EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT NELSON

I TE KŌTI WHĀNAU
KI WHAKATŪ

FAM-2019-042-000253
[2022] NZFC 11062

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
AND	
IN THE MATTER OF	THE ESTATE OF [JANET HAYS]
BETWEEN	[FREDA ROBBINS] Applicant
AND	[JENNIFER CLEMENTS] Second Applicant
AND	[OLIVER HAYS] DAVID ANTONY EARLE As Trustees of the Estate of [Janet Hays] First Respondents
AND	[OLIVER HAYS] Second Respondent

Hearing:	In chambers – on the papers
Counsel:	G Downing for the First Applicant J S Angland and R Walsh for the Second Applicant G C Engelbrecht for the First Respondents L C L Yong for the Second Respondent
Judgment:	16 November 2022

JUDGMENT OF JUDGE G P BARKLE
[in respect of costs, anonymisation of judgment and access to the Court file]

[1] In my judgment of 31 August 2022 I determined that Mrs [Janet Hays] had breached her moral duty owed to her eldest daughter, [Jennifer Clements] ("[Jen]") in her last Will by only making a bequest of $2,000 to [Jen].[1] I dismissed a claim by Mrs [Hays]' second daughter, [Freda Robbins] ("[Freda]"), for further provision from the residue of the estate.

[2] I made an award of $125,000 under s 4 of the Family Protection Act 1955 ("the Act") to [Jen]. Having dismissed [Freda]'s claim I directed that the residue of the estate would be divided between her and Mrs [Hays]' son, [Oliver Hays] ("[Oliver]") in accordance with the terms of the Will, that is 60 per cent to [Oliver] and 40 per cent to [Freda]. The executors of Mrs [Hays]' Will had advised that the value of the estate at the time of the hearing was a little over $486,500. Relying on the calculations of Ms Yong, counsel for [Oliver], her client would receive the sum of approximately $217,000 and [Freda] the amount of $144,667 from their mother's estate.

[3] Counsel for the parties sought the ability to make submissions on the issue of costs once the substantive decision was provided. This decision determines the matter of costs, along with anonymisation of the substantive decision and access to the Court file.

Position of the parties

Submissions on behalf of [Jen]

[4] Mr Angland on behalf of [Jen] sought an award of indemnity costs in the sum of $110,571 plus disbursements of $7,456.30. Failing that, he sought costs in accordance with scale 3C of the District Court Rules 2014 ("DCR"), with an uplift of 50 per cent, making a total of $83,331 plus the disbursements already noted.

[1] *[Robbins] v [Hays]* [2022] NZFC 7768.

Mr Angland submitted that [Jen]'s application was successful with the consequent result that the share of the residue of each of [Oliver] and [Freda] had been reduced, therefore costs should follow the event and be awarded in full to [Jen] from the estate.

[5] Mr Angland advised that [Jen] had offered to attempt to resolve matters by Alternative Disputes Resolution via mediation prior to filing her claim. [Jen]'s first chronology was provided to [Freda] and [Oliver] at that time to ensure they were aware of their sister's position and the impact on her life of the significant maltreatment she had suffered from her parents. While [Oliver] was willing to proceed on a mediated basis, [Freda] did not agree.

[6] All parties attended a judicial settlement conference on 11 August 2020 that did not resolve matters and settlement offers were made subsequent to that conference by [Oliver] and [Jen]. At no time did [Freda] make any offer of settlement.

[7] In seeking indemnity costs, Mr Angland submitted:

(a) There was a lack of recognition by both [Freda] and [Oliver] that [Jen]'s claim had substance and there was unreasonable opposition on their part.

(b) He, on behalf of [Jen], had informed [Freda] and [Oliver] of the significant costs his client was incurring so they were conscious of the need to resolve the matter.

(c) It should have been obvious to both the other parties that [Jen]'s claim for further provision from the estate would be successful, and that costs therefore would also be payable by the estate.

(d) [Freda] assumed the litigation risk in pursuing her claim whilst strenuously opposing [Jen]'s claim without any willingness to engage in settlement negotiations. Therefore, his client together with [Oliver] had no other choice than to proceed to hearing.

(e) That some of [Freda] and [Oliver]'s actions during the proceeding were vexatious, frivolous, improper and unnecessary. However, no particulars were provided of the actions that were referred to.

[8] If unsuccessful in obtaining an award of indemnity costs, then Mr Angland submitted that [Jen] should be awarded costs on a scale 3C basis with an uplift of 50 per cent. The reason justifying that outcome, apart from the matters outlined in paragraph [7], included there were four parties involved in the proceeding, the major issue was [Jen]'s historical claim of mistreatment over a considerable period of time, including sexual abuse of [Jen] and her daughters, and the relevant events spread over a period of approximately 55 years. Apart from those matters needing to be investigated, and sufficient evidence being obtained to discharge the burden of proof, there was also the legal issue of the obligation of the testatrix to make good the abusive treatment of [Jen] by her deceased spouse. All of these matters having to be addressed by [Jen] justified the large volume of evidence she had filed.

[9] In his responding submissions, Mr Angland clarified that Mr Downing, on behalf of [Freda], had misinterpreted his advice regarding [Jen]'s liability for the payment of costs to his firm. In email correspondence dated 13 August 2020, Mr Angland had advised other counsel that he would pay any security for costs awarded by the Court should an application be made as he was funding his client's litigation and related costs. He had concluded the relevant paragraph in the email with the advice that "She [Jen] has no costs to pay along the way".

[10] Mr Angland advised that [Jen] did not have the ability to pay costs through the course of the proceedings. [Jen], having waived privilege in respect of the fee arrangements with Mr Angland's firm, counsel was able to advise that there is the usual agreement in place with respect to the payment of legal costs by [Jen].

[11] Mr Angland also rejected the position of Mr Downing that the position of [Jen] at the hearing of seeking an award of 80 per cent of the estate was unprincipled. As in his closing submissions, he referred particularly to the recent High Court case of

Kinney v Pardington where 70 per cent of a small estate was awarded to an ex-nuptial daughter who had no relationship with the testator throughout her life.[2]

Submissions on behalf of [Freda]

[12] Mr Downing placed much emphasis on the email of Mr Angland of 13 August 2020 from which he had, it seems, erroneously concluded that [Jen] would not be paying any legal costs and the funding of the litigation by Mr Angland on behalf of [Jen] was therefore, he submitted, an abuse of process. As I have set out earlier, Mr Angland has now clarified the position.

[13] Counsel also submitted that there were excessive and voluminous affidavit evidence filed by [Jen] that included irrelevant and unnecessary material which appeared to have been drafted by herself, and therefore increased the legal costs incurred by [Freda] and [Oliver]. Mr Downing referenced *Law of Family Protection and Testamentary Promises* that where irrelevant or unnecessary materials are included in affidavits, the Court may take this into account and even refuse to award costs which might otherwise be awarded.[3] The authority that is referred to in Patterson is *re Hill (deceased)*.[4]

[14] Mr Downing also stated that the submission on behalf of [Jen] seeking 80 per cent of the estate was unprincipled and had no realistic chance of success. He noted that the amount awarded by the Court of just over $125,000 was 25 per cent of the estate, considerably less than what was sought. While accepting that the more usual practice now in estate litigation is to award costs to the successful party on the civil court scale, for the reasons he had set out, Mr Downing submitted there should not be any award of costs made to [Jen].

[15] Rather, Mr Downing stated there should be costs awarded in favour of his client and [Oliver] to take account of the huge amount of largely irrelevant evidence filed by [Jen] which had to be read and responded to. Mr Downing's submission was that scale 3C costs should be paid by [Jen] to each of [Freda] and [Oliver], and that those should

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[2] *Kinney v Pardington* [2019] NZHC 317.
[3] Bill Patterson *Law of Family Protection and Testamentary Promises* 5th ed, LexisNexis, Wellington, 2021)
[4] *Re Hill (deceased)* [1999] NZFLR 268.

be directed to be paid by the executors prior to distribution of the estate from the award made by the Courts.

[16] In terms of [Oliver]'s position, Mr Downing submitted that the differential percentage share of the estate between he and [Freda] had remained the same, so there was no increase in the interest of [Oliver] in the estate vis-à-vis [Freda]. Therefore, no costs should be awarded between them.

Submissions on behalf of [Oliver]

[17] Ms Yong sought on behalf of [Oliver] an award on a scale 2B basis with a 20 per cent uplift. Counsel emphasised that [Freda] was unsuccessful in her claim for further provision from the estate. While [Jen] was successful in obtaining further provision, Ms Yong noted there was a significant disparity between what she had sought and what she was awarded.

[18] [Oliver] had conceded that [Jen]'s claim was likely to be successful, with his position at the hearing being that [Jen] should be awarded the sum of $60,000. Meanwhile, he had successfully opposed [Freda]'s claim for further provision.

[19] Ms Yong referred to [Oliver] making a without prejudice save as to costs offer on 29 August 2019 proposing he receive 50 per cent of the estate, with 30 per cent to [Freda] and 20 per cent to [Jen]. While accepting that [Jen] had been awarded a greater quantum at the hearing, counsel said the amount was not considerably more, and if the issue of further costs incurred since the time of the offer were factored into the assessment, [Jen] would arguably have received a lesser net amount. Ms Yong submitted that the offer made to [Freda] was comparable to the outcome of the proceedings. Therefore, the refusal of both [Jen] and [Freda] to accept [Oliver]'s offer was unreasonable and justified an uplift of 20 per cent on the scale costs sought by [Oliver].

[20] Ms Yong submitted that the apportionment of payment of such an award of costs between [Jen] and [Freda] should be in accordance with their shares in the estate.

Legal principles

[21] All matters in respect of costs of a proceeding are at the discretion of the Court. In the Family Court costs are to be determined pursuant to r 207 of the Family Court Rules 2002 ("FCR"). The discretion as to an award of costs must be exercised in a principled way in accordance with part 14 of the District Court Rules ("DCR"). If the discretion is exercised outside the general scheme of the DCR, then it must be undertaken in a considered and particularised way.

[22] Justice Cull in the decision of *Kinney v Pardington* helpfully discussed the applicable legal principles in dealing with the issue of costs in this area.[5]

[23] The usual starting point in civil litigation is that the party who fails with respect to the proceedings ought to pay costs to the party who succeeds. However, there has been a general practice until recent times in Family Protection Act claims, albeit with exceptions, for all parties' costs to be borne out of the residue of the estate. Particularly in defended family protection claims, it is becoming more common for the Court to order that costs lie where they fall or award costs to the successful party. This practice has developed "because the Courts have appreciated that a costs order against the residue of an estate can impact unfairly on residuary beneficiaries, particularly where the estate is not large."[6]

[24] I also note the reference in Patterson to the decision of *Fry v Fry* where the Court referred to the previous practice of the costs of an unsuccessful claimant often being directed to be paid from the estate, and then said:[7]

> [13] However, as time has worn on the comparatively increased cost of legal services has made such an outcome quite unfair for small to middle-sized estates because the legal costs are quite capable of gobbling up the entire value of the estate. There is no longer a general rule that the costs of all parties should be paid out of the estate in a family protection claim.
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> [14] Thus, over the years, an approach that more reflects the philosophy behind the present costs rules in the High Court Rules and District Court Rules has developed whereby the estate does not bear the costs, and scale costs are awarded, payable by parties in accordance with established costs principles.

[5] *Kinney v Pardington* [2019] NZHC 2196.
[6] *Bones v Wright* [2013] NZHC 2093 at [5].
[7] *Fry v Fry* [2015] NZHC 2716 at [13] – [14].

> The consequence of this is that the estate does not bear all the burden of all the actual costs, and limited costs in the amounts prescribed by the scale are awarded between the contesting parties. However, there is by no means a settled practice.

Matters impacting on an award of costs in this case

[25] In my judgment of 31 August 2022, I determined the bequest of $2,000 made by Mrs [Hays] to [Jen] in her Will was a serious breach of her moral duty, and [Jen] was successful in her application. Save [Oliver] and/or [Freda] successfully establishing [Jen] had been responsible for the estrangement between her and Mrs [Hays] (and her father) then an increase in that amount was always going to take place.

[26] Recognising that was the case, both [Freda] and [Oliver] accepted at the hearing that an award should be made to [Jen], but each submitted that it should be significantly less ([Oliver] 12.5 per cent and [Freda] 10 per cent of the estate) than what was awarded by the Court. Neither accepted that [Jen] had been subject to the conduct she alleged at the hands of their parents. That meant [Jen] had to go to significant lengths to discover evidence supporting her claim. While she had to discharge the burden of proof to the civil standard, higher courts have said where allegations are serious as in this case, then the civil standard needs to be flexibly applied to reflect that situation.

[27] [Jen]'s actual costs and disbursements total $118,027.30. Relevantly scale costs on a schedule 2B basis of $21,845 (relying on Ms Yong's calculation on behalf of [Oliver]) plus disbursements would leave a significant shortfall and substantially erode the amount of the Court's award to [Jen]. Even worse would be no award of costs as submitted by counsel for [Freda] and [Oliver], let alone then contributing to their costs.

[28] [Freda] was unsuccessful in both her claim seeking further provision from the estate and in opposing the quantum of the award to [Jen]. That being the outcome, I respectfully suggest that Mr Downing's submissions justifying an award of costs to his client lacks a degree of realism.

[29] [Oliver] successfully opposed [Freda]'s claim but was also unsuccessful in opposing the quantum of the award to [Jen]. In terms of the claim of [Jen], his position at trial was only slightly beyond that of [Freda]. [Jen] was awarded double what [Oliver] submitted the evidence justified. While his without prejudice offer of 29 August 2019 proposed 20 per cent of the estate to [Jen], that position was not maintained. Further, the award of costs to [Jen] that must properly be made will mean the offer of August 2019 is well short of the ultimate outcome, and the offer of [Oliver] loses the relevance and weight that Ms Yong submits it should have.

[30] The leading authority in respect to indemnity costs is *Bradbury v Westpac Banking Corporation* where the Court of Appeal stated the relevant test as:[8]

> …
>
> (c) indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

Neither [Freda] nor [Oliver], in my view, fall into that category.

[31] As I noted in my decision, it was unfortunate that there was an inadequate focus of the evidence provided by [Jen] in this proceeding.[9] It was voluminous, repetitive and lacking adequate order.

[32] Therefore, an indemnity award or even an uplift of 50 per cent on a scale 3C award would result in [Oliver] and [Freda] bearing unfairly the comparative inefficiency in the presentation of [Jen]'s case.

[33] I accept that in most contested family protection cases the position now is that costs should generally be determined in accordance with the costs principles in the District Court Rules 2014.

[34] I have considered the various submissions made on the issue of costs including the settlement negotiations and without prejudice offers to settle. I am aware of how each party's cases were run and that because of the allegations made by [Jen] and the

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[8] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].
[9] Above n 1, at [204].

timeframe involved, significant work was necessary for her together with counsel to gather persuasive evidence to ensure she could meet the required burden of proof.

[35] Standing back, I consider this case justifies an award on a scale 3C basis to [Jen]. Relying on the calculation of Mr Angland that is an amount of $55,554. The disbursement sum of $7,456.30 is to be added to that sum, resulting in a total award of $63,010.30.

[36] I determine the costs award to [Jen] will be paid 60 per cent by [Freda] and 40 per cent by [Oliver] for the following reasons:

(a) largely due to [Freda]'s lack of success in gaining any further provision from the estate, that claim being successfully opposed by [Oliver] (and [Jen]); and

(b) recognising that [Freda] was less generous than [Oliver] in respect of the quantum to be awarded [Jen].

[37] I intend to adopt Mr Downing's submission that the payment of costs to [Jen] should be part of the distribution of the estate by the administrator. That will bring all matters to a conclusion between the parties, particularly when there is a high level of antipathy between them. Therefore, the costs awarded to [Jen] are to be deducted from the share of the residue of the estate to be received by [Oliver] and [Jen] and paid by Glasgow Harley to Mr Angland's firm's trust account as part of the final distribution of the estate.

[38] There will be no costs award to [Oliver] or [Freda].

Anonymisation of Judgment

[39] As set out in my substantive judgment, Mr Downing had sought at the conclusion of the hearing on behalf of [Freda] that the judgment be anonymised. The reason advanced by [Freda] was the high-profile position held by Dr [Joe Robbins], the [position deleted] in this area. [Jen] opposed anonymisation taking place. Mr Angland has now advised that [Jen] has changed her position and does not oppose

such an order. Ms Yong, on behalf of [Oliver], advises her client supports such an order.

[40] The judgment can only be anonymised if s 11B(3) of the Family Court Act 1980 applies. That section will have application if a vulnerable person is the subject of or a party to the proceedings (see s 11B(3)(b)). The meaning of a vulnerable person is set out in s 11D and includes the following:

> **11D Meaning of vulnerable person**
>
> For the purposes of section 11B, **vulnerable person** means—
>
> …
>
> (i) a person who the court considers likely for any other reason to be particularly susceptible to any adverse consequences associated with the publication of a report of the proceedings that contains identifying information.

[41] While [Jen] initially opposed anonymisation there was considerable evidence of the adverse consequences she has suffered as a result of her maltreatment during her childhood and youth. I made findings accepting a level of the alleged abuse had taken place. Similarly, her daughters were the victims of significant sexual abuse by their grandfather, Mr [Hays], for which he served a sentence of imprisonment. [Freda] also alleged she was the subject of sexual and physical abuse at the hands of [Jen]. In the circumstances of the case it was not necessary for those allegations to be resolved.

[42] Ms Yong helpfully referred to the decision of *Williams v Williams* where Judge P Callinicos determined that the definition of "vulnerable person" could be extended to a person who is now deceased, in circumstances where serious allegations had been made (but not accepted) against them.[10]

[43] While I accepted that some of the allegations of [Jen] against her parents, Mr and Mrs [Hays], were made out I also noted that the extent and degree of abuse could not be confidently measured. It appears from the evidence, despite Mr [Hays] pleading guilty to the charges of sexual abuse against his grandchildren, he did not accept his culpability. His pleas seemed to have been entered for pragmatic reasons

[10] *Williams v Williams* [2015] NZFC 7137, [2016] NZFLR 5 at [26] – [30].

and to avoid his grandchildren from having to give evidence. As I set out in the substantive judgment, Mrs [Hays] supported her husband at all times and did not accept the abusive conduct took place.

[44] Having regard to the subject matter of the proceedings and the impact of the misconduct of Mr [Hays] and also Mrs [Hays] on [Jen] and her daughters, I accept there may well be adverse consequences for them if publication took place without the judgment being anonymised. Potentially there may well also be adverse consequences for [Freda]. I direct that anonymisation take place and should extend to the parties, and all relatives and associated persons, named and identified in the judgment. A copy of both anonymised judgments is issued along with this judgment.

Restriction on public searching of the Court file

[45] In his submissions Mr Downing also sought on behalf of [Freda] that no member of the public be able to search the Family Court file without leave of the Court. Counsel referred to the same matters as outlined with respect to the issue of anonymisation and the decision of Mallon J in *Chapman v P*.[11]

[46] Rule 429 of the FCR sets out the process to be followed if a person seeks to access a document or Court file. A registrar of the Court may grant permission, and if in doubt refer the application to a Judge. To ensure any application for access is referred to a judge, my view is that r 16 of the FCR can be utilised.

[47] For the reasons discussed in respect to anonymisation of the judgment and more generally accepting similar reasons set out by her Honour in *Chapman* apply in this case, I determine it is appropriate in this case for an order to be made that no member of the public may access the Court file without leave of the Court.

Orders

[48] [Jen] is to be paid the sum of $55,554 in legal costs as calculated in accordance with scale 3C of the DCR. In addition, disbursements of $7,456.30 are to be paid.

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[11] *Chapman v P* [2010] NZFLR 855 (HC) at [32].

[49] The award of costs and disbursements to [Jen] are to be paid 60 per cent by [Freda] and 40 per cent by [Oliver]. The amounts are to be paid to the trust account of the solicitor acting for [Jen] by the executor of the estate of Mrs [Hays] from the funds held in the trust account of Glasgow Harley, Lawyers, as part of the distribution of the estate of Mrs [Hays].

[50] The costs of the administration of the estate are also to be paid from the funds held by Glasgow Harley prior to distribution of the residue of the estate.

[51] The substantive judgment is to be anonymised in accordance with s 11B of the Family Courts Act 1980.

[52] There is to be no public access to the Court file in accordance with r 429 of the FCR without leave of the Court being provided.

G P Barkle
Family Court Judge