

SUPREME COURT OF QUEENSLAND

CITATION: *Williams v Williams* [2004] QSC 325

PARTIES: **NANNETTE JANE WILLIAMS**
(first applicant)
and
**SAM JOHN WILLIAMS (by his litigation guardian
NANNETTE JANE WILLIAMS)**
(second applicant)
v
**JOHN CHARLES WILLIAMS and BENJAMIN DEAN
WILLIAMS (as executors of the estate of Marcus John
Charles Williams – Presumed Deceased)**
(respondents)

FILE NO: BS2396/04

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 17 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 14 May 2004

JUDGE: Wilson J

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE
GENERAL RULE – ORDER FOR COSTS ON
INDEMNITY BASIS – where application for removal of
executors successful – where respondents not entitled to
indemnity out of estate – whether costs should be assessed on
indemnity basis – whether there is misconduct in respect of
application for removal.

PROCEDURE – COSTS – GENERAL RULE – COSTS
FOLLOW THE EVENT – COSTS OF WHOLE ACTION –
COSTS OF ISSUES – where court asked for written
submissions as to first applicant’s standing to bring
application – where first applicant found not to have standing
– whether respondents should have costs of written
submissions.

COUNSEL: A Collins for the applicants
I Perkins for the respondents

SOLICITORS: Damien Bourke & Associates for the applicants
Quinn & Scattini for the respondents

- [1] **WILSON J:** I refer to my reasons for judgment delivered on 26 August 2004. The parties have now made written submissions on costs.
- [2] Clearly the respondents should pay the second applicant's costs of and incidental to the application (including reserved costs). The order for costs will be against the respondents personally: it is not intended that they should be entitled to indemnity out of the estate. The second applicant has asked that those costs be assessed on the indemnity basis, while the respondents have submitted that they should be assessed on the standard basis.
- [3] In the usual case, a successful litigant is entitled to costs on the standard basis. There must be some special or unusual feature in the case to justify a departure from the ordinary practice: *Di Carlo v Dubois* [2002] QCA 225 at [37]; *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 400 - 401; *Colgate-Palmolive Company v Cussons Pty Limited* (1993) 46 FCR 225 at 231. Commonly cited examples are the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud; misconduct that causes loss of time to the court and the other parties; the fact that the proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions; the imprudent refusal of an offer to compromise; and costs against a contemnor: *Di Carlo v Dubois* [2002] QCA 225 at [37].
- [4] The second applicant has submitted that this an appropriate case for indemnity costs because –
- (a) it is an estate matter, and –
- (i) it is common for orders for costs to be paid out of the estate on the indemnity basis; and
- (ii) the beneficiary should not suffer at the hands of the executors and trustees; and
- (b) the conduct of the respondents warrants such an order.

The respondents have submitted that costs on the standard basis are appropriate because –

- (a) the costs order is to be against them personally; and
- (b) conduct justifying an order for indemnity costs is generally conduct beyond that justifying the decision on the substantive issues in the case: but here there

is no additional conduct or feature beyond that justifying the removal of the respondents as executor and trustees.

- [5] As I said in my reasons for judgment, the Court will not lightly interfere with a testator's appointment of executors and trustees.¹ In this case I was satisfied that the respondents' conduct as executors and trustees was sufficiently reprehensible to justify their removal. But what is relevant to the issue of costs is their conduct in the defence of this application.
- [6] The respondents declined to give their solicitors instructions to accept service on their behalf. They were entitled to insist upon personal service and should not be criticised for doing so, especially given that their then solicitors were in Dalby and the first named respondent is in Central Queensland.
- [7] I dealt with the respondents' conduct in relation the family provision application in my reasons for judgment, saying²;

“The respondents' delays and partial or non-compliance with directions in the family provision application reflect poorly on their stewardship of the estate, and display a high-handed, defiant attitude to their legal responsibilities.”

That conduct was relevant to the question of the respondents' removal as executors and trustees, rather than to costs.

- [8] I regard the circumstances of the first named respondent's non-disclosure of the withdrawal of funds from the estate as relevant to the issue of costs. While inexcusable, on balance I do not think it a sufficient basis for an award of costs on the indemnity basis.
- [9] During the oral argument on 14 May 2004 I raised the question of the first applicant's standing to bring the application, and the parties later made written submissions on the point. Ultimately I concluded that she did not have standing, and ordered that her application be dismissed. The respondents were put to expense by her unsuccessful application, and there should be an order that she pay their additional costs occasioned by her being an applicant.
- [10] Accordingly I order as follows:
- (a) that the respondents in their personal capacity pay the second applicant's costs of and incidental to the application, including reserved costs, to be assessed on the standard basis;

¹ *Williams v Williams* [2004] QSC 269 at [45]

² at [35]

- (b) that the first applicant pay the respondents' costs of making written submissions in respect of the first applicant's standing, such costs to be assessed on the standard basis.