IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2022] SGHCF 1

Registrar's Appeal from the Family Justice Courts No 17 of 2021

Between

VVB

… *Appellant*

And

VVA

… *Respondent*

GROUNDS OF DECISION

[Family Law] — [Procedure] — [Costs]
[Mental Disorders and Treatment] — [Management of patients' property and affairs] — [Costs] — [Mental Capacity Act (Cap 177A, 2010 Rev Ed)]

Version No 1: 06 Jan 2022 (12:30 hrs)

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VVB
v
VVA

[2022] SGHCF 1

General Division of the High Court (Family Division) — Registrar's Appeal from the Family Justice Courts No 17 of 2021
Debbie Ong J
10 November, 30 December 2021

6 January 2022

Debbie Ong J:

Background

1 The appellant in this appeal was the defendant in FC/OSM 270/2020 ("the OSM"). The respondent was the plaintiff in the OSM who sought, amongst other prayers, that "the Court revokes the appointment of [the appellant] as donee of [the donor ("P")] under Lasting Power of Attorney No. LPA 30097NU20 dated 26 June 2020".

2 The District Judge ("DJ") provided the following snapshot of the background in his Grounds of Decision ("GD") at [1]–[4]:

> 1 This case involved, among other matters, an application for revocation of a Lasting Power of Attorney ("LPA"). At the conclusion of the matter, costs were ordered against the [appellant]. …

Version No 1: 06 Jan 2022 (12:30 hrs)

> …
>
> 2 The [respondent] was the son of the LPA Donor ("P").
>
> 3 The [appellant] was the Donee under the LPA.
>
> …
>
> 4 Before the final hearing of the Originating Summons, the [appellant] disclaimed her appointment as Donee and, as a result, the LPA ceased to have effect.

3 The DJ ordered that "the [appellant] was to pay costs to the [respondent] and that the quantum, if not agreed by the parties, was to be taxed" (GD at [28]). It was this decision on costs that the appellant appealed against. The DJ provided the following context and reasons in respect of the order on costs (GD at [15]):

> …this was a case which involved the [respondent] seeking to remove the [appellant] as LPA Donee for wrongdoing and, therefore, there was no justification for the [appellant's] costs (or costs ordered against the [appellant]) to be borne by P's estate. Naturally, if the [appellant] had contested the matter and had won, and thereby demonstrated that there had been no wrongdoing, it might well have been a case where the [appellant] ought not to be out of pocket and where P's estate ought to pay the [appellant's] costs. But this was not the case here. This was a case where the [appellant] was accused of wrongdoing and chose to voluntarily give up her appointment as LPA Donee just before the hearing of the Originating Summons seeking revocation of her appointment. While the [appellant's] Counsel made a lot of the fact that the [appellant] had conceded and thus settled the matter amicably, the fact was that the [appellant] contested the matter aggressively right until almost the very end. It might perhaps have been a different situation if the [appellant], at the very beginning, had chosen to concede in order to avoid an acrimonious contest.

4 Thus, one of the key reasons for ordering costs against the appellant despite the appellant disclaiming the appointment as donee was that the appellant "contested the matter aggressively right until almost the very end". By this, it is apparent that the DJ considered the conduct of the parties in his

Version No 1: 06 Jan 2022 (12:30 hrs)

determination of the question of costs, rather than focusing only on the "label" of the outcome (see [12]–[15] below).

Appellant's submissions

5 The appellant appealed on the following grounds:

(a) The DJ erred in finding that the appellant ought to bear costs because she "threw in the towel" and "disclaimed her appointment" prior to the hearing;

(b) The DJ erred in finding that the appellant ought to bear costs because she had "aggressively contested" the application;

(c) The DJ erred in finding that the parties' in-principle agreement regarding costs "cut both ways"; and

(d) Costs, if any, should be borne by the estate.

The appellant clarified at the hearing that in the alternative, if costs were awarded, that costs be fixed instead of taxed.

Relevant provisions on costs

6 The appellant acknowledged that costs were in the discretion of the court. Specifically, in respect of the present case, s 40(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("MCA") provides that: "Subject to the Family Justice Rules, the costs of and incidental to all proceedings in the court are in its discretion."

7 Rule 852(2) of the Family Justice Rules 2014 ("FJR") provides:

Version No 1: 06 Jan 2022 (12:30 hrs)

> (2) If the Court in its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Division, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

8 Rule 854 of the FJR provides that:

> The Court in exercising its discretion as to costs must, to such extent, if any, as may be appropriate in the circumstances, take into account –
>
> > (*a*) any payment of money into Court and the amount of such payment;
> >
> > (*b*) the conduct of all the parties, including conduct before and during the proceedings;
> >
> > (*c*) the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and
> >
> > (*d*) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice directions.

9 Costs are generally ordered to follow the event because a successful party has had to institute proceedings in order to obtain what he deserved (r 852(2) of the FJR). Since the other party's conduct necessitated the litigation, it is fair that he bears the costs of the litigation (see *JBB v JBA* [2015] 5 SLR 153 ("*JBB*") at [9]).

10 Rule 854 of the FJR (see [8] above) directs the court exercising its discretion as to costs to take into account the conduct of the parties. Indeed, "[it] is the conduct of the parties in the proceedings which will have greater relevance in the court's exercise of discretion in determining costs (see also rr 854, 856 and 857 of the FJR)" (*JBB* at [33]).

Version No 1: 06 Jan 2022 (12:30 hrs)

Decision

Issue involving the finding that appellant threw in the towel

11 The appellant submitted:

> …[T]he Appellant had decided, under legal advice, to ***voluntarily resign*** from her appointment as Donee ***without any admission of liability***. It is important for the Honourable Court to appreciate that a donee is legally entitled to resign at any time without legal liability. And if that resignation had the effect of rendering OSM 270 otiose, it does not follow as a matter of law that the Respondent had in fact proven to the Honourable Court's satisfaction that [P's] LPA ought to be revoked or that the Respondent had succeeded on the merits. Rather, the resignation of the donee is an ***independent and unrelated event*** which had the effect of rendering it unnecessary to continue with OSM 270 insofar as the donee's resignation would render [P's] LPA as being no longer operative.
>
> [emphasis in bold italics in original]

12 The High Court in *UTOC Engineering Pte Ltd v ASK Singapore Pte Ltd* [2016] 5 SLR 83 ("*UTOC Engineering*") has observed (at [10]):

> …Many counsel appear to take the view that an application that is withdrawn stands on a different footing from one that has been dismissed. I have had counsel appearing before me who, in the course of submissions, when it appears that the application is likely to be dismissed, forestall the event by applying to withdraw it (although I must stress that such was not the situation in the present case). The *basis for ordering costs is not whether the application is labelled as dismissed or withdrawn* but *whether it is in the interest of justice that the respondent be compensated* for the costs incurred in relation to the application.
>
> [emphasis added]

13 This insightful reminder that "[t]he basis for ordering costs is not whether the application is labelled as dismissed or withdrawn but whether it is in the interest of justice that the respondent be compensated for the costs incurred in relation to the application" is important (*UTOC Engineering* at [10]). Labelling an outcome may assist the court in considering all the appropriate

Version No 1: 06 Jan 2022 (12:30 hrs)

factors in its exercise of discretion, but it should not cause one to miss the woods for the trees.

14 Had the matter been adjudicated, and the respondent successful in the litigation, this outcome would be the "event" referred to in r 852 of the FJR. However, if the same outcome is reached not by full adjudication but by the appellant's voluntary act, is such an outcome the "event" intended in r 852?

15 In the present case, the substantive outcome was that the appellant was no longer the donee – this was what the respondent had sought in his application. He had also sought to be appointed the deputy for P. The respondent had to institute proceedings and might not have achieved this outcome had he not pursued the summons to that very point when the appellant voluntarily resigned as the donee of the LPA. One could say analogously that for the purposes of determining costs, this outcome is the closest to what the "event" was, and thus as costs follow the event, the respondent should be awarded costs. It is clear that the conduct of the parties is crucially relevant in the determination of costs. As the DJ said, his decision "might perhaps have been a different situation if the Defendant, at the very beginning, had chosen to concede in order to avoid an acrimonious contest" (GD at [15]). The mode of reaching the outcome is highly relevant – whether by full court adjudication, mutual agreement, the appellant resigning voluntarily very soon at the initial stages, or resigning only after many months of adversarial exchanges.

16 It is important to note that this was *not* a case of the parties "settling" or "resolving" their dispute through negotiations resulting in agreed terms that can be incorporated into a consent order. Often, such settlements would include the agreement on the issue of costs – this in itself indicates that costs can be payable

Version No 1: 06 Jan 2022 (12:30 hrs)

even in compromise situations, and that the matter of costs itself is an issue over which parties negotiate in attempting settlement.

17 In the present case, the DJ stated that the potential agreement on $8,000 for costs "fell through" (GD at [9(a)]) and it was confirmed at the hearing that the parties did not reach an agreement on any draft consent order.

18 It was understandable why the DJ described the present case as one where the appellant threw in the towel at the doorstep of the hearing (GD at [9(d)]).

Issue involving the finding that the appellant had "aggressively contested" the application

19 The appellant submitted that she could not be faulted for merely taking all necessary steps to defend the action, particularly when all the appellant was seeking to do was to protect P's wishes as set forth in the LPA, and not for any personal gain. She asserted that she and her counsel were also simultaneously trying hard to settle the matter amicably in negotiations and that her decision to resign was primarily motivated by a genuine desire to deal with the respondent's aggressive litigation tactics in a way that de-escalated the acrimony.

20 The appellant further submitted that:

> 43. …the District Judge had also found that "*neither side could have been said to have acted extremely unreasonably*" … To order costs against a party who has not acted unreasonably but in fact helped to settle the matter pursuant to Rule 854(c) is to penalise and dissuade parties from settling.
>
> 44. This raises an important issue of signalling. We respectfully submit that the Family Courts should consider very carefully what signal it is sending by making a cost order against a party who is acting reasonably by offering to step aside from acting as a

Version No 1: 06 Jan 2022 (12:30 hrs)

> donee in a bid to avoid unnecessary litigation, particularly when the basis for the other party's challenge is far from clear.
>
> [emphasis in original]

The appellant's counsel submitted at the hearing that the adoption of "Therapeutic Justice" in family proceedings supported this submission.

21 The DJ found that the appellant had aggressively contested the application and "was certainly not trying hard to settle the matter amicably" (GD at [21]–[22]). He provided his reasons by setting out the chronology of proceedings and appellant's actions as follows (GD at [21]):

> a. 7th September 2020 – This was the first case conference. The [appellant's] Counsel stated that the [appellant] wanted to file an affidavit in reply as well as affidavits by her son and "various doctors".
>
> b. 5th October 2020 – 6 affidavits from various persons were filed by the [appellant].
>
> c. 6th October 2020 – A further 2 affidavits were filed by the [appellant]. Of these, the one affirmed by the [appellant] was almost 400 pages in length.
>
> d. 19th October 2020 – The [appellant] filed SUM 3143 / 2020.
>
> e. 30th November 2020 – The [appellant's] Counsel sought leave to file a further affidavit by the [appellant].
>
> g. 13th December 2020 – The [appellant] filed SUM 3987 / 2020.
>
> i. 11th January 2021 – This was the day fixed for hearing of a committal application against the [appellant] but the [appellant] did not show up in court on that day. The Originating Summons was also fixed for hearing on that day but could not proceed due to a host of issues raised by [appellant's] Counsel, most of which were of somewhat questionable merit.
>
> j. 22nd February 2021 – The matter was resolved after the [appellant] disclaimed her appointment as LPA Donee.

Version No 1: 06 Jan 2022 (12:30 hrs)

22 In *Chan Choy Ling v Chua Che Teck* [1995] 3 SLR(R) 310 ("*Chan*"), the Court of Appeal took into account the following conduct and approach of the parties and counsel in respect of how the case was conducted when determining the costs order (at [22]):

> …in this case, it seems to us that all the disputes relating to maintenance of and access to children and division of matrimonial assets, which have come before us, *could have been resolved before the High Court, if the parties themselves and those advising them had applied their good sense and had been more reasonable and conciliatory*. Unfortunately, the disputes had developed into a *protracted and bitter fight* and the parties had gone before the High Court on several occasions with the actual hearing occupying a period of two to three days. In addition, a lot of paper work had been *unnecessarily generated* and voluminous bundles of documents relevant as well as irrelevant – in fact, more irrelevant than relevant – had been indiscriminately compiled by or on behalf of the parties and placed before us. We are therefore of the opinion that the wife should not be entitled to all the costs of the appeals. …
>
> [emphasis added]

23 One could imagine that, from the subjective point of view of the parties in *Chan*, defending one's position in itself is not unreasonable. Indeed, it is common in family proceedings for parties to feel that it is the other party who is being unreasonable and increasing acrimony. Yet, *Chan*'s case shows that more is expected from the parties. Each step or act taken by one party in court proceedings has an effect on how the other party reacts. The Court of Appeal has said in *VDZ v VEA* [2020] 2 SLR 858 that "a kind act begets a kind response while a nasty act inflames the other" (at [77]).

24 Therapeutic justice seeks to support parties in their journey of healing and moving forward by adopting a problem-solving approach instead of an adversarial one. The appellant submitted that:

> 21. Despite the Appellant's good grounds for her position, she was willing to compromise and on 26 August 2020, she offered to meet the Respondent "*over coffee and just*

Version No 1: 06 Jan 2022 (12:30 hrs)

> *have a without prejudice discussion*". … This was rebuffed by the Respondent.
>
> 22. Thereafter, the Appellant had little choice but to contest the Respondent's application. …
>
> [emphasis in original]

25 It appears that in those months before the hearing was fixed in January 2021, numerous affidavits and applications were filed in this period of "contest" (see [21] above). I did not think that the DJ could be faulted in reaching the view that he did after considering the objective facts such as the filing of many affidavits and other applications, as well as an eleventh-hour adjournment of the hearing of the OSM on 11 January 2021. There may have been an early invitation to have a discussion, but without more clarity from both sides on what transpired, it was hard to see this early invitation as constituting best efforts at an amicable resolution, in light of the litigious actions from September 2020 onwards.

26 The approach taken by the appellant did not look like a problem-solving stance but an adversarial one – one that undermines therapeutic justice. For the purposes of costs, this approach taken during those months cannot be erased away just because the appellant decided much later to voluntarily resign from the appointment so that no further proceedings would be required. The appellant submitted that "the Family Courts should consider very carefully what signal it is sending by making a cost order against a party who is acting reasonably by offering to step aside from acting as a donee in a bid to avoid unnecessary litigation". In the present case, awarding costs in fact signals that adversarial stances are not acceptable in a family justice system that adopts therapeutic justice.

Version No 1: 06 Jan 2022 (12:30 hrs)

27 I add a few more *general* remarks on the notion of therapeutic justice. Therapeutic justice is *not* about parties feeling happy and satisfied that they got whatever they sought in their present dispute. In fact, for both parties to obtain what each wanted in the first place is not practically possible without some compromise – the parties had, after all, a dispute that they simply could not resolve on their own. It would be a grave misperception of the therapeutic justice system if parties feel entitled to be "pandered to" during the court proceedings. Instead, a therapeutic justice system involves parties making what they may perceive to be "sacrifices" – letting go of what has hurt them deeply, refraining from doing "inflammatory" acts against the other party, compromising by giving in and cooperating with the other party in some issues, taking responsibility where required and finding the will to recast the future. Going through this part of the journey is not easy. In the Family Justice Courts Workplan 2018, *In The Next Phase*, I had said (Debbie Ong J, "Family Justice Courts: In The Next Phase", speech at the Family Justice Courts Workplan 2018 (28 February 2018)):

> 20 A doctor diagnoses and provides a patient with timely interventions and treatments. A doctor may also refer the patient to another doctor or other professionals for specialist treatment. Sometimes a doctor must act swiftly to remove a tumour so that a cancer does not spread further. Treatment thereafter can be difficult and painful, such as chemotherapy for many months.
>
> 21 A family judge may make orders that *seem painful* to the parties, like the removing of a tumour, but these orders can *start the journey of restoration*. …
>
> [emphasis added]

Just as the surgical removal of a diseased organ is painful and a loss, the problem-solving process takes effort and some sacrifices. But healing will come after the pain. It is that new positive future in the long term that is of great gain to the parties in this therapeutic justice system.

Version No 1: 06 Jan 2022 (12:30 hrs)

28 The notion of therapeutic justice *operates within* the framework of the law and does not prevail over the law. Judges apply the law and legal principles, in a system that is non-adversarial and conducive to problem-solving. Our family law is rich in legal principles and jurisprudence that promote therapeutic outcomes, and all legal actors in the family justice system would do well to apply the law to achieve therapeutic justice for our families.

Issue involving the finding that the agreement regarding costs "cut both ways"

29 The appellant submitted that the respondent had sought an order that the appellant pay him a total sum of $66,249.06 on the High Court scale. The appellant's offer was to resign as donee and pay the respondent a sum of $8,000 without prejudice to the appellant's position that the LPA was valid, and the respondent was not in fact entitled to ask for costs. She suggested this was not far off from the respondent's starting offer of $16,329.06. The appellant submitted that the sizeable difference between what was sought initially and subsequently showed that it was unfair for the DJ to have characterised the failure to adhere to the costs agreed as cutting "both ways".

30 I did not see how this submission would assist her case. The DJ had said that (GD at [9(a)]):

> The [appellant's] Counsel argued that the [respondent's] costs submissions were "unreasonable" and made in "bad faith" as the parties had previously reached an in-principle agreement for the [appellant] to pay to the [respondent] costs fixed at $8,000 but this agreement eventually fell through. I was of the view that this argument cut both ways. It could equally be argued that the [respondent's] position that there should be no order as to costs was also unreasonable and in bad faith given the in-principle agreement in question. However, *the fact was that the agreement eventually fell through* and this meant that both parties were subsequently free to take whatever position they chose.

Version No 1: 06 Jan 2022 (12:30 hrs)

> [emphasis added]

31 In the present case, the DJ stated that the potential agreement on $8,000 for costs "fell through". The appellant's counsel confirmed at the hearing that the parties did not reach an agreement on the draft consent order. This was consistent with [15]–[18] above, where I have noted that this was a case where the respondent was prepared to pursue the application in court and it was the appellant who still resigned as donee even when there was no agreement on costs.

Issue on whether costs should be borne by estate

32 The appellant submitted that costs, if any, should be borne by P's estate. The DJ had explained (GD at [9(d)]):

> …I did not agree with this submission as this was not a case where the [appellant] was conducting legal proceedings for the benefit of P such that P's estate ought to bear the costs. This was instead a case where the [respondent] had accused the [appellant] of wrongdoing and sought the [appellant's] removal as LPA Donee and where the [appellant] eventually threw in the towel and voluntarily relinquished her appointment. …

33 The appellant submitted that the DJ was in error because:

> …the Appellant was in fact the Donee under the LPA at the time Dr [X] activated it. That activation is not automatically impugned simply because she later resigned as Donee. *Prima facie*, the Appellant's actions in the proceedings were taken in her capacity as Donee under the LPA for the benefit of [P] such that [P's] estate ought to pay the costs. …

34 The respondent's application was to remove the appellant as donee in order to protect P's interests, and this was ultimately in substance the outcome in this case. Thus, I did not think that the DJ was in error in holding that the appellant was not conducting legal proceedings for the benefit of P such that P's estate ought to bear the costs.

Version No 1: 06 Jan 2022 (12:30 hrs)

Conclusion

35 HCF/RAS 17/2021 was dismissed – I affirmed that costs shall be paid by the appellant to the respondent. However, I accepted the appellant's alternative submission for costs to be fixed instead of taxed. Taxation will incur more costs and time, while fixing costs can equally achieve a fair outcome for costs in the circumstances of this case.

36 As the DJ was in the best position to assess how the matter proceeded, he was well placed to determine the fixed costs. I ordered that costs were to be fixed by the DJ. The Registry will give directions to the parties in respect of this.

Debbie Ong
Judge of the High Court

Vergis S Abraham SC, Loo Yinglin Bestlyn and Choo Hao Ren Lyndon (Providence Law Asia LLC) (instructed), Elsie Lim Yan (Lin Yan) (N S Kang) for the appellant;
Narayanan Sreenivasan SC and Lim Min (K&L Gates Straits Law LLP) (instructed), Lin Ming Khin (Charles Lin LLC) for the respondent.

Version No 1: 06 Jan 2022 (12:30 hrs)