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**LOW  
PRIORITY**

HZLR

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M 1279A/96

IN THE MATTER of the Family Protection Act 1955

AND

IN THE MATTER of the estate of Helen May Dobbs

BETWEEN AIA DOBBS

Plaintiff

AND HSL WATERS and JG ROY

Defendant

Hearing: 19 September 1997

Counsel: CA Holden for plaintiff  
T Ito for HSL Waters and AH Conroy  
RL Roberts for defendants

Judgment: 25 September 1997

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**JUDGMENT OF MASTER FAIRE**

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Solicitors:

*O'Sullivan Clemens, DX JP 30002, Rotorua for plaintiff*  
*Short & Co, DX CP 25514 for defendants*

Counsel for the principal beneficiary filed an application for an order striking out the proceeding. The application was filed at about the same time as the plaintiff offered to discontinue on the basis that no costs would be sought.

The plaintiff now consents to the striking out the proceeding but opposes any order for costs.

Mr Ito, who acts for the principal beneficiary, and Miss Roberts who acts for the trustees seek orders for costs.

The plaintiff's pleading sought further provisions from the estate of his mother pursuant to the Family Protection Act 1955. The principal contest was likely to be with his sister, who is one of the two trustees. The problem for the plaintiff in this proceeding was that the estate had been distributed after the filing of his application for further provision but before service on the trustees. In short, there is no remaining estate against which an order might be made.

The plaintiff does not pursue any tracing of the assets of the estate so that there might be an estate for the purposes of the Family Protection Act 1955.

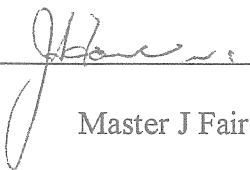
In the plaintiff's affidavit of 13 November 1996, he says that he was then aged 61 years, not employed, had no qualifications and no prospect of future work. He said that he was then in receipt of an unemployment benefit. He listed his assets as a share in a residential property which had a then Government valuation of \$55,000 and which was subject to a mortgage of \$38,745. He received from his mother's estate in two payments, totalling \$20,861.79.

His sister received a similar bequest but in addition received the proceeds of the sale of the deceased's home, which was \$155,417.51.

The plaintiff invites me to make no order for costs on the basis that it is fair as between the parties that costs should lie where they fall. The essence of the submission is that the claim of the plaintiff has been defeated by a technicality, namely, the payment out of the

estate before service with the result that an otherwise meritorious claim has been prevented from being pursued. I cannot make a decision on the merits of the claim but I do note the disparity in what has been received pursuant to the deceased's will. I am entitled to find that the claim has been defeated by the lack of assets which has prevented a determination on the merits. I take that factor into account together with what is clearly the poor circumstances the plaintiff. When I consider those two matters it seems to me that this would not be an appropriate case to order costs.

Accordingly, I decline both the defendant's and the named beneficiary's application for costs against the plaintiff. I order that the proceeding be struck out.

  
Master J Faire