

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

HOMAYOUN NOBARANI

APPELLANT

AND

TERESA ANNE MARICONTE

RESPONDENT

Nobarani v Mariconte [No 2]
[2018] HCA 49
17 October 2018
S270/2017

ORDER

The costs referred to in orders 2(b), 2(d) and 3 of the orders of this Court in this matter made on 15 August 2018 be paid from the estate of the deceased and on a trustee basis.

On appeal from the Supreme Court of New South Wales

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Nobarani v Mariconte [No 2]

Practice and procedure – Costs – Wills, probate, and administration – Where respondent sought and obtained grant of probate in solemn form – Where respondent resisted appeals to set aside grant of probate – Where grant of probate set aside on appeal – Where respondent applied for order that appellant's costs of trial and appeals be paid out of estate of deceased and on trustee basis – Where costs not shown to be other than properly and reasonably incurred by respondent in connection with administration of estate – Whether order sought by respondent should be made.

Words and phrases – "administration of the estate", "costs payable from the estate", "executor", "litigation expenses", "properly and reasonably incurred".

1 KIEFEL CJ, GAGELER, NETTLE, GORDON AND EDELMAN JJ. Order 4 of the orders made in this matter on 15 August 2018 provided that the respondent have liberty to apply within 14 days for an order that the appellant's costs of (i) the trial, (ii) the appeal to the Court of Appeal of the Supreme Court of New South Wales, and (iii) the appeal to this Court be paid out of the estate of the deceased and on a trustee basis¹. On 29 August 2018, the respondent, who was the executrix of the estate, brought that application.

2 The general rule concerning executors, like that concerning trustees, is that costs properly and reasonably incurred by the executor in connection with the administration of the estate are payable from the estate². These costs can include litigation expenses. Some examples of recoverable litigation expenses are: where an executor has a reasonable and bona fide belief in the validity of the will albeit one that is found to be incorrect³; where an executor is unsuccessful in reasonably defending an action brought by legatees⁴; or where an executor unsuccessfully, but reasonably, seeks to uphold a grant of probate on appeal⁵.

3 The same approach applies to the circumstances of this litigation, where the respondent reasonably and properly sought and obtained a grant of probate in solemn form, and then reasonably and properly resisted appeals seeking to set aside that grant of probate. Although, after an appeal to this Court, the grant of probate was set aside due to a denial of procedural fairness at trial to the appellant, there was, and is, no suggestion that the respondent acted other than reasonably and properly in seeking the grant and in resisting the appeals.

4 The appellant objects to the order sought on the bases that (i) the respondent is also the sole beneficiary of the estate according to the handwritten will made by the late Ms Iris McLaren in 2013 ("the 2013 Will"), and (ii) the respondent, in seeking the costs order, did not inform this Court that, sometime

1 *Nobarani v Mariconte* (2018) 92 ALJR 806; [2018] HCA 36.

2 *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268 at 274, 277, 279; [1941] HCA 3.

3 *In re Keane* [1909] VLR 231 at 232.

4 *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268 at 279.

5 *Perpetual Trustee Co Ltd v Baker* [1999] NSWCA 244 at [15].

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Gordon J
Edelman J

2.

between the trial and the appeal to the Court of Appeal, the estate was distributed to her. For this failure of disclosure the appellant also seeks an order that the solicitors for the respondent pay the costs of the respondent's application on an indemnity basis.

5 The co-existing interest of the respondent as executrix and as the sole beneficiary under the 2013 Will does not detract in this case from the reasonableness or the propriety of the proceedings brought by the respondent as executrix, or her defence of the appeal to the Court of Appeal and the appeal to this Court as executrix⁶. In addition, no order was made to restrain any distribution of the estate by the respondent following the grant of probate after trial but while an appeal was pending. That distribution may have been at the respondent's risk, but it was not improper. Nor, contrary to the appellant's submissions, is the failure of the solicitors for the respondent to advert to this matter in this Court a basis for an award of costs against the solicitors personally.

6 An order should be made that the costs referred to in orders 2(b), 2(d) and 3 of the orders of this Court in this matter made on 15 August 2018 be paid from the estate of the deceased and on a trustee basis.

6 *Geffen v Goodman Estate* [1991] 2 SCR 353 at 391.

