**Neutral Citation No. [2015] NICA 13** | *Ref:* **MOR9595**

*Judgment: approved by the Court for handing down* | *Delivered:* **26/03/2015**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**FLEET COOKE**

**Appellant;**

**-and-**

**KENNETH COOKE AND MALCOLM COOKE**

**Respondents.**

**MALCOLM COOKE**

**Respondent;**

**-and-**

**FLEET COOKE**

**Appellant.**

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**Before: Morgan LCJ, Coghlin LJ and Gillen LJ**

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**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal from two Orders of Deeny J made on 30 May 2014 in which he refused the application of Fleet Cooke (the appellant) to be reappointed as an executor of the estate of his mother, E V Conway, and acceded to the application of his brother Malcolm Douglas Cooke (the second respondent) to appoint the Official Solicitor as administrator of the said estate. Mr Fleet Cooke appeared on his own behalf and Mr Orr QC led Mr Neeson for Kenneth Cooke and Malcolm Douglas Cooke (the respondents).

**Background**

[2] Emily Conway, the mother of the appellant and respondents, died on 24 May 2008. By virtue of a will dated 4 October 1995 the appellant and the respondent Malcolm Cooke were both named as executors of her estate. It would appear, however, that at some stage Malcolm Cooke removed himself as executor.

[3] The appellant enjoyed a close relationship with his mother and in her later years she lived with him in Cambridge. He held a power of attorney in her name. He had moved to England in the 1970s and before that had conducted an agricultural contracting business at the family home which included quarry lands. On his departure his brothers took over the conduct of the business which it appears has been very successful.

[4] The appellant maintained that when he moved to England he left the business to his brothers on the basis that they would take all necessary steps to look after their mother. In extensive written submissions in this appeal he contended that the brothers were guilty of mental cruelty to their mother. His submissions stated that his mother had developed glaucoma and become blind because of stress and that one of the brothers had used radiation to attack his mother's brain in an attempt to end her life. In addition it was claimed that the brothers had left their mother malnourished and isolated. There was no medical evidence to support these assertions which were denied by the other brothers.

[5] These differences led to the issue of a number of proceedings. On 15 September 2009 the present appellant issued a Writ of Summons against the respondents, alleging breach of trust and loss of earnings regarding businesses which he claimed he had agreed to give to his brothers on condition they looked after their frail mother. Following various interlocutory applications, on 16 January 2013 the proceedings were struck out by Deeny J under Order 18 Rule 19(1)(a) of the RCJ as disclosing no reasonable cause of action. That decision was affirmed by the Court of Appeal on 17 September 2013.

[6] On 7 June 2010 Rachel Cooke, the appellant's daughter, had a Writ of Summons issued challenging the validity of the will on the grounds that the testator lacked testamentary capacity for many years before, during, and after the making of

the will. As the executor, the appellant was named as the defendant to those proceedings. There is medical evidence to indicate that Rachel suffered from significant addiction problems and continued with treatment in respect of those issues.

[7] It was suggested by the respondents that the appellant was promoting his daughter's claim, although he denied this. On 17 March 2011, however, due to his daughter's ill health, the appellant was appointed as her Power of Attorney limited to taking over completely in every aspect the challenge to the validity of the deceased's will. By virtue of this appointment, and the conflict of interest which it created for the appellant, on 17 May 2012 Deeny J ordered that the appellant:

> "hereby renounces his executorship of the will of his late mother Emily Conway but without prejudice to his right to apply to be re-appointed executor if the Court holds that the will is valid".

The appellant was joined as a co-Plaintiff to the proceedings and it was ordered that the present respondents were at liberty to defend the proceedings as interested parties.

[8] On 19 June 2012, during the substantive hearing of the claim, the Court was advised that a settlement had been reached by which the land was to be divided between the parties. The terms of the settlement, which were made a Tomlin Order of the Court by consent, provided for full and final settlement of all claims except the appellant's breach of trust claim against his brothers which was a separate claim dealt with as set out at paragraph 5 above.

[9] On 21 November 2012 the appellant made an application in the Chancery Division seeking to stay the execution of the June 2012 settlement claiming he had only entered into the settlement because he had been assaulted by the respondent's legal representative. This application was refused by Deeny J on 22 November 2012. Sometime after this the appellant made an application to the Court of Appeal for an extension of time in which to appeal the consent order made on 19 November 2012. This application was refused by the Court of Appeal on 3 March 2014.

**The present proceedings**

[10] By a summons dated 27 September 2013 the appellant sought to be re-instated as the executor of the deceased's will. By originating summons dated 5 November 2013 the respondent Malcolm Cooke sought to have the Official Solicitor or such other person as the Court thought fit appointed to administer the deceased's estate, under Article 5(1)(d) of the Administration of Estates (NI) Order 1979, in the terms of the settlement of 19 June 2012.

[11] The learned judge noted that both the appellant and Malcolm Cooke had been executors of the deceased's will but both had removed themselves from those positions with the result that there was no longer any executor to administer the deceased's estate. He further noted that the issue was now the administration of the deceased's estate in accordance with the terms of the settlement of 19 June 2012, a settlement from which the appellant had since attempted to resile and, indeed, attempted to get both the High Court and Court of Appeal to set aside. The learned judge considered it would be inappropriate to re-instate the appellant as the executor given that he lives in England, he is far from neutral and is reluctant to implement the settlement agreement which is now binding in law. Having satisfied himself that the Court had a wide discretion under Article 5 of the 1979 Order in relation to appointing a person to administer the estate, the learned judge considered that a neutral person would be most appropriate given the appellant's ongoing hostility towards the settlement. This meant that Malcolm Cooke would not be an appropriate person either and, therefore, the learned judge deemed it appropriate to appoint the Official Solicitor. He further ordered that the costs be paid out of the estate.

[12] Although the appellant's written submissions set out in considerable detail the allegations of wrong doing summarised in paragraph 4 above, in his oral submissions the appellant submitted that he could be relied upon to administer his mother's estate in accordance with law. He explained that he had not sought to take advantage of the power of attorney he held in relation to his mother to disadvantage his brothers despite the differences between them. It had been his mother's wish that he should be her executor and he wished to fulfil that responsibility.

**Consideration**

[13] Article 5 of the Administration of Estates (NI) Order 1979 provides:

> "(1) Where-
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> (a) a person has died, and
> (b) by reason of any circumstances it appears to the High Court necessary or expedient to appoint an administrator under this Article,
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> the High Court may grant administration of the deceased person's estate, appointing as administrator such person as the High Court in its discretion thinks fit.
>
> (2) Administration under this Article-

(a) may be granted whether the deceased person died before or after the end of the year 1955;

(b) may be limited as the High Court thinks fit.

(3) On administration being granted under this Article no person shall be or become entitled to administer the estate of the deceased person by virtue of the chain of representation."

[14] The overriding basis for the decision of the learned trial judge to appoint the Official Solicitor as the administrator of the estate of Emily Conway was the concern that the appellant would not implement the administration in accordance with the terms of the settlement but would continue to frustrate that administration. There is considerable evidence to support that conclusion. On 7 June 2010 the appellant's daughter, Rachel, instituted proceedings challenging the testamentary capacity of the deceased naming the appellant, who was then an executor, as a defendant. Because of medical issues the appellant accepted the appointment of a Power of Attorney for his daughter in order to challenge the will. He elected, however, to remain as the executor of the will which he was then challenging. Despite this obvious conflict he did not renounce his executorship until 17 May 2012 when he became a co-plaintiff with his daughter.

[15] There is no record of the revocation of the Power of Attorney but correspondence from Rachel Cooke dated 20 February 2015 indicates that she believed it had been revoked in 2012 because by that stage her father was in a position to challenge the will himself. There is every reason to believe that he intends to continue on that course. The appellant's submissions in this case continue to show a deep hostility to his brothers and give no indication that he has now accepted the outcome of the litigation which was settled on 19 June 2012.

[16] There is an overwhelming case that if the appellant was appointed as administrator of the estate that he would seek to re-litigate issues which have been determined against him thereby increasing cost and incurring delay in the administration of the estate. It is apparent from the extensive litigation which has already taken place that an independent person is required to administer the estate and the Official Solicitor is clearly such a person.

**Conclusion**

[17] For the reasons given we consider that there is no merit in the appellant's submissions and we dismiss the appeals.