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IN THE FAMILY COURT
AT WHANGAREI

I TE KŌTI WHĀNAU
KI WHANGĀREI-TERENGA-PARĀOA

FAM-2018-088-000375
[2020] NZFC 3760

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
AND	
IN THE MATTER OF	THE ESTATE OF GEORGE FREDERICK HANSEN
BETWEEN	FRANCES ELLEN BROWNLEE (DECEASED) Applicant
AND	ANDREW GOLIGHTLY CHRISTOPHER POOL Respondents
AND	KAY ABRAHAM DAWN FRANCES ROGERS KAREN FAY HALLIDAY Other Parties

Hearing:	28 May 2020
Appearances:	D Adams for the Applicant D Reeves for the Respondents J Armstrong for the Other Party Abraham D Adams for the Other Party Rogers D Adams for the Other Party Halliday D Shanahan as Counsel to Assist
Judgment:	28 May 2020

ORAL JUDGMENT OF JUDGE M HOWARD-SAGER

[1] I have before me today the matter of Brownlee v Golightly and Pool and this is in relation to the estate of Mr George Frederick Hansen. Present in Court today I have Mr Adams, who acts for Ms Brownlee's daughters now, as the representatives of Ms Brownlee, who has passed away. Ms Brownlee's daughters are present, Ms Rogers and Ms Halliday. Also present in Court I have Mr Reeves, who acts for the executors in this matter, and I have Mr Shanahan, who was appointed as counsel to assist the Court in respect of the unnamed charities who were left money under the will. Present early on in the hearing was Mr Armstrong, who acts for Ms Abraham. Ms Abraham is the niece of Mr Hansen, who also was left a bequest under the will.

[2] The issue before me today relates to the costs of parties to the proceedings and how they should be met. Also requiring determination is how the costs of counsel to assist the Court should be paid, together with those costs incurred by Mr Hansen's niece, Kay Abraham, who was a beneficiary under his will.

[3] Just by way of background, Mr Hansen passed away on 31 December 2017. He left a will, dated 31 May 2017, which had a codicil attached to it and that had been signed on 3 July 2017.

[4] In his will, Mr Hansen left provision for his niece, Ms Kay Abraham, of $100,000, and he also left provision for Ms Frances Brownlee, his partner, to receive the home at Denby Crescent, Tikipunga, and the sum of $300,000. The residue of his estate, around $1.8 million, was to be held in trust by the executors, Mr Golightly and Mr Pool, to provide to a registered charitable organisation or organisations in New Zealand of their choosing and at their discretion. Probate was granted on 9 February 2018.

[5] On 10 July 2018, Ms Brownlee filed applications in the Court, pursuant to the Family Protection Act 1955, seeking an order granting her further provision from the estate and that was for her proper maintenance and support. She sought a capital payment of a sum that the Court thought fit. Ms Brownlee also sought an order that

any capital payment made should fall upon the residuary estate only. She sought a further order that the residuary estate be held on life interest for her, with such income as accumulated being paid for her proper maintenance and support. Ms Brownlee sought that the costs of her application be taken from the residuary estate.

[6] Sadly, on 11 June last year, Ms Brownlee passed away following an accident at her home. Her daughters, Ms Rogers and Ms Halliday, were joined as parties to the proceeding in her stead and a notice of discontinuance to her applications was then filed in the Court in September of last year. That discontinuance was considered by Judge McHardy on 9 March this year, at which point he discontinued the proceedings, save as to costs. That is the purpose of today's submissions only hearing.

[7] I will deal first with Ms Abraham's involvement in the proceedings. Ms Abraham is a beneficiary under Mr Hansen's will. As stated, he left her the sum of $100,000 and that sum was finally paid to her on 8 May this year. In terms of the costs issue before the Court, Ms Abraham's involvement in the proceedings has been minimal. I noted that she had been served with the proceedings and that, following that, she filed a notice of appearance on 6 September 2018. The purpose of that notice really was just to preserve her rights in the event that any other person became a party or in the event that a party took steps adverse to her interests, and she also wanted to be heard on the matter of costs.

[8] From Ms Abraham's perspective, she sought recovery of her costs incurred as a result of the proceedings to be met from the estate. In fact, her solicitor submitted that the costs of all parties should be borne from the estate. In their submissions in September last year, they stated that the claim had not proceeded beyond the preliminary procedural steps and no party had been put to the cost of filing any evidence in opposition. They believe that in the circumstances of a discontinuance having been filed in the Court, that that was the most even-handed way of dealing with costs. I am advised that Ms Abraham's costs sit at $4800, plus GST and disbursements. Ms Abraham's counsel, Mr Armstrong, submitted that all parties were comfortable with her costs being met by the estate and I have received that acknowledgement today.

[9] As a result of Mr Hansen leaving the bulk of his estate on trust to an unnamed charity or charities, Mr Shanahan was appointed to assist the Court. That was to represent the charities and to have a right of audience and an opportunity to make submissions as well. It was submitted during the course of the proceedings that as the executors wished to maintain their neutral role, that it was important that the charities be represented in order to potentially resist Ms Brownlee's applications.

[10] Mr Shanahan has filed a memorandum, dated 27 May 2020. He submitted that it was appropriate that his costs be borne by the estate. He very helpfully set out the applicable Family Court Rules 2002, District Court Rules 2014, and referred the Court to the case of *Perkins v Malthus*.[1] Mr Shanahan submitted that due to the unfortunate passing of Ms Brownlee, that the merits of her claim had not been tested, nor had questions arising in relation to his appointment been answered. His submission was that it is appropriate that the estate bear the costs of all counsel in the proceedings.

[11] In his oral submissions today, Mr Shanahan reiterated his view that this is an unusual case and that his actions in making inquiry of the specifics of his role were well-justified. He supports Ms Brownlee's costs being met by the estate and submitted that if the Court decided against that course of action, that the inference could be drawn that the Court considered her claim lacked merit.

[12] With respect to Ms Brownlee's costs, I have noted the memorandum of counsel filed on 26 September 2019, together with the submissions that I have received only today as a result of what appears to have been a technical error. Their position is that the proceedings brought by Ms Brownlee were at an early stage only. They say that no evidence had been required of the unnamed charities at the time of her passing. They have further submitted that her claim held merit, that this is a large estate, that there was a lack of competing claims, and it was further submitted by Mr Adams that she was likely to receive some kind of award, pursuant to her claim.

[13] It was also submitted on her behalf that counsel to assist, Mr Shanahan, was content that the unnamed charities would not be unfairly affected by Ms Brownlee's costs being met by the estate. Their submissions were that all beneficiaries had

[1] *Perkins v Malthus & Ors* CIV-2004-485-000437 Mar 7, 2006.

effectively agreed on the matter of costs and from their perspective they ask that Ms Brownlee's costs be met from the residuary estate.

[14] With respect to the executors of the estate, I am in receipt of their memorandum of counsel, dated 18 November 2019, and I have also received their submissions filed late yesterday. I did advise counsel that whilst I have had an opportunity to read those submissions, I had not had an opportunity to digest them in any great detail.

[15] Their initial submissions filed in November last year refer to the costs incurred by Ms Abraham. They said at that time that they did not oppose an order obliging them to meet Ms Abraham's costs. This, it appears, is due to the fact that she was obliged to incur legal fees to respond to the applications as an interested party. If that was to occur at that time though, they were concerned that there needed to be an order to justify any payment outside of the terms of the trust. At that time, the executors also stated that with respect to the costs of other parties that the respondent executors did not seek costs against any party.

[16] In the submissions that were filed last night though, they do oppose the costs of Mr Shanahan being met from the estate and they oppose the applicant's costs also being met from the residue estate. They say that Mr Shanahan's focus was on identifying his role as independent counsel, as opposed to making submissions on behalf of the charities. I do not agree with that submission. It is my view that it was only right that Mr Shanahan sought to clarify his role at the time that his appointment was made.

[17] With respect to Ms Brownlee's claim, they are also of the view that her fees should not be paid from the estate and they point, in their view, to an unmeritorious claim and refer to an earlier minute of Judge Hunt where he raised an issue querying the merits of the case. The reality from my perspective though is that the proceedings were discontinued not because there was a lack of merit, but due to Ms Brownlee passing away. The discontinuance was at a very early stage of the proceedings. It is also noted that Ms Brownlee did not nominate an exorbitant figure in her claim, but rather she asked the Court to apportion a further sum to her that the Court considered appropriate.

[18] Whilst the executors have submitted that they have acted without any fault or unduly, I do note that there was a question in the same minute of Judge Hunt regarding the executors' stance around whether there was in fact a defacto relationship. It appeared that concessions at that point were anticipated.

[19] With respect to the law, r 207 Family Court Rules provides:

> (1) The Court has discretion to determine the costs of—
>
> (a) any proceeding:
>
> (b) any step in a proceeding:
>
> (c) any matter incidental to a proceeding.

[20] The rules go on to state that, "In exercising that discretion, the Court may apply any or all of the District Court Rules applicable to the proceedings." In that regard, r 14.2 District Court Rules sets out the principles to be applied in determining the issue of costs. They are:

> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
>
> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
>
> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
>
> (f) an award of costs should not exceed the costs incurred by the party claiming costs:
>
> (g) so far as possible the determination of costs should be predictable and expeditious.

[21] For the purpose of the matter before the Court today, I am of the view that r 14.2(a), (b), (f) and (g) apply and I will deal with each of those principles shortly.

Before doing so, I am assisted by common law and the general approaches that are taken in cases of this nature, as referred to by Mr Shanahan in his submissions.

[22] What has been clear to me throughout and having read the pleadings is that the Court has a discretion to deal with costs arising as a result of the applications brought by Ms Brownlee. I am advised that traditionally the practice in any Family Protection Act case is that costs of all parties are borne by the estate, however, it appears that that position is changing. In a defended Family Protection claim, the Court may order that costs lie where they fall or that costs may be awarded against an unsuccessful claimant. Similarly, if an executor breaches their neutral stance or their actions are considered unreasonable, then their costs may not be met from the estate. It really does enforce the fact that the Court has quite a wide discretion to determine costs under the rules.

[23] I have considered the case of *Perkins v Malthus*, which is a High Court matter from Wellington, citation in Mr Shanahan's memorandum. That case decided the issue of costs where proceedings had been discontinued by the claimant. In that matter, the estate bore the costs of all parties to the proceeding. The proceedings were discontinued at an early stage and the estate there was also substantial, and that was important as it meant that only modest costs were incurred and the estate was large enough to bear the costs of the parties. The Court considered the merits of the case but noted that there was little before the Court to indicate why the proceedings were brought or discontinued and the merits of that potential case were not clear. In my view, that case bears many similarities to the matter that I am dealing with today.

[24] Due to the unfortunate passing of Ms Brownlee, the merits of the case have not been determined. There is insufficient evidence before me today to say that her claim would have been unmeritorious. However, I do reflect on the fact that she was very clear in her claim that she sought only an amount that the Court considered appropriate. The actions of Ms Brownlee's representatives, her daughters, in discontinuing the proceedings following her death has meant that the parties have not incurred any unreasonable cost. I cannot see that any party has acted unreasonably. The proceedings were concluded at an early stage and very promptly. In my view, this case supports the submission that the costs of all counsel should be met from the estate.

[25] With respect to the rules and in particular the principles set out in r 14.2 District Court Rules, no party has failed in the proceedings. Rule 14.2(a) states that, "A party who fails…should pay costs to the party that succeeds." Obviously, that is not the case here, as the proceedings have been discontinued at a very early stage.

[26] With respect to r 14.2(b), I note that an award of costs should reflect the complexity and significance of the proceeding. It would appear from the pleadings that the proceedings were not particularly complex. There were essentially three bequests, those being one to Mr Hansen's niece, one to Ms Brownlee, and one to the unnamed charities. In my view, it is important that parties be able to bring a claim when merited. The costs incurred, from having heard from counsel, appear to be reasonable. In total, the costs amount to around $30,000. On that basis, they reflect the level of complexity or lack of complexity in this matter.

[27] Rule 14.2(f) states that, "An award of costs should not exceed the costs incurred by the parties claiming costs," and on that basis I have heard from all counsel in relation to the actual costs that they have incurred. I believe that that puts me in a position to deal with the issue of costs without concern that any award would be too high.

[28] With regard to r 14.2(g), I need to ensure that, "The determination of costs should be predictable and expeditious." Given the fact that submissions have been filed in this matter and the questions that I have asked today, I do not think anyone would be under any disillusion as to what I am going to do in respect of this matter.

[29] Having considered the submissions of all counsel, both written and oral, the rules and the commentary in the caselaw that I have been directed to, I am going to order that the costs of all counsel are to be met from the residuary estate. In justification, the proceedings have been discontinued at an early stage, parties have not been put to the expense of protracted proceedings without merit. There is nothing, in my view, to suggest that the claim brought by Ms Brownlee lacked merit or was without foundation, despite the fact that this had been queried.

[30] Similarly, whilst there have been comments made that the executors had taken an adversarial approach, they were clear in the proceedings that were filed and I have before me that their stance was neutral, hence the appointment of Mr Shanahan to represent the interests of the charities.

[31] It is my view, having considered the case of *Hampson v Spencer*, to which I have been referred which considered the unreasonableness of executors in that matter, that this is not a case that aligns with the actions of the executors in that case.[2]

[32] Accordingly, I order that the costs of all counsel be met from the residue estate. Mr Reeves' costs will be no more than $11,000, plus GST and disbursements, Mr Shanahan's costs will be no more than $3800, plus GST and disbursements, Mr Armstrong's costs no more than $4800, plus GST and disbursements, and Mr Adams no more than $11,000, plus GST and disbursements.

[33] I have awarded costs on the basis that these are reasonable and actual costs as incurred on a solicitor/client basis. It is my view that in light of the legislation to which I have been referred and the caselaw and noting that the Court has a discretion in terms of costs, that that is a reasonable position to take.

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Judge M Howard-Sager
Family Court Judge

Date of authentication: 04/06/2020
In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.

[2] *Spencer (dec'd), Re; Hampson v Spencer* [2014] NZFC 6590.