



THE COURT OF APPEAL

APPROVED

**Court of Appeal Record Number: 2020/242
Neutral Citation Number [2022] IECA 228**

**Barniville P.
Murray J.
Whelan J.**

IN THE MATTER OF T.H. (A WARD OF COURT)

**PURPORTED RESPONDENT/
APPELLANT**

JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of October 2022

Introduction

1. This judgment is confined to a preliminary – and net - issue as to the entitlement in law of legal practitioners, including a firm of solicitors, to maintain and prosecute the within appeal, notwithstanding that the individual who originally retained the solicitors, T.H., (a) subsequently was admitted into Wardship and (b) is now deceased.

Context

2. The Legal Services Regulation Act, 2015, as amended, in s.2 defines a “legal practitioner” thus: “subject to *subsection (2)*, means a person who is a practising solicitor or a practising barrister and a reference to a solicitor includes a reference to a firm of solicitors.” Noonan J. in *Ward v Tower Trade Finance (Ireland) Limited* [2022] IECA 70 emphasised the ambit of the definition. The solicitor is furthermore an officer of the court and as such is governed by the provisions of the Solicitors Acts, 1954-2011. A team of three legal

practitioners appeared at the hearing of the preliminary issue purporting to act on behalf of the above-named appellant who was made a Ward of Court on the 2 July 2019, comprising a solicitor and senior and junior counsel.

Background

3. T.H. was born in July 1937. He died on the 10 April 2021, aged 83 years and 9 months approximately. The relevant history includes that he was admitted to Naas General Hospital on or about the 6 October 2018. Thereafter, he came to reside at a nursing home in Kildare – initially for respite care from mid-December 2018 to mid-January 2019 and subsequently, from the 27 May 2019 to the 8 August 2019. He resided at a different nursing home in Co. Kildare from the 8 August 2019 until the date of his death.

4. His diagnosis after initial hospitalisation in October 2018 was of significant advanced vascular dementia. At an unspecified date, he fell whilst residing in one nursing home, sustaining a fracture of two vertebrae. The certified causes of death were stated to include “pneumonia, vascular dementia, atrial fibrillation.”

5. Invoking the 12th section of the Lunacy Regulation (Ireland) Act, 1871, the HSE, acting through its solicitors, Messrs. J.D. Scanlon & Co., wrote to the Office of Wards of Court on the 19 December 2018 setting forth concerns in respect of T.H. and appending medical notes prepared by two consultant physicians. The letter on behalf of the HSE instigating the Wardship process indicated that T.H. had no known next of kin, that he required long-term residential care and concluded “[i]n all the circumstances, we would be very grateful if the President of the High Court would give consideration to requesting a Medical Visitor to attend on [T.H.] in order to commence 12th Section proceedings on foot of the information furnished.”

6. It can be observed in passing that the routine procedure for admission to Wardship under the Lunacy Regulation (Ireland) Act, 1871 was s. 15. The 12th section offered an

alternative process which could be activated, *inter alia*, when a specific case was brought to the attention of the Registrar of Wards of Court who, pursuant to the statutory process, could then acquire the statutory entitlement to commence an enquiry and requisition one of the medical visitors to prepare a report on the capacity of the individual in question. In practice, that report was treated as a petition for enquiry and the language of the 12th section clearly intended it to be so: "... any report to be made under the provisions in the proceedings section contained shall stand and be proceeded upon as a petition presented in the matter of the alleged lunacy..."

The initial retainer of the solicitors by T.H.

7. The circumstances whereby T.H. retained the solicitors in the first instance appear to have been for the purposes of opposing his proposed Wardship. He appears to have given instructions to a particular solicitor in the said firm to object to the proposed Wardship. A Notice of Objection was filed on the 13 March 2019, objecting to the medical visitor's report being directed to stand and be proceeded on as an enquiry. The solicitors represented his interest in court in connection with the proposed Wardship and in that regard retained counsel.

Compliance with s.68 in April 2019

8. S.68(1) of the Solicitors (Amendment) Act, 1994 stipulated: -

"(1) On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of –

(a) the actual charges, or

(b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, and estimate (as near as may be) of the charges, or

(c) where the provision of particulars of the actual charges or the estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made, by that solicitor or his firm for the provision of such legal services and, where those legal services involve contentious business, with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties and the circumstances, if any, in which the client's liability to meet the charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties (or any insurers of such party or parties)."

9. The solicitor appears to have furnished the requisite s.68 letter relevant to the Wardship application in early April 2019 and same was duly signed by T.H. It was not suggested that this s.68 letter did or could extend to the valid authorisation of the legal practitioners to pursue an appeal regarding costs. The application for the admittance of T.H. into Wardship was heard by the President of the High Court. Medical evidence by way of affidavit was furnished on behalf of T.H., including affidavits from a consultant in psychiatry and a consultant physician in geriatric medicine. The Wardship hearing took place on the 2 July 2019. It does not appear that the legal representatives of T.H. formally opposed the Wardship beyond having placed the aforesaid affidavits before the court. No demand for an inquiry before a jury was advanced on his behalf. The learned President of the High Court, in light of the evidence before him, declared T.H. to be a person of unsound mind and incapable of managing his person and property.

10. The order taking T.H. into Wardship was formally drawn up on or about the 5 July 2019. It expressly notes that there had not been a demand for an enquiry before a jury and that the President of the High Court had declared T.H. to be of unsound mind and incapable of managing his personal property. The High Court appointed the General Solicitor for Minors and Wards of Court as the Committee of the Person and Estate of T.H. Directions were given that the said Committee file in the Office of Wards of Court, within eight weeks of the 2 July 2019, a Statement of Facts in accordance with O. 67, r. 40 of the Rules of the Superior Courts.

11. At the instigation of the legal practitioners who had represented T.H. up until the making of the order taking him into Wardship on the 2 July 2019, the issue of costs of the Wardship application was initially stood over until the 8 July 2019. Essentially, it was being contended by the legal practitioners that the HSE was liable for the costs of T. H's legal team in respect of the Wardship application rather than that same be borne out of his estate which had come to vest in his Committee.

The Costs Motion

12. Following correspondence and engagement between the solicitors and the HSE, a Notice of Motion was issued by the solicitors on the 24 June 2020 in relation to the outstanding issue of costs seeking an order for costs on behalf of T.H. against the HSE. The motion was the subject of directions by the High Court. That matter came on for hearing before Ms. Justice Hyland in September 2020. Judgment was reserved.

The Judgment of the High Court

13. In rejecting the arguments advanced by the legal practitioners who had been retained by T.H. to oppose the application that the HSE should bear the costs of the Wardship application, Hyland J. in her judgment of the 1 October 2020, [2020] IEHC 487 observed:

“49. ... the mere fact that Ward Solicitors might prefer to recover their costs against a statutory body rather than the ward himself ... is not a sufficient reason to require the HSE to pay the costs in this case, given that Mr H is in a position to discharge (measured) costs from his estate.

50. ... the below factors lean in favour of an order for costs being made from Mr H’s own estate rather than by the HSE.

51. First, ... the court has explicit jurisdiction to make orders directing that costs be paid out of the estate of a ward of court.

52. Second, the costs in question in this case were incurred representing Mr H’s interests and on his instructions.

53. Third, the HSE cannot be considered liable for the costs of Mr H on the basis that it was unsuccessful in the proceedings or that there was any event that was determined against it and in favour of Mr H. The concept of “success” or the “event”, while far from being determinative in the context of a petition for wardship, is not irrelevant.

54. Fourth, the solicitors for Mr H did not agree with the HSE in advance that the costs of his representation would be borne by the HSE.

55. Fifth, the estate of the ward in this case has sufficient means to discharge the legal costs when measured.

56. Finally, the right of a ward to have his or her voice heard can be vindicated just as effectively by an intended ward bearing the costs of legal representation from their own funds, where appropriate, as by a third party bearing those costs.

57. In all the circumstances, it appears an appropriate case in which to exercise the discretion of the court to make an order directing the costs be borne out of the estate of Mr H.”

The judgment continued;

58. For the reasons identified above, I direct that the costs of the legal representation of Mr H (when measured) in respect of the petition for an inquiry into wardship be paid out of the estate of the ward.

Costs of this application

59. Finally, in relation to the costs of this costs hearing, subject to any submissions the parties may wish to make, I would propose that the solicitors for Mr H and the General Solicitor obtain their measured costs from the estate of the ward and that no order for costs is made in respect of the HSE.”

Specific order as to costs of the 28 October 2020

14. The following terms were specified in the order of Ms. Justice Hyland of the 28 October 2020:

“(1) That the costs incurred by the solicitors for the ward of and incidental to the wardship proceedings herein to include any reserved costs and any outlay reasonably incurred are to be paid out of the estate of the ward such costs to be measured by the Registrar of Wards of Court.

(2) That the costs incurred by the solicitors for the ward of and incidental to this application to include all reserved costs any outlay reasonably incurred are to be paid out of the estate of the ward such costs to be measured by the Registrar of Wards of Court.”

Effect of Orders of High Court

15. In the instant case, the order made by Ms. Justice Hyland on the 28 October 2020 brought the inquisitorial Wardship process to an end and with it the retainer of the legal practitioners in relation to T.H.

Was the Ward “a client” of the solicitor from and after the 28 October 2020?

16. The Solicitors (Amendment) Act, 1994, s.2 defines “client” to include “...the personal representative of a client and any person on whose behalf the person who gave instructions was acting in relation to any matter in which a solicitor or his firm had been instructed; and includes a beneficiary to an estate under a will, intestacy or trust.” T.H. ceased to be a client of the solicitors by act and operation of law upon being taken into Wardship by the President of the High Court. He did not and could not as a matter of law have instructed the solicitors thereafter. The sole outstanding issue for determination concerned liability for costs which had been incurred prior to the said date in the context of opposing the Wardship. The High Court authorised the prosecution of that Motion issued by the solicitors in accordance with the terms of the said motion and allocated a date for hearing. It ought to have been obvious to the legal practitioners that they had ceased to have a client as and from the 2 July 2019. The retainer and authority of the solicitor to act was automatically revoked on the said date by virtue of the order of the learned President.

17. From the perspective of agency law, T.H. was a person of unsound mind so found and protected as to his person and his estate by Wardship and all legal practitioners involved had actual knowledge of that fact at all material times. In general, when an individual is declared a Ward of Court, they lose the right to make decisions pertaining to their person and property. Such decision-making functions fall upon the Committee of the Ward as appointed by the President of the High Court. A Ward may not enter a binding contract or institute or defend legal proceedings. In the instant case, the legal practitioners never had contact of any kind with T.H. nor he with them from and after the 2 July 2019, the date on which the order admitting him to Wardship was made.

Events Subsequent to the 28 October 2020

The Notice of Appeal

18. The process which led to the lodging of a Notice of Appeal in the Court of Appeal Office on the 23 November 2020 is important. The Notice of Appeal is extensive and 21 separate grounds of appeal are identified. In particular, the Notice of Appeal at part 4 identifies the orders being sought from this Court if the appeal is successful: -

- “(a) An Order setting aside the Order of Ms. Justice Hyland perfected 28 October 2020;*
- (b) An Order setting aside the Order of the High Court that the costs of the wardship proceedings should be discharged out of Mr H’s estate;*
- (c) An Order setting aside the Order of the High Court that the costs of the hearing on costs should be discharged out of Mr H’s estate;*
- (d) An Order awarding the costs of the wardship proceedings together with the motion re-entering the proceedings in the High Court and the costs of the hearing on costs and the costs of the Appeal to the Respondent/Appellant be paid by the HSE; and*
- (e) Such further or other relief as may be necessary or appropriate.”*

No Agency

19. The solicitors/legal practitioners were never the subject of any purported retainer by the Ward to act in respect of any matter subsequent to him being taken into Wardship – nor could he have affected such a retainer in law.

Warranty of Authority

20. In his judgment in *Yonge v Toynbee* [1910] 1 K.B. 215 which concerned a solicitor, Swinfen Eady J. in the English Court of Appeal observed at pp. 233-234;

“... in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts

*appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one. At one time the Common Law Courts acted very firmly upon the view that, if an attorney took upon himself to sue or defend, the Courts would presume his authority and not inquire into it; so much so that, if an attorney (being a solvent person) without authority instituted or defended proceedings, the Court would not interfere, but left the party injured to his remedy in damages against the attorney. In an anonymous case, in *Salkeld (Anon., 1 Salk. 86 .)*, Holt C.J. said: "The course of this Court is, where an attorney takes upon him to appear, the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." See also *Stanhope v. Eavery (1836) 5 Dowl. 357; 3 Bing. N C. 301.; Bayley v. Buckland (1847) 1 Ex. 1.* Subsequently, and in consequence of Lord Mansfield's decision in *Robson v. Eaton (1785) 1 T.R. 62.*, the Common Law Courts took a different view, and stayed the unauthorized action, and made the attorney pay the costs: *Hubbart v. Phillips (1845) 13 M. & W. 702.; Reynolds v. Howell L. R. 8 Q. B. 398.* The manner in which business is ordinarily conducted requires that each party should be able to rely upon the solicitor of the other party having obtained a proper authority before assuming to act. It is always open to a solicitor to communicate as best he can with his own client, and obtain from time to time*

such authority and instructions as may be necessary. But the solicitor on the other side does not communicate with his opponent's client, and, speaking generally, it is not proper for him to do so, as was pointed out by Kekewich J. in In re Margetson & Jones (1897) 2 Ch. 318. It is in my opinion essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorized in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and, whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority.”

21. Solicitors are officers of the court. Under the general rules of agency, they must act on authority based upon instructions. The Superior Courts exercise jurisdiction over their own officers. A solicitor who holds herself out as acting as an agent for an individual warrants that she has authority to act for her principal. Since *Collen v Wright* (1857) 8 E. & B. 647, it is generally accepted that she also warrants absolutely that the authority she professes to have does in fact exist.

S.150 Legal Services Regulation Act 2015

22. On the 7 October 2019, the following section came into operation, effectively replacing s. 68 of the Solicitors (Amendment) Act, 1994 referred to above. It provides:

“150. (1) A legal practitioner shall, whenever required to do so under this section, provide to his or her client a notice (in this section referred to as a “notice”) written in clear language that is likely to be easily understood by the client and that otherwise complies with this section.

(2) On receiving instructions from a client, a legal practitioner shall provide the client with a notice which shall—

(a) disclose the legal costs that will be incurred in relation to the matter concerned,
or

(b) if it is not reasonably practicable for the notice to disclose the legal costs at that time, set out the basis on which the legal costs are to be calculated.

(3) Where subsection (2)(b) applies, the legal practitioner concerned shall, as soon as may be after it becomes practicable to do so, provide to the client a notice containing the information specified in subsection (2)(a).

(4) A notice shall:

(a) subject to subsection (2)(b), specify the amount of legal costs—

(i) certified by the legal practitioner as having been incurred as at the date on which the notice is provided,

(ii) certified by the legal practitioner to be of a fixed nature or otherwise certain to be incurred (or if it would be impracticable for the legal practitioner to so certify, the basis on which they are to be charged), and

(iii) insofar as is practicable, certified by the legal practitioner to be likely to be incurred;

(b) specify the amount of value-added tax to be charged in respect of the amounts referred to in paragraph (a);

(c) set out the basis on which the amounts were or are to be calculated, explained by reference to the matters set out in paragraph 2 of Schedule 1;

(d) contain a statement of the legal practitioner's obligation under subsection (5);

(e) if the matter which is the subject of the notice involves or is likely to involve litigation, provide—

(i) an outline of the work to be done in respect of each stage of the litigation process and the costs or likely costs or basis of costs involved in respect of each such stage, including the likelihood of engaging a practising barrister, expert witnesses, or providers of other services,

(ii) a statement of the legal practitioner's obligation under subsection (6),

(iii) *information as to the likely legal and financial consequences of the client's withdrawal from the litigation and its discontinuance, and*

(iv) information as to the circumstances in which the client would be likely to be required to pay the costs of one or more other parties to the litigation, and information as to the circumstances in which it would be likely that the costs of the legal practitioner would not be fully recovered from other parties to the litigation;

(f) *specify a period, which shall be not longer than 10 working days, for the purposes of subsection (7).*

(5) *Where the legal practitioner becomes aware of any factor that would make the legal costs likely to be incurred in a matter significantly greater than those disclosed or indicated in a notice relating to that matter provided under this section, he or she shall, as soon as may be after he or she becomes aware of that factor, provide the client concerned with a new notice.*

(6) *Where a matter which is the subject of a notice under this section involves or is likely to involve litigation, the legal practitioner shall not, in relation to that matter, engage a practising barrister, expert witness or provider of any other service without first, to the extent practicable—*

(a) ascertaining the likely cost or basis of cost of engaging the person,

(b) providing the client with the information referred to in paragraph (a), and

(c) having complied with paragraph (b), satisfying himself or herself of the client's approval (whether express or implied) of the engaging of the person.

(7) A legal practitioner shall not, during the period referred to in subsection (4)(f) that is specified in a notice, provide any legal services in relation to the matter concerned, unless—

(a) the client concerned confirms that he or she wishes to instruct the legal practitioner to continue to provide legal services in connection with the matter concerned, or

(b) subsection (8) applies.

(8) *A legal practitioner to whom subsection (7) applies shall, notwithstanding that subsection, provide legal services in relation to the matter concerned where—*

(a) in the professional opinion of the legal practitioner, not to provide those legal services would constitute a contravention of a statutory requirement or the rules of court or would prejudice the rights of the client in a manner that could not later be remedied,

(b) a court orders the legal practitioner to provide legal services to the client, or

(c) where the matter involves litigation, a notice of trial has been served in relation to the matter or a date has been fixed for the hearing of the matter concerned.

(9) The legal practitioner shall provide his or her client with clarification in relation to a notice, as soon as is reasonably practicable after having been requested to do so by the client.

(10) Where a practising solicitor, having received instructions from a client in relation to a matter, proceeds to instruct a practising barrister in relation to that matter—

(a) an obligation on the barrister under this section to provide a notice shall be fulfilled where the barrister provides the notice concerned to the solicitor,

(b) a duty owed by the barrister under subsection (6), (7) or (9) to his or her client shall be construed as a duty owed by the barrister to the solicitor, and

(c) the solicitor concerned shall—

(i) where he or she considers it appropriate, or where requested to do so by the client, request the barrister to provide clarification in relation to a notice provided by the barrister, and

(ii) immediately on receipt of a notice referred to in paragraph (a) or the clarification referred to in sub paragraph (i), provide that notice or clarification to the client.” (emphasis added).

23. The solicitor made no contact with the Committee of the Ward, the General Solicitor, prior to the 23 November 2020 either seeking her views in relation to a proposed appeal or engaging with the merits of the course of action she proposed to embark upon or seeking the authorisation, approval or prior consent of the Committee of the Ward to same.

24. The solicitor ought reasonably to have understood that her retainer had been revoked or otherwise had been automatically determined by the Wardship of her client. She was present in court when the orders were made appointing the General Solicitor as Committee of the Ward and pursued a claim for costs in respect of same on behalf of the legal practitioners with the assent of the High Court.

25. The solicitor conferred with no client in regard to this litigation step and failed to comply with any aspect or requirement mandated pursuant to s.150, including in connection with retaining counsel, prior to filing the Notice of Appeal. No argument was put forward to the court to suggest that she could on that date have reasonably understood that she had a client or had prior authorisation from either the Committee of the Ward or the President of the High Court for her actions or that there was any legal basis on which she could proceed to lodge that Notice of Appeal without the authority of a third party.

26. In turn, the Notice of Appeal was served on the HSE, the respondent. The authorities suggest that such conduct amounts to an implied undertaking or promise made by the solicitor to the party on the other side of the litigation that the authority she professes to have does in fact exist; *Starkey v Bank of England* (1903) A.C. 114 at p.119; *Collen v Wright* (1857) 8 E. & B. 647.

27. In fact, on the 23 November 2020, when the Notice of Appeal was presented in the Office of the Court of Appeal the solicitor, and presumably the other legal practitioners involved, knew that they had no client, no instructions and no authorisation of any kind to take this litigation step. On that date the solicitor could not have reasonably believed that her professed agency for the Ward existed.

Was the General Solicitor, as Committee of the Ward, “a client” of the solicitor from and after the 28 October 2020?

28. The authors of *Delany & McGrath on Civil Procedure* (4th ed., Round Hall, 2018) observe, regarding the bringing of litigation on behalf of a person of unsound mind, at para. 6-06:

“Order 15, rule 17 provides that a person of unsound mind may sue as plaintiff by his committee or next friend. So, in C.K. v Northern Area Health Board [2002] 2 IR 545, Finnegan P held that where the applicant, who was the committee of a ward of court, had been authorised by the President of the High Court to continue proceedings instituted by her in relation to the provision of care and services to the ward, the action was properly before the court and no issue as to her locus standi arose.”

That excerpt reflects the established practice and procedural prerequisites in this jurisdiction to be adhered to by any legal practitioner before taking or pursuing litigation steps in respect of a person in Wardship. The necessary procedural step mandated by Order 15, rule 17 was disregarded in this case.

29. It is clear that the solicitor never engaged with the Committee in whom the person and property of the Ward had vested on the 2 July 2020, either to discuss the proposed appeal or the suggested reasons or basis for same or to canvas the views of the Committee generally or, in particular, to seek instructions from her before undertaking the filing of the Notice of Appeal on the 23 November 2020.

Consent

30. An argument was advanced on the appeal that the General Solicitor, as Committee of the Ward, could be considered or deemed to have retrospectively consented to the appeal – either expressly or impliedly. However, this argument lacks substance. There was no consent to the bringing of the appeal since there was no evidence that the Committee was ever made

aware that the Notice of Appeal was to be filed. Further, the Committee was not made a party or notice party to the proceedings. This is surprising since one would have thought that the title of the appeal would have identified T.H. in the circumstances as “suing by his Committee” so appointed on the 2 July 2019 pursuant to Order 67, rule 57 and otherwise conform with the procedural norms where an appeal is brought in such circumstances.

31. The legal practitioners appearing at the hearing pointed to no clear unequivocal or informed consent given prior to the filing of the appeal such as could amount to authorisation for its bringing. Since the Committee did not consent to the filing of the appeal and the leave of the President of the High Court was neither sought nor obtained in regard to the appeal, it necessarily follows that the Ward never constituted a party to same, notwithstanding that it was brought in his name.

32. An argument was advanced that the General Solicitor was likely aware of the appeal appearing in the lists and as such ought to be deemed to be on notice or bound by it. Such an argument is wholly unmeritorious. The General Solicitor as Committee of the Ward never retained the solicitors to act on behalf of the Ward on any basis between the 2 July 2020 and the date of his death nine months later on the 10 April 2021. The clear omission of the solicitors to serve the statutory notice in accordance with s.150 upon the General Solicitor is, in my view, fatal to the contention that the legal practitioners involved could reasonably have believed that they had authority or consent to act for the Ward in filing an appeal on the 23 November 2019 or that same was ever subsequently provided. At the hearing, counsel did not point to any specific event which could be fairly characterised as the giving of instructions by the Committee of the Ward to the legal practitioners or the “receiving of instructions from a client” by the legal practitioners referable to the Committee purporting to retain them within the meaning of s.150(2) of the 2015 Act for the purposes of filing or pursuing this purported appeal.

Alleged Acquiescence

33. Though the Committee was not a party to the appeal, the Notice of Appeal was served on her. Neither was she made a notice party to the appeal. Counsel for the Committee, in carefully framed submissions, argued that the concept of acquiescence should be understood in light of the jurisprudence in the area of child abduction where the concept arises as a potential defence to the claim for the summary return of a child to the state of their habitual residence. There is some merit in that argument, save that I do not consider the distinction identified in some jurisprudence between active and passive acquiescence to be of assistance. In that regard, I find cases such as the analysis in the judgment of Lord Browne-Wilkinson in *Re H. (a Minor) (Abduction; Acquiescence)* [1998] AC 72, House of Lords, of assistance.

34. Acquiescence, for the present purposes, must involve words or actions by the Committee of the Ward communicated to the solicitor who is on record which clearly and unequivocally can be shown to have led the legal practitioners, including the officer of the court, to reasonably understand and believe that she is consenting to the filing of the Notice of Appeal and thereafter to the prosecution of the appeal for and on her behalf as Committee of T.H. The General Solicitor, in the discharge of her functions as Committee, has no function in policing lists in the Court of Appeal to effectively invigilate officers of the court and legal practitioners who purport to pursue litigation in the name of a Ward without formal retainer by the General Solicitor or prior approval of the President of the High Court.

35. The burden of establishing acquiescence rests upon the party who seeks to assert it and it must be in clear and unambiguous terms as per *Re W. v W. (Abduction; Acquiescence)* [2010] EWHC 332 (Fam). If the assertion that the General Solicitor as Committee, either consented to the institution and prosecution of the appeal – or acquiesced in it – has any substance, one would expect that the solicitors would have furnished a s.150 letter to the Committee for her agreement and completion. T.H. had signed one relative to the opposition

of his proposed Wardship in or about early April 2019. The legal practitioners did not seek to argue that its terms extended to the appeal they filed on the 23 November 2019.

Section 150 Notice

36. No s.150 Notice was or could be produced in this Court since, self-evidently, the legal practitioners had no client from the conclusion of the Wardship proceedings in the High Court. It would have been particularly important for the solicitors to have focused on the necessity to comply with s.150 of the 2015 Act in relation to whomsoever they considered to be their client before embarking on an appeal raising issues of kind specified at grounds 1 – 21 inclusive in the Notice of Appeal. That factor ought to have immediately alerted the legal practitioners to the fundamental issue of *locus standi* in this case. It appears to be in the nature of a test case asserting the liability of the HSE to discharge the costs of T.H. in respect of the Wardship. The key relief sought includes “[a]n Order awarding the costs of the Wardship proceedings together with the motion re-entering the proceedings in the High Court and the costs of the hearing on costs and the costs of the Appeal to the Respondent/Appellant be paid by the HSE” in addition to an order setting aside the order of the High Court as to costs.

No Application made to President of High Court

37. Given the significant statutory role of the President of the High Court, one might have expected that prior to purporting to pursue an appeal in the name of T.H. and thereby availing of his identity as a nominal litigation vehicle to pursue a wide array of novel propositions engaging domestic law and provisions of the European Convention on Human Rights, the authority of the President for taking of such a step would have been sought. However, no such step was ever taken by the solicitor or the other legal practitioners retained.

Was the Legal Personal Representative of the Ward “a client” of the solicitor from and after the 2 April 2021?

38. The Legal Personal Representative of the Ward, who apparently died testate, does not support – indeed she opposes – the appeal and never consented to its prosecution by the legal practitioners from and after the death of the Ward.

No instructions taken

39. It is clear that the solicitors proceeded to file a Notice of Appeal and take on the conduct of an appeal at a time when T.H. had ceased to be a client of that firm. It is further clear that they did so without obtaining any instructions from the Committee of the Ward authorising the appeal against the costs orders made by Hyland J.

40. In particular, it is not clear whether the legal practitioners involved, including the solicitors, had appraised themselves of the financial circumstances of the Ward and the risk that should any appeal be unsuccessful, the costs incurred would potentially have to be borne by his assets and estate which was held in Wardship. Such a Costs Order could have significant adverse implications for the funding of his future care. He was aged 83 years when the Notice of Appeal was lodged and living in a nursing home at the time.

23 November 2020 – 10 April 2021

41. The Notice of Appeal was served on the HSE's agents on the 24 November 2020. It was separately served on the Office of the General Solicitor for Minors and Wards of Court on the 26 November 2020. The General Solicitor, in this instance, the Committee of the person and the property of the Ward, was never made a party or indeed a notice party to the appeal *per se*. Whilst the decision of the Supreme Court in *A.C. v Hickey & Ors.* [2019] IESC 73 was sought to be relied upon, it is of limited assistance and readily distinguishable. In particular, a central issue in the said case was as to the legality or otherwise of the detention of an individual and Article 40.4 of the Constitution. The issue of the lawfulness of the detention of the Ward was not in issue in this appeal.

42. On the 9 December 2020, the HSE filed a respondent's notice to the appeal clearly indicating that it opposed the entirety of the appeal. It was specifically asserted in the said notice as follows: -

“The Appellant herein is alleged to be [T.H.] who is now a Ward of Court. [T.H.] lacks capacity to make decisions in respect of his person and property. [T.H.] does not have capacity to make litigation decisions. No appeal has been issued on behalf of [T.H.] through his Committee, namely the Office of the General Solicitor.”

The solicitor did not engage with this issue and took no step, even belatedly, to apply to the President of the High Court or the General Solicitor, who was T.H.'s Committee.

2021

43. The matter came before this Court for directions on the 15 January 2021. A date for hearing was initially fixed for the 14 June 2021 and directions for submissions by the parties was made. The Ward died on the 10 April 2021. The solicitors were notified with great expedition of the death. Patrick J. Farrell & Co. Solicitors, who had acted for the General Solicitor for Minors and Wards of Court, had informed the solicitors of the death of T.H. having occurred on the 10 April by cover letter on the 13 April 2021. That is acknowledged in a letter of the 20 April 2021: –

“We had in fact received an email from Court Service notifying us of the Ward's death. We have notified our counsel and enquired whether or not the appeal should stand to be discontinued in the light of the Ward's death.

In brief, our costs have not been paid for any part of this [T.H.'s] business so same in due course should be dealt with in the administration of the estate.

As far as we are aware H.G. Donnelly & Co. Solicitors in Athy held a Will for the deceased and possibly handed it in to the Wards of Court Office and the order for [T.H.'s] Wardship being finalised.”

44. By letter dated the 26 April 2021, the solicitors wrote to Patrick J. Farrell & Co. stating: “[w]e have reverted to our Senior Counsel to consider the matter in the light of [T.H.’s] recent demise” and indicated awaiting advices as to whether the appeal should be continued or be discontinued.

45. On being made aware of the death of the Ward, J.D. Scanlon & Company Solicitors for the HSE, quite reasonably, sought to have the appeal mentioned before this Court. The solicitors adopted the following stance *vis-à-vis* HSE’s request on the 29 April 2021: -

“We understand that the processes of the legislation governing Wards of court provide that, following the death of a Ward, a Statement of Facts ... would be prepared and in due course a formal dismissal or discharge from Wardship will be recorded. Until that time it appears that the President of the High Court, in conjunction with the Office of Wards of Court, retains jurisdiction in all matters relating to the Ward’s affairs. We are in correspondence with the solicitors acting for the General Solicitor for Wards of Court, the committee for the late [T.H.] in that connection. The administration of the estate of the Ward will be a separate matter entirely.

The costs application [and appeal] relates to the constitutional and ECHR imperative that the voice of the proposed Ward be heard in the Wardship process (a right acknowledged by you in these proceedings), together with all legal advice given prior to and in connection with [T.H] being taken into Wardship. Its determination will obviously be of relevance to the listings of assets and liabilities of the late Ward.”

The letter continues –

“In the circumstances that it is envisaged that the appeal will proceed, in accordance with those arrangements. If you propose to bring the status of the appeal before the Court of Appeal we trust that you will provide us with ample notice.”

Thus, undeterred not alone by the Wardship of their former client but also of his death the legal practitioners, unencumbered by instructions from any quarter, proposed to continue with the purported appeal without any application to seek a grant of letters of administration *ad litem* whether pursuant to s.27(4) of the Succession Act, 1965 or otherwise.

46. It is difficult to understand how the legal practitioners in question continued to assert an entitlement to pursue propositions and arguments pertaining to “... the voice of the proposed Ward be heard in the Wardship process...” in the name of T.H., their former client, whose retainer ended at the conclusion of the costs motion in the High Court, who was never a party to this purported appeal and was now deceased. All the more beguiling is that this stance was maintained notwithstanding the clear opposition of the executrix. By virtue of s.10(1) of the Succession Act, 1965, all the real and personal estate of the deceased devolved upon and became vested in his executrix on his death and she held that estate in trust for the persons entitled thereto as provided for by s.10(3) of the said Act. No legal basis or authority for the conduct and approach adopted by the legal practitioners was identified at the hearing of this application.

47. Due to an administrative error, the HSE was not represented before this Court at the call over on the 30 April 2021. A letter from the solicitors dated the 4 May 2021 outlined what had transpired, confirming that the Court had been advised of the death of the Ward and that letters had been written to the General Solicitor and the HSE, “in response to letters received from them, and indicating that in our view the matter should proceed on the date fixed for the hearing, 14 June next.” The letter also went on to state: -

“In relation to the consequences of a ward dying before a final Statement of Facts has been prepared and the wardship discharged by the President, counsel referred Costello J to relevant Rules of the Superior Courts O. 67 and also relevant sections of the Lunacy Regulation (Ireland) Act, 1871 including Section 51. Counsel indicated that on our view of the law and legal authorities the matter required to be determined. However counsel also informed the court of the view expressed in your letter that the case should not proceed...”

48. S.51 provided as follows: -

“Notwithstanding the death of a lunatic the real and personal estate of such deceased lunatic shall continue under and in the control, custody, and protection of the Lord Chancellor intrusted as aforesaid, until the Lord Chancellor intrusted as aforesaid shall have by an order discharged the real and personal estate of the deceased lunatic from the custody and protection of the Court; and until such order as aforesaid the Lord Chancellor intrusted as aforesaid shall retain, possess, enjoy, and exercise the same powers, control, and authority over the real and personal estate of the deceased lunatic as he would and might have possessed, enjoyed, and exercised over such real and personal estate if the said deceased lunatic had not died as aforesaid.”

Submissions of Solicitors at hearing of Preliminary Issue in the Appeal

“I do not need to have a client”

49. Counsel who attended with the solicitors at the hearing of the preliminary issue contended that the substantive appeal should proceed notwithstanding the Wardship and subsequent death of T.H. asserting *“I do not need to have a client.”* It was contended that the issue of *locus standi* raised by the HSE was “misconceived” and “...it is in any event

long out of time for any such preliminary point to be raised” (appellant’s written submissions dated the 27 May 2021, para. 14.)

50. Herein significant issues arise in regard to two discrete periods of time – before and after the date of death. From the date of perfecting the order in the High Court to the date of death of the deceased – within that time frame, the undisputed evidence is that neither the President of the High Court nor the Committee of the Ward, namely the General Solicitor, ever assented to the proposed appeal nor did she approve the grounds of appeal, nor was there any process of engagement at any time up to the date of death of the deceased on the 10 April 2021 assenting to same.

Succession Act, 1965

51. The deceased died testate. It appears from a letter from Messers. H.G. Donnelly & Sons Solicitors addressed to this Court dated the 24 December 2021 that the executrix is one Ann Crowe.

Devolution of estate of a deceased testator upon death

52. An executrix derives her title under the Will which contrasts with an administratrix who derives title solely from the grant of administration. Generally speaking, the real and personal estate of a deceased person vests in the executrix immediately upon his death.

53. Maxwell in *Miller’s Irish Probate Practice 1900 Edition: 1980 Reprint* (Professional Books Ltd., 1980) observes at p. 206: -

“It should be always borne in mind that an executor’s powers and liabilities commence from the death of the testator, whereas those of administrator commence only from the time of extracting the grant.”

The decision of *Whitehead v. Taylor* (1839) 10 Ad. & El. 210 is cited as authority for that proposition. The judgment of Lord Denman C.J. reiterated the long-established principle that the law knows no interval between a testator’s death and the vesting of the right in his

representative. As soon as the executrix obtains the Grant of Probate under the principle of relation, her rights are considered to relate back and to have accrued from the date of death.

54. It is generally accepted that an executrix can ratify the acts of a third party, including a litigant, such that the estate of the deceased is bound by the conduct steps and obligations assumed on foot of the said ratification. In the instant case, the position of the executrix towards the within appeal could not be clearer and is considered more fully below.

55. The position is succinctly set out in *Williams, Mortimer & Sunnucks: Executors Administrators and Probate* (17th ed., Sweet & Maxwell, 1993) at p. 83 –

“Where an executor is appointed by a Will, he derives title from the Will, and the property of the deceased vests in him from the moment of the testator’s death, so that probate is said to have relation to the time of the testator’s death. Thus, though he cannot rely on his title in any court without production of probate or a grant of administration with the Will annexed, the grant is merely operative as the authenticated evidence of the executor’s title.”

The position was extensively reviewed in *Chetty v Chetty* (1916) 1 A.C. 603 where Lord Parker stated at pp. 608-609: -

“It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator’s death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on

the point is well settled: see Comyn's Digest, 'Administration', B. 9 & 10, Thompson v Reynolds 3 C. & P. 123: Woolley v Clark 5 B. & Ald. 744."

The executrix, Ann Crowe, never assented to the appeal proceeding

56. A copy of a letter dated the 24 December 2021 from the Executrix's solicitors was furnished to this Court. It appears to be in response to a letter dated the 1 December 2021 from the solicitors who purport to prosecute this appeal: -

"We refer to your letter of the 1st December written in reply to our queries set out in our letter of the 25th November. We note that you have declined to answer the questions asked of you.

Accordingly, the Executrix is entirely unaware of the size of the liabilities that have already been incurred and will have to be borne by the Estate (as a result of orders made in the High Court). Nor does she have any sense of the scale of liabilities that may arise in this appeal.

For the avoidance of doubt, the Executrix does not accept that the Estate bears any liability towards your firm beyond that which arises from the order of Ms. Justice Hyland of the 20th October 2020, and nothing in this letter should be taken as accepting any position to the contrary.

While we note the confidence which you express as to the merits of the appeal, the Executrix notes with concern the indication given in the submissions filed on behalf of the HSE that that party intends to seek an order for its costs in the proceedings.

The Executrix gathers from your response in submissions that your firm has proceeded with this appeal without seeking authority from the President of the High Court or, we understand, approaching the Deceased's Committee.

In circumstances where you have decided to deprive the Executrix of the information sought, she is simply not in a position to give her support to your

continuing this appeal. Moreover, the Executrix shares the concern of the HSE as to the basis upon which your firm has purported to expose the Ward – who as set out was manifestly lacking in capacity – and now his Estate, to what will presumably be significant liabilities.

Having said that, the Executrix does not intend to participate in the appeal hearing on the 11th January. Her reasons in that regard are as follows:

First, the arguments which would be advanced on her behalf would (on the basis of the written submissions circulated), overlap to a large extent with those of the HSE in respect of the basis of your authority to bring and continue this appeal.

Second, she notes the intimation contained in your letter of the 1st December of challenging her standing to participate in the appeal.

The Executrix does not wish the question of her participation in the appeal to divert the Court from the central issue of your authority to bring this appeal.” (emphasis added).

57. From the date of death of the deceased, in circumstances where, by act and operation of law, both the real and personal estate of the deceased T.H. had vested in his executrix immediately upon his death, as outlined above, the principle of relation is not engaged in regard to the appeal. No act was done, step taken, or representation made that could have caused the solicitors to believe or reasonably understand that the executrix was ratifying, or in any manner whatsoever, supporting the purported appeal. Nor could it be said that she was assuming any obligations, whether in respect of costs or otherwise, such as could bind the estate of the testator or create an obligation of any kind against the said estate. From 10th April 2021 onwards no step taken could be characterised as resulting in the prosecution of the appeal or constituting an act performed at the instigation or with the assent of the

executrix in assertion of any right vested in the latter. The stance of the executrix's solicitor was commendable in its restraint – but that was not reciprocated.

Fees incurred

58. Prior to the High Court hearing as to costs on the 16 January 2020 in response to a request from solicitors for the General Solicitor, the latter firm had prudently proposed that the solicitors *“seek the approval of the Court for the payment of your costs that they be measured by the Court, and we will revert when we have a response to that.”* That firm purporting to pursue this appeal on the 16 January 2020 reverted suggesting that *“our bill of costs be put on hold by the General Solicitor's Office for the moment... As you are aware the bill of costs previously submitted did not include either Senior Counsel's fees or Junior Counsel's fees for the respondent which would be in addition to any Solicitors' fees and outlay submitted.”* Otherwise, on the 19 October 2019, the said firm submitted a bill of costs to the solicitors acting for the General Solicitor in respect of the costs, indicating *“We are contacting our senior and junior counsel to obtain their fees which should be added to our bill of costs when received.”*

Locus Standi

59. The application falls at the first hurdle since the legal practitioners has not identified any party as having ever been their client with *locus standi* to institute, file or pursue the purported appeal or as having instructed the filing of the within appeal on the 23 November 2020. Nor was the appeal approbated validly thereafter by the President of the High Court at any time or the prior consent of the Committee of the Ward validly sought either prior to or during the lifetime of the Ward. It is not open to a solicitor to unilaterally appropriate the name and identity of a former client, for the purposes of instituting or pursuing litigation, however meritorious the claims may be considered to be. Where the former client has been admitted to Wardship, the prior consent of the Committee of the Ward should be formally

sought and obtained, preferably in writing, before any step can be validly taken. Where a former client is deceased, the prior consent of the lawfully appointed Legal Personal Representative is a necessary prerequisite.

60. The assertion of senior counsel made in the course of the hearing that “*I do not need to have a client*” is fundamentally inconsistent with a lack of understanding of the nature and extent of the obligations of a legal practitioner engaged in advocacy and is at variance with the definition of “client” in s.2 of the Solicitors (Amendment) Act, 1994, as amended. The arguments of counsel that the legal practitioners were entitled to pursue this purported appeal in the teeth of the circumstances outlined above and subsequent to the taking into Wardship of their client and his death are untenable. Such a coercive overriding power, were it vested in legal practitioners, would be inconsistent with the autonomous right of an individual to decide whether to litigate or not as expressed, *inter alia*, by Keane J. (as he then was) in *Crindle Investments Ltd. v Wymes* [1998] 4 I.R. 567. It is unsupported by any authority identified to the court. Further, the purported pursuance of an appeal potentially incurring legal costs and expenses in the name of the Ward or his estate without leave or any authority potentially breaches his constitutionally protected property rights.

61. In the case *Re. K. (Ward of Court)* [2001] 1 I.R. 338, issues surrounding the institution of legal proceedings in the context of a Ward were considered by the Supreme Court. In that case, the Ward’s sister was a member of the Committee of the Person of the Ward jointly with another party. The General Solicitor was Committee of the Estate of the Ward. The Supreme Court was of the view that the sister, in her capacity as a member of the Committee of the Person of the Ward, had the right to bring litigation on behalf of the Ward in relation to welfare and day to day care. The case is wholly distinguishable from the instant case and offers no assistance to the solicitor or the legal practitioners/counsel in connection with the filing of the Notice of Appeal, without any lawful authority, in the name of the Ward of

Court who was not her client and the purported prosecution of this appeal thereafter both before and after the death of the Ward.

Conclusions

62. The solicitor is an officer of the court. The solicitors and counsel are legal practitioners within the meaning of the 2015 Act. Litigation, potentially exposing third parties to legal costs, cannot be conducted in the absence of a client. The solicitor knew as and from the 2 July 2019 that T.H. was taken into Wardship and that the only residual issue outstanding between the firm and T.H. concerned issues around costs properly due to the firm in connection with the Wardship. Those issues were dealt with by direction of the High Court.

63. The litigation in which the solicitor and counsel were retained concluded when the Order of Hyland J. was made on the 28 October 2020.

64. It ought to have been obvious that either the prior consent of the Committee of the Person and the Property of the Ward, the General Solicitor, or the prior authorisation by the President of the High Court was required by way of instruction and authorisation to proceed had to be obtained before any Notice of Appeal against the Orders made in the High Court could be filed.

65. The legal practitioners had no client and no instructions of any kind when a Notice of Appeal was filed in the name of T.H., the Ward, on the 23 November 2020.

66. The said Notice of Appeal was, therefore, filed without lawful authority.

67. The legal practitioners lacked *locus standi* to conduct this appeal. They had no client. It was erroneous on their part to assert that they did not need a client to institute or prosecute the purported appeal.

68. The use of the name and identity of the Ward, without lawful prior consent of his Committee or leave of the President of the High Court to pursue this appeal, was inappropriate and regrettable.

69. By the filing of the Notice of Appeal and its pursuance thereafter, the legal practitioners exposed the estate to the risk of incurring costs at a time when the Ward and his property was subject to the exclusive control of the High Court.

70. The purported pursuance of this appeal from and after the 13 April 2020, upon which date, at the latest, the solicitor was actually aware of the death of the Ward was erroneous and occurred where the legal practitioners had no client, lacked *locus standi* to proceed, knew that the executrix opposed the bringing of the appeal and risked exposing the estate to orders for costs.

71. Insofar as the legal practitioners purported to challenge the standing of the executrix to participate in this “appeal”, such as it is, same was ill-advised and failed to have due regard to the position of the executrix as a statutory trustee of the estate of the deceased pursuant to s.10(3) of the Succession Act, 1965.

72. The officer of the court /legal practitioners in question never had a retainer to pursue the purported appeal and never had any client to give instructions in connection with same. Further, they had no “client” either within the meaning of s.68 of the 1994 Act or s.150 of the 2015 Act.

73. The stance maintained by the legal practitioners involved an asserted entitlement to continue to prosecute this appeal, notwithstanding the death of the Ward and the clear opposition of his executrix to same, is contrary to all norms and no valid basis or authority was identified for same.

74. The legal practitioners have not shown that they had any client at any time or received instructions from any party who had *locus standi* to direct the filing, prosecution or pursuance of this purported appeal either prior or subsequent to the death of the person named in the title of the appeal.

75. There was no acquiescence by the Committee of the Ward to the filing or prosecution of this purported appeal.

76. The appeal falls to be struck out as having been improperly brought without instruction or lawful authority.

Costs

77. Insofar as the solicitors may contend that the Ward or his estate are liable for any costs incurred by them on or after the 2 July 2019 in connection with any aspect of this appeal, my preliminary view is that such a claim is not maintainable for all the reasons stated above since, at the point of being taken into Wardship, the property of the Ward became subject to the control of the High Court. The Ward was never the client of the solicitors/legal practitioners within the meaning of s.2 of the Solicitors (Amendment) Act, 1994 and neither was his estate.

78. My preliminary view is that the HSE and the General Solicitor should make written submissions in connection with the issue of the costs to date in this matter within 21 days of the date of this judgment. Any party or individual concerned shall be entitled to furnish legal submissions in response thereto within a further 21 days. Such submissions are not to be greater than 2,000 words in length. Thereafter, the Court will consider same and give directions including concerning any oral hearing should same be considered necessary.

79. Barniville P. and Murray J. confirm their agreement with the within judgment.