EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2022-019-000401
[2024] NZFC 10062

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	[SAM DRUMMOND] Applicant
AND	[BUD DRUMMOND] Respondent
AND	[HARVEY DRUMMOND] Respondent
AND	[BOYCE DRUMMOND] Respondent
AND	[RODGER DRUMMOND] Respondent
AND	[LEE DRUMMOND] Respondent

Appearances: D Fraundorfer for [Sam Drummond]
M Branch for [Miriam Rowan]
W Patterson for the Beneficiaries

Judgment: 7 August 2024

RESERVED CHAMBERS DECISION OF JUDGE D A BLAIR
[IN RELATION TO COSTS]

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[1] In a reserved decision dated 7 June 2024 the applicant [Sam Drummond] received provision from the estate of his late mother [Wilma Drummond] in the amount of 10 per cent. The decision provides that the second applicant [Miriam Rowan] receives provision of 7.5 per cent.

[2] Five of Mrs [Drummond]'s sons opposed these claims brought by the applicant pursuant to the Family Protection Act 1955 ("FPA"). They are [Bud Drummond], [Harvey Drummond], [Rodger Drummond], [Lee Drummond] and [Bryce Drummond].

[3] There are eight siblings in total, the other person being [Janet Logan] who took no part in the proceedings and is not provided for in the Will.

[4] The applicant [Sam Drummond] now seeks an award of costs based upon 2B scale pursuant to the District Court Rules ($1,910 per day) and seeks a 20 per cent uplift based upon the circumstances of the case including [Sam Drummond]'s past attempts to resolve the proceedings. [Sam] also seeks full reimbursement of his disbursements incurred totalling $1,139.41. The total sought is $15,006.01.

[5] [Miriam Rowan] does not make a claim for costs.

[6] The five sibling beneficiaries all represented by the same counsel reject the claim for costs, and propose costs lie where those fall.

[7] Rule 207 of Family Court Rules 2002 ("FCR") provides the Court with the discretion to determine costs of any proceedings.

[8] Rule 207(2) brings in aspects of costs pursuant to the District Court Rules 2014. It provides:

> **207 Costs at discretion of court**
>
> …
>
> (2) In exercising that discretion, the Court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:

(a) 14.2—principles applying to determination of costs:

(b) 14.3—categorisation of proceedings:

(c) 14.4—appropriate daily recovery rates:

(d) 14.5—determination of reasonable time:

(e) 14.6—increased costs and indemnity costs:

(f) 14.7—refusal of, or reduction in, costs:

(g) 14.8—costs in interlocutory applications:

(h) 14.9—costs may be determined by different Judge:

(i) 14.10—written offers without prejudice except as to costs:

(j) 14.11—effect on costs:

(k) 14.12—disbursements.

[9] Rule 14.3 DCR provides that proceedings must be classified as falling within one of three categories:

(a) Category 1 proceedings - of a straightforward nature.

(b) Category 2 proceedings - of average complexity.

(c) Category 3 proceedings - because of their complexity or significance require counsel to have special skill and experience.

[10] Rule 14.5 DCR sets out the structure for what is reasonable time for a step in the proceeding, with reference to Schedule 4. Pursuant to r 14.5:

(2) A determination of what is a reasonable time for a step in a proceeding under subclause (1) must be made by reference:

(a) To band A, if a comparatively small amount of time for a particular step is considered reasonable; or

(b) To band B, if a normal amount of time for the particular step is considered reasonable; or

(c) To band C, if a comparatively large amount of time is considered reasonable.

[11] In *Pyke v Sherriff* [1]

> The new 207 and in particular the reference in R207(2) to particular District Court Rules, raises the question of whether the costs discretion in the Family Court is now also subject to the more rigid costs regime applied in the District Court and High Court. In those courts, the specific costs rules including the rule that costs follow the event contained in R14.2 are to be applied in the absence of some reason to the contrary; any departure must be considered and particularised exercise of the discretion. There is no dispute that the discretion in the Family Court must also be exercised in a principled manner …

[12] There is not any provision in the FPA about costs, meaning r 297(3) FCR does not come into play.

[13] The five sibling beneficiaries are therefore subject to r 14.2(1)(a) being "the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds."

[14] Counsel for the applicant points to *Fry v Fry* in support of the proposition that any historic rule that the estate bears all costs in the small to medium size estates has generally been substituted with a more "civil" approach whereby unsuccessful beneficiary parties meet the costs of the applicant.[2]

[15] This matches my indication in paragraph 110 of the reserved decision about my preliminary view - being there would not be an inclination to award costs for any party to be met from the estate and that costs would be an inter party issue.

[16] Rule 14.6 DCR refers to increased and indemnity costs. Rule 14.6(3) provides in full:

> **14.6 Increased costs and indemnity costs**
>
> …
>
> (3) The Court may order a party to pay increased costs if—
>
> (a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

[1] *Pyke v Sherriff* [2017] NZHC 1990 Woolford J at [17].
[2] *Fry v Fry* [2016] NZFLR 713.

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—

(i) failing to comply with these rules or a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or

(d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[17] *Holdfast NZ Ltd v Selleys PTY Ltd* is a decision of the Court of Appeal setting out guidance to an award of increased costs the steps are:[3]

(a) First categorising the proceedings (DCR 14.3).

(b) Working out a reasonable time for each step in the proceedings (DCR 14.5).

(c) As a part of the second step above, a party can claim extra time for a particular step (DCR 14.6)(3)(a).

[3] *Holdfast NZ Ltd v Selleys PTY Ltd* (2005) 17 PRNZ 897 (CA).

(d) Stepping back and looking at the scale costs entitlement and an argument for additional costs, noting that any increase on scale costs above 50 per cent is unlikely.

[18] Those aspects of r 14.6(3) which might be relevant to [Sam Drummond]'s request for increased costs are, as I read his submissions, the time-consuming nature of pursuing this claim - r 14.6(3)(a). Further, the position taken by the sibling beneficiaries pursuing a defence which allegedly lacked merit – r 14.6(3)(b)(ii) and failing without reasonable justification to accept an offer of settlement whether under r 14.10 or other - r 14.6(3)(b)(v).

[19] Rule 14.10 and 14.11 DCR relate to without prejudice except as to costs offers and how this is then dealt with on a costs basis. Those rules provide:

14.10 Written offers without prejudice except as to costs

(1) A party to a proceeding may at any time make to any other party to the proceeding a written offer that—

(a) is expressly stated to be without prejudice except as to costs; and

(b) relates to an issue in the proceeding.

(2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.

14.11 Effect on costs

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

(2) Subclauses (3) and (4)—

(a) are subject to subclause (1); and

(b) do not limit rule 14.6 or 14.7; and

(c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).

(3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account if party A makes an offer that—

(a) does not fall within subclause (3)(a) or (b); and

(b) is close to the value or benefit of the judgment obtained by party B.

[20] [Sam Drummond] points to early attempts to resolve matters by Deed of Family Arrangement. This was for the eight siblings to take 12.5 per cent each. Further, to a without prejudice except as to costs letter dated 6 May 2022 written by his counsel, in which Antony offered in full and final settlement of his claim the receipt of 10 per cent in the estate as at 8 July 2021 (being about $77,000) and in addition payment of his legal costs to date which were $18,325.43. [Sam] effectively submits the 10 per cent proposal matches what he achieved at hearing meaning it triggers his entitlement to costs pursuant to r 14.11 DCR.

[21] Counsel for the respondent sibling beneficiaries points out the offer made was for 10 per cent and that the request within that offer by [Sam] for an additional 'costs' amount of $18,325.43 was at a point in the case where there was no entitlement to request reimbursement of costs. On approximate calculations, what [Sam] had sought in that settlement offer presented in the letter of 6 May 2022, equated to a request for about 12.4 per cent of the estate if one compares the figure requested with the value of the estate at the time.

[22] Counsel for the respondents submits there are circumstances in this case which would best leave costs lie where those fall. Those asserted grounds are:

(a) [Sam Drummond] has received recognition and has no economic need.

(b) The five beneficiary siblings were united in their resolve to defend their mother's memory and reputation in the light of the claims made by both [Sam] and [Miriam] about her. The proceedings brought into play alleged family history about an affair and whether one of the children was born as a result of this.

(c) The beneficiaries made attempts to avoid the need for proceedings. They had made a very modest financial offer – they would say to provide the applicant some recognition.

[23] I find that the r 14.2(1)(a) DCR principle has application, that is the five sibling beneficiaries should pay costs to [Sam Drummond]. Those five siblings have joint and several liability for costs pursuant to r 14.13 DCR. At a practical level it is assumed they will make a 1/5th contribution to the costs amount from their share of the estate.

[24] On the issue of any uplift, the focus in the first branch of r 14.6(3), at (a), is whether the time taken for a step would substantially exceed the allocated time pursuant to *band C*. Therefore, rather than undertaking an uplift by way of percentage across the board for the band B steps, an increased reasonable time by selecting band C sits as a possibility for any particular step in these proceedings.

[25] I am prepared to direct that band C is to apply to step 5 of Schedule 4, the balance of the steps being band B. Step 5 relates to the preparation of the case and the evidence, which in these proceedings took place by way of affidavits, including by way of supplementary/response affidavit information. Quite extensive affidavit evidence was needed about the situation pertaining to the section purchase, Mrs [Drummond] then acquiring that section via [Sam] (more correctly the Trust) and financial arrangements/repercussions then following. It will have been quite a significant exercise to set that issue out in detail and it was important to do, to give the decision maker a sufficient overall understanding about what had happened and the part it may have then played in any deteriorating relationships, particularly as between [Sam] and his mother. Another deemed day as per band C for step 5 at $1,910 is appropriate.

[26] [Sam] does not make out the second branch of r 14.6, at (b)(i) to (v). Those grounds are not made out, including failure by the respondents to accept an offer of settlement at (v).

[27] The offer to settle by way of Deed of Family Arrangement at 12.5 per cent did not match what was achieved at hearing. The '10 per cent offer' made in 2022 was in reality closer to 12.5 per cent. The decision achieved a division of 10 per cent for [Sam], and I was sure to take into account Mrs [Drummond]'s testamentary freedom, and a degree of impact caused by the 2009 letter written by [Sam] to Mrs [Drummond].

[28] I also take into account one motivation held by the five sibling beneficiaries in defending the proceedings which when viewed subjectively, was understandable. They wanted to resist adverse allegations brought against the late Mrs [Drummond], specifically the alleged affair.

[29] The costs therefore ordered in favour of the first applicant [Sam Drummond] against the five respondent beneficiaries named at paragraph two of this decision are as follows:

(a) $13,465.55 on scale at 2B, other than step 5 at 2C.

(b) Disbursements as sought at $1,139.41.

[30] The total costs award is therefore **$14,604.91**.

[31] The five respondent sibling beneficiaries therefore have joint and several liability for this costs award.

[32] For the avoidance of doubt the executors would pay, from the estate, their legal costs incurred in relation to these proceedings. No order about this is necessary.

[33] [Miriam Rowan] has not pursued any argument for costs and consequently there is no order about this. There is no order about the eighth sibling, [Janet] who has taken no part in these proceedings. [Janet] was left out of Mrs [Drummond]'s Will

and for what would have been reasons of her own, chose not to engage with the proceedings to challenge that outcome.

D A Blair
Family Court Judge