have been paid by cheque. He did not make clear that he had countersigned all of the withdrawals. Nor that he say that he had ever previously expressed his disquiet or that he had ever proposed that the suppliers would be paid by cheque. Mr. Chawke deposed that he had never expressed a view on the Kerry shares issue and expressed concern as to how Mr. Michael O'Donnell had had Ms. Ahern sign the form of assent and the share transfers given the financial position of the estate.

20. As I have said, the motion was on notice inter alia to Mr. Ivan O'Donnell. Mr. Ivan O'Donnell wrote a letter to Mr. Michael O'Donnell's solicitor on 27th May, 2020 supporting the application for the appointment of an independent solicitor to finalise the estate. In that letter it was suggested that Mr. Chawke had cattle on the lands and had taken the use of the sheds in cahoots with Mr. Neville O'Donnell.

21. Mr. Neville O'Donnell supported the removal of Ms. Ahern but opposed the removal of Mr. Chawke. He deposed that he had instructed his solicitors to apply to the High Court for an order joining him as a party to the special summons proceedings and exhibited a draft notice of motion and grounding affidavit. Mr. Neville O'Donnell deposed to his grave concern that Mr. Michael O'Donnell had endeavoured to have the Kerry shares transferred to him.

22. Ms. Ahern's initial response to the application was to sign a form of authority dated 29th April, 2020 by which she indicated that she had no objection to the appointment of Mr. Lucey provided her costs were paid from the estate. In an affidavit filed on 12th June, 2020 Ms. Ahern averred that her health had sufficiently recovered that she could continue to act as executor and that she was willing to do so, or she was willing to step aside provided an independent administrator was appointed. She acknowledged that the impasse between her and Mr. Chawke was such that it was impossible to administer the estate. Ms. Ahern suggested that Mr. Cadogan was biased in favour of Mr. Neville O'Donnell and emphasised that the correspondence showed that Mr. Cadogan was Mr. Chawke's solicitor and not the estate solicitor. She swore that she never signed any document authorising Mr. Cadogan to act in the administration of the estate.

23. Ms. Ahern swore that Mr. Cadogan had prepared and sent to her for signature an amended inland revenue affidavit that would have shown all of the Kerry shares passing to Neville O'Donnell, which is what she said Mr. Chawke wanted. In addition, Ms. Ahern said that she did not want to sign an affidavit which would have shown a liability on the part of the estate for €40,000 for a shed which had been erected after the date of the deceased's death.

24. As to the Bank of Ireland account, Ms. Ahern deposed that soon after the deceased's death an executors' account was opened at AIB, Rathkeale, through Casey & Company, solicitors, but that it was later agreed that an account would be opened at Bank of

Ireland, Rathkeale, instead. This, she said, was agreed by everyone and the account was opened in the presence of Mr. Chawke, Mr. Ivan O'Donnell and Mr. Neville O'Donnell. Ms. Ahern deposed that on an unspecified date while the account was with AIB, €12,500 was paid in cash to Mr. Chawke for cattle which he sold to the estate, and later, on 7th July, 2014 a sum of €10,000 was withdrawn in cash from the account and paid to Mr. Chawke for heifers which he had sold to the estate. She said that receipts had been requested for these sums – she did not say when or by whom – but that they had never been supplied. Ms. Ahern declared herself to be bemused by Mr. Chawke's evidence that he found it unsettling that so many of the withdrawals were in cash. Various other sums, she said, had been given in cash to Mr. Neville O'Donnell for various purposes. Ms. Ahern emphasised that all of the cash withdrawals were agreed with Mr. Chawke and that he knew all about them. She added that it was her belief that the deceased had wanted Michael O'Donnell to have all of his Kerry shares, and not just the Kerry Co-Op shares. Ms. Ahern deposed that at the time she transferred or assented to the vesting in Mr. Michael O'Donnell of the lands which were devised to him, she also assented to the vesting in Mr. Ivan O'Donnell of the lands which he was to have, and offered to vest in Mr. Neville O'Donnell the lands which he was to have but that he said that he wished to defer the formal transfer. More or less as an afterthought, Ms. Ahern swore that the cattle and heifers sold to the estate by Mr. Chawke for €12,500 and €10,000 and had later been sold by Mr. Neville O'Donnell who had not accounted for the proceeds, and that Mr. Neville O'Donnell had failed to remit to the estate a sum of €1,965.34 received for other cattle belonging to the estate. That, she says, is a matter of great concern for her but she does not say that she ever previously expressed any such concern – whether to Mr. Chawke or to anyone else – or that she ever did or tried to do anything about it.

25. This motion first came into the list on 11th May, 2020 when I gave directions for the filing of affidavits. Ms. Ahern's affidavit was sworn on 12th June, 2020.

26. On 9th July, 2020 Mr. Chawke swore a supplemental affidavit. He continued to protest Ms. Ahern's refusal to explain the Bank of Ireland transactions but disavowed any imputation of any wrongdoing on his part. Mr. Chawke's concern with Ms. Ahern's conduct, he said, was the requirement that she should make an account; the fact that she had completed certain assents; and – for the first time – her refusal to give any instructions in respect of the taxation of the costs of the probate action. Mr. Chawke retraced the well-trodden ground of Jordan J.'s direction and the undertaking to Haughton J. and the delay in providing information and the hole in the estate caused by the costs of the probate action. In response to Ms. Ahern's evidence that she had never engaged Cadogan O'Regan to act for the estate, Mr. Chawke averred that "*the reality was different*" . He and Ms. Ahern, he said, had asked a number of solicitors to act and for various – unspecified – reasons they had refused. The fees proposed by Cadogan O'Regan, he said, were not materially different to what had been quoted by other firms. I pause here to express my puzzlement that solicitors who had refused to act might have given fee quotes.

27. In his supplemental affidavit Mr. Chawke accepted that he did sell cattle to the estate and that "*maybe*" he should not have done do. There is no maybe about it. An executor is a fiduciary and must not profit from his office. Mr. Chawke has averred that the transactions were at arm's length and good business for the estate. I cannot see how they could have been. There was no suggestion that the cattle were independently valued. Mr. Chawke has averred that he was never been asked for a receipt and would have no problem providing one if required. Being as charitable as I can, this rings hollow coming from a man who has been chasing Ms. Ahern for vouchers. All that Ms. Ahern had to say about countersigned withdrawals, undocumented cash sales of cattle, and the attempt to enhance the lands devised to Neville by erecting a shed at the expense of the estate was uncontested. Mr. Chawke swore that he knew nothing of the sales of cattle by Neville, save a number of sales in November, 2019, the proceeds of which were lodged to the client account of Cadogan O'Regan.

28. On 12th June, 2020 Mr. Bernard Cunnane, solicitor, swore an affidavit on behalf of his client Ms. Ahern in which he deposed that he had had no reply to his correspondence to Cadogan O'Regan proposing that the administration should be completed by an independent solicitor.

29. It will be recalled that the evidence of Mr. Chawke on his motion to remove Ms. Ahern was that Ms. Ahern had "*gathered one or two small assets and paid some bills*". The account directed by Jordan J. on 15th July, 2019 and which Ms. Ahern undertook to Haughton J. would be provided within three weeks of 4th November, 2019 was eventually provided on 24th July, 2020 in the form of an Excel spreadsheet made up from the Bank of Ireland bank statements showing receipts and expenditure and a short narrative explanation for most of the transactions on the account. This spreadsheet shows that between 11th November, 2014 and 20th November, 2018 there were 213 transactions on the account. A total of €215,072.44 was paid into the account, and a total of €183,647.84 paid out. It shows, in addition to the purchases of cattle for €12,500 and €10,000 which predated the opening of the Bank of Ireland account, a payment by draft to Mr. Chawke on 20th May, 2015, for heifers, of €6,002.40, and a cash "*Payment to Neville*" on 23rd April, 2018 of €4,900.

30. Having done as much as I could to get the long overdue account I heard the motion on 27th July, 2020. One of the issues then discussed was whether there was any substance to the allegation in Mr. Ivan O'Donnell's letter of 20th May, 2020 that Mr. Chawke had cattle on the land. Counsel for Mr. Chawke indicated that he did not. Having heard counsel for Michael, who urged that the executors should be replaced by an independent solicitor; Mr. Chawke, who supported the removal of Ms. Ahern but was determined to continue as executor; Ms. Ahern, who was willing to withdraw if, but only if, Mr. Cadogan was not to be instructed in the administration; and Neville, who supported Mr. Chawke, I reserved my judgment.

31. On 17th August, 2020 a motion was issued on behalf of Michael for an order giving him liberty to file a further affidavit with a view to clarifying a matter of fact that had arisen at

the hearing, specifically whether Mr. Chawke had cattle on the land. In an affidavit sworn on 30th July, 2020 Mr. Michael O'Donnell deposed that he had visited the land on 27th July, 2020 where he had found upwards of 50 cattle which, he said, were the property of Mr. Chawke, they bearing tags referable to his, Mr. Chawke's, herd number. Mr. O'Donnell exhibited a long distance photograph of some cattle, two photographs of tags, and a two page extract from a Department of Agriculture record.

32. Mr. Chawke swore an affidavit in reply on 22nd October, 2020. Mr. Chawke made the point firstly, that the photographs of two ear-tags with herd numbers linked to him did not support the averment that he had fifty cattle on the land. More to the point, Mr. Chawke exhibited the entirety of the Department of Agriculture record. From this, but not from the two pages exhibited by Mr. Michael O'Donnell, it can be seen that the two pages exhibited by Mr. Michael O'Donnell are pages 4 of 5 and 5 of 5 of a Department of Agriculture record of cattle registered in the name of Conor O'Donnell. Mr. Chawke acknowledged that the tags which had been photographed bore his herd number and explained that they were yearling dry stock that had been born on his farm and later, at the request of Neville, swapped for dairy cattle from the herd in the deceased's name. This, he said, was done without money changing hands to protect the single farm payment to the estate and – because Neville does not have time to deal with dairy cattle – to ensure the welfare of the animals.

33. When the motion for leave to file the supplemental affidavit came on for hearing, counsel for Michael acknowledged that what had been deposed to in his affidavit of 30th July, 2020 was wrong. The cattle which Mr. O'Donnell saw on the land on 27th July, 2020 were not Mr. Chawke's cattle, and the records clearly showed that they were registered in the herd in the deceased's name. However, it was said, Mr. Chawke's replying affidavit opened another can of worms: not only was Mr. Chawke selling cattle to the estate but he was swapping in and out without the concurrence of his co-executor and without valuations.

34. Counsel for Mr. Chawke protested that the case had concluded in July and that the accusation that the accusation that Mr. Chawke had cattle on the land had been made recklessly, without evidence, and in the teeth of what the Department of Agriculture records which Mr. Michael O'Donnell, who is a solicitor in practice in Rathkeale, must have understood. The fact that cattle had been swapped, it was said, was evident from the records available to Mr. O'Donnell before the motion was heard in July. The applicant's attempt to adduce additional and plainly wrong evidence was said to underline the argument previously made that a probate motion was not the appropriate procedure for the removal of an executor. Counsel expressed concern that the suggestion that the court had been misled reflected on the lawyers as well as on Mr. Chawke.

35. Ms. Ahern was neutral as to the admission of additional evidence. Mr. Neville O'Donnell was steadfast in his support for Mr. Chawke.

36. In the end, the question of whether the court should permit Mr. Michael O'Donnell to adduce additional evidence rather evaporated. The issue to which the affidavit of Mr.

O'Donnell of 30th July, 2020 was directed was whether Mr. Chawke had cattle on the land. The complete Department of Agriculture record, which Mr. O'Donnell had, clearly showed that the cattle which had previously belonged to Mr. Chawke were registered in the name of the deceased and that was acknowledged. However, I cannot ignore the additional evidence tendered by Mr. Chawke that besides selling he was swapping cattle with the estate. That said, the outcome of the motion does not turn on that evidence.

37. As to whether Mr. Chawke should be removed as executor, counsel makes a procedural point. I will not dwell too long on it. While it was submitted that the appropriate procedure was a special summons rather than a motion in the non-contentious probate list, no authority was cited. The report of *Dunne v. Heffernan* [1997] 3 I.R. 431 shows that that was the procedure adopted in that case, but the judgment focusses on the substance of the application. In *Estate of Horan, deceased* [2020] IEHC 21 McDonald J. observed that an application under s. 27(4) of the Succession Act, 1965 is not among the reliefs identified in O. 3 of the Rules of the Superior Courts. Neither is an application pursuant to section 26(2). As McDonald J. noted in *Horan*, Keating in *Probate Motions & Actions Relating to Wills and Intestacies* (2017) (Round Hall) suggests that the appropriate procedure for the removal and replacement of an executor or administrator is by motion on notice.

38. Procedural niceties apart, Mr. Chawke supports Mr. O'Donnell's application, by notice of motion, for the removal of Ms. Ahern and, it will be recalled, he adopted the same procedure when, on 26th February, 2019, he applied for an order removing Ms. Ahern, and he now supports the application by Mr. O'Donnell to re-enter that application.

39. As was explained by Baker J. in *Re Estate of Charles Gillespie* [2015] 3 I.R. 46, the starting point for the purposes of identifying those disputes which are suitable for the so-called non-contentious probate list is to determine whether the issue is one which may be resolved on affidavit. There is not, in this case, any suggestion that there is any issue of disputed fact that needs to be resolved. It is not argued that the application should be sent for plenary hearing but rather that, by reason of the procedure invoked, the court should not entertain the application as far as Mr. Chawke is concerned but should make the order as far as Ms. Ahern is concerned. The objection is purely technical. To strike out the motion would achieve nothing apart from wasted time and costs. I am not persuaded that there has been any non-compliance with the rules. If I had been, I would have used my discretion under O. 124 to deal with the substance of the application.

40. The applicant seeks firstly an order pursuant to s. 26 of the Succession Act, 1965 revoking the grant to Ms. Ahern and Mr Chawke and secondly, an order pursuant to s. 27(4) appointing Mr. Lucey. In the course of argument there was some discussion as to the applicable principles of law, specifically whether a different approach should be taken to the application to appoint Mr. Lucey than to the application to revoke the grant.

41. The principles to be applied in deciding an application under s. 26(2) are to be found in the judgment of the Supreme Court in *Dunne v. Heffernan* [1997] 3 I.R. 431. At pp. 442 to 444 of the report Lynch J. (with whom the other members of the court agreed) said:-

"An order removing the defendant as executrix (which would be made by virtue of s. 26, sub-s. 2 and not s. 27, sub-s. 4 of the Succession Act, 1965) and appointing some other person as administrator with the will annexed by virtue of s. 27, sub-s. 4, is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded from what he considered his legitimate concerns. It would require serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step. …

When read in the light of its own facts the decision in Re Martin Glynn deceased has no relevance to this case. When an executor is appointed and proves the will and thus accepts a duty of administering the testator's estate he or she can be removed, not pursuant to s. 27, sub-s. 4, but pursuant to s. 26, sub-s. 2 of the Act of 1965, but there must be serious grounds for overruling the wishes of the testator. If such an order is made then of course s. 27, sub-s. 4 enables the court to appoint another person as administrator with will annexed.

Where the person nominated as executor renounces, or where no executor is appointed, or on any intestacy, the right to administration is determined by the Rules of the Superior Courts in O. 79, rule 5. In such a case, the person entitled to the grant of administration may be passed over more readily and someone else appointed pursuant to s. 27, sub-s. 4 than when an executor is appointed and accepts the appointment by proving the will when weighty reasons must be established before the grant of probate would be revoked and cancelled pursuant to s. 26, sub-s. 2 and the testator's chosen representative thereby removed, and someone else not chosen by the testator appointed pursuant to s. 27, sub-s. 4 of the Act of 1965."

42. In *Estate of Horan, deceased* [2020] IEHC 21 McDonald J., citing the judgment of Baker J. in *Estate of O'Callaghan, deceased* [2016] IEHC 668, said that the test laid down by the Supreme Court in Dunne v. Heffernan is not applicable to an application under s. 27(4) but it is I do not understand either case to be authority for the proposition that in the case of joint executors the court should sequentially apply different tests, first to so much of the application as seeks the revocation of the grant, and then to so much of the application as seeks the appointment of a substitute.

43. It is essential to recognise that *Estate of Horan, deceased, Estate of O'Callaghan, deceased* and the later judgment of Baker J. in *Re Estate of Hannon* [2018] 3 I.R. 402 were all cases in which the court was asked to pass over persons who would otherwise be entitled to representation but who had not extracted a grant.

44. I will come to the question of misconduct, but it appears to be accepted on all sides that there are, in this case, sufficiently serious special circumstances as to necessitate the revocation of the grant. Since very soon after the grant of probate was issued the executors have been at loggerheads, at least as to the engagement of a solicitor. They are agreed that it will be necessary to appoint a solicitor but cannot agree on the question of who that is to be. Ms. Ahern has set her face against Mr. Cadogan. She has

suggested a number of possible alternatives but Mr. Chawke is resolute that it must be Mr. Cadogan. Mr. Chawke declares himself to be determined to complete the task which the deceased asked of him and which he undertook by proving the will and extracting the grant of probate. Ms. Ahern declares herself to be willing and able, if needs be, to complete the administration but only if that is the price of displacing Mr. Cadogan. The only means of breaking the impasse is to make an order revoking and cancelling the grant of probate issued on 7th March, 2018.

45. As to the appointment of an alternative, it seems to me that the court in the exercise of its discretion must take into account and accord appropriate weight to the fact that both executors were chosen by the testator. If either had been unable or unwilling to act, the other would have been entitled to act by himself or herself. Both accepted the office and proved the will. The scheme of the legislation is that the grant issued to them jointly must be revoked and cancelled but it seems to me that in principle I must approach the question of replacement as if either could have been removed and the other permitted to continue to act. On that basis, I approach the question of replacement by assessing whether there has been serious misconduct, by either or both, or there are serious special circumstances or weighty reasons which would justify the appointment of someone other than one or the other.

46. In the immediate aftermath of the deceased's death the executors acted perfectly properly. They might have applied to have the caveat removed and forced the caveators to challenge the will, but they were entitled, as they did, to bring an action to prove it in solemn form of law. They might have applied for a grant of administration *pendente lite*, but they are not to be faulted for taking steps to collect and preserve the estate, including opening a bank account. What happened thereafter cannot be stood over. Ms. Ahern and Mr. Chawke, as joint executors, had a joint obligation to ensure that proper records were kept of receipts and expenditure. This they abjectly failed to do. Years later Mr. Chawke sought to blame Ms. Ahern for the absence of a vouched account but it is quite clear that he not only abdicated his own responsibility but was party to multiple significant cash dealings. The picture painted by his affidavit filed in support of his motion of 26th February, 2019 was misleading as to the number and extent of transactions and his knowledge of them.

47. Mr. Chawke, as a fiduciary, ought not to have sold or swapped cattle with the estate. He was on both sides of these transactions. There is no record by reference to which these dealings might now be examined. Ms. Ahern ought not to have facilitated his self-dealing, but the primary responsibility is his.

48. The evidence is that soon before or immediately after the grant of probate issued on 7th March, 2018 the executors' previous solicitors declined to act further for them. Mr. Chawke has averred and Ms. Ahern has not disputed that on 16th April, 2018 they both signed an authority for the transfer of the files, title deeds and any money to Cadogan O'Regan. There is an issue on the affidavits which the court is unable to resolve without oral evidence or cross-examination as to whether the executors agreed before the form of

authority was signed that Cadogan O'Regan would act, but it is common case that Cadogan O'Regan could not act without the form of Client Authority Agreement which was sent to both under cover of a letter of 25th May, 2018 and later signed by one but not the other.

49. The evidence is unclear as to precisely when Ms. Ahern decided that she did not want Cadogan O'Regan to act and precisely when she gave her reasons, but she took the position which she did soon enough after she was asked to sign the necessary form of agreement and – since the execution of the agreement as a prerequisite to the authority of the solicitors to act on behalf of the estate – before Cadogan O'Regan could do any work on behalf of the estate. In my view, if Mr. Chawke did not agree with the reasons, if any, given by Ms. Ahern why she did not want Cadogan O'Regan to act, or if Ms. Ahern did not clearly articulate her reasons and Mr. Chawke was irritated or frustrated by any change of mind, the interests of the beneficiaries plainly required that some other solicitor should be identified and agreed on. If Ms. Ahern changed her mind and there was no good reason why Cadogan O'Regan should not act, Mr. Chawke was not entitled to insist that no one other than Cadogan O'Regan should act. From no later than Mr. Cadogan's letter of 30th November, 2018 it was apparent that Mr. Cadogan was aligned to Mr. Chawke and that the administration was stalled.

50. The explanation for Ms. Ahern's objection to Cadogan O'Regan first emerged in the evidence in her affidavit of 12th June, 2020. It was that the corrective inland revenue affidavit prepared by Mr. Cadogan and sent to her on 25th May, 2018 suggested that the Kerry shares would go to Mr. Neville O'Donnell and that the estate should bear the cost of the €40,000 shed erected after the death of the deceased on the lands which had been specifically devised to Neville. If Ms. Ahern did not at that time clearly express her concern, the issues ought to have been recognised before the corrective affidavit was drafted and discussed with Ms. Ahern before she was asked to sign the affidavit.

51. Ms. Ahern's declared objection to Mr. Cadogan was that he appeared to be biased in favour of Neville. I am not prepared to say that Mr. Cadogan was biased in favour of Neville but I am satisfied that when Ms. Ahern was presented with a draft inland revenue affidavit which would have shown the Kerry shares devolving to Neville, and that the estate would be charged with the €40,000 cost of erecting sheds on the lands which had been devised to Neville, she was entitled to take that view. However, if Ms. Ahern was entitled to perceive a mote in Mr. Cadogan's eye, she failed to see the beam in her own. While refusing to sign anything for Mr. Cadogan she signed a form of assent and transfers for Michael and so demonstrated that she was biased in favour of Michael. Moreover, she failed to recognise – or if she did, she ignored – the fact that burden on the estate of the costs of the probate action meant that there would have to be abatement.

52. In deciding whether a new grant of probate ought to be given to Mr. Chawke, I apply the test laid down by *Dunne v. Heffernan.* Mr. Chawke was chosen by the deceased and there must be serious grounds for overruling his wishes. In my view, Mr. Chawke's dogged determination that Mr. Cadogan and no one else would be instructed to act in the

administration, by itself, would have amounted to sufficiently serious circumstances to have justified the appointment of someone else. I do not equate obduracy with misconduct but the net practical effect of that alone has been that the administration has been delayed by more than two and a half years. If Mr. Chawke took the view that Ms. Ahern's refusal to sign the form of Client Authority Agreement was inconsistent with the fact that she had only a week or so earlier signed a form of authority for the release of the files, he ought not to have matched any obduracy on her part with his own, to the detriment of the due administration of the estate and ultimately of the beneficiaries.

53. Precisely what will amount to serious misconduct or will constitute serious special circumstances such as will warrant the removal of an executor, or a joint executor, is, of course, a matter for the court but it is interesting to contemplate briefly Mr. Chawke's declared position. As witness his motion of 26th February, 2019 Mr. Chawke's position is that the removal of his joint executor was warranted by the delay in the progress of the administration; the operation of a bank account by one joint executor to the exclusion of the other; and the absence of proper records. To these grounds, Mr. Chawke's supplemental affidavit of 9th July, 2020 added the ground that his co-executor had failed to agree to the appointment of a solicitor to act on behalf of the estate. The detailed picture that emerged following the exchange of affidavits on this application was rather different, but the outline was similar. There was in this case a continuing delay in the progress of the administration but responsibility for the delay was not the sole responsibility of Ms. Ahern but was at best shared equally. There was an account maintained by one executor to the exclusion of the other, but it was not the joint Bank of Ireland account – of which, and of the transactions on which, Mr. Chawke was well aware – but an account under the sole control of Mr. Chawke with Cadogan O'Regan. There was a dearth of records, but Mr. Chawke was not only equally responsible for the absence of proper records of transactions with third parties but had contributed to it in his own dealings with the estate. There was no solicitor appointed, but the reason for this was Mr. Chawke's refusal to countenance the appointment of anyone other than Mr. Cadogan.

54. I am satisfied that the impasse between the executors and the failure to progress the administration, by itself, amounts to sufficient special circumstances to require the making of an order pursuant to s. 26(2) recalling the grant.

55. It is clear that Ms. Ahern has no real enthusiasm to act as executrix but was hanging on with the sole object of ensuring that Mr. Cadogan would not be engaged to act in the administration. That apart, I am satisfied that Ms. Ahern's part in the failure to keep proper records; her part in the conduct of the estate's business in large bundles of cash; her acquiescence in Mr. Chawke's self-dealing; and the execution by her of the deed of assent and the forms of transfer and indemnity in respect of the Kerry shares was serious misconduct which would have warranted her removal, and which excludes her from consideration for appointment as sole executrix.

56. While Mr. Chawke is enthusiastic to complete – or in truth, to start – the administration, I am satisfied that his part in the failure to keep proper records; his part in the conduct of

the estate's business in large bundles of cash; and his self-dealing with the assets of the estate, which was compounded by the fact that it was undocumented and in cash, was serious misconduct which would have warranted his removal and which excludes him from consideration for appointment as sole executrix. To these grounds I add his obduracy in insisting that no one other than Mr. Cadogan could be engaged as solicitor which has stalled the administration of the deceased's estate to the detriment of the beneficiaries since the grant was issued on 7th March, 2018. The proposed charge on the estate for the €40,000 cost of erecting the shed after the deceased's death on the lands which had been specifically devised to Neville was plainly irregular. The evidence as to who was responsible for listing that cost as a liability of the estate is not clear but having regard to the conclusions to which I have come on the other issues it would not be useful to call for the detailed explanation that otherwise would be required.

57. On Mr. Michael O'Donnell's motion issued on 11th March, 2020 there will be an order pursuant to s. 26(2) of the Succession Act, 1965 revoking the grant of probate issued on 7th March, 2018 to Ms. Ahern and Mr. Chawke, and an order pursuant to s. 27(4) of the Succession Act, 1965 giving liberty to Mr. James Lucey, solicitor, to apply for a grant of letters of administration with will annexed.

58. I will hear the parties on 21st December, 2020 on the costs of that motion.

59. Provisionally, it does not appear likely that Ms. Ahern's hope or expectation expressed in the form of authority which she signed on 29th April, 2020 that her costs might be paid from the estate will be realised. Nor does it appear likely that the estate will be burdened with the costs of Mr. Neville O'Donnell, who supported Mr. Chawke's position. Mr. Michael O'Donnell has succeeded in his application, but it seems to me that in the proper exercise of my discretion I may need to take into account the deed of assent and transfers and indemnities of the Kerry shares, which I have found Ms. Ahern ought not to have signed.

60. Mr. Chawke's motion issued on 26th February, 2019 to remove Ms. Ahern, which was adjourned generally by Haughton J. on 4th November, 2019 will be re-entered for 21st December, 2020 for final disposal. That motion is spent, save as to the question of costs.

61. Mr. Michael O'Donnell's special summons proceeding against Ms. Ahern and Mr. Chawke, which was adjourned generally by Haughton J. on 4th November, 2019 will be re-entered for 21st December, 2020. Those proceedings, too, if they were not misconceived in the first place, appear to me to be spent: but, of course, I will hear counsel.