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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 80/82

BETWEEN [redacted]
of [redacted]

Appellant

A N D [redacted] of [redacted] as one of the executors of the estate of [redacted] late of [redacted], deceased, and as testamentary guardian of [redacted] a minor

Respondent

Coram: Richardson J. (presiding)
Somers J.
Roper J.

Hearing: 16 June 1982

Counsel: W.P. Jeffries and D.E. Murphy for Appellant
B.D. Inglis, Q.C., and Miss J. Downs for Respondent
J.W. Gendall for Child

Judgment: 5 November 1982

JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

This is an appeal about costs in proceedings concerning a child called [redacted] who was born in January 1972. We will call him the ward. His father was [redacted]; his mother is [redacted] A [redacted] They never married.

On 29 March 1974, pursuant to s.9 of the Guardianship

Act 1968 it was ordered, by consent of the parents, that the ward be placed under the guardianship of the Court. Further orders were made appointing the father the agent of the Court for the purpose of having custody, as to access by the mother, and as to conditions affecting the father's custody.

The father died on [redacted] 1981. He left a will dated 14 December 1973 and a codicil thereto dated 20 December 1979, probate whereof was granted to [redacted] and [redacted] the executors named in the will on 3 August 1981.

In the events that have happened [redacted] after providing for certain specific legacies left the residue of his estate for such of his 5 children including the ward as attained the age of 20 years in such manner that the ward and one daughter are each entitled to a two-seventh share and the remaining three daughters are entitled to a one-seventh share. Each of the testator's four daughters had attained her majority at his death and accordingly their respective interests in the residue are vested. The share of the ward is contingent upon his attaining the age of 20 years and carries the intermediate income so far as it is not paid or applied for his benefit. There is power to pay or apply the whole or any part of his contingent share to or for his maintenance or benefit.

Although the residue of the estate is not yet finally ascertained it seems likely to be in the vicinity of $90,000.

Included in that sum is an amount of over $39,000 which was owed to the testator by the trustees of the [redacted]. That is a settlement created by [redacted] in 1972 and concerning which it is necessary to say no more than that during a period ending in 1994 capital and income are held upon discretionary trusts of which the ward and his sisters are objects. To the extent annual income is not otherwise paid or applied by the trustees during that period it vests in the five children and if the ward lives so long he will in 1994 receive at least one half of the capital. We have no information as to what if any part of the income has vested in the ward or been paid or applied to or for his benefit. From what we were told it seems likely to be insignificant in relation to the sums involved in this case.

It was submitted in the High Court by counsel for [redacted] that it could not be assumed that the sum of $39,000 would be called up because the will trustees have power to defer enforcement of payment for so long as they think fit. But the power is only to defer recovery. The debt is an asset of the estate and must at some time be realised. So the estate should be put at about $90,000 and the contingent share of the ward at about $25,700.

By the codicil to his will the testator appointed [redacted] to be the guardian of the ward. Such a testamentary appointment is authorised by s.7 of the Guardianship Act 1968. But as [redacted] was not at his death a guardian

of the ward - the order of 29 March 1974 committing him to the guardianship of the Court was still in force - the provisions of s.7(3) of the Act applied viz., -

> "...the testamentary guardian may apply to the Court, and the Court may if it thinks fit appoint him as a guardian accordingly."

On 6 May 1981 [redacted] S[redacted] applied ex parte for orders that leave be granted to him to apply for orders in respect of the ward; that he be appointed agent of the Court for the purposes of custody of the child; that he be authorised to direct and permit the child to reside with a [redacted] and [redacted] C[redacted] until further ordered; and that costs be reserved. On the same day the Chief Justice minuted the file in this way -

> "Because it is important that an immediate interim decision be made as to care of this child I propose to make an interim order in terms of the within motion. The whole question of the future care of the child can be gone into after hearing all relevant parties on a date to be fixed."

Two features of these proceedings should be remarked. First, [redacted] S[redacted] did not apply under s.7(3) for appointment as guardian. His application could only have been made under s.9(2)(d) of the Act. Section 9(1) provides that the High Court may order that any unmarried child be placed under the guardianship of the Court and may appoint any person to be the agent of the Court either generally or for any particular purpose. Section 9(2) provides that

such an application may be made by a parent, the Director-General of Social Welfare, the child and "(d) with the leave of the Court, by any other person."

The second feature indirectly led to the present difficulties. [redacted] was described in the application by his occupation and "as one of the executors of the estate of [redacted] late of [redacted], and as testamentary guardian of [redacted]." No doubt these descriptions were accurate although authentification of title as an executor by probate had not yet occurred. But their only materiality was the indication they gave of the confidence in which he was held by the father. [redacted] did not apply in virtue of his office as executor and did not in any way in his application represent the estate or the beneficiaries under the will. If there were ever any reservations or misunderstandings about this they were dispelled by the clear statement of Mr. Inglis in this Court.

On 7 May 1981 the mother, [redacted] applied to rescind the ex parte orders made by the Chief Justice on the grounds that the same were contrary to the welfare of the ward.

The next step occurred on 9 June 1981 when [redacted] applied on notice to [redacted] for orders in the same terms as those he had obtained ex parte. The mother also applied for custody.

The respective claims of the mother and [redacted] were first heard by the Chief Justice on 18, 19 and 20 August 1981. He had reservations as to some aspects of

the mother's physical capabilities and financial affairs and adjourned the matter to a date to be fixed after 31 March 1982. The formal order was that the proceedings were adjourned to 31 March 1982 on terms (a) that the ward was to continue to live with [redacted] and (b) that [redacted] be given an opportunity to dispel any doubts concerning her health and stability. The proceedings were restored to the list on 3 and 4 May 1982 and final judgment given on 18 May 1982. The Chief Justice then held that the welfare of the ward would "best be enhanced if he is given into the custody of the mother." No formal order has been sealed.

In the result the ward while still in the guardianship of the Court is in the custody of his mother. The ex parte order was not expressly rescinded. If any part of it remains alive it can only be the appointment of [redacted] as agent without any apparent purpose.

The Chief Justice concluded his judgment by saying that he was not at that time prepared to make any order as to costs and sought memoranda from counsel as to the approximate position of [redacted] estate, and the anticipated costs of each of the parties, including costs of expert and other witnesses. This intimation followed some argument during the last day of the hearing on 4 May 1982. It was in part brought about by a notice of motion on behalf of [redacted] made on 29 March 1982 for an order that her costs be paid by "the executor" of the Estate "out of the funds of the estate." We have been told that in the course of that argument [redacted], of counsel appointed under s.31 of the Act (as enacted by s.18 of the Guardianship Amendment

Act 1980) to represent the ward, asked for an order that [redacted]'s costs be paid out of the residue of the estate and that counsel for [redacted] indicated that he abided the decision of the Court, that the order sought by [redacted] appeared proper, and that the beneficiaries were aware of the situation. He also submitted on behalf of [redacted] that no order for costs be made in favour of [redacted].

On 28 May 1982 counsel for [redacted] indicated by memorandum that her costs including disbursements and witnesses expenses were anticipated as being approximately $18,000. On 23 April 1982 [redacted] formally moved that the costs of [redacted] be paid by the "executor out of the funds of the Estate" and not be left as a charge against the separate one-seventh (sic) share of the child in the Estate.

On 9 June 1982 counsel for [redacted] filed a memorandum indicating that [redacted]'s solicitors' costs amounted to $20,000 plus disbursements of $4,406.26 but that a lesser total of $17,406.26 was sought plus fees of counsel amounting to $6,500. As to the incidence of such order counsel for [redacted] submitted:

> "4. Counsel for the child in the course of the hearing invited the Court to authorise the payment of [redacted]'s costs from the residue in the Estate as distinct from [redacted]s 2/7ths share of residue. Counsel for [redacted] then intimated that [redacted] would abide the decision of the Court.
>
> 5. The only other substantial beneficiaries in the Estate are [redacted]'s sisters, the late [redacted]

four daughters of whom one receives 2/7ths of the Estate (the same share as [redacted]) and three receive 1/7th share each. The Court has held that [redacted] acted perfectly properly in inviting the Court to rule on what was in the best interests of their brother. The application of Counsel for the child would therefore appear equally proper."

The Chief Justice in a memorandum said -

"I have considered counsel's submissions in this matter.

[redacted] seeks an order for costs from the estate of [redacted] deceased. [redacted] as one of the executors of the estate and the testamentary guardian of [redacted] seeks payment of his costs from the estate.

The nett estate of the deceased is estimated at $50,982.36. In terms of the will, [redacted] and one sister are entitled each to a two-seventh share and each of three other sisters to a one-seventh share. That means that the shares of [redacted] and one sister amount to $14,566 each and the shares of the other three sisters to $7,283 each.

[redacted] as an executor and guardian was perfectly justified in bringing these proceedings to determine the custody of [redacted]. In fact it was his duty to do so where [redacted] was a ward of Court. It was necessary for the Court to decide on [redacted]s future.

[redacted] in making his will must have realised that he was imposing on [redacted] the likelihood of litigation involving [redacted] and it is proper that [redacted]s estate should bear the reasonable costs of such litigation. [redacted] is entitled to have his proper costs of the proceedings paid out of the estate. Counsel for [redacted] has proposed costs which have been substantially reduced below those which would ordinarily have been charged and I fix those costs at solicitors' fees $13,000; disbursements $4,406.26 and counsel's fees $6,500. The costs are a proper charge on the whole of the estate and shall be paid out of the balance before calculation of the shares of the five children.

[redacted] has through her counsel indicated to the Court that her legal fees are anticipated to be approximately $18,000. This is not a case, however, where it would be proper to order that [redacted]s estate pay her costs. She must pay her own.

> [redacted] G[redacted], who was appointed by the Court to represent the interests of the child [redacted], is entitled to have his costs and disbursements paid out of money appropriated for the purpose by Parliament. I fix those costs at $1,784 plus [redacted] B[redacted]'s fee."

The effect is that [redacted] S[redacted]'s costs amounting to $23,906 are directed to be paid out of the residue of the estate; a further sum of $3,224 (including [redacted] B[redacted]'s fee of $1,440) is payable out of the parliamentary fund; and that [redacted] A[redacted]'s costs now ascertained at $18,233.10 are to be borne by her.

[redacted] A[redacted] has appealed against the judgment of the High Court in so far as it relates to the costs of the proceedings between her and [redacted] S[redacted] upon the grounds that the judgment is wrong in fact and in law. She seeks an order for payment of her own costs from the testator's estate. If unsuccessful in that she asks that the order in favour of [redacted] S[redacted] be set aside.

Neither side has sought to dispute the quantum of the costs of the other, viz., [redacted] S[redacted]s amounting to $23,906 and [redacted] A[redacted]'s claim for (now) $15,760 and disbursements $2,473.10. Nor has either party sought to suggest that the other should be ordered to pay his or her costs of the proceedings.

We turn to the first part of [redacted] A[redacted]'s appeal - the refusal of the Chief Justice to make an order in her favour. That her application was justified and was for the benefit of the child is evident from the result. Some part of the length of the proceedings can fairly be attributed to some deficiencies in her case at the first hearing. That however would go to

quantum only. In our view her claim to costs is meritorious.

The real difficulty does not lie in want of merit but in the absence of anyone against whom such an order can properly be made or any fund to which resort may properly be had for this purpose.

Section 27B of the Guardianship Act (as enacted by s.14 of the Guardianship Amendment Act 1980) provides that in any proceedings under the Act the court may make such order as to costs as it thinks fit. The discretion thereby given does not enable the Court to make an order for costs against a person or persons who are not parties to the proceedings. While the discretion is unfettered normally those disputing custody are in the position of parties to an action: cf. In re P.C. (an infant) [1961] 1 Ch. 312.

The Chief Justice rightly observed that the proceedings concerned the son of the testator, that the testator must have realised the likelihood of litigation such as occurred, and that [redacted] as the recipient of his confidence would morally at least be bound to resist [redacted]'s claim to custody. But it does not appear that his attention was ever drawn to the question of whether it was within the Court's power to direct that costs be paid out of the residue of [redacted]'s estate. Indeed the submissions made on [redacted]'s behalf seem likely to have concealed that difficulty including as they did the submission that such an order "appeared proper" and the obscure statement that the beneficiaries "were aware of the situation." In truth neither the executors of the will nor the persons entitled

to the residue other than the ward were before the Court.

While it is no doubt open to adult beneficiaries to meet all or such part of the costs of either party as in their charity they may think fit we do not think that the Court has power to direct that [redacted] costs be paid out of the estate. Counsel were unable to refer to any decision directly in point. Our own researches have discovered only Storke v. Storke [1730] 3 P. Wms. 51 which is clearly distinguishable. There a dispute arose between executors who were also testamentary guardians as to the upbringing of the three infant daughters of the deceased. All parties were given costs out of the estate. It seems that the children must have been the beneficiaries and that the executors were parties as such is clear from the account which was also sought and decreed.

In the case of other guardians such as those ad litem there is no doubt that in a proper case costs may be awarded in favour of the guardian out of the infant's property: See e.g. Barton v. Cooke (1800) 5 Ves. Jun. 461; Damant v. Hennell (1886) 33 Ch.D. 224; Steeden v. Walden [1910] 2 Ch. 393; and Nelson v. Nelson [1937] N.Z.L.R. 771. And when the property is not vested in the infant leave has been reserved to apply upon the happening of that event: Damant v. Hennell (1886) 33 Ch.D. 224. In the instant case there is no evidence of any fund absolutely possessed by the ward. On the material before us he has only the contingent interests under the trusts of the will and settlement already described. Whether, although not appearing as a guardian, [redacted] might by analogy have obtained such leave was, perhaps understandably,

not mentioned.

It seems clear that the provisions of s.30 of the Guardianship Act (as enacted by s.18 of the Guardianship Amendment Act 1980) cannot apply. Subsection (1) provides -

> "(1) In any proceedings under this Act (not being criminal proceedings), a Court may appoint a barrister or solicitor -
> (a) To assist the Court; or
> (b) To represent any child who is the subject of or who is otherwise a party to the proceedings."

Section 30(4) provides -

> "(4) The fees and expenses of any barrister or solicitor appointed under this section shall be paid out of the Consolidated Account from money appropriated by Parliament for the purpose."

It is only in favour of an appointed barrister or solicitor that such payment is authorised. The provisions are for the benefit of the child by providing for the costs of a particular class of person who appears in the character of guardian ad litem.

It follows therefore that [redacted]. A[redacted]s application for costs could not have been acceded to and her appeal under that head must fail. The burden of that conclusion may not be as heavy as was anticipated when the appeal was heard. We were told that [redacted]. A[redacted] was originally granted legal aid; that the grant was withdrawn, and that an appeal by her against the withdrawal was pending. Since the hearing we have been advised by the Registrar that aid has now been restored albeit with a substantial contribution.

We turn to the alternative part of [redacted] A[redacted]'s appeal,

namely that the award of costs to [redacted] be set aside. From what we have already written it will be apparent that if a decision were necessary in these proceedings we would hold, on the case we have heard, that the High Court lacked jurisdiction to make that order. But having said that we must also say that we do not consider the order can or should be set aside at the suit of [redacted].

This Court has jurisdiction under s.66 of the Judicature Act 1908 to hear and determine appeals from any judgment decree or order (save as mentioned in the Act) of the High Court. A party to civil proceedings in the High Court may appeal without leave and any person not a party may appeal by leave if he could have been made a party to the proceedings in the High Court by service and can expect leave if he shows a prima facie case that he is interested, aggrieved or prejudicially affected by the judgment or order. (We do not state this matter exhaustively or with any more accuracy than is necessary to illustrate the point which emerges: reference may be made to 1982 Supreme Court Practices Vol. 1., 59/312.)

The interest which has to be made good in the second case is equally in point in the first. The right of any person to appeal is dependent upon his having an interest. In Rochfort v. Battersby [1849] H.L.C. 388 an insolvent was held to have been improperly joined in proceedings in the Irish Court of Chancery. Lord Cottenham L.C. said -

> "The appellant had been improperly made a party below; it is therefore quite obvious that that is no reason why he should be heard here; because the question of incompetency may arise very well between parties

> who are parties to a cause. The question is, whether they have that interest in the subject-matter which would entitle them to appear here as parties questioning the propriety of the decision below. There certainly may be causes in which parties are made such for some matter in which they may have some probable interest, and that matter having been decided below, they come here on the ground that they were parties to the original cause, and have therefore a right to appeal against a decision on a matter in which they have an interest; but if they come here and appeal against a matter in which they have no interest, the House will not hear them, because they are incompetent to raise a discussion of such a matter, and, a fortiori, if they appear improperly as parties in the court below, this House will not permit them to raise here an argument in a matter in which they had no interest, even in the Court below." (406)

and

> "...the question is, whether you can hear him as an appellant? The moment you shew that he had no recognized interest in the property or in the matter, there is an end of his competency to raise the question." (410)

(The observations on Rochfort v. Battersby by Lord Cranworth L.C. in Wearing v. Ellis (1869) 6 De G.M. & G. 596, 608 do not affect the principle enunciated by Lord Cottenham).

The same reasoning is involved in Sun Life Assurance Co. of Canada v. Jervis [1944] A.C. 111. There leave to appeal to the House of Lords was given by the Court of Appeal subject to an undertaking that the appellant Insurer would pay costs and not ask for the return of any money ordered to be paid by the Court of Appeal. It was held that there was no issue to be determined by the House. Viscount Simon L.C. said -

> "I do not think that it would be a proper exercise of the authority which this House possesses to hear

> appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way."
> (113)

and

> "...objection here is that, if the appeal fails, the respondent gains nothing at all from his success."
> (113-4)

So we hold that the right to appeal is dependent upon the existence of an interest.

Here [redacted] A[redacted] has no interest in the estate of [redacted]. O[redacted] and is not directly affected by the order made. Its only effect on her could be that the amount of the ward's contingent interest in the estate being reduced, the moneys which might be applied for his benefit are less with the possibility that her expenditure on his maintenance may be higher. We regard that as too remote. There is too the added fact that her own submission in the High Court was that the assets of the estate were available for costs.

We do not think we should interfere with the order made. We express no view as whether it has any and if so what effect; or whether the executors, if it binds them, may not consider it their duty to dispute it, at least vis-a-vis the ward if the adult children assent to it.

Three matters remain. First we cannot leave this case without observing the concern we have felt at the very large sums incurred for costs in this relatively straightforward litigation. Secondly this judgment has

been long delayed. That has arisen from the necessity after the hearing to obtain further information from the parties and the temporary absence from New Zealand in the meantime of one member of the Court. Last there are the costs of the appeal. As at present advised we do not think this is a case in which any order should be made. But we reserve leave to either side to apply.

Save for the names of the parties and the ward and facts pointing to the identity of any such persons leave is given under s.27A(1) of the Guardianship Act to publish a report of the proceedings on appeal.

Solicitors for Appellant:
Jeffries & Murphy, Wellington.

Solicitors for Respondent:
Chapman, Tripp & Co., Wellington.

Solicitors for Child:
Buddle Finlay, Wellington.