Neutral Citation Number: [2023] EWHC 2796 (Ch).

Case No: PT-2022-000246

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY TRUST AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 10 November 2023

Before :

Master McQuail

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Between :

(1) THEODORA RICHEFOND **(2) LEE PETER RICHEFOND** **(3) LUCIA THERESA PHILLIPS**	**Claimants**
- and -	
(1) HOPE DILLON **(2) JO-ANN MORRIS** **(3) LEONARD GRIZZLE** **(4) KYM LUCIA RICHEFOND** **(5) GARY RICHEFOND**	**Defendants**

Julia Beer (instructed by Ronald Fletcher Baker LLP) for the **Claimants**
Adrian Carr (instructed by Crown Law Solicitors LLP) for the **First to Third Defendants**
(The Fourth and Fifth Defendants not appearing or being represented)

Hearing dates: Written Submissions following Judgment given on 6 October 2023

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Approved Judgment

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MASTER McQUAIL

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am 10 November 2023

Master McQuail :

1. I gave judgment in this probate claim on 6 October 2023. I concluded that the will of Kenneth Grizzle (**Kenneth**) dated 3 November 2023 (**the Will**) was valid as to part but, because Kenneth did not know and approve the gift of residue, that gift failed. The result is that Kenneth's residuary estate will devolve under the rules of intestacy.

2. If the Will had been fully effective the following dispositions would have been made:

(i) a gift of Kenneth's 50% of the property at Stanley Road to trustees to allow his partner, Theodora, to live there for as long as she wished, with the remainder interest to be divided between the three children of his family with Theodora, Lee, Kym and Gary (who is not Kenneth's child); and
(ii) a gift of residue to Theodora.

3. As a result of my judgment the gift of Stanley Road stands but residue will fall to be divided five ways between: Kenneth's two children with Theodora namely, Lee and Kym, and Kenneth's three children from his marriage to Ena namely, Hope, Jo-Ann and Leonard (**the Grizzle Children**).

4. The main asset in Kenneth's estate apart from Stanley Road is the property at Sebert Road which Kenneth had owned as beneficial joint tenants with his wife Ena and of which he became 100% owner by survivorship when she pre-deceased him. The net residue will only be determined after payment of debts, administration costs and any costs of the litigation which it may be required to bear.

5. The claimants in the proceedings were the executors appointed by the Will namely, Theodora, Lee and Theodora's sister, Lucia. The active defendants in the proceedings were the Grizzle Children. Kym and Gary were joined as defendants but took no active part.

6. Theodora had a direct financial interest in propounding the Will and establishing that the trust and residuary gift were effective, while it was in the direct financial interests of the Grizzle Children as well as Lee and Kym to establish an intestacy in whole or part. Lucia had no financial interest. Gary would have had an interest in arguing in favour of the trust. Lee, Kym and Gary would also have some indirect interest in Theodora's financial success in the litigation as her likely beneficiaries.

Costs- the Usual Rules

7. CPR r.44.2(1) gives the court a discretion in relation to costs. CPR r.44.2(2), provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.

8. CPR 44.2(4) and (5) require the Court in exercising its discretion on the question of costs, to take into account all of the circumstances, including:

(i) the conduct of all the parties, including conduct before, as well as during the proceedings and whether it was reasonable for allegations or issues to be raised or pursued, the manner in which allegations or issues were pursued and whether a claim has been exaggerated;

(ii) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(iii) any admissible offer to settle made by a party not attracting the consequences under CPR Pt 36.

9. CPR 46.3 (2) provides: "The general rule is that [a trustee party to proceedings] is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate."

10. CPR PD 46 provides:

"1.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') -

(a) obtained directions from the court before bringing or defending the proceedings;
(b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and
(c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings."

11. Mr Carr for the Grizzle Children submits that they have substantially succeeded in these proceedings. They have succeeded to the extent that there will be a partial intestacy and each will receive a one-fifth share of residue. He points out that, although their case was not wholly successful, none of the evidence at trial was separately directed to the unsuccessful element of their claim. He also points out that the claimants' case until the conclusion of trial was that the whole will should be admitted to proof.

12. Accordingly, he says that the executors should pay all of the costs of the Grizzle Children personally. Alternatively, if the court is minded to mark the claimants' only partial success then the right course would be to apply a modest percentage deduction to the amount the claimants are ordered to pay.

13. Mr Carr points out that in the ordinary course where the validity of a will is in question the real dispute is between those who stand to benefit under the contested will and those who stand to benefit if the court decrees the will invalid. Whoever begins a probate claim, the court will endeavour to ensure that all relevant parties, including the executors, are before the court so that all are bound. Normally the executors will take a neutral role, allowing those with a financial interest to contest the litigation at their own risk as to costs.

14. As Theobald on Wills (19th ed) explains at [11-005]:

"An executor or a beneficiary under a will may, for his own protection (particularly in cases where doubts have been raised by those interested under another will or on intestacy), desire to prove the will in solemn form. By doing so they obtain a decision, which ensures that no future contest arises over the validity of the will and that a decision is obtained while the witnesses are still available. Executors should, however, remain neutral if the validity of the will is contested.

> "In such cases the executor or beneficiary should issue a claim form and join as defendants the executor and principal beneficiaries of any immediately prior will who would be adversely affected by the proving of the will propounded. Where there are doubts as to the validity of the will immediately prior to that propounded, it may be advisable to join persons interested in a yet earlier will, or on intestacy. Any beneficiaries entitled to lesser interests in the will immediately before that propounded, if adversely affected, should be notified and given an opportunity to become parties. Where there is no other will those interested on intestacy should be made defendants."

15. Ms Beer submits that if the usual costs rules applicable to hostile litigation are to be applied I should take account of the fact that the Grizzle Children only partially succeeded in their defence and counterclaim, that they never contended for a partial intestacy before the close of evidence at trial, and that this is not a case in which the Will was wholly unsupportable as is it will be admitted to proof as to part as a result of my judgment.

16. Ms Beer says also that the claimants, as executors, were reasonable in bringing this claim in circumstances where no grant had been extracted some 2 ½ years from Kenneth's death, where a caveat had been entered and become permanent and the DWP as a creditor of the estate needed to be paid and therefore should be entitled to their own costs out of the estate. She says also that the executors should be entitled to recoup any adverse costs order made against them from the estate as they have not acted unreasonably or improperly or acted in a belief that their costs would be met from the estate.

17. Ms Beer submits that even if the usual rules apply the claimants should be entitled to their costs from the estate until the date of the exchange of witness statements in June 2023 and thereafter, if costs are to follow the event, the partial success of each party should lead to equal adverse costs orders or an outcome whereby each side should bear their own costs.

Exceptions to the Usual Costs Rules in Probate Cases

18. In *Spiers v English* [1907] P 122, the Court identified two exceptions to the usual costs rules which may be applicable in probate case. Sir Gorell Barnes P said at page 123:

> "In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made, the Court has to consider whether the facts warrant either of those principles being brought into operation.

19. In *Kostic v Chaplin* [2007] EWHC 2909 (Ch) Henderson J (as he then was) commented at [6]:

> "This statement of principle makes it clear, in my judgment, that a positive case has to be made out before departing from the general rule that costs should follow the event, and also that "the two great principles upon which the court acts" are neither exhaustive nor rigidly prescriptive. They are guidelines, not straitjackets, and their application will depend on the facts of the particular case. The important distinction between the two exceptions to the general rule is, of course, that where the first exception applies the unsuccessful party may be awarded his costs out of the estate, whereas if the case is merely one where "the circumstances lead reasonably to an investigation of the matter", the appropriate order is likely to be that each side will be left to bear its own costs.

20. In the same case Henderson J pointed out at [4] that the costs position is governed by the CPR, but that the considerations of policy and fairness which underlie the *Spiers* exceptions remain applicable today.

First Exception - Was the Deceased "really the cause of the litigation"?

21. Henderson J went on to consider the meaning of the testator being "the cause of the litigation". At [9] he explained it was:

> "reasonably clear … the touchstone should be whether it was the testator's own conduct which had led to his will "being surrounded with confusion or uncertainty in law or fact."

22. He referred at [13] to the headnote of the costs decision of Sir James Hannen in the case of *Boughton v Knght* (1873) LR 3 P&D 64 as follows:

> "Prima facie, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to show eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will be pronounced against."

23. At [21] Henderson J said this:

> "… the trend of the more recent authorities has been to encourage a very careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged. There are at least two factors which have in my judgment contributed to this change of emphasis. First, less importance is attached today than it was in Victorian times to the independent duty of the court to investigate the circumstances in which a will was executed and to satisfy itself as to its validity. Secondly, the courts are increasingly alert to the dangers of encouraging litigation, and discouraging settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party."

Second Exception - Did the Circumstances "lead reasonably to an investigation of the matter"?

24. Henderson J referred at [8] of *Kostic,* to the following passage from the judgment of Sir James Wilde in *Mitchell v Gard* (1863) 3 Sw.&Tr. 275 at pages 277-8:

> "It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial enquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this enquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.
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> …
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> From these considerations, the court deduces the two following rules for its future guidance: … secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question whether the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

Submissions on the Exceptions

25. It is submitted on behalf of the claimants that the exceptions are both engaged in these proceedings and that the right order for costs is that their costs up to exchange of witness statements should be borne by the estate and thereafter each side should bear their own costs, with the claimants, as executors, being entitled to indemnity for those costs from the estate.

26. It is submitted on behalf of the Grizzle Children that the claimants have pursued the claim as ordinary hostile litigation and that they had knowledge of Kenneth's limited literacy and the risk of his not knowing and approving the Will and were present at the meeting at which Mr Coe took instructions for the Will.

Conclusions on the Exceptions to the Usual Rules

27. In determining the applicability of the first exception I must consider whether it is right to regard Kenneth as "really the cause of the litigation" and whether looking to the knowledge of the claimants they were justified in seeking to propound the will in its entirety.

28. Unusually here the Will has been found to be valid as to part and invalid for want of knowledge and approval as to part. The cause of the litigation was that Mr Coe did not fully bring home to Kenneth the operation of the gift of residue in the Will that WSL would be drafting for him and that WSL's processes were such that there was no opportunity later than Mr Coe's visit to Stanley Road when he took instructions at which the Will would be read to Kenneth or his understanding of it would be further considered. The result was that Kenneth signed a will which he did not fully know and approve. It would be wrong to blame, in the sense of attributing the cause of the litigation to, Kenneth himself for that state of affairs, the blame lies with Mr Coe and

the processes of WSL. However, Mr Coe and WSL were acting as Kenneth's agent for these purposes and I conclude that in that capacity they were the cause of the litigation such that, without more, the claimants would have been justified in seeking to propound Kenneth's will.

29. However, the claimants all knew Kenneth's reading and writing skills were limited and that he would need assistance with comprehending formal documents. Lucia's own witness statement referred to her role in the family as helping out with filling in forms including for Kenneth and to Kenneth having asked her to help him with drafting a home-made will. The claimants were all present on the occasion Mr Coe took Kenneth's instructions and knew that Kenneth and Mr Coe had not discussed Sebert Road or the Grizzle Children in front of them. They all said that there was a private meeting between Mr Coe and Kenneth, but they did not know what Mr Coe might have discussed privately with Kenneth. They, or at least Theodora, also knew that there was no further visit from Mr Coe or anyone else from WSL when the will could have been read to or discussed with Kenneth. They knew Kenneth would not be able to fully read and understand the will that WSL sent to him unassisted and none of them so assisted him.

30. Against that background the claimants chose to pursue litigation in which Theodora had an obvious interest. Lee and Lucia cannot be characterised as acting as neutral executors in doing so, rather they acted in Theodora's interest.

31. Given the claimants' knowledge of the potential uncertainties of Kenneth's state of knowledge and approval and lack of knowledge of what passed between Mr Coe and Kenneth at the will-instruction meeting, I do not therefore consider that the first exception is engaged so that any part of the claimants' costs should be paid out of the estate.

32. In determining the possible application of the second exception I must consider whether the circumstances reasonably lead to an investigation and ultimately determination by the court.

33. The Grizzle Children's case as originally advanced was that Kenneth could not have known and approved the Will because he was illiterate. The claimants denied that Kenneth was illiterate, although they knew he would not have been able to read and understand legal documents without assistance. It was always known to the claimants that answering the Grizzle Children's case would require investigation being made of Mr Coe and WSL. In fact, it was the Grizzle Children who pursued extensive pre-action correspondence with WSL through 2020 and 2021 and, in their letter before action of 2 November 2021, brought some of the unsatisfactory features of WSL's responses to queries to the attention of the claimants as well as the essence of their case namely, that Kenneth did not intend Sebert Road to be the subject of the gift of residue.

34. I conclude that the circumstances were such as to reasonably lead to an investigation, but a pre-action investigation, not one that required the issue of proceedings and the processes of disclosure and exchange of witness statements. The Grizzle Children had pursued their investigation with WSL to an extent that led to the terms of their letter of 2 November 2021. Against that background the executors should have pursued further enquiries of WSL and Mr Coe himself before issuing proceedings.

They do not seem to have done any further investigating until they made contact with Mr Coe in June 2022, as is recorded in his witness statement.

35. It was not reasonable for the claimants to issue proceedings on 25 March 2022 without pursuing investigations further. The claimants issued before they had contacted Mr Coe and obtained his evidence at the risk, which eventuated, that Mr Coe's evidence would not support their position.

36. I do not accept the submission made by the claimants that it was only upon exchange of witness statements in June 2023 that there was a fundamental change in the material available to them to assess their position. The claimants knew from before the issue of their proceedings that Kenneth needed assistance with formal documents and knew that the evidence of Mr Coe, which could have been obtained pre-issue, would be vital.

37. I conclude therefore that neither of the exceptions to the usual rules is applicable here.

Conclusions on the Usual Rules

38. There is no duty on an executor to prove a will and, unless one of the exceptions is established, executors who actively seek to propound a will without the court's prior sanction, which would be unlikely to be given where all beneficiaries are capacitous adults, or an agreed indemnity do so at risk as to an adverse costs order if they fail.

39. Theodora as the only executor beneficiary who stood to financially benefit from the success of the claim is an adult with capacity, who could have brought the claim in her personal capacity. The executors who have no financial interest could have commenced or joined with Theodora in commencing the proceedings and then taken a neutral stance leaving it to the financially interested beneficiaries to engage in hostile litigation at their own risk as to costs.

40. By actively pursuing the claim, rather than taking a neutral stance, the claimants have not acted for the benefit of estate but for the benefit of one of their number namely, Theodora. That was a course that they took at their collective risk as to the costs order that might follow. I conclude that the claimants are not entitled to be indemnified from the estate for any costs incurred or any costs which they are liable to pay.

41. The Grizzle Children have successfully achieved a financial result better than that which the Will, if admitted to proof in full, would have afforded them and have achieved that result at a financial cost to Theodora. They have not however succeeded in full. Theodora has herself succeeded in upholding the Will to the extent that it provided for Kenneth's 50% of Stanley Road to be held on trust for her benefit. Lee and Lucia threw in their litigation lot with Theodora and neither can say for the purposes of the costs questions that they achieved any different result in terms of success than Theodora, notwithstanding that Lee will in fact benefit by the Grizzle Children's success.

42. There is nothing particular in the conduct of the claim, which leads me to conclude that any costs order should depart from the general rule.

43. Although the Grizzle Children did provide for the contingency of mediation in their costs budget and the claimants did not, there was no offer of mediation by either side and no offers of settlement were made and I agree with Ms Beer that the parties' conduct in this respect is a neutral factor.

44. The Grizzle Children succeeded in their claim that residue would pass as on intestacy. Theodora's success was in preserving the trust interest in Kenneth's share of Stanley Road. The costs incurred by each side cannot realistically be apportioned between the Grizzle Children's success and Theodora's success.

Conclusions

45. Taking all that into account I conclude that the right orders are that (i) neither the claimants nor the Grizzle Children should be ordered to pay any of the costs of the others; (ii) the claimants are not to be entitled to any indemnity from the estate, and (iii) since the Grizzle Children's success will entail residue passing on intestacy to themselves and to Lee and Kym, the Grizzle children's costs be paid out of residue before its division, not to make such an order would result in Lee and Kym (in their capacity as residuary beneficiaries) receiving a risk and cost free windfall.