IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-7110
[2013] NZHC 1102

UNDER	the Family Protection Act 1955
IN THE MATTER OF	the Estate of Valerie Patricia Wennink
BETWEEN	DAVID MICHAEL ASHWELL Plaintiff
AND	KENNETH NORMAN ASHWELL AND HOWARD ANTHONY ASHWELL Defendants

Hearing: On papers
[2013] NZHC 1102

Counsel: R G Espie for Plaintiff
S L Robertson for Defendants

Judgment: 15 May 2013

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 12:30pm on the 15th May 2013.

JUDGMENT OF WILLIAMS J
(COSTS)

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[1] In this case Ken and David Ashwell were successful in their Family Protection Act claim against the estate of Valerie Wennink. The net result was that Ken and David received $80,000 between them. That notwithstanding, Howard Ashwell continued to receive the Lion's share of the estate – primarily the family home in Avondale valued at the time of judgment at $415,000 – albeit now

(I presume) burdened with the need to find a further $60,000 to top up Ken and David's allocation.

[2] Howard, although unsuccessful in defending his brothers' claims, claims costs against them. Ms Robertson has produced a Calderbank letter dated 26 June 2012 (that is a month before hearing and four months before judgment) in which Howard offers the brothers $60,000 in full and final settlement. The offer was rejected.

[3] Ms Robertson also points to correspondence outlining Mr Espie's unco-operative approach to the litigation and an apparent refusal until the very last minute to disclose relevant financial details of Ken and David.

[4] The costs sought are $19,847.50 made up of $9,400 in costs prior to the date of the Calderbank letter and then $10,447.50 from that point until trial being 2B costs with a 50 per cent punitive uplift.

[5] Mr Espie, for Ken and David, points out that the offer made in Ms Robertson's Calderbank letter was less than the final result of $80,000 in favour of Ken and David.

[6] I agree with Mr Espie that the final judgment awarded to David and Ken was a sum $20,000 greater than the $60,000 offer in the Calderbank letter. I accept that the terms of the letter were aimed at giving a final wash-up figure rather than the uplift figure (which was indeed $60,000).

[7] Nonetheless the correspondence does seem to disclose a troublingly unrealistic attitude on the part of Ken and David to this litigation. A counter-offer of $80,000 on their part to the Calderbank letter might well have produced a settlement prior to trial in line with my judgment.

[8] Weighing these factors together, it seems to me that the just result here is that costs must lie where they fall because each party achieved some level of success from their own respective perspectives.

[9] There will accordingly, be no award of costs.

Williams J

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