

SUPREME COURT OF QUEENSLAND

CITATION: *Lamond v Public Trustee of Queensland & Ors (No 2)* [2009] QSC 313

PARTIES: **LINDA DIANA LAMOND**
(applicant)
v
THE PUBLIC TRUSTEE OF QUEENSLAND (as
executor of the will of **DORIS IDA DALTON**, deceased)
(respondent)
DESMOND JOHN MORRIS
(applicant)
OLIVER JAMES LAMOND
(respondent)
TESS OLIVIA LAMOND
(respondent)

FILE NO: BS4097 of 2006

DIVISION: Trial Division

PROCEEDING: Hearing on costs

DELIVERED ON: 29 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 4 September 2009

JUDGE: Mullins J

ORDER: **1. That further and better provision for Desmond John Morris be made out of the estate of Doris Ida Dalton, deceased (the deceased), by reading and construing the last will of the deceased dated 11 August 1997 as if the following proviso were added at the end of sub-clause (b) of clause 5.02:**

“provided that to the extent that a ¼ share is less than \$280,000, the gift to Desmond John Morris under clause 5.02 must be increased to the sum of \$280,000 by first deducting the amount necessary from the gift of a ¼ share to Tess Olivia Lamond under sub-clause (c) of clause 5.02 but, if there then remains a shortfall between the amount of the gift to Desmond John Morris and the sum of \$280,000, second by deducting half of the balance required to meet that shortfall from each of the respective gifts of a ¼ share of the residue for the benefit of Linda Diana Lamond and Oliver James Lamond under sub-clauses (a) and (d) of clause 5.02 of the will”;

and as if the following words were inserted at the

commencement of each of sub-clauses (a), (c) and (d) of clause 5.02 of the will:

“subject to sub-clause (b),”.

2. That no legacy interest is payable on the gift to Desmond John Morris under clause 5.02(b) of the will.
3. The costs incurred by the Public Trustee and Oliver James Lamond in respect of the proceeding be assessed on an indemnity basis and paid out of the estate of the deceased.
4. The costs incurred by Desmond John Morris in respect of the proceeding, other than all costs incurred in connection with the report from occupational therapist Vivienne Williams (exhibit 9) including obtaining, circulating and the giving of advice in respect of the report, be assessed on an indemnity basis and paid out of the estate of the deceased.
5. The costs incurred by Linda Diana Lamond in the preparation, filing and serving of affidavits in connection with the proceeding be assessed on an indemnity basis and paid out of the estate of the deceased.
6. The costs incurred by Tess Olivia Lamond in the preparation, filing and serving of her affidavit (document 20) be assessed on an indemnity basis and paid out of the estate of the deceased.
7. There are otherwise no orders as to costs in respect of the costs incurred by Linda Diana Lamond and Tess Olivia Lamond in respect of the proceeding.

CATCHWORDS: SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – PROCEDURE, ORDERS AND OTHER MATTERS – Other procedural matters – orders for costs and consequential orders following delivery of reasons for judgment – where applicant successful in his application for further provision – where each of the other three beneficiaries were separately represented and opposed the application for further provision – where Public Trustee as executor did not take an active role in the hearing of the application – where one of the beneficiaries under a disability and required a litigation guardian – where it was appropriate to order the costs of the litigation guardian out of the estate – whether orders for costs should be made in favour of the other unsuccessful beneficiaries

Re Klease [1972] QWN 44, considered
Vasiljev v Public Trustee [1974] 2 NSWLR 497, considered
Warren v McKnight (1996) 40 NSWLR 390, considered

COUNSEL: GW Diehm SC for the applicant DJ Morris
 MK Conrick for the respondent The Public Trustee of Queensland
 DG Mullins SC and M Hindman for the respondent LD Lamond

RT Whiteford for the respondent OJ Lamond
 PW Hackett for the respondent TO Lamond

SOLICITORS: de Groots for the applicant DJ Morris
 The Official Solicitor to The Public Trustee of Queensland
 for the respondent The Public Trustee of Queensland
 Adamson Bernays Kyle & Jones for the respondent LD
 Lamond
 McCowans for the respondent OJ Lamond
 Bernard Ponting & Co for the respondent TO Lamond

- [1] **MULLINS J:** I delivered my reasons for judgment in this family provision application on 27 August 2009: *Lamond v Public Trustee of Queensland & Ors* [2009] QSC 247 (the reasons). On 4 September 2009 the parties appeared by counsel and solicitors and made submissions on the form of orders that should be made to reflect the reasons and the appropriate orders for costs.
- [2] For the purpose of the submissions the Public Trustee updated the value of the estate (exhibit 17). Because of fluctuations in the share prices, the estimated value of the shares as at 3 September 2009 was about \$710,000 (net of income tax and capital gains tax): *cf* the net value of the shares as at 14 April 2009 of \$570,212 set out in the reasons at [6].
- [3] One of the issues that arose during these submissions was the effect on the costs incurred by the parties of the Public Trustee's decision not to play an active role on the hearing of the family provision application. Subsequent to the hearing, Ms Hindman of counsel, with the consent of all parties, forwarded to my associate copies of correspondence from the Official Solicitor to Public Trustee to Oliver dated 29 August 2006 and to the solicitors for Mrs Lamond dated 11 September 2007 and references from other material before the court relevant to this issue.

Approach of the Public Trustee to the family provision application

- [4] In the letter of 29 August 2006, the Public Trustee informed Oliver of the Public Trustee's duty as executor to bring before the court information relevant to the application, but would not press any individual beneficiary's claim and advised Oliver in terms of paragraph 8(a) of Practice Direction No 8 of 2001.
- [5] Mr Feely, an officer of the Public Trustee, in his affidavit that was filed on 4 December 2006, estimated the Public Trustee's legal costs and outlays, if the family provision application proceeded to trial on the basis that all parties were separately represented, at between \$25,000 and \$30,000.
- [6] It was part of Tess' case at the hearing of the family provision application to rely on the letter her solicitors received from the Public Trustee dated 24 April 2007 (exhibit 10) under cover of which the Public Trustee forwarded copies of affidavits of Mrs Lamond and Mr Morris and advised of the information conveyed by Mrs Lamond's solicitors that it was Mrs Lamond's intention that Oliver's entitlement under the will not be reduced. The Public Trustee noted that had consequences for Tess.

- [7] The letter from the Official Solicitor to Mrs Lamond's solicitors dated 11 September 2007 (which was copied to all parties) concerned the preparation for mediation. The letter noted that there was no affidavit material filed on behalf of Oliver at that stage and that all other separately represented parties had agreed with Mrs Lamond to proceed to mediation on that basis. The letter then stated:

"I advise that while I am otherwise available to attend the mediation conference the Public Trustee's instructions for the mediation have yet to be obtained from the Public Trustee but will be sought this week. It is usual though where all the parties are separately represented as is the case here that the Public Trustee will decide not to be represented by counsel at a mediation conference for a family provision claim and that a legal officer alone will attend. Should the other parties agree terms of settlement the approval of the Public Trustee's delegate subsequently will have to be obtained by the legal officer."

- [8] A letter sent by the Official Solicitor of the Public Trustee to the solicitors for Tess dated 10 December 2008 (which was also copied to all parties) stated:

"As foreshadowed, the intended approach to be taken by the Public Trustee is to appear by Counsel on the first day of trial to provide the Court with necessary information and then seek leave to withdraw subject to being able to be heard on costs at the conclusion of the trial.

I presume the above approach will be satisfactory to the other parties having regard to the interest of all parties in minimising costs and that they are all separately represented in the proceedings. If not, I should be informed by the other parties as early as possible."

- [9] There must have been no objection by the parties to this approach of the Public Trustee, as it was the approach substantially followed by the Public Trustee at the hearing: the reasons at [4]. Although the Public Trustee did not participate in the hearing, the submissions tendered at the outset by the Public Trustee argued against the success of Mr Morris' application (and Mrs Lamond's application).
- [10] The approach adopted by the Public Trustee had the consequence that the Public Trustee's costs incurred in connection with the proceeding were far less than those of any of the other parties: the reasons at [8].

Course of the hearing of the family provision application

- [11] Mrs Lamond and her two children sought to resist the application of Mr Morris, primarily on the basis that he did not satisfy the jurisdictional question. Their interests diverged in the identification of what part of the estate should bear the burden of any order for further provision, to the extent that Mr Morris was successfully in obtaining such an order.
- [12] There were three witnesses who gave oral evidence at the hearing of the family provision application. Mr Morris gave further evidence-in-chief to supplement his affidavits and then was cross-examined extensively by Mr Mullins of senior counsel

for Mrs Lamond. There was also some relatively short cross-examination by Mr Whiteford of counsel on behalf of the litigation guardian for Oliver. There was no need for and no cross-examination by Mr Hackett of counsel for Tess. The next witness was Mrs Lamond who was cross-examined by Mr Diehm of senior counsel on behalf of Mr Morris. There was very short cross-examination by Mr Whiteford and, again, no cross-examination was required or undertaken by Mr Hackett. As Mr Diehm required Tess for cross-examination, she was available by telephone for that purpose and was cross-examined only by Mr Diehm.

Summary of the submissions of the parties on costs

- [13] The Public Trustee submits that Mrs Lamond should bear her own costs and that there should be an order for costs in favour of Tess. This was on the basis that for most of the time prior to the hearing of the application Mrs Lamond was an applicant, Mr Morris was an applicant and Oliver's interest was in preserving his entitlement under the will, so that Tess assumed the role that the executor would normally take in defending the will. The Public Trustee has always supported a costs order in favour of Oliver on the basis that his medical needs made him a special case.
- [14] Mrs Lamond submits that each party's costs on an indemnity basis should be ordered to be paid from the estate. Mrs Lamond proposes that each party's costs be paid from the residue first and that, insofar as the amount that one-quarter of the residue for Mr Morris falls short of his entitlement under the terms of the judgment, the shortfall should be funded from the sale of the real property. This proposal in respect of the shortfall is inconsistent with the reasons at [106].
- [15] The litigation guardian for Oliver seeks an order for Oliver's costs on an indemnity basis out of the estate. The litigation guardian submits that the costs of the Public Trustee and Tess on an indemnity basis should also be paid out of the estate. The litigation guardian opposes any costs order being made in favour of Mrs Lamond.
- [16] Tess submits that there should be an order for costs in her favour from the estate on the basis that she was the only active party who endeavoured to uphold the terms of the will and she was the party who had the most to lose out of the proceeding. She does not oppose an order for costs in Mrs Lamond's favour.
- [17] It was not controversial that there should be an order for costs on an indemnity basis in favour of Mr Morris. Mr Morris does not oppose an order for costs in Mrs Lamond's favour from the estate.

The role of the "defender of the will"

- [18] Implicit in the submissions that were made in support of an order for costs in favour of Tess are the assumptions that every family provision application requires either the executor or another party to undertake the role of the "defender of the will" and that if another party undertakes the role of defending the will that other party should enjoy the advantages in respect of indemnification for costs from the estate that usually applies to an executor. The argument put in favour of Tess on the issue of costs was that, as the Public Trustee had abdicated its role of defending the terms of the will, it was proper for Tess to be separately represented and take on that role. Mrs Lamond opposes the characterisation of Tess as the "defender of the will" as

the only affidavit filed by Tess to resist Mr Morris' application was her one affidavit (document 20) and Mrs Lamond (and Oliver) also actively defended Mr Morris' application at the hearing.

- [19] Many of the statements in the authorities about the responsibility of the executor as the defender of the will and the duty of the executor to contest the family provision application and uphold the provisions of the will are made in the context of small estates where the court has recognised that the undertaking of that task by the executor should obviate the need for beneficiaries to be separately represented: *Re Klease* [1972] QWN 44, *Vasiljev v Public Trustee* [1974] 2 NSWLR 497, 503-504, and *Warren v McKnight* (1996) 40 NSWLR 390, 395-396. This approach is reinforced by paragraph 8(a) of Practice Direction No 8 of 2001.
- [20] The defence of the provisions of the will that was undertaken by Tess was incidental to her defence of the gifts made to her under the will. The defence of the will was also incidental to the role undertaken by the litigation guardian for Oliver and, from shortly prior to the hearing, by Mrs Lamond in resisting Mr Morris' application. Prior to Mrs Lamond abandoning her application for further provision, it was both Oliver and Tess who were, in substance, defending the provisions of the will.
- [21] The quality of the defence by Tess of the provisions of the will was also qualified by the vulnerability of the gifts in her favour, to the extent that any order for further provision was made in favour of Mr Morris.
- [22] It therefore oversimplifies the analysis of this proceeding to equate Tess' role with that of the executor for the purpose of considering appropriate orders for costs.

What costs orders should be made

- [23] Although the Public Trustee did not play an active role in the hearing of the application, the Public Trustee incurred costs in connection with the proceeding by virtue of being the executor of the deceased's estate and, as executor, is entitled to be indemnified for those costs, even without the benefit of a formal court order. To avoid any doubt, I will make an order for costs in the Public Trustee's favour on an indemnity basis.
- [24] As Mr Morris was successful in his application for further provision, his costs assessed on an indemnity basis should be paid out of the estate, except those costs that were incurred in connection with the report that was obtained on behalf of Mr Morris from the occupational therapist (exhibit 9) in relation to Oliver's needs. The litigation guardian for Oliver had obtained reports from his treating psychiatrist Dr Eyears and an occupational therapist Ms Hague. These witnesses were not cross-examined at the hearing. In the circumstances, it is not appropriate that the estate bear the costs of the decision that was made by Mr Morris to obtain a report from a second occupational therapist.
- [25] In view of Oliver's special needs, it was appropriate that a litigation guardian act on his behalf to protect his interests under the will and that the litigation guardian's costs on an indemnity basis be paid out of the estate, even though Oliver was unsuccessful in resisting Mr Morris' application.

- [26] Mrs Lamond did not continue with her application for further provision and was unsuccessful in defending Mr Morris' application. Written submissions provided on behalf of Mrs Lamond (exhibit 16) that were supplemented by oral submissions put forward a number of arguments to support a claim by Mrs Lamond for an order that her costs be paid out of the estate. I accept that most of the material filed on behalf of Mrs Lamond was relevant to opposing Mr Morris' application (in addition to supporting her own application) and, if she had not made an application for further provision, that material in the normal course would have been prepared by the executor. Apart from the preparation of the material, Mrs Lamond elected to be separately represented in the proceeding and was unsuccessful in pursuing her own application and in resisting Mr Morris' application. It was always likely that the estate would bear the litigation guardian's costs. The question arises whether the costs of other unsuccessful beneficiaries should also be paid out of the estate.
- [27] Many of the arguments now put forward on Mrs Lamond's behalf are matters that were no doubt considered by her at the various times that she made decisions in relation to this proceeding: that she had no other funds available to her to pay her costs other than what she is able to obtain from the estate, burdening her with her own costs inflicts "punishment" on both Oliver and Mrs Lamond and placing Mrs Lamond in a position where she has difficulty in paying her own legal costs "acts an injustice on her legal representatives who have at all times acted on instructions".
- [28] On any objective analysis of Mrs Lamond's application for further provision from the deceased's estate, if it were ever to have any success, it had to be at the expense of the benefits given under the will to her children Oliver and Tess and, more likely, the benefits given to Tess. Ultimately Mrs Lamond joined Oliver and Tess in resisting Mr Morris' application. It is a matter for Mrs Lamond as to how she pays her legal costs. When it comes to determining whether it is appropriate to make an order in her favour from the estate, her lack of success in the proceeding is a relevant consideration. That there are compelling reasons for ordering out of the estate one set of costs for a party (Oliver) who also was resisting Mr Morris' application is also relevant. Representation at the hearing by three separate parties focussed on resisting Mr Morris' application was excessive. In the circumstances, apart from an order in Mrs Lamond's favour in respect of the costs for the preparation, filing and serving of affidavits in connection with the proceeding, there should be no other order as to the payment of Mrs Lamond's costs out of the estate.
- [29] Like her mother, Tess was unsuccessful in resisting Mr Morris' application for further provision. It was, in fact, the gifts to Tess under the will where Tess was not in the category of a beneficiary with a legitimate claim on the deceased's bounty that assisted in determining the jurisdictional question in favour of Mr Morris: the reasons at [95]. It was Tess' choice to participate in the proceeding in the manner in which she did, even though as a young university student, she had no means of financing her participation, other than through the estate, and objectively it was likely to be the gifts in her favour under the will that were the most vulnerable to a successful application for further provision by Mr Morris. Effectively, Tess sought to resist Mr Morris' application on the basis that the jurisdictional issue was not satisfied by him. No submissions were made on behalf of Tess about where the incidence of any order for further provision in favour of Mr Morris should fall: see exhibit 11. The very reason why it was argued that Tess' interests differed from that of Mrs Lamond and Oliver was not a matter that was pursued on behalf of Tess at the hearing.

- [30] If Tess had not been separately represented, the Public Trustee would have borne the cost of the preparation of her affidavit. As a beneficiary who was unsuccessful in resisting Mr Morris' application, where multiple representatives at the hearing in substantially the same interest were excessive, Tess should also bear her own costs of the proceeding, other than in respect of the preparation of her affidavit.

Other matters

- [31] Consistent with the reasons at [106], the incidence of the further provision will primarily fall on Tess' one-quarter share of the residue. To the extent that Tess' share of the residue may not be sufficient to meet the further provision ordered for Mr Morris, the shortfall should be borne equally between the respective gifts of residue in favour of Mrs Lamond and Oliver. Although the litigation guardian argued in favour of preserving Oliver's share of the residue as much as possible, it is also in Oliver's interests that his mother has access to some funds from her share of the residue of the estate. Even after allowing for the costs ordered to be paid out of the estate, the residue is sufficient to fund and appropriate for funding the further provision for Mr Morris.
- [32] Mr Whiteford also suggested that an order should be made that there should be no legacy interest on the gift under the will payable to Mr Morris, as a result of his success in his application for further provision. In view of the manner in which the further provision was calculated in the reasons by reference to the value of the estate at the date of the hearing, it is appropriate there be no legacy interest if, in fact, any were payable.
- [33] An issue arose as to whether the interim distributions (referred to in the reasons at [6]) should be exonerated. In the circumstances, and in view of my conclusions about the objective analysis of the position of each of the beneficiaries under the will, and particularly Tess, I am not prepared to make an order exonerating the interim distributions from the incidence of the burden of the order for further provision for Mr Morris.
- [34] Although the parties were generally supportive of the quantum of costs put forward by each other, there were significant costs incurred in this proceeding and I do not consider it appropriate to attempt to fix the costs for any party on the basis of the agreement of or consistency with the costs incurred by other parties.

Orders

- [35] It follows that the following orders should be made:
1. That further and better provision for Desmond John Morris be made out of the estate of Doris Ida Dalton, deceased (the deceased), by reading and construing the last will of the deceased dated 11 August 1997 as if the following proviso were added at the end of sub-clause (b) of clause 5.02:

“provided that to the extent that a ¼ share is less than \$280,000, the gift to Desmond John Morris under clause 5.02 must be increased to the sum of \$280,000 by first deducting the amount necessary from the gift of a ¼ share to Tess Olivia Lamond under sub-clause (c) of clause 5.02 but, if there then remains a shortfall between the amount of the gift to Desmond John Morris and the

sum of \$280,000, second by deducting half of the balance required to meet that shortfall from each of the respective gifts of a ¼ share of the residue for the benefit of Linda Diana Lamond and Oliver James Lamond under subclauses (a) and (d) of clause 5.02 of the will”;

and as if the following words were inserted at the commencement of each of sub-clauses (a), (c) and (d) of clause 5.02 of the will:

“subject to sub-clause (b),”.

2. That no legacy interest is payable on the gift to Desmond John Morris under clause 5.02(b) of the will.
3. The costs incurred by the Public Trustee and Oliver James Lamond in respect of the proceeding be assessed on an indemnity basis and paid out of the estate of the deceased.
4. The costs incurred by Desmond John Morris in respect of the proceeding, other than all costs incurred in connection with the report from occupational therapist Vivienne Williams (exhibit 9) including obtaining, circulating and the giving of advice in respect of the report, be assessed on an indemnity basis and paid out of the estate of the deceased.
5. The costs incurred by Linda Diana Lamond in the preparation, filing and serving of affidavits in connection with the proceeding be assessed on an indemnity basis and paid out of the estate of the deceased.
6. The costs incurred by Tess Olivia Lamond in the preparation, filing and serving of her affidavit (document 20) be assessed on an indemnity basis and paid out of the estate of the deceased.
7. There are otherwise no orders as to costs in respect of the costs incurred by Linda Diana Lamond and Tess Olivia Lamond in respect of the proceeding.