IN THE HIGH COURT OF NEW ZEALAND 30/4
HAMILTON REGISTRY

M 223/89

IN THE MATTER of the estate of
CHARLES ERIC TAYLOR

563

A N D

BETWEEN ROBIN SNEDDON TAYLOR

Plaintiff

A N D BRUCE GIBBS TAYLOR
and ROBERT THOMSON
FLEMING

Defendants

Written
Submissions: 28 October 1992 (Marion Johnson, Jeanette Taylor and the adult grandchildren)
27 January 1993 (Plaintiff)
17 February 1993 (BG Taylor in his personal capacity, Raewyn Taylor and Joanne Taylor)
22 February 1993 (Infant grandchildren)

Counsel: Mr JP Doogue for Plaintiff
Mr J Campion for Trustee Defendants
Mr BJ Paterson for BG Taylor in his personal capacity, Raewyn Taylor and Joanne Taylor
Mr R Jefferson for Marion Johnson, Jeanette Taylor and adult grandchildren
Mr CM Earl for infant grandchildren

Judgment: 28 April 1993.

JUDGMENT OF PENLINGTON J AS TO COSTS AND INTEREST

On 31 August 1992 I gave my reasons for judgment in this proceeding under the Family Protection Act 1955. The plaintiff's claim succeeded. I awarded him provision out of the deceased's estate in the form of a general legacy of $125,000 free of duty. The order in favour of the

plaintiff was to operate from the death of the deceased. The incidence of the award to the plaintiff was to be borne by Bruce Taylor.

I called on counsel for all parties, with the exception of counsel for the trustees, to submit memoranda as to costs. I also reserved to all parties liberty to apply for such further or other orders or directions as are now necessary to implement my judgment.

Counsel have now lodged their respective memoranda. Two issues require my determination (i) costs; and (ii) the incidence of the interest on the award to the plaintiff. I shall deal with each of these issues in turn.

(i) Costs

As to the costs of the plaintiff and Bruce Taylor

Mr Doogue for the plaintiff submitted (i) that as the plaintiff was the successful party costs should follow the event. See Rule 47; (ii) that the plaintiff should, having regard to all the circumstances, receive an award approaching solicitor and client costs. See ***Re Miller*** No.2, Barker J, Invercargill A15/85 unreported judgment 24 August 1988; (iii) that the plaintiff's costs should be paid by Bruce Taylor; and (iv) that Bruce Taylor should meet his own costs.

In support of these submissions Mr Doogue pointed to the following matters:

1. That having regard to the matters in issue and the size of the estate the case justified the retention of counsel of some seniority.

2. That if costs are awarded on a lesser basis than that contended for then that will result in a significant diminution in the award to the plaintiff.

3. That the plaintiff has in fact incurred costs in the sum of $33,540.81.

4. That the contest was essentially between the plaintiff and Bruce Taylor.

5. That the evidence adduced by the plaintiff was germane to the matters in issue, that it was not regarded as irrelevant and that in the event the plaintiff was successful.

6. That a number of assertions made by the plaintiff which were well supported by the evidence were however contested by Bruce Taylor and that his resistance had little merit. In particular Bruce Taylor had unsuccessfully contended:

   a) That he did not receive substantial benefits from his father.

   b) That the deceased did not use his wills as a means of expressing his disapproval of the plaintiff.

   c) That the plaintiff had been guilty of disentitling conduct.

Mr Paterson for Bruce Taylor acknowledged that the Court's discretionary powers as to costs are unlimited. See the discussion in Patterson on Family Protection and Testamentary Promises in New Zealand para 10.18. See also ***Re Z*** [1979] 2NZLR 495,504 and ***Re Wotton*** [1982] 2NZLR 691.

Mr Paterson resisted the contention that Bruce Taylor should pay the plaintiff's costs. Mr Paterson then submitted that notwithstanding the unlimited discretion of the Court the reported cases appeared to indicate that it was usual to follow one or the other of two courses. The more common was for costs to be paid from the residue; the less common was for the plaintiff and the beneficiary to bear their own costs. Against this background Mr Paterson submitted that in the circumstances of this case it would be more appropriate for the plaintiff and Bruce Taylor to meet their own costs than for the costs to be paid out of the estate.

Mr Paterson was supported in this submission by Mr Jefferson for Marion Johnson, Jeanette Taylor and the adult grandchildren and by Mr Earl for the infant grandchildren.

Bruce Taylor was unsuccessful both in resisting any award to the plaintiff and in resisting the attack on the specific legacy given to him under the deceased's will as varied. Bruce Taylor even went as far as raising disentitling conduct on the part of the plaintiff. In making that allegation he assumed an affirmative onus. He failed to discharge that onus.

I therefore conclude, in the exercise of my discretion, that Bruce Taylor should bear his own costs.

In contrast the plaintiff as the successful party is plainly entitled to costs. The first question is whether those costs should come out of the estate or whether they should be paid by Bruce Taylor. In the exercise of my discretion I have decided that the plaintiff's costs should be paid out of the estate. I am not disposed to order Bruce Taylor to pay them personally.

The second question is the quantum of the plaintiff's costs. The plaintiff is entitled to an award of costs which reflects the issues involved, the work required to place his case before the Court and the result achieved. I am conscious of the observations of Barker J and ***Re Miller*** No.2 (Supra). The present circumstances of the deceased's estate, which are fully set out in my reasons for judgment must also be brought into account. Having regard to all these matters I accordingly award in the exercise of my discretion costs to the plaintiff in the sum of $20,000 plus GST together with disbursements as fixed by the Registrar together with GST.

<u>As to the costs of Marion Johnson, Jeanette Taylor and the adult grandchildren</u>

Mr Jefferson submits that in all the circumstances the costs of Marion Johnson, Jeanette Taylor and the adult grandchildren should come out of the residue of the estate.

While it was common ground that the legacies to the two daughters Marion Johnson and Jeanette Taylor were to be left untouched there was a contest as to whether the incidence of any award to the plaintiff should be borne in whole or in part by the grandchildren. This meant that the adult grandchildren, like the infant grandchildren, had to take an active part in the hearing. In the event the grandchildren were successful in resisting the attack on their legacies. They are accordingly in my view entitled to costs out of the estate.

As to the quantum of the costs claimed by Mr Jefferson I take into account that some of the legatees whom he was representing lived in North America. I also accept that it was reasonable for Mr Jefferson to take part in the pre-hearing efforts to settle the claim.

In the exercise of my discretion I award costs to Marion Johnson, Jeanette Taylor and the adult grandchildren in the sum of $5,500.00 plus GST together with disbursements $570.70 plus GST and disbursements in the sum of $726.23 (GST exclusive). I further order that these costs and disbursements are to be paid out of the residue of the estate.

As to the costs of the infant grandchildren

Mr Earl was appointed by the Court to represent the infant grandchildren. In my view the infant grandchildren are entitled to their costs out of the residue of the estate. In the exercise of my discretion I fix the costs of the infant grandchildren at the sum of $4,500.00 plus GST together with disbursements plus GST as fixed by the Registrar.

(ii) **Interest**

In my reasons for judgment I determined that the general legacy of $125,000 free of duty to the plaintiff would attract interest after the expiration of the executor's year and that it would abate like the other general legacies.

Mr Doogue for the plaintiff has now contended that the interest generated on the general legacy to the plaintiff should be Bruce Taylor's responsibility and that it should not be met by the other beneficiaries from the residue of the estate.

Mr Paterson for Bruce Taylor on the other hand has contended that the interest payable to the plaintiff should be met from the residue of the estate and not from Bruce Taylor's share.

At page 51 of my Reasons I set out the consequences of Bruce Taylor's share bearing the burden of the award. I stated:

> "As the result of the previous finding the special legacy to Bruce Taylor will decrease by $125,000 together with the sum required to make the general legacy to the plaintiff free of duty. The terms of the first codicil to the deceased's will will then operate against the reduced special legacy to Bruce Taylor. The nett effect for Bruce Taylor will be a reduction of $125,000 in the benefit which he receives under the deceased's will as varied."

In elaboration of this paragraph I intended that Bruce Taylor would still pay the amount of the duty which he would have paid if there had been no award to the plaintiff and that he would fund the $125,000 for the general legacy awarded to the plaintiff. Mr Paterson was therefore correct when he contended that the interest payable on the general legacy to the plaintiff is to come from the residue of the estate and that it is to abate along with the interest on the other general legacies. As the result the plaintiff will stand in the same position in relation to his legacy as Marion Johnson and Jeanette Taylor stand in relation to their legacies. I reject Mr Doogue's contention. It was not intended that Bruce Taylor should be responsible for the interest payable on the legacy awarded to the plaintiff.

PGS Penlington J

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