THE COURT OF APPEAL

UNAPPROVED

Appeal Number: 2020/242

Neutral Citation Number [2023] IECA 35

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 17th day of February 2023

Introduction

1. This judgment is directed towards the issue of the proper allocation of costs in this matter, the substantive judgment in which was delivered on the 14th October, 2022, [2022] IECA 228. A legal team comprising senior counsel, junior counsel and a solicitor (the legal practitioners) appeared in the appeal for the purposes of asserting their entitlement to pursue the appeal in the name of a purported respondent T.H., a deceased Ward of Court. Section 2 of the Legal Services Regulation Act, 2015 (the "2015 Act") defines the term "legal practitioner" as "a person who is a practising solicitor or a practising barrister".

Key facts

2. Briefly put, the essential facts are as follows. T.H., born in 1937, was a bachelor and had no immediate family. Prior to his hospitalisation T.H. resided alone in a modest rural dwelling house which he owned. Whilst a patient in Naas General Hospital (the "Hospital") in March 2019, through the intercession of a patients' advocacy group, he was put in touch with the solicitor. The immediate concern of T.H. was to secure assistance to lodge an

objection to and to oppose an application for his proposed Wardship which the HSE had instigated. The nature and extent of the role (if any) of the advocacy group in question in regard to the conduct of the proceedings concerning the Wardship of T.H. is unclear. They were neither a party nor a notice party to the wardship application. That aspect will be returned to later. It appears that the primary focus and interest of counsel in the case was, on what they viewed, as a "test case" to determine the circumstances when the HSE might be liable to bear the costs of the proposed Wardship. There is no evidence before this court that T.H. was ever informed of or assented to that approach.

3. From the Hospital's perspective, the evidence suggests that, as of March 2019, its assessment was that the appropriate care of T.H. required either that he reside at home under a suitable care arrangement following discharge from the Hospital or that he would move to suitable residential nursing home care. The HSE's assessment was that he needed to be in age appropriate accommodation and that his stay in a hospital setting on a continuing basis was inappropriate and not warranted.

4. In the context of opposing the application to have T.H. taken into Wardship, at the instigation of the legal practitioners, he was examined by two independent medical experts proficient in the field of gerontology, in addition to the Medical Visitor appointed by the President of the High Court to carry out a medical examination as to his soundness or unsoundness of mind and his capacity or otherwise to manage his affairs. On the 2nd July, 2019, having duly considered the totality of the medical evidence, the President of the High Court made an order taking T.H. into Wardship. It appears that the making of that order was ultimately unopposed. At the conclusion of the matter Senior Counsel for T.H. sought an order that the HSE should discharge the legal fees and outlay in respect of T. H. incurred in the application. The President directed that the issue of costs be adjourned to a later date and be determined after a Statement of Facts was filed.

5. It bears emphasis that this is a case in which the correctness of the President's order taking T.H. into Wardship is not in contest. It would appear that his counsel did not resist the making of the order by the President of the High Court. No attempt was made to appeal the said order and the purported notice of appeal does not encompass any challenge to the order taking him into Wardship.

Costs of the Ward

6. It was thus that the application of the legal practitioners' team for T.H. for costs came to be dealt with separately and subsequently to the Order taking T.H. into wardship. The costs application was ultimately heard by Hyland J. and judgment was delivered in October 2020. It would appear that this occurred, at least in part, because T.H.'s legal practitioners had given no prior indication to the HSE of their intention to seek an order that it should be liable to discharge T.H.'s legal fees and outlay, which is not an order conventionally sought in wardship proceedings.

7. At the adjourned costs hearing, counsel for T.H. sought to frame an argument that the costs of T.H. should be borne by the HSE. That proposition was characterised thus by Hyland J. in her judgment delivered on the 1st October, 2020, [2020] IEHC 487;

"2 The application for costs was advanced by counsel for Mr H on the basis that the Constitution and the ECHR require that the intended ward's voice be heard and that therefore the HSE ought to pay the costs of his legal representation. The question of the entitlement to be represented and the question as to who pays for that representation are two quite different issues. I fully agree that it was appropriate in this case that Mr H be represented and that his solicitors be entitled to an order for costs when measured. However, simply because the HSE presented the petition under s. 12 of the Lunacy Regulation (Ireland) Act 1871 (the "1871

Act") (i.e. at the direction of the President), that does not mean it should inevitably pay Mr H's legal costs."

8. In the judgment Hyland J. expressed the view that the entitlement of a respondent in a wardship application to have his 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." She rejected the arguments that the HSE was liable to bear the said costs. She reasoned, inter alia, that the HSE could not be viewed as an "unsuccessful" party within the meaning of s. 169 of the 2015 Act for the purposes of costs and, having satisfied herself that T.H. had sufficient means to discharge same, ordered that the measured costs of the legal representation provided by the firm of solicitors and by both senior and junior counsel in respect of the petition for an inquiry be borne out of his estate.

9. After the matter had finally concluded in the High Court, on the 23rd November, 2020 a notice of appeal was filed in his name by the legal practitioners. There is no evidence that T.H. had any awareness that such a notice of appeal had been filed. Neither he nor his Committee in Wardship was communicated with seeking instructions or informing them of this proposed course of action. Same occurred without any notice or any application for leave to the President of the High Court or to the General Solicitor for Wards of Court who had been appointed the ward's Committee by the Order of 2nd July, 2019.

10. Subsequently the Ward died on the 2nd April, 2021. The legal practitioners asserted an entitlement to continue to pursue the appeal from the orders of Hyland J. For reasons explained in its judgment and on foot of an application brought by the HSE to determine a preliminary issue as to the entitlement of the legal practitioners to institute or pursue the purported appeal, this court determined that they were not entitled to institute, maintain or

pursue the within appeal subsequent to the conclusion of the Wardship proceedings in the High Court following the above-referred to judgment and orders of Hyland J. made in 2020.

Costs in respect of determination of the preliminary issue in this court

11. In the judgment of this court referred to above a preliminary view was expressed in respect of costs as follows:

"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. (emphasis added)

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."

Position of the Parties regarding Costs of preliminary issue

12. The respective position of the parties including notice parties in regard to the issue of the costs are, briefly, as follows:

(i) **The General Solicitor for Minors and Wards of Court.**

In submissions dated 1st November, 2022 it is recalled that the General Solicitor had appeared before this court to offer assistance if required. "The usual practice of the General Solicitor when she appears in a matter to assist

the court is to bear her own costs." No order for costs was sought by the General Solicitor.

(ii) **Health Service Executive**

The HSE seeks an order for its costs of the within appeal against the legal practitioners on the basis that same were incurred by the HSE and were "all fruitless" or wasted costs. It was emphasised that the HSE had objected to the legal practitioners' locus standi to maintain the within appeal in correspondence and also in its notice of opposition to the appeal. As such, it contended that it was entitled to recover its costs as the "successful party" to the appeal. In measured submissions, it emphasised that it was not seeking an order for costs against the estate of the deceased ward T.H. Rather it sought them "directly against the legal practitioners who maintain the within appeal without cause." Reliance was placed on O. 99, r. 2 of the Rules of the Superior Courts, O. 99, r. 9(1), s. 169(1) of the Legal Services Regulation Act, 2015 and the principles adumbrated by Murray J. in this court in Chubb European Group SE v Health Insurance Authority [2020] IECA 183 and the decision of this court in Ward v Tower Trade Finance (Ireland) Limited [2022] IECA 70 wherein Noonan J. had carried out a detailed analysis of O. 99, r. 9 and the jurisdiction of the court to make a wasted cost order against a legal practitioner and principles that might inform the exercise of same. The HSE acknowledged that the application was an exceptional one. However it contended in the circumstances of the case that same was appropriate where "[a]s a result of the advancement of the appeal, costs have been incurred by the Respondent without any reasonable cause by virtue of the maintenance of the appeal in the name of T.H. by the legal practitioners, improperly, without instructions from the estate of T.H. to do so." It contended that the legal practitioners had acted improperly and without instructions, including from the estate of T.H. which had never authorised the maintenance of the appeal.

(iii) **The solicitor**

On behalf of the solicitor and the firm it was emphasised that the issues which were the subject of criticism by this court had all been considered by the solicitor and raised with counsel. "Counsel provided advices and detailed submissions and the solicitor considered that both Junior Counsel and Senior Counsel acted assiduously and diligently in the matter." "The solicitor understood the appeal to be a test case which engaged both the Constitutional and ECHR rights of individuals as to a right to have the costs of wardship proceedings paid by a state party who brought such proceedings against the wishes of the individual." (emphasis added). It was contended that the solicitor was entitled to rely upon the advices of counsel. It was further contended that in the circumstances the making of a wasted cost order was not warranted as against the solicitor in light of the decision of Noonan J. in Ward v Tower Trade Finance (Ireland) Limited [2022] IECA 70. Reliance was placed in particular on para. 31 of same. The solicitor's submissions outline that her involvement arose through a referral by a patient advocacy group for older people. That organisation or member/s connected with it had recommended the name of a geriatrician "… who may be in a position to carry out a medical assessment of Mr. H. to support his objection". (emphasis added) It also recommended the name of junior counsel to the solicitor. In her written submissions the solicitor engages in detail with the issues raised in the judgment of this court and offers her perspective, emphasising that she placed reliance on the advices of both senior and junior counsel and that of her own initiative she had raised several of the issues referred to in the judgment with them as matters of concern and had acted diligently on the advices obtained in regard to same. She ultimately observes:

"The solicitor herein is conscious of the findings and criticisms made in the Court's judgment …. It submits that notwithstanding those findings, the conduct of the solicitor herein does not amount to misconduct …. The solicitor had prudently engaged both junior and senior counsel

who are specialists in the area of wardship and human rights and acted on their advice. The solicitor understood the case to be a test case with other cases awaiting the outcome of the appeal."

(iv) **Senior and Junior Counsel**

It will be recalled that at the hearing of the preliminary issue in the context of ascertaining counsel's source of instructions, locus standi and, in an effort to identify whom she understood herself to represent, it was contended by senior counsel that; "I don't need a client". On their behalf it is submitted that "…the parties potentially affected by the lis before this court were the HSE and the estate of the ward, not the legal practitioners" and that the argument that HSE was the successful party might be the foundation of an argument that it should, therefore, be entitled to its costs against the estate of the Ward (although in the circumstances and particularly in light of the court's reasoning, that would seem a wholly unjust result) but it could not be the basis of an argument that the legal practitioners are liable for the costs because the arguments they advanced were unsuccessful. (p.2)

"A matter of personal indifference"

13. In submissions for both counsel it was observed:

"There was no dispute in the High Court but that the legal practitioners were entitled to their costs … in the wardship proceedings and in the subsequent argument about the costs of those proceedings which took place before the High Court. The issue was whether they were entitled to their costs from the estate of the ward or from the HSE. Although therefore a matter of personal indifference to the legal practitioners (the estate of the ward having assets to discharge their costs), the legal practitioners appealed the High Court decision for the same reasons they argued the point in the High Court i.e. with a view to protecting the estate of the ward and for the purposes of bringing clarity to the position on costs where the HSE seeks to

make a patient in a HSE hospital a ward of court (such lack of clarity having been acknowledged by the General Solicitor who is a notice party to the High Court argument on costs). The bona fides of the legal practitioners in both arguing the issue before the High Court and in bringing the appeal on the same issue have not been questioned."

14. The judgment of Ward v Tower Finance is relied on and several of the indicia identified by Noonan J. at para. 33 are considered in turn; it being contended that:

"The lodging of the appeal in the present case cannot remotely be described as vexatious or designed to harass the other side rather than advance the resolution of the case. As appears from the matters referred to below, it permits of a reasonable explanation even if it transpired to be misguided or wrong."

15. Whilst purporting "not to reargue the issues" decided by this court, the submissions postulate why they considered "they were fully entitled to pursue the appeal and why in doing so, they did not consider they were in dereliction of their duty to the court in a way that would warrant making them personally liable for the costs of the unsuccessful appeal." (emphasis added) (paras. 16/17 of submissions on behalf of counsel). They assert:

"The mere fact that Mr. H. was taken into wardship … did not mean that his legal representatives were not subsequently entitled to argue for his benefit the question of whether the HSE or Mr. H. himself should pay for the costs of his representation."

This stance suggests an entitlement not alone to pursue the costs application as explicitly authorised by the President of the High Court on 2nd July 2019 but also the purported appeal. However, the issue of costs was an integral element of the Wardship application in respect of which the legal practitioners were retained and while the process of determination of the costs application was formally provided for by the President on 2nd July, 2019, those directions could not reasonably be taken to authorise or approve any appeal.

No evidence T.H. either knew or agreed to possibility of a test case on Costs

16. It appears that in all the various engagements with T.H. prior to his admission into Wardship the only purpose referred to and apparently understood by him to be the basis of engagement of the solicitor and indeed counsel was for the purposes of objection to his proposed Wardship. That is borne out, for instance, by p. 11 of the Bill of Costs and Outlay of his solicitor dated the 5th September, 2019 where she observes and records:

"Further telephone conversation on the 9th May, 2019 by... solicitor with… (a neighbour of T.H.) and notifying her that counsel had now been briefed and it was suggested a senior counsel…also be briefed. Advising…that Mr. H. should be aware of the costs involved in his High Court objection to Wardship." (emphasis added)

17. All the indications are that T.H. had understood that he was retaining legal representation for the sole purpose of "opposing his admission into Wardship". There is no evidence that he was informed that the application that he be admitted to Wardship was to provide a vehicle whereby his estate and assets would be laid out or put at risk by way of a test case in respect of the instances or circumstances where the HSE might be found liable to pay the costs of legal representation in respect of a party who opposed being taken into Wardship. There is nothing within the s. 68 letter or in any correspondence or documentation made available to this court to demonstrate that any cogent steps were taken to apprise him of the fact that were it to transpire, as it did - and as the medical evidence unequivocally warranted - that the High Court would find that his admission into Wardship was warranted and appropriate, that nevertheless his assets would be "put on the hazard" for the purposes of litigating such a " test case".

18. There is no suggestion that he was apprised of the fact that he had been selected as a "test case" to be pursued separately against the HSE confined to the issue of costs to be pursued by way of appeal, potentially even to the Supreme Court, exposing his estate to the risk of costs which could potentially be quite substantial.

19. At the hearing of the Wardship application before the President of the High Court on the 2nd July, 2019, the focus of attention by counsel was on the issue of costs; counsel sought without advance warning to the HSE that the latter discharge the T.H.'s legal fees and outlay. The President of the High Court clearly directed that that application be adjourned for determination after the statement of facts was filed. Those facts are clearly stated, including at p. 29 of the Bill of Costs and Outlay prepared by T.H.'s solicitor dated 5th September, 2019. This accords with the statement of the relevant facts set forth in the judgment of Hyland J. [2020] IEHC 487.

Test case

20. Test cases are frequently brought before the courts. They are of great importance and have played a significant part in the evolution of our understanding of the parameters of various fundamental rights and the obligations of the State. Frequently such suits are brought pro bono. Invariably the litigant, or if under a disability the next friend they have consented to, will give prior agreement to the proposed litigation. T.H. was a vulnerable person with no earning capacity in his 80s, whose assets, when ascertained, were to be applied for his maintenance and care in an appropriate nursing home setting. He had no immediate family who might have intervened and evaluated via costs-benefit analysis the risks to T.H. inherent in such a "test case".

21. It is contended that counsel pursued the appeal "with a view to protecting the estate of the ward". However, there is no evidence of any assessment having been carried out at any stage

with regard to the extent to which the assets and estate of the Ward were being put on the hazard by the conduct of an appeal. Nothing in the s. 68 letter – which is directed towards opposing the wardship, as instructed - engages with the exposure or the potential risks to the assets of T.H. if the test case failed. Rather the s. 68 letter is directed towards opposing the wardship as instructed. Such a "test case" would presumably have been intended to run its course and, if unsuccessful in the Court of Appeal, no doubt an application for leave to appeal to the Supreme Court would have ensued. Were provisions of the European Convention on Human Rights invoked, an application to the European Court of Human Rights might arise. It can be inferred that T.H.'s means were limited since it would appear that although he wished to live at home that was not possible because he did not have the financial means to disburse the charges and costs attendant on 24-hour care in the home. There are no unlosable test cases. At no time was a statement provided identifying the additional potential costs which T.H., or his estate, stood exposed to arising from this litigation strategy which was apparently not disclosed to or agreed by T.H. prior to the hearing on 2nd July, 2019.

22. The contention that "[t]he parties potentially affected by the lis before this court were the HSE and the estate of the ward, not the legal practitioners", with respect, misunderstands the ambit of O. 99, r. 9 and the import of Ward v Tower Trade Finance (Ireland) Limited. The appeal embarked upon at the behest of counsel had no impact on the Wardship - the sole issue that T.H. was opposed to. No appeal was brought against the admission of T.H. into Wardship. It is difficult to see any valid basis for such an appeal. Once he had been admitted into Wardship the sole matter for which the legal practitioners had been retained by T.H., namely that his Wardship be opposed, was at an end. He had agreed to the payment of his legal costs.

23. In the context of the principles adumbrated by Noonan J. in Ward v Tower it is contended by the counsel that "in the absence of deliberate dishonesty or misbehaviour" a mere error of

judgment, even one amounting to negligence, would not suffice to warrant the exercise of the jurisdiction pursuant to O. 99, r. 9. However, if it was clear that counsel repeatedly overrode or elected to ignore the legitimate concerns of the solicitor and failed to ascertain the practical consequences of adverse costs orders for a vulnerable litigant in the course of the litigation, such behaviour could potentially amount in a given case to deliberate misbehaviour. The stance maintained from and after a point when counsel were aware of the death of the Ward in April 2021 was, at the very least, fraught with risk of reaching the threshold of intermeddling identified in Goods of Davis (1860) 4 Sw. & Tr. 213.

24. It is evident that there was some awareness that the Ward had made a will and that same was retained by his usual firm of solicitors. It is clear that the solicitor had spoken with the latter firm on the 11th June, 2019 which confirmed that it held a will in respect of T.H. Proceeding to insist on conducting an appeal without the consent of an executrix following the death of a Ward of Court who has died testate risks amounting to intermeddling improperly in the assets of a testator rendering counsel executrices de son tort. It is noteworthy that counsel could identify no authority for the proposition that such a course of action has ever been found to be permissible or has ever been approved of by the courts. Indeed there is a corpus of jurisprudence that goes the other way, dating back to Beavan v. Lord Hastings (1856) 2 Kay & J. 724.

25. Counsel seek to stand over and justify their conduct of causing the solicitor to lodge the appeal. The arguments ultimately though unconvincing reflect the sincere – albeit misguided -confidence of counsel in the perceived infallibility of the test case.

26. The contention at para. 21 of counsel's submissions that "[i]f it is the case that it was proper for the legal practitioners to advance an argument to the High Court, not for their own benefit, but for the benefit of their incapacitated client, it was reasonable for them to consider

that this entitlement and, perhaps, duty did not terminate with a High Court decision on the issue when there is an entitlement, as of right, to appeal a High Court decision" betrays a [fundamental] misunderstanding of the functions and duties of counsel in the context of the conduct of litigation where the client is a vulnerable person and in this instance had been admitted to Wardship without contest with the General Solicitor appointed his Committee. It is not a litigation manoeuvre which could be contemplated with express authorisation were the client not under a disability. It ignores the significant legal implications of his admission into Wardship. Further, counsel appeared to misunderstand the crucial fact that the costs hearing before Ms. Justice Hyland took place on foot of the directions made by the President on the 2nd July, 2019, specifically adjourning the question of costs and the freshly launched claim seeking costs against the HSE to a later date and, in particular, until a statement of facts was filed. The conclusion of the costs aspect of the Wardship occurred with the orders of Hyland J. and judgment of October 2020.

27. At paragraph 22 of their submissions counsel argue:

"This is particularly so in circumstances where all parties understood that the case was what is colloquially referred to as a test case where at least two other cases were awaiting the result."

Nothing was disclosed in the course of this appeal that could satisfy this court that T.H. was ever apprised of or understood that the case was a test case concerning costs of wardships generally and that his entire estate, or a significant part thereof, was to be potentially put on the hazard for the purposes of such a test case. However, in the context of the costs application by HSE, there is the possibility that same arose by reason of some error or oversight rather than amounting to deliberate misbehaviour. It appeared that T.H's sole purpose in engaging legal representation was to object to the proposed Wardship. That

purpose was at an end in October 2020. The entitlement of counsel to continue to act and to argue the issue of costs after the formal order of the 2nd July, 2019 arose solely from the specific tenor of the order made by Kelly P. on that date.

28. It is ultimately apparent from their submissions that counsel were convinced of the rightness of their "test case" and, in consequence, may have failed to fully and properly advert to the fact that T.H. had ceased to be their client. Their authorised involvement on his behalf came to an end at the conclusion of the costs process which had been directed by direction of the President on 2nd July, 2019.

The death of T.H.

29. The stance of counsel following the death of the ward is, with respect, difficult to understand. It is encapsulated in the assertion "I do not need a client". Order 17 of the Rules of the Superior Courts ("RSC"), as amended, sets out clear procedures where the death of a party occurs:

Change of Parties by Death – Procedural requirements

0.17 r.2. In case of the death, or devolution of estate by operation of law, of any party to a cause or matter, the Court may, if it be deemed necessary for the complete settlement of all the questions involved, order that the personal representative, assignee, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court shall think just, and shall make such order for the disposal of the cause or matter as may be just. (emphasis added)

At no time was the consent of the executrix forthcoming for the pursuance of the purported appeal. No application was ever made pursuant to Order 17 RSC to amend the title of the purported appeal nor was an application brought pursuant to s.27 of the Succession Act, 1965

for a limited grant which might be necessitated if they considered that there was a transmission on death of a lis arising or if they viewed themselves as entitled to pursue litigation without the express concurrence or against the wishes of the executrix. Had such applications been adverted to the unviability of the enterprise would have become immediately apparent, as would the unstateability of their proposition that they enjoyed a free-standing locus standi to pursue an appeal at the expense of the Ward or his estate.

30. From the conclusion of the High Court proceedings T.H. was no longer a client of the legal practitioners. However, his identity and circumstances were availed of to pursue a test case.

31. Counsel explain their pursuit of the purported appeal by reason, inter alia, that the General Solicitor was present in court at most "for mention" dates in the Court of Appeal and that no attempt had been made by her to intervene in the appeal prior to the 4th January, 2022. It is further contended to be of relevance that at no stage had counsel for the General -Solicitor or the HSE indicated that the matter should be referred to the President for further directions or express authorisation. However, it is not disputed that the HSE had raised the issue of locus standi to pursue the purported appeal in writing and also in their response to the appeal which should have brought the issue to the attention of counsel.

32. The submissions imply that at a point, possibly subsequent to the death of the Ward in April 2021, it was established that he had died testate and an executrix was identified. However, this was clearly known to the legal practitioners prior to T.H. being taken into Wardship, as is demonstrable from, inter alia, p. 24 of the aforementioned Bill of Costs and Outlay, which records an attendance with a firm of solicitors who held a will made by T.H. That conversation took place on the 11th June, 2019, some weeks prior to the application in Wardship on the 2nd July, 2019. Thus the legal practitioners knew that the deceased had died

testate. The conduct of insisting on prosecuting a purported appeal subsequent to the death was ill judged, in my view, in the circumstances.

34. T.H.'s objection was to being taken into wardship. He apparently did not express objection to bearing the costs of same as outlined to him by the solicitor. He did not seek or agree to pursuing any "test case" regarding costs. It is not generally in the public interest that the assets of the vulnerable are put at risk in pursuance of a test case unless informed consent or direction of the court is first obtained. That core fact was unfortunately entirely overlooked.

Conclusions

35. The position of the General Solicitor for Wards of Court is pragmatic and reasonable and no order as to costs should be made in respect of her.

36. With regard to the solicitor, this is a clear instance where the solicitor placed reliance upon the expertise and standing of counsel. Counsel had knowledge and experience in the area of Wardship. I am satisfied that this is an instance where the solicitor did not abdicate her professional responsibility. Mindful of the limitations of her expertise she sought the advices of counsel. In the first instance junior counsel was retained. When junior counsel indicated that a senior counsel was required, she agreed and senior counsel was retained. The solicitor was careful to note her conversation with junior counsel in regard to the retainer of senior counsel recording "Only one counsel's fee is charged and they split the fee between them." (p. 16 of Bill of Costs and Outlay dated 5th September, 2019). I am satisfied that the solicitor did apply her mind to the advices received. It is clear from the authorities including Ridehalgh v Horsefield [1994] Ch 205 at 237, where Sir Thomas Bingham MR had endorsed the views in Locke v Camberwell Health Authority [1991] 2. Med LR. 249, that given the specialist nature of the advices sought, it was reasonable in all the circumstances of this case

for the solicitor to accept the advices of counsel and to act upon it. The approach is endorsed by Noonan J. in Ward v. Tower Trade Finance (Ireland) Ltd & anor.:

"33.(vii) Pursuing litigation on the advice of counsel may afford a solicitor a defence to a wasted costs application, unless that advice is so obviously wrong that any reasonable solicitor giving the matter due consideration would realise that fact."

This is such a case. The advice of counsel regarding the appeal was unfortunately inaccurate. The solicitor did endeavour to stress-test and query the advices and in all the circumstances was justified in ultimately reposing trust and confidence in senior and junior counsel in their specialised field of reputed expertise. Counsel concede this to be so. I am satisfied accordingly that no order as to costs ought to be made against the solicitor.

37. In the case of counsel I ultimately conclude that they should not be liable for the costs for, inter alia, the following reasons;

- It appears clear that to a significant extent they focused on the "test case" quality of the issue of costs to the exclusion of all other considerations, and that they may have assumed that the public importance of the litigation (as they perceived it) meant that T.H. was unlikely to be exposed to an adverse order for costs.

- It is regrettable that steps were not taken to ensure that the vulnerable T.H. became aware at some point prior to the hearing on the 2nd July, 2019 that his opposition to wardship was being co-opted into a test case on an aspect of costs and that the attendant costs could potentially substantially deplete his estate. It appears that there were circumstances of mutual misunderstanding.

- Counsel erroneously mistook the presence of the General Solicitor in court as amounting to implicit consent to pursue an appeal.

- Suffused with the zeal of establishing a principle and insufficiently sensitive to the

possibility that the “test case” - which was roundly rejected by Hyland J. in her judgment - might not succeed, counsel did not, in retrospect, take full account of the rights and interests of T.H., the practical consequences of his Wardship, the legal consequences of his death and the absence of authorisation from the executrix.

- These errors fell short of such misbehaviour as would merit visiting the costs upon counsel.

In all the circumstances in the exercise of discretion it is in the interests of justice overall that no order as to costs be made against counsel.

In particular, I have no doubt that this is a case in which counsel have acted in a manner that was well meaning and which advanced their seemingly genuine sense of where the overall public interest lay in proceedings of the kind in issue.

38. I emphasise the latter factor which I view as central to the fair and just resolution of this application. However, it must hereafter be clearly understood by all that legal practitioners are not generally entitled pursue “test cases” on behalf of vulnerable individuals who have not given their informed consent to the pursuance of the specific issue, particularly where such a case puts on the hazard the assets of the individual in question, and that those who disregard that injunction risk exposure to personal liability in respect of costs. The prosecution of litigation on behalf of a Ward without appropriate authorisation from the President of the High Court and/or the Committee of the Ward or without formal notice to or the assent, where appropriate, of the General Solicitor is imprudent and, in such instances, save in the most exceptional circumstances, in the exercise of its discretion a court may order the payment of all or a portion of the other party’s costs or costs by the legal practitioners concerned from or until a specified date, pursuant to s. 168(2)(a) of the Legal Services Regulation Act, 2015 as amended.

Barniville P. and Murray J. are in agreement with this judgment.