Neutral Citation no. [2003] NIFam 4 | *Ref:* **GIRF3877**

Judgment: approved by the Court for handing down | *Delivered:* **26/02/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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PROBATE AND MATRIMONAL OFFICE

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IN THE ESTATE OF NORMAN EDWARD THOMPSON DECEASED

2002 No. 1

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BETWEEN:

DAVID ROBERT THOMPSON
AND
PETER JOHN THOMPSON

Plaintiffs;

-and-

JEANNIE THOMPSON
AND
ANNIE E WATTON

Defendants.

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GIRVAN J

[1] Following the main judgment in this action the question of costs now arises for determination. While costs in probate actions are as in all cases at the discretion of the court the general rule is that costs follow the event. In special circumstances the general rule is departed from. There are authorities

which establish that if the litigation has been caused by the conduct of the testator costs of unsuccessful parties may be ordered out of the estate. Examples of such a case are where owing to the confusion in which the papers were left it was doubtful whether the deceased intended entirely to revoke an earlier will or where it was doubtful whether an apparently duly executed document was intended to be testamentary. The authorities are myriad and do not speak with the one voice. In Wilson v Bassil [1903] P 239 the defendant had challenged a will and pleaded undue influence in a case which excited the suspicion of the court. Walton J considered that the defendant was justified in pleading undue influence. Walton J stated that where the acts surrounding the making of a will bring the case within the principles laid down in Brown v Fisher (1890) 63 LT 465 Fulton v Andrew (1875) LR 7 HL 448 and Tyrrell v Painton [1894] P 151 and impose upon the party propounding the will not merely the onus of proving due execution and testamentary capacity but the additional burden of removing the suspicion attaching to the making of the will a person opposing it is prima facie justified in pleading undue influence and fraud and though unsuccessful ought not to be condemned in costs unless the circumstances of the case be such as to render it unreasonable for him to raise such issues. Where a defendant put forward these pleas and failed the court ordered that the costs of the defendant as between party and party be allowed out of the estate after the plaintiff who had succeeded in discharging the additional onus of proof cast upon her in the case should have first taken her costs as between solicitor and client out of the estate. A different approach was taken by Sir Gorrell Barnes P in Spiers v English [1907] P 122. He stated that the two main principles which should guide the court in determining that costs in an appropriate suit are not to follow the event are firstly where the testator or those interested in the residue had been the cause of the litigation and secondly, if the circumstances lead reasonably to the investigation in regard to a propounded document. In the latter case the costs may be left to be borne by those who incurred them. In the former the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate. Neither of those principles are exhaustive and neither justifies a plea of undue influence unless there were reasonable grounds for putting it forward. In that case the court came to the conclusion that the plaintiff had not shown grounds on which the plaintiff's costs should be paid out of the estate or to interfere with the ordinary rule that costs follow the event.

[2] A plea of undue influence is a serious plea to make. When it is made the party accused of undue influence will no doubt feel that his reputation is at stake and that it is a serious matter for him to be found guilty of the charge. Where such an allegation is made and persisted in throughout the trial the trial may become lengthy and embittered as happened in this case.

[3] While I did conclude in my judgment that Mr Harold Thompson had not been fully frank in relation to his evidence about lack of appreciation of

the value of the land and I concluded that he probably had discussed the will in greater detail with his sons than he is prepared to concede I was not satisfied on the totality of the evidence that the case of undue influence had been made out. The case of undue influence depended ultimately very considerably on the evidence of Mr and Mrs Watton and Mr Joseph McLaughlin. I found Mr McLaughlin's evidence to be unsatisfactory for the reasons set out in my judgment and I did not regard him as a credible witness on many issues. Mr Watton sought to bolster his evidence and for the reasons set out in my judgment I was not satisfied that Mr Watton's evidence on that point was correct. The defendants were in effect presenting a flawed case on the issue of undue influence and it would I am satisfied be unfair to decide that the defendants should be entitled to their costs out of the estate on the issue of undue influence. The defendant having pleaded and raised that issue and having failed to make it good and having sought to bolster the case through flawed evidence, costs on that issue would normally follow the event and go against the defendants.

[4] The initial challenge to the will on the grounds of lack of testamentary capacity and of want of knowledge and approval raised many issues that were inter-related to some extent with the issues of undue influence. At the end of the day the issue of testamentary capacity as such does not seem to have been pursued in the skeleton argument presented by the defendants though the case of lack of knowledge and approval remained a live issue. There were certainly aspects in relation to the case which indicated that it was not a wholly mis-placed view to challenge the will on the grounds of capacity and want of knowledge and approval. It can be justifiably said that the habits and actions of the testator called into question his capacity and his knowledge and approval. I consider that the defendants on those issues should be entitled to costs out of the estate. Weighing up the arguments in relation to costs following the unsuccessful plea of undue influence and the issue of costs in relation to the other issues which were raised properly by the defendants I consider that the fair proportion of the defendants' costs to be allowed out of the estate should be one third of their taxed costs.

[5] The order that I make accordingly is that the plaintiffs' costs as executors costs be taken out of the estate taxed on the indemnity basis and subject thereto that one third of the defendants' costs on the standard basis be paid out of the estate.

[6] This action lasted a considerable length of time. Evidence in chief from the various witnesses in itself took a considerable period which could have been minimised by the preparation and use of full witness statements or affidavits to stand as evidence in chief. The exchange of such witness statements or affidavits in advance of trial would have reduced the length of the hearing and would have clarified many of the issues. They may well have assisted in reducing the number of issues to be determined and could

possibly have led to an earlier resolution of the matter. It does seem to me that those involved in the preparation and running of such actions and the court in carrying out reviews of such actions should consider the appropriateness of the use of such witness statements or affidavits.

[7] In England and Wales contentious probate actions are now assigned to the Chancery Division. I respectfully consider that thought should be given to following that practice in this jurisdiction. Such actions would then be subject to the standard Chancery procedures and practice directions.