Lacey & Anor v Public Trustee for the Northern Territory & Anor [2010] NTSC 01

PARTIES:	ROKIAH MARIE LACEY AND: LISA ANN FEREDAY v PUBLIC TRUSTEE FOR THE NORTHERN TERRITORY AS EXECUTOR OF THE ESTATE OF THE LATE DAVID LEITH NAPIER (DECEASED) AND: MAY MCCORRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	94 of 2008 (20820310)
DELIVERED:	7 January 2010
HEARING DATES:	23 November 2009
JUDGMENT OF:	KELLY J

CATCHWORDS:

COSTS -

Original proceedings dismissed – application for costs against unsuccessful plaintiffs – Family Provision Act – no reasonable prospect of success – principles to be applied - size of the estate and needs of other claimants relevant – costs to follow the event

Family Provision Act 1970 (NT)
Supreme Court Rules (NT), r63.03

Bowyer v Wood [2007] 99 SASR 190 @ pp210-211; *In re Allen (deceased), Allen v Manchester* [1922] NZLR 218 at 220-221; *McCosker v McCosker* [1957] 97 CLR 566 at 571-572; *Pellissier v Melville* [2006] NTSC 93 at [57]; Singer v Berghouse [1993] 114 ALR 521 @ p 522, followed

REPRESENTATION:

Counsel:

Plaintiff:	G. Clift
Defendant:	A. Young

Solicitors:

Plaintiff:	Withnalls
Defendant:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	KEL10001
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lacey & Anor v Public Trustee for the Northern Territory & Anor [2010] NTSC 01
No. 94 of 2008 (20820310)

BETWEEN:

ROKIAH MARIE LACEY
First Plaintiff

AND:

LISA ANN FEREDAY
Second Plaintiff

AND:

PUBLIC TRUSTEE FOR THE NORTHERN TERRITORY as executor of the estate of the late DAVID LEITH NAPIER (deceased)
First Defendant

AND:

MAY MCCORRY
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 7 January 2010)

[1] The plaintiffs, Rokiah Marie Lacey and Lisa Ann Fereday are the daughters of David Napier, now deceased.

[2] The second defendant, May McCorry, is Mr Napier's widow. Although not married, Mr Napier and Ms McCorry lived together as husband and wife for 17 years and she cared for him in his final illness.

[3] Mr Napier died leaving a will in which he left his entire estate to Ms McCorry.

[4] In August 2008 Ms Lacey and Ms Fereday instituted these proceedings pursuant to the *Family Provision Act*, claiming orders that adequate provision be made for their proper maintenance and support out of the estate of Mr Napier.

[5] The proceedings were listed for trial on 23 November 2009. At a mention on 17 November 2009, counsel for the plaintiffs indicated that the matter would not be proceeding to trial as Ms Lacey and Ms Fereday were going to withdraw their claims. On the morning the trial was to begin, by consent, I made an order dismissing the plaintiffs' claims and adjourning the question of costs.

[6] Ms McCorry now seeks an order that Ms Lacey and Ms Fereday pay her costs of and incidental to the proceedings. Ms Lacey and Ms Fereday resist such an order.

[7] As the plaintiffs' proceeding was dismissed rather than discontinued, the situation is governed by rule 63.03 (which confers a general discretion on the Court in relation to costs) rather than rule 63.11 (which provides that

when an action is discontinued, the plaintiff shall pay the defendant's costs unless the Court otherwise orders).

[8] In normal circumstances, costs follow in the event. However, different considerations apply to applications under the *Family Provision Act*. In *Singer v Berghouse*[1], Gaudron J said in considering equivalent New South Wales legislation:

> "Family provision cases stand apart from cases in which costs follow the event. …[C]osts in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate."

[9] The Full Court of the Supreme Court of South Australia considered the principles to be applied to costs in *Family Provision Act* applications in *Bowyer v Wood*[2]. Debelle J (with whom Nyland J and Anderson J both agreed) reviewed the authorities and concluded:

> "The principles are that, generally speaking, there will be no order as to costs of an unsuccessful application. The court may in its discretion make an order in favour of an unsuccessful applicant who makes a reasonable application founded on a moral claim or obligation. While it is unnecessary to decide the issue in this case, the cases also suggest that the court may in its discretion order an unsuccessful applicant to pay costs where the claim was frivolous or vexatious or made with no reasonable prospects of success or where the applicant has been guilty of some improper conduct in the course of the proceedings."

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[1] Singer v Berghouse [1993] 114 ALR 521 @ p 522;

[2] Bowyer v Wood [2007] 99 SASR 190 @ pp210-211;

[10] I do not take *Bowyer v Wood* to be authority for the proposition that the Court may only award costs against an unsuccessful applicant where the claim was frivolous or vexatious or made with no reasonable prospects of success.[3] The Court has an unfettered discretion on the question of costs (which must be exercised judicially) and, as Gaudron J said in *Singer v Berghouse*, "[C]osts in family provision cases depend on the overall justice of the case".

[11] Having said that, in this case I am of the view that the claims by Ms Lacey and Ms Fereday in fact had no reasonable prospects of success. Indeed, by withdrawing their claims before trial and consenting to an order that their proceeding be dismissed, it seems to me that they have effectively conceded as much.

[12] Mr Napier left a modest estate. The only substantial asset was the former matrimonial home.

[13] Mr Napier's widow, Ms McCorry, is 69 years of age with no assets of her own of any substance and no capacity to earn income through employment. Her income, which consists of superannuation and top up social security payments, amounts to approximately $25,000.00 per annum gross. Her legal costs in defending this proceeding have exceeded what little cash was in the

[3] This formulation seems to have been taken from Victorian legislation considered in *Re Stich (No 2)*[2005] VSC 383 which specifically provided that costs could be awarded against an applicant where the Court was satisfied that an application had been made frivolously, vexatiously or with no reasonable prospect of success: see *Bowyer v Wood* p 210.

estate. There is also a liability to the Public Trustee of $18,000.00 to be met.

[14] By contrast, both Ms Lacey and Ms Fereday are in their 40s. Both are employed. Both are married to husbands who are also employed. Both have combined household incomes of well in excess of $100,000.00 per annum gross. Both couples own their own homes which are mortgaged but in which they have substantial equity.

[15] All of these matters were known to Ms Lacey and Ms Fereday when this proceeding was commenced from the affidavit of assets and liabilities filed in the application for probate and their own knowledge of their own personal circumstances.

[16] It is to be assumed that Ms Lacey and Ms Fereday withdrew their claims having received the benefit of advice from counsel. In my opinion that advice was sound and Ms Lacey and Ms Fereday acted reasonably in not proceeding to incur even more costs by going to trial.

[17] However, I do not consider it was reasonable for them to have waited until just before the matter was due to be tried to obtain and act upon counsel's advice. It is not suggested that there was any material change in circumstances between August 2008 when proceedings where filed and November 2009 when the proceedings were abandoned.

[18] If Ms Lacey and Ms Fereday had obtained counsel's advice before instituting proceedings it is likely that these proceedings would never have been brought and the costs of prosecuting and defending them would not have been incurred.

[19] Counsel for the plaintiffs submitted that Ms Lacey and Ms Fereday had a moral claim, a worthy and meritorious case that was stymied by the size of the estate, and that, absent the size of the estate and the needs of the widow, their claims had good prospects of success.

[20] I do not agree. One cannot divorce the meritoriousness of the case from the size of the estate and the needs of the other claimants.

[21] In *McCosker v McCosker*[4], Dixon CJ and Williams J said:

> "The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life. As the Privy Council said in *Bosch v Perpetual Trustee Co (Ltd)* the word 'proper' in this collocation of words is of considerable importance. It means 'proper' in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune." [emphasis added]

[4] *McCosker v McCosker* [1957] 97 CLR 566 at 571-572

[22] In the much quoted judgment in *In re Allen (deceased), Allen v Manchester*[5] Salmond J said:

> "The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

[23] Counsel for the Plaintiffs relied upon the statement by Southwood J in *Pellissier v Melville*[6] that:

> "The more modern authorities place significance stress on the existence of the parental relationship and the primary duty of a parent to provide adequately for the proper maintenance, education and advancement in life of all of his or her children."

[24] However, in that case, as Southwood J pointed out at [59], the size of the testator's estate was not insignificant and was equipped to cope with all of the claims that were placed upon it. That is not the case here.

[25] There can be no moral duty on a father to give what he has not got, and no correlative moral claim by his daughters to receive what is not there.

[26] It cannot be said that a just and wise testator in the position of Mr Napier would have deprived his widow of her home (or have limited her to a life interest in that home when she may have future needs for supported accommodation in her old age) in order to provide a capital sum to his

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[5] *In re Allen (deceased), Allen v Manchester* [1922] NZLR 218 at 220-221

[6] *Pellissier v Melville* [2006] NTSC 93 at [57]

daughters, both of whom are comfortably off and well able to provide adequately for their own maintenance and support.

[27] The other factor which counsel for the plaintiffs urged in opposition to the costs order sought by Ms McCorry is that such an order may adversely affect the financial situation of Ms Lacey and Ms Fereday.

[28] Mr Young for the Second Defendant submits that there is no evidence from which I can conclude that a costs order would have an unacceptably adverse impact on the financial circumstances of either plaintiff and that what evidence there is shows that both have sufficient equity in their homes against which to borrow to meet a costs order.

[29] I am told that the Ms McCorry's costs are in the order of $70,000.00. Party/party costs are likely to be somewhat less than that. If the plaintiffs are ordered to pay the second defendant's costs, the burden will be split two ways. I do not consider that that would be an unduly onerous burden considering the assets and income of the plaintiffs.

[30] Mr Clift for the plaintiffs points to the evidence of the plaintiffs' income and expenditure and submits that it shows very little capacity to service further borrowings. He did not contend however that Ms Lacey and Ms Fereday have no capacity to pay the Ms McCorry's costs without financial ruin.

[31] On the other hand, it seems to me on the evidence that Ms McCorry may suffer considerable financial hardship if a costs order is not made. In the circumstances, it seems to me that justice requires that Ms Lacey and Ms Fereday pay Ms McCorry's costs. I order that the first and second plaintiffs pay the second defendant's costs of and incidental to the proceeding.