

DISTRICT COURT OF QUEENSLAND

CITATION: *Wright v Wright* [2016] QDC 97

PARTIES: **CASANDRA ELIZABETH WRIGHT** (under Part IV, sections 40 – 44, *Succession Act 1981*)
(Applicant)
And
TREVOR JOHN WRIGHT (As Executor of the Will of **KEITH ARTHUR WILL** deceased)
(Respondent)

FILE NO/S: 3579/13

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 29 April 2016

DELIVERED AT: District Court at Brisbane

HEARING DATE: 17 – 18 March 2016

JUDGE: Devereaux SC DJC

ORDER: **1. That the costs of the parties to the proceeding, to be assessed on the indemnity basis, be borne rateably among the three beneficiaries.**
2. The said costs include the costs of the Children’s Hospital Foundation Queensland, to be assessed on the indemnity basis.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – PROCEDURE – ORDERS AND OTHER PROCEDURAL MATTERS – COSTS – GENERALLY – where the deceased left the proceeds of his estate to a charitable body and the residue to his siblings – where a significant change to the testamentary disposition was ordered – where the costs of the proceeding were significant - where written submissions on costs were received on behalf of a beneficiary who was not previously separately represented in the proceeding –whether it would be unjust for the incidence of the orders made to fall rateably on the whole of the estate.

COUNSEL: A Fraser for the applicants
D Kelly for the respondent

SOLICITORS: Paul Pattinson Solicitor for the applicants
Biggs Fitzgerald Pike Solicitors for the respondent

- [1] On 5 April 2016 I published reasons for judgment in this application and invited written submissions with respect to an order for costs or any order under s 41(3) of the *Succession Act*. I have received written submissions on behalf of the Children's Hospital Foundation Queensland ("CHF"), one of the beneficiaries under the will, which was not previously separately represented in the proceeding; submissions from the legal representatives of the executor and from the legal representatives of the applicants.
- [2] In paragraph [59] of my reasons for decision I wrote that once effect was given to the orders I made for provision out of the estate to the two applicants, the balance of the estate would fall rateably so that CHF would receive about \$380,000 and each of the two siblings of the testator would receive about \$360,000. I notice that counsel for CHF calculates the shares slightly differently so that CHF would receive a little more than \$378,000 and each sibling would receive \$373,819.

- [3] In paragraph [59] of my reasons I wrote,

"Taking into account the evidence of the relationships of the siblings with the deceased and their future needs and giving weight to the Testator's implicit desire to provide, eventually, for his siblings' children, the shares to be received by Trevor Wright and Lynette Roberts should not be depleted by the costs of the proceeding. I have already accepted the worth of the Foundation's work, but no particular connection between the deceased and the charity was established. The interests of justice require that the incidence of the orders to be made in favour of the applicants not fall rateably on the whole of the estate. This would be most simply achieved by an order, pursuant to s 41 (3) of the *Succession Act*, that the costs of the proceeding be paid from the Foundation's share of the balance of the estate after effect is given to the orders for provision of the applicants."

Counsel for CHF has submitted that the order I have been considering would have potential effects much wider than the present case, in particular, "a disastrous effect on the costs of all future estate litigation". This, it was submitted, was because where an Executor has a personal interest in addition to its duty to other beneficiaries, each other beneficiary would insist on being separately represented.

- [4] I accept that this would not be a desirable outcome, but am not able to predict whether such an outcome is likely. In any case, the circumstances of this application

are quite unusual – the testator left a large part of his estate to CHF and the residue to his two siblings. This was done to the exclusion of his own children, from whom he was estranged since they were young.

- [5] As counsel for CHF points out, should I not make the order that I have been considering, CHF would receive about \$378,000 and the costs would come from the residue, thereby reducing the amounts mentioned above with respect to each of the two siblings to about \$257,000.
- [6] Counsel for CHF submits the Executor's proposed costs for the proceeding are extraordinarily high and out of all proportion to the size of the estate and the complexity of the matter. Senior counsel was engaged for the trial. There is something in that argument. The evidence in the trial was, of course, largely on affidavit. Cross-examination took less than one day of court time. The second day was taken up with oral submissions to written outlines. The predicted costs are very high, particularly by comparison with the proposed costs of the applicants. It might be that the assessed costs are not as high as those that have been proposed. But I am not persuaded to enter into the exercise of assessing or capping the parties' costs in the proceeding.
- [7] Counsel for CHF submits that it may be inferred that at the time of making the will, the deceased intended that CHF should benefit more than anyone else. This is because the value of the AMP policy bequeathed to CHF was then about one half the value of the estate. That is, Trevor and Lynnette would each receive about 25% of the total estate. It is not the function of the Court to rewrite the will. It is submitted that making the proposed costs order would significantly do so. If proper provision had been made for the applicants in the will I consider it seriously unlikely that the testator would have left the specific request untouched given the obvious intention to benefit his siblings. In other words, only because proper provision was not made for the applicants could there have been such a bequest in the first place to the charity. So, it does not help the exercise I must now perform to consider the deceased intended the charity to receive more than any other beneficiary. It seems to me the interest of all parties requires that the proportion of the estate bequeathed to the charity be affected by the orders.

- [8] Counsel for the estate submits that the CHF had the opportunity to put forward evidence to support a connection between it and the deceased but chose not to do so. If this is correct, there is yet something persuasive in the submission of counsel for CHF that a specific beneficiary ought to be able to rely on the Executor to conduct litigation with all of the beneficiaries' interests in mind. I have no information about who attended pre-trial negotiations or attempts at settlement and it is inappropriate to speculate. I would have thought, however, that where a charity has such a large bequest at stake it would take particular interest in pursuing and preserving the bequest.
- [9] In the end, I am persuaded to move from my original consideration. It seems to me reasonable for a charity, or other beneficiary, to allow the executor to conduct litigation on behalf of all beneficiaries. This could, among other benefits, keep litigation less complex and less expensive. On the other hand, where a significant change is ordered it is not inappropriate, as in the circumstances of this case, that a charity bear a reasonable share of the costs of the proceeding which brought about the change. The estate was defended on behalf of all beneficiaries.
- [10] In light of all of the submissions received, I have reconsidered the notion that, for the reasons I listed, the shares to be received by Trevor Wright and Lynnette Roberts should not be depleted by costs of the proceeding. In the end I am satisfied that it would not be unjust for the incidence of the orders made to fall rateably on the whole of the estate. But it would be unjust for Trevor Wright and Lynnette Roberts as beneficiaries of the residue of the estate to suffer the whole of the costs of the proceeding. In all of the circumstances, the appropriate order is that the costs of the proceeding should be borne rateably among all three beneficiaries.
- [11] It is reasonable to treat the CHF's costs as part of the costs of the proceeding. I invited submissions as to costs or an order under s 41(3) and it was appropriate and useful to the Court for CHF to file this submission.