

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2007-404-007543

UNDER The Family Protection Act 1955

BETWEEN DALE ANNE ARMER
Plaintiff

AND JILLIAN PATRICIA SIMPSON AND
HUGH GREGORY KASPER AND
JOYCE NORMA WINIFRED PALMER
Defendants

Hearing: ON THE PAPERS

Appearances: F MacKenzie for Plaintiff
A H Waalkens QC for J Simpson and J Howarth
B J Lawler for Defendants

Judgment: 16 December 2009 at 12

JUDGMENT OF ASSOCIATE JUDGE ROBINSON ON COSTS

This judgment was delivered by me on 16 December 2009 at 12 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: Fisher Lamberg, PO Box 9074 Newmarket, Auckland
Mackenzie Elvin, PO Box 14016, Tauranga

[1] Proceedings by the plaintiff for further provision out of the Estate of the late Joyce Norma Winifred Palmer were settled in December 2008. In terms of that settlement the plaintiff filed a notice of discontinuance pursuant to rule 475 of the High Court Rules.

[2] The parties have not agreed on costs. Consequently, submissions have been filed by the plaintiff, the defendants and two of the beneficiaries who were resisting the plaintiff's claim.

[3] The deceased is survived by two daughters namely the plaintiff and Jillian Simpson. In terms of her Will the deceased bequeathed \$5,000 to the plaintiff. She also bequeathed \$5,000 to Julie Lesley and \$5,000 to six of her grandchildren. In addition she bequeathed \$20,000 to her granddaughter Jennifer Louise Howarth whose mother Jillian Patricia Simpson is the other child of the deceased.

[4] The balance of the deceased's Estate was left to the Simpson Pauanui Family Trust and the Simpson Family Trust. It is understood that the beneficiaries of these Trust are Jennifer Howarth and her mother Jillian Simpson.

[5] It is submitted on behalf of the defendants and Mrs Simpson and Miss Howarth that the plaintiff's claim for further provision was bound to fail and was in effect a "try on". Consequently, there are no good reasons to depart from the principle which is referred to in rule 476c of the High Court Rules namely that a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance. In this respect it is submitted that Miss Simpson and Miss Howarth are in effect defendants. The plaintiff's claim if successful would probably have resulted in Miss Howarth and Mrs Simpson's interest in the Estate being reduced.

[6] It is submitted on behalf of the plaintiff that the plaintiff had a genuine claim in that a bequest of \$5,000 to the plaintiff out of an Estate worth just under \$1 million dollars did not satisfy the testators moral obligation to the plaintiff in terms of the Family Protection Act 1955.

[7] It is impossible in the circumstances I have outlined to determine whether as claimed by counsel for the beneficiaries and defendant that the plaintiff's claim was a try on or whether the plaintiff had a genuine claim for further provision out of the Estate. However, due recognition must be given to the plaintiff's responsible attitude in settling her claim. Her decision has saved the beneficiaries the emotional stress of a defended hearing together with the extra costs involved. The costs being sought by the beneficiaries inclusive of disbursements total \$21,345,00. The defendants costs amount to \$3,520.

[8] It is likely that the costs incurred by the plaintiff to date will exceed the amount of her bequest of \$5,000.

[9] Consequently, in the unusual circumstances of this case having regard to the very small bequest received by the plaintiff compared with the substantial amounts inherited by the beneficiaries I have concluded that it is appropriate for there to be no order for costs against the plaintiff. Consequently, the application by the beneficiaries and the defendants for costs against the plaintiff will be dismissed.

Associate Judge Robinson