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Powell and the perils of litigating

The recent case concerning the estate of David Powell is a salutary lesson to would be litigators in probate disputes. The case concerned a classic scenario which is so often the recipe for trouble, namely children from a first marriage and the widow from a subsequent marriage.

Thus was the case when Richard and Jonathan Powell took their stepmother, Ailsa Williamson Powell to court over their late father's estate. Poor David Powell had suffered from Parkinson's disease for a number of years before his death in 2012.

His final Will in 2009 left a number of small legacies to grandchildren and a gift to a church with the residue of £250,000 to be split as to 50 percent to his widow Ailsa and 25 percent each to his two sons, Richard and Jonathan. This may not seem unreasonable but it was not enough for the two sons. They chose to fight it all the way through to trial with disastrous consequences for them.

The deceased married Ailsa in February 2003. One month later he made a Will in which he left Ailsa only £2,000 and the whole of his residuary estate passed to his two sons in equal shares. Maybe he was "testing the water" at an early stage in his second marriage.

However, his second marriage was clearly successful and one of mutual affection. This led to him changing his Will in 2008 and leaving it as to one third each to Ailsa and his two sons. This would have meant them receiving £100,000 each. In 2009 he made his final Will as above.

The sons claimed that the February 2003 Will was the last valid Will and they alleged lack of testamentary capacity on behalf of the deceased and/or want of knowledge and approval of the contents of both his 2008 and 2009 Wills. However, these allegations were firmly rejected by the Judge.

He commented that most of the symptoms of Parkinson's disease are physical and would not have impacted on the deceased's capacity to make a Will in either 2008 or 2009. He further rejected the allegation that the deceased did not know or approve the contents of the Wills.

He regarded the allegations in respect of the 2008 Will as so hopeless that Counsel for the sons felt no option other than to abandon the challenge in respect of the 2008 Will on the third day of the trial.

At this point, if the sons' challenge to the 2009 Will succeeded, the 2008 Will would stand. The financial difference (as a result of the smaller legacies) meant that Ailsa would have received £100,000 under the 2008 Will and £125,000 under the 2009 Will. Such a differential is not to be litigated over but by the third day of the trial it was too late.

Judge Dight found conclusively in favour of Ailsa and the 2009 Will stood. In probate claims

parties sometimes litigate in the hope that even if unsuccessful the costs will come out of the estate so that either they do not have to bear their own costs or they do not have to foot the bill for the opposing party's costs even if they lose.

However, Judge Dight was in no doubt that the appropriate costs order was that both sons should bear their own costs and Ailsa's costs. To underline his disapproval of their conduct he ordered those costs on the indemnity basis.

The case does not establish new law. However, it does underline the pitfalls of litigating a weak claim. It also raises the question of what was the point of this litigation when Ailsa would clearly have had a claim for reasonable provision against her late husband's estate under the Inheritance (Provision for Family and Dependants) Act 1975 in the unlikely event that the 2003 Will had been found to be the final valid Will.

The sons reportedly have a legal bill of £200,000 which will more than extinguish what was left to them by their father under the 2009 Will. It doubtless will leave them licking their wounds in pursuing what the Court found wholly unmeritorious litigation.

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