

SUPREME COURT OF QUEENSLAND

CITATION: *Tolbert v Hicklin* [2020] QSC 199

PARTIES: **CAMERON LEE TOLBERT**
(Plaintiff)

v

NINA RUTH HICKLIN
(Defendant)

FILE NO/S: BS 7852 of 2018

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 26 June 2020

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Brown J

ORDER: **The order of the Court is that:**

- 1. The counterclaim is dismissed.**
- 2. Subject to formal requirements of the Registrar, a grant of Letters of administration with the Will of Kenneth Hicklin, deceased, dated 9 August 1979 be made to the Plaintiff, Cameron Lee Tolbert.**
- 3. The costs of the Plaintiff and the Defendant of the proceeding be paid out of the estate of Kenneth Hicklin, deceased, on an indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – COSTS OUT OF FUND OR PROPERTY – LITIGATION CAUSED BY TESTATOR, PERSONAL REPRESENTATIVE OR BENEFICIARY – RELATING TO EXECUTION OR REVOCATION OF WILL – COSTS OF PERSONAL REPRESENTATIVE OR APPLICANT – where deceased gave instructions for will in hospital – where deceased did not execute will in hospital – where plaintiff propounded earlier will – where *Calderbank* offer made by plaintiff – where defendant rejected *Calderbank* offer – where plaintiff successful at trial – whether defendants costs should be paid out of the estate on indemnity basis – whether defendant reasonably propounded 2017 Document

Calderbank v Calderbank [1975] 3 All ER 333, considered

Frizzo v Frizzo (No 2) [2011] QSC 177, followed
Re: Prien [2019] VSC 47, considered
Re: Toulitch (Deceased) [2016] QSC 219, considered

COUNSEL: J Byrnes for the Plaintiff
 L Nevison for the Defendant

SOLICITORS: Cooke & Hutchinson Lawyers for the Plaintiff
 Big Law Pty Ltd for the Defendant

- [1] Cameron was successful in these proceedings insofar as the Court found that the 2017 Document did not satisfy the requirements of s 18 of the *Succession Act* 1981 (Qld) and Kenneth Hicklin's last Will was the Will made by him on 9 August 1979.¹ That said, there was no dispute that in the event that the 2017 Document did not satisfy the requirements of s 18 of the *Succession Act*, the 1979 Will was Kenneth's last valid will or that Cameron should be granted the Letters of Administration.
- [2] Nina had brought a counterclaim on the basis that the 2017 Document was Kenneth's last will.
- [3] Submissions in respect of costs and the form of Order arising out of the judgement have been made on behalf of both Cameron and Nina. In its submissions, Cameron relies on a *Calderbank* offer dated 30 May 2019.
- [4] Dealing with the form of order first. Counsel for Nina contends that it is not necessary for the Court to declare the force and validity of the 1979 Will in solemn form,² and the order only needs to provide for Letters of Administration. There was no contest at trial that, in the event that the counterclaim did not succeed, the 1979 Will was Kenneth's last Will. I accept that an order only needs to be made in relation to the grant of the Letters of Administration to Cameron.
- [5] There is no dispute that Cameron is entitled to be paid his costs of the proceedings from Kenneth's estate on an indemnity basis.
- [6] Cameron recognises that the 2017 Document did create a controversy. The issue is whether Nina was unreasonable in not accepting a *Calderbank* offer,³ and continuing to trial based on the 2017 Document. Cameron submits that Nina was unreasonable and should only be paid her costs up until 14 June 2019, and that she should bear her own costs after that date. In the *Calderbank* offer dated 30 May 2019, the Plaintiff made an offer whereby the parties consent to the orders claimed by Cameron, with the parties' costs up to the date of acceptance to be met by the estate, and for Cameron not to oppose leave for Nina to bring a family provision application within three months of his appointment.⁴ Given that the testamentary intentions contained in the 2017 Document provided for Nina's son Ethyn, not Nina herself, to receive the house, it was not unreasonable for her not to accept the *Calderbank* offer. As to the submissions of whether this case was stronger or

¹ *Tolbert v Hicklin* [2020] QSC 166.

² As to which see Peter Lyons J in *Re: Toulitch (Deceased)* [2016] QSC 219.

³ Affidavit of Daniel Hutchinson at exh DEH-01.

⁴ Which was said to be otherwise out of time.

weaker than *Re Prien*,⁵ each case turns on its own facts and it was not unreasonable for Nina to not accept that the outcome of the present case would be the same as in *Re Prien*, particularly since the present case largely turned on the evidence of Mr Pattison who had to be subpoenaed at trial. The 2017 Document raised a matter which properly required the determination of the Court, namely whether Kenneth intended the 2017 Document to be his Will.

- [7] Mr Pattison had provided a file note and statement. Nina had a copy of those documents. However, the question of whether Kenneth intended the 2017 Document to be his will of immediate effect, and signed it with knowledge of and approval of its contents, could not be predicted with any certainty absent Mr Pattison's evidence. As was submitted by Cameron at trial, the file note and statement were inconsistent in some respects. The statement of Mr Pattison, which the Court ultimately did not consider was the most accurate statement of what had occurred on 4 June 2017, was in fact more favourable to Nina's case.
- [8] Although seeking to resolve proceedings through alternative avenues such as *Calderbank* offers is to be encouraged, I do not find that Nina was unreasonable in rejecting the *Calderbank* offer made by Cameron.
- [9] As to the appropriate costs order,⁶ the present case is an unfortunate one where Kenneth took steps to give instructions for a new will immediately prior to his death, but was not fit to execute the formal will that was drafted as a result of those instructions. Nor could Kenneth determine that he did not wish to proceed with the will. As a result, Kenneth left a state of uncertainty as to his intention upon his passing. There is no doubt that the result has been to delay the administration of a small estate. Nina and her son have, to a certain extent, benefitted from that delay by being able to remain in the Kallangur Property. I am not able to attribute the delay to any particular party.
- [10] In the particular circumstances of this case, it could not be said that Nina continued fruitless litigation with the costs to be defrayed by others. There were reasonable grounds upon which to propound that the 2017 Document satisfied s 18 of the *Succession Act* and Nina acted reasonably in doing so,⁷ albeit that the counterclaim ultimately was unsuccessful. The litigation was the result of Kenneth seeking to make a further will at the very last minute, albeit that he appeared to deteriorate very suddenly. I found that the Defendant did not have any involvement in Kenneth's provision of instructions to Mr Pattison.
- [11] In my view, notwithstanding the small size of the estate, it is appropriate that both parties' costs are paid out of the estate, in the particular circumstances of this case, on an indemnity basis, rather than costs following the event.
- [12] The order of the Court will be in accordance with the draft submitted by counsel for Nina, namely that:

1. The counterclaim is dismissed.

⁵ *Re Prien* [2019] VSC 47.

⁶ As to the principles of costs in estate matters I adopt Applegarth J's statement in *Frizzo v Frizzo (No 2)* [2011] QSC 177 at [25]-[39].

⁷ *Daley v Barton: Barton v Daley* [2008] QSC 322 at [7]; *Dolan v Dolan* [2007] WASC 249 at [59]-[60].

2. Subject to formal requirements of the Registrar, a grant of Letters of Administration with the Will of Kenneth Hicklin, deceased, dated 9 August 1979 be made to the Plaintiff, Cameron Lee Tolbert.
3. The costs of the Plaintiff and the Defendant of the proceeding be paid out of the estate of Kenneth Hicklin, deceased, on an indemnity basis.