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Judgment: approved by the Court for handing down | *Delivered:* **20/10/16**
*(subject to editorial corrections)**

2015/17278

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

(CONTENTIOUS PROBATE)

Between

WILLIAM WATTON and MAUREEN WATTON

Plaintiffs

and

HUGH CRAWFORD

Defendant

HORNER J

A. Introduction

[1] This is a dispute about who should pay the costs of proceedings brought by the plaintiffs against the defendant in which they sought to set aside the last Will and Testament of Mr Robert Warke deceased ("the deceased") who died on 6 June 2014 on the grounds that he did not have sufficient capacity or soundness of mind and/or in the alternative that the Will was the product of the undue influence of the defendant. The proceedings were discontinued following the action being set down for hearing on 24 June 2016.

B. Background Facts

[2] The defendant is the nephew of the deceased. Under a Will dated 31 May 2014 he was left the deceased's dwelling house at 10 Glenara Court, Coleraine, its contents, the deceased's dogs and the residue of his estate. The deceased made various cash bequests including one of £10,000 to the plaintiffs.

[3] The deceased had made an earlier Will on 12 March 2013 which bequeathed the deceased's home, its contents, his dogs and the residue to the plaintiffs. In effect the deceased had left to the defendant in his final Will what he had left to the plaintiffs in his earlier Will of March 2013.

[4] The plaintiffs, who were neighbours of the deceased, but unrelated to him, claimed the defendant had:

(a) bullied the deceased; and

(b) told the deceased that the plaintiffs would put his dog down if he died.

[5] The new Will was executed when the plaintiffs were away on holidays. It is their case that they had cared for him as friends and neighbours and looked after his dog when he was unable to do so.

[6] The correspondence from the plaintiffs' solicitors commenced on 17 July 2014. In that letter they asked for confirmation:

(a) that Doherty Brennan, the defendant's solicitors, had drafted the Will of 31 May 2014;

(b) that the deceased was seriously ill; and

(c) that the deceased had left the second plaintiff his home.

[7] Doherty Brennan provided a copy of the latest Will, but not of the earlier Will. By letter of 20 August 2014 the plaintiffs' solicitors alleged that the deceased did not have capacity to make a new Will and asked Doherty Brennan to confirm that they would not deal with the estate of the deceased until various questions had been answered. In response Doherty Brennan confirmed that a grant of probate had been extracted and that they were completely satisfied the deceased had testamentary capacity to make his last Will and Testament. The plaintiffs' solicitors again sought a copy of the earlier Will unsuccessfully. Proceedings were issued on 19 February 2015 and a defence was served on 21 August 2015 which admitted that there was a previous Will dated 12 March 2013 which left the house and the residue to the plaintiffs. This earlier Will was provided to the plaintiffs together with the medical notes and records of the deceased upon service of the defence.

C. Discussion

[8] Costs in a probate action are at the discretion of the judge. "It is a general rule in probate actions, as in other actions, that costs follow the event": see Williams, Mortimer and Sunnuck on Executors, Administrators and Probate (20th Edition).

[9] There is much to be commended in a solicitor in a case where there are allegations of undue influence and/or incapacity sending a Larke v Nugus letter (See Larke v Nugus) [1979] 123 Sol Jo 337) which may request the following information prior to the institution of proceedings. The requests may include:

(a) how long the solicitors had known the deceased;

(b) who introduced the solicitors to the deceased;

(c) what date the solicitors received instructions from the deceased;

(d) contemporaneous notes of all meetings and telephone calls including an indication of where the meeting took place and who else was present at the meeting;

(e) how the instructions were expressed by the deceased;

(f) what indication the deceased gave that he knew he was making a will;

(g) whether the deceased exhibited any signs of confusion or loss of memory;

(h) whether and to what extent earlier Wills were discussed and what attempts were made to discuss departures from the deceased's earlier Will making pattern;

(i) what reasons the deceased gave for making any such departure;

(j) how the provisions of the Wills were explained to the deceased; and

(k) who, apart from the attesting witnesses, were present at the execution of the Will and where, when and how this took place.

This is discussed in detail at 37.04 of Williams, Mortimer and Sunnucks.

[10] There may also in appropriate circumstances be a request to disclose the deceased's medical notes and records.

[11] This court does not believe in ambush or delay. It is firmly of the view that the default approach should be "cards on the table". This means that before a party commences proceedings he or she should be in a position to make a fair assessment of the risks of that litigation. If a solicitor acting for the estate does not want to provide early disclosure of the circumstances in which the disputed Will was made and the capacity of the person making the Will, then there are likely to be adverse consequences for the estate and/or the principal beneficiary depending on who is responsible for the failure to co-operate in the sharing of crucial information.

[12] I should also say that in determining whether costs should follow the event, the court will also give weight to those cases where:

(a) the deceased's behaviour has caused or contributed to the legal challenge;

(b) the litigation has been caused by the conduct of the principal beneficiary; and

(c) the circumstances lead reasonably to an investigation into whether the Will was valid or not.

[13] Where allegations of fraud and/or undue influence are made the court will take into account whether there were reasonable grounds to support such claims. This will include consideration of whether or not the failure of the executor or personal representative to provide disclosure contributed to such claims being made.

[14] Finally, in certain cases there is a public utility in a Will being contested and being proved to be valid and effective because it can remove the taint of wrong doing or sharp practice on the part of the principal beneficiary to whom the deceased has left the estate or a substantial part thereof.

[15] In this case the plaintiff's legal advisers:

(a) failed to request information about the making of the disputed Will that should reasonably have been sought;

(b) such limited information as they did seek, namely an earlier Will, was refused by the deceased's solicitors quite unreasonably;

(c) there was delay on the part of the plaintiff's legal team in obtaining access to the previous Will and to the medical notes and records of the deceased.

(d) it is also clear that a claim for undue influence and/or lack of capacity was made when it should not have been on the evidence then available.

[16] I would stress that I am not in a position to determine whether or not the deceased contributed to the difficulties because I do not know whether the deceased did or did not say that he intended to leave his house and the residue of his estate to the plaintiffs as they allege. However the defendant's refusal to engage and provide a copy of the will was unreasonable.

D. Conclusion

[17] Although the response of the defendant to the request for sight of the earlier will was tardy and unsatisfactory, the majority of the blame for the unnecessary institution of these proceedings lies with the plaintiffs and their solicitors. The request for information by the plaintiffs was poorly thought out and far too narrow.

The claims which were made in the proceedings which were then instituted were not supported by any contemporaneous documents. In all the circumstances, I consider that the fair order is that originally requested by the plaintiffs, namely that the defendant be awarded half costs.

[18] For the avoidance of doubt, I must stress that a headlong rush into litigation where serious allegations are made by a disappointed beneficiary without ascertaining all the relevant circumstances and/or obtaining the key documents will almost certainly have adverse costs consequences for that party. By the same token a refusal by an executor or personal representative to provide a full response to a reasonable request for information under cover of a Larke v Nugus letter and/or to make disclosure of key documents will almost certainly have serious cost implications for the estate and/or the principal beneficiary. There should always be full disclosure as soon as reasonably possible of both the circumstances in which the will was made and executed and/or the capacity of the deceased if the validity of the will is being challenged. Any behaviour by either side thwarting this laudable aim is almost certainly contrary to the overriding imperative enshrined in Order 1 Rule 1A.