IN THE FAMILY COURT
AT NAPIER

I TE KŌTI WHĀNAU
KI AHURIRI

FAM-2016-041-000152
[2020] NZFC 3223

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	V F BENNETT Applicant
AND	V C PERCY and A J GALLAGHER as executors of estate of Leone Helen Percy (deceased) Respondents

In chambers: On the papers

Judgment: 19 May 2020

JUDGMENT OF JUDGE M A COURTNEY
[as to costs]

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[1] By judgment dated 5 February 2020 I granted the applicant, Virginia Bennett ("Virginia") leave to bring an application against her mother's estate out of time and ordered further provision for her out of the estate of her late mother pursuant to s 4 Family Protection Act 1955 ("FPA"). I concluded my judgment by recording that if costs were an issue then any party seeking costs was to make an application for the same.

[2] Counsel for Virginia has filed submissions seeking an order for full reimbursement of costs being legal fees of $14,653.30 and disbursements of $1,283.75.

[3] The named respondents in the proceedings are Vance Percy ("Vance") (a son of the deceased) and Allan Gallagher, a solicitor, acting as executors in the deceased's estate. The respondents took no part in the proceedings in their capacity as executors, apart from Mr Gallagher filing two affidavits following the hearing addressing queries the Court had regarding the estate. The respondent executors took no position with regard to the applications by Virginia.

[4] Vance, in his personal capacity as a beneficiary in the estate, opposed the application by Virginia.

[5] Virginia therefore seeks that her costs be paid by Vance, being the one who was effectively opposing her application. Alternatively, she seeks that her costs be met from the estate.

[6] Submissions filed on behalf of Vance propose the costs incurred by both him and Virginia be paid out of the estate. Total costs incurred by Vance amount to $30,859.10.

[7] The submissions filed on behalf of Vance make reference to earlier proceedings under the Family Protection Act against the estate commenced by Virginia's brother, Douglas Percy. Douglas' proceedings were struck out due to failure to comply with Court directions. He was served with the proceedings subsequently commenced by Virginia and would have been entitled to make a claim within the context of her proceedings.

[8] Whilst closing submissions filed on behalf of Virginia sought further provision for Douglas from the estate, I determined that, notwithstanding Douglas filing a notice of intention to appear, he had not made an application for an order for provision from the estate for himself pursuant to FCR 384. I therefore decided there was no application before the Court by Douglas for further provision from his mother's estate.

[9] It is submitted on behalf of Vance that the Court could consider an award of costs against Douglas. As I have decided Douglas had no application before the Court,

I do not treat him as a party who has made an unsuccessful claim and against whom costs should be awarded.

The law

[10] Rule 207 Family Courts Rules 2002 ("FCR") provides that the Court has a discretion to determine the costs in this proceeding, subject to the provisions of any family law Act under which the proceedings are brought. The Family Protection Act 1955 contains no provision dealing with costs.

[11] FCR 207(2) provides that in exercising its discretion as to costs, the Court may apply rules 14.2–14.12 of the District Court Rules 2014 ("DCR"), so far as applicable and with all necessary modifications.

[12] Schedules 4 and 5 to the DCR provide for scale costs to be calculated having regard to the steps involved in the proceedings and the complexity of the proceedings. An award of scale costs should not exceed the actual costs incurred by the party claiming costs.

[13] The submissions on behalf of Ms Bennett say that scale costs on a 3B basis would be $16,779.00 plus disbursements. Such amount exceeds Ms Bennett's actual costs.

[14] Whilst not set out in the submissions, costs on a 2B basis would amount to $11,364.50 plus disbursements. I do not consider these proceedings would warrant an award of costs on a 3B basis even if costs were to be awarded.

[15] In determining whether or not to grant costs, and if so the extent of them, the Court is to have regard to factors such as:[1]

[1] *RMJ v BJG* [2017] NZHC 2470 at [13]; *Hawthorne v Cox* [2008] NZCA 146 at [26]–[27]; *M v M* [2015] NZFC 314 at [19].

(a) The outcome of the proceedings. The general principle is that a party who fails in their application, or opposition to an application, should pay costs to the successful party.

(b) The complexity or otherwise of the matters in issue.

(c) The way in which the parties and their legal advisers conducted the proceedings, in particular whether the proceedings were unduly complicated or protracted by either party.

(d) The means of the parties.

(e) The actual costs incurred by the parties.

(f) The overall interests of justice.

[16] The principles applicable to costs in Family Protection Act proceedings were considered in *Fry v Fry*.[2] After addressing the FCR provisions regarding costs as set out above, the Court went on to state;

> (c) The general principle is that the party who "fails" with respect to a proceeding "should pay costs to the party who succeeds". The Court may refuse to make an order for costs that would be otherwise payable for the various reasons that are set out in r 14.7 of the District Court Rules. These include:
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> …
>
> (d) although the party claiming costs has succeeded overall, that party has failed in relation to a cause of action or issue that significantly increased the costs of the party opposing costs; or
>
> (e) the party claiming 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

[2] *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [17].

(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

(f) some other reason exists that justifies the court refusing costs or reducing costs despite the principle that the determination of costs should be predictable and expeditious."

[17] The Court went on to note;[3]

> **[18]** The system of awarding costs will break down if the examination of the facts and circumstances of the conduct of the case is minute in detail. Judges have to approach the issue of costs in a broad way, looking at the end result and the key developments during the course of the proceeding that have led to that result.

Discussion

The outcome of the proceedings

[18] Virginia has succeeded in her applications for leave to commence her proceedings out of time and for further provision from her mother's estate, albeit receiving a significantly lesser provision than she sought. Vance was unsuccessful in his opposition to Virginia's application for leave to commence her application out of time and her substantive application for further provision. On the face of it, Virginia is entitled to costs against Vance.

The complexity or otherwise of the matters in issue

[19] There were a number of issues for determination by the Court being:

(a) Had the estate been finally distributed?

[3] At [18].

(b) If not, should Virginia be granted leave to file her application out of time?

(c) If leave to apply out of time is granted, what further provision should be made for Virginia?

(d) Did there need to be any tracing of distributed assets in order to fulfil any provision for Ms Bennett?

(e) Could the Court make any further provision for Douglas and, if so, what provision should be made?

[20] Submissions filed on behalf of Vance regarding costs place significant reliance on the passages in my judgment relating to Virginia's delays in bringing a claim against her mother's estate[4]. I noted that Virginia had not explained why she had not taken any steps to make a claim in the context of the earlier proceedings issued by Douglas between the time she was served with them on 1 November 2016 and the time Douglas' proceedings were struck out on 18 July 2017. I also made reference to the significant delay in Virginia bringing any claim following her mother's death. Notwithstanding such delay I did grant leave for her to bring her claim out of time.

[21] The application for leave to apply out of time would only need to be considered if the estate had not been finally distributed. If the estate had been fully distributed, then an extension of time within which to bring the proceedings cannot be granted[5].

[22] I found the submissions on behalf of Vance that the estate had been finally distributed were not made out. There was a reasonably complex issue to determine, namely whether or not shares the deceased held in the farming company had been distributed. However, an enquiry of the estate solicitors would have ascertained that all liabilities in the estate had not by that stage been paid and consequently residue funds were still held by the solicitors. An argument on behalf of Vance that those funds had been distrusted and were held for the benefit of the farming trust could not

[4] At [108] to [119] of judgment dated 5 February 2020.
[5] Section 9 FPA.

be sustained having regard to the provisions of s 2 (4) FPA. Notwithstanding any issue around distribution of the company shares, it should have been readily apparent that the residue had not been distributed.

[23] Whilst the issue of leave and the related issue of whether or not final distribution had taken place only arose because of Virginia's delay in bringing her claim, the opposition to the application for leave to apply by Vance was, in my view, needlessly pursued.

The way in which the parties and their legal advisors conducted the proceedings, in particular whether the proceedings were unduly complicated or protracted by either party

[24] I have covered aspects of this factor under the above heading.

[25] As determined by me, the specific provision made by the deceased in her will for Virginia was extremely minimal. Whilst Virginia is a discretionary beneficiary in the farming trust, she has received no benefit from that to date and, given the major asset owned by the trust is the shareholding in the farming company operated by Vance, it could be some considerable time before Virginia receives any benefit from the trust. The potential benefit from the trust did not fulfil the deceased's obligation to make appropriate testamentary provision for Virginia.

[26] There are clearly strained relationships between Vance on the one hand and Douglas and Virginia on the other hand. This has been particularly reflected in the litigation involving the parties, including Douglas' application under the FPA and proceedings commenced by him in the High Court regarding the farming trust.

[27] Notwithstanding such strained relationships, I consider an attempt to resolve these proceedings by agreement should have been made, avoiding ongoing costs to all parties if agreement had been reached. There is no evidence of any offer by Vance to resolve the claim. On the contrary, he strenuously opposed the applications, which is his right. However, he also needs to accept there is a consequence to an unsuccessful

opposition to a claim by a daughter who received negligible provision in her mother's will.

The means of the parties

[28] Virginia provided no detail to the Court as to her financial circumstances. In closing submissions her lawyer advised that the claim was being advanced on the basis of family recognition as opposed to any financial need on the part of Virginia.

[29] Vance has provided no financial details. He holds a significant equity in the value of the property he farms, due to his shareholding in the farming company. No valuation of the company shares was provided to the Court. A simple application of rating value of the farm to the shareholding suggests the shares owned by Vance, including those he is to receive from his mother's estate could be worth in the vicinity of $1.12 million. Obviously, that is not cash available to him, but he has been farming the property for a number of years. There is no suggestion he is not in a position to pay any costs.

The overall interests of justice

[30] The award made in favour of Virginia was 4000 shares in FW Percy Farming Company Limited and $10,000.00 cash from the estate. Virginia's actual costs are just over 50 percent greater than the cash award from the estate. It would not be in the interests of justice if, having succeeded with her claim, Virginia has to apply all of that award towards her legal costs and fund the balance from her own resources.

DCR 14.7 Factors

[31] None of the factors set out in DCR 14.7(d) apply. Virginia has not failed in relation to a cause of action or issue, which has significantly increased costs to an opposing party.

[32] None of the factors set out in DCR 14.7 (e) have demonstrated Virginia contributed unnecessarily to the time or expense of the proceeding.

Conclusion on Costs

[33] Whilst there is no factor within the progression of the claim commenced by Virginia which should count against her as far as costs are awarded, there was, however, the failure of her part to commence a claim in the context of Douglas's proceedings and the significant delay in bringing proceedings in her own name. This delay resulted in the need to make an application for leave to commence her proceedings out of time and an examination of the issues surrounding that, including whether or not final distribution had taken place. For this reason, I do not consider it appropriate to award full indemnity costs to Virginia.

[34] Considering all the above points, I am of the view that an award of costs calculated at 85% of a 2B basis is appropriate. This amounts to $9,659.83 plus disbursements of $1,283.75, making a total of $10,943.58. This award will cover two-thirds of Virginia's fees and all of her disbursements.

Should the award of costs be against Vance Percy or the estate?

[35] As noted above, the estate has taken no formal part in the proceedings. The only active opposition came from Vance. Vance was defending any application in so far as that would have impacted upon the 40,000 shares in the company left to him by the deceased. Any cash award was to come from residue, which was left to the trustees of the Percy Farming Trust.

[36] Whilst Vance took steps personally to oppose the application, a significant amount of the information provided by him was to address the interests of the trust in the estate.

[37] In the circumstances, I consider the award of costs should be split equally as against Vance personally and against the residue of the estate.

Order

[38] I award costs and disbursements to Virginia in the sum of $5,471.79 against Vance Percy and make a similar award of costs in her favour in the sum of $5,471.79 against the estate, to be met from residue.

M A Courtney
Family Court Judge