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

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IN THE FAMILY COURT
AT WHANGANUI

I TE KŌTI WHĀNAU
KI WHANGANUI

FAM-2014-083-000287
[2021] NZFC 12262

IN THE MATTER OF	THE STATUS OF CHILDREN ACT 1969
BETWEEN	[KIM THORPE] Applicant
AND	[SADIE GREENE] Respondent
AND	[HELEN GREENE] Respondent

Hearing:	2 August 2021
Appearances:	P Brosnahan for the Applicant G Paine for the Respondents
Judgment:	6 December 2021

CHAMBERS JUDGMENT OF JUDGE D G MATHESON AS TO COSTS

Introduction

[1] On 2 August 2021 I made a declaration that [Dominic Greene], deceased, was the father of the child [Lawrence Thorpe], born [date deleted] 2012. That declaration

was made after a formal proof hearing. I reserved the issue of costs. I have now received the requested memoranda and now make my decision.

Position of the Parties

[2] It is the position of the applicant that increased and/or indemnity costs should be awarded against each respondent, because of their approach to the proceedings.

[3] The proceedings arose out of the applicant's interest in pursuing a claim on behalf of his son against the Estate of the father's father. Doubts as to paternity were raised by the respondents, and at that point, the applicant, through her counsel, suggested DNA testing. That approach was rebuffed.

[4] As a result, proceedings then had to issue.

[5] Counsel for the respondents suggests that earlier proceedings, wherein the deceased father commenced his own application for a declaration as to paternity, identified that the mother herself by not engaging positively is partly to blame for the situation and that that is an excuse for these respondents not to respond positively to a suggestion of a DNA test, and that costs should be where they fall.

The Law

[6] The jurisdiction to award costs is contained in s 171 of the Family Proceedings Act 1980 which provides:

> **171 Costs**
>
> (1) Subject to any other provision in this Act, the court, on the hearing of any proceedings before it under this Act, may make such order as to costs as it thinks fit.
>
> (2) An order made by the District Court or the Family Court under subsection (1) shall be enforceable in the same manner as money ordered to be paid by a maintenance order under this Act, and all the provisions of this Act as to recovery of such money shall apply.
>
> (3) This section is subject to section 162B.

[7] Some general principles can be discerned from the various decisions that have been made. See *A v A*, *H v A*, *R v S* and *T D P v S J C*.[1] The principles include:

(a) The Court has a discretion that is unfettered.

(b) The discretion must be exercised on a principled and reasonable basis.

(c) In all cases the object and principles set out in the Act under which the costs application is made must be taken into account.

(d) The range of other factors to be taken into account are broad and will vary according to the nature of the case but may include:

(i) The issues or nature of the dispute

(ii) The outcome of the proceedings

(iii) The way the parties and their advisors conducted the proceedings

(iv) The means of the parties

(v) The actual costs incurred by the parties

(vi) The overall interests of justice

(vii) The need to bear in mind that a genuine and reasonable litigant ought not to fear an order for costs and given the Courts inquisitorial jurisdiction it is important that all relevant arguments are heard.

[8] Once a decision has been made that an award of costs is appropriate the issue becomes quantum. The following principles are applicable to quantum:

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[1] *A v A* [1999] NZFLR 447, approved; *H v A* [costs] (2002) 22 FRNZ 447; *R v S* [guardianship] (2003) 22 FRNZ 1017; and *T D P v S J C* [costs] (2011) NZFLR 241.

(a) The Court has an unfettered discretion as to quantum.

(b) Due to the diversity of factual situations in the Family Court the Court must retain a wide discretion and not be bound by a scale.

(c) An award of costs should represent a reasonable contribution to the actual costs incurred.

(d) The scale set out in the District Court Rules 2014 is a helpful guide and starting point but not a mandatory approach.

(e) In some cases application of the District Court Rules 2014 scale will be appropriate; in others it may not.

[9] Rule 207 of the Family Court Rules 2012 provides the following:

Costs at discretion of court

(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.

(2) In exercising that discretion, the court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:

(a) 14.2—principles applying to determination of costs:

(b) 14.3—categorisation of proceedings:

(c) 14.4—appropriate daily recovery rates:

(d) 14.5—determination of reasonable time:

(e) 14.6—increased costs and indemnity costs:

(f) 14.7—refusal of, or reduction in, costs:

(g) 14.8—costs in interlocutory applications:

(h) 14.9—costs may be determined by different Judge:

(i) 14.10—written offers without prejudice except as to costs:

(j) 14.11—effect on costs:

(k) 14.12—disbursements.

(3) This Rule is subject to the provisions of the family law Act under which the proceedings are brought.

[10] Rule 14.2 of the District Court Rules 2014 sets out the general principles applying to determination of costs:

Principles applying to determination of costs

The following general principles apply to the determination of costs:

(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.

[11] Where costs in excess of the District Court Rules 2014 scale costs are sought or where indemnity costs are sought consideration needs to be given to r 14.6. It provides:

Increased costs and indemnity costs

(1) Despite rules 14.2 to 14.5, the court may make an order—

(a) increasing costs otherwise payable under those rules (**increased costs**); or

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (**indemnity costs**).

(2) The court may make the order at any stage of a proceeding in relation to any step in the proceeding.

(3) The court may order a party to pay increased costs if—

(a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—

(i) failing to comply with these rules or a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or

(d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or a direction of the court or breached an undertaking given to the court or another party to the proceeding; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

> (d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or
>
> (e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
>
> (f) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Discussion

[12] The purpose of the Family Court Rules 2002 is to make possible proceedings in the Family Court to be dealt with fairly, inexpensively, simply and speedily as I consistent with justice.

[13] Principle 5(f) of the Care of Children Act 2004 identifies that a child's identity should be preserved and strengthened.

[14] Section 3 of the Status of Children Act 1969 identifies that for the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other.

[15] These principles identify that the status of a child's parentage is important and proceedings about that are of significance and that those involved should get on with resolution promptly.

[16] The nature of this dispute was the parentage of the applicant's child. The respondents who are the administrators of the estates of the child's father and grandfather opposed the mother's application on behalf of her child.

[17] The outcome of the proceedings was that I made a declaration, that on the strength of the evidence before me, was inevitable.

[18] At a judicial conference on 22 May 2020, I brought to the attention of these parties, the deceased father's original application. That application was subsequently

struck out as the father disengaged from the Court process, but in his affidavit material, he asserted that he was the child's father.

[19] A further judicial conference before Judge Smith on 6 July 2020, revealed that counsel for the respondents argued that the Court did not have jurisdiction to enquire whether the respondents would consent to DNA testing. Judge Smith forthrightly rejected such a statement and noted that if the respondents did not consent, then that is a matter that the Court can take into account.

[20] Thereafter, a further pre-hearing conference was convened, at which point the respondents sought to file late, an affidavit from a person who would give evidence that although he was not the father, an approach to him revealed that there may be a number of potential fathers.

[21] I rejected the late filing of that affidavit noting that the material was already before the Court, and further delay was unhelpful.

[22] Thereafter, the matter was tracked for hearing but the respondents sought the fixture on 6 May to be abandoned because of personal circumstances. I cancelled the fixture but did record that the respondents agreed to DNA testing and that subsequently took place.

[23] The DNA test result, as I noted in my decision of 2 August, revealed that "These results very strongly support that a son of [Helen Greene] is the biological father of [Lawrence Thorpe]". Notwithstanding that result, the respondents were not prepared to consent to a declaration as to paternity and so the matter tracked to hearing.

[24] Counsel for the applicant submits that the litigation only arose as a consequence of the respondents declining to recognise the child as a member of the family, and submits that a simple DNA test early in the process, before proceedings issued, would have resolved the matter.

[25] The respondent's counsel argues that costs should lie where they fall and suggests that had the applicant agreed to a DNA test while the deceased was alive,

then the issue would not have arisen at all. I note that the deceased was the person who did not proceed with those proceedings, thereby causing them to be struck out in 2015.

[26] No issue as to means has been raised in relation to this discussion.

[27] The actual costs incurred by the applicant amount to $25,384 including GST and disbursements, which at first blush might seem significant for a relatively straight forward application but which is not unreasonable given the multiple appearances needed.

[28] The respondents have not provided any information as to costs incurred by them, nor argued about the size of the applicant's fees.

[29] While a genuine and reasonable litigant ought not to fear an order for costs, given the Court's inquisitorial jurisdiction, it is important that all relevant arguments are heard, I consider that in this instance, the overall interests of justice call for an award of costs.

[30] Having reached that determination I note that I have an unfettered discretion as to quantum. I am not bound by any scale and an award of costs should represent a reasonable contribution as to actual costs incurred.

[31] Here, counsel for the applicant seeks increased indemnity costs on the basis that the respondents contributed unnecessarily to the time or expense of the proceeding by failing without reasonable justification to engage in a simple DNA testing process.

[32] I agree that an order for increased costs is appropriate, but do not consider that the response was vexatious, frivolous or improper, or that there has been disobedience of any orders or directions that give rise to significant concern.

[33] It seems to me that there was potential for doubt as to paternity, as identified by the applicant's own approach in arranging for testing of another person. It was not inappropriate for the respondents to put the matter to proof, but a simple remedy was in their own hands and that simple remedy was raised prior to the proceedings issuing

and was again referred to by Judge Smith on 6 July 2020. It was not until the fixture was imminent that common sense prevailed, and testing was arranged. Even when the test results came back and affirmed paternity, the applicant was still put to proof.

[34] I consider that an award of just under two-thirds of the costs incurred is a reasonable and fair result, taking into account the nature of the application and the response.

[35] As a result, I award costs in favour of the applicant in the sum of $15,000, to be paid, $7,500 by the first respondent and $7,500 by the second respondent.

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Judge DG Matheson
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 06/12/2021