IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2024] SGHCF 20

Originating Summons (Mental Capacity Act) No 2 of 2022

In the Matter of Section 20 of the Mental Capacity Act (Cap 177A)

And

In the Matter of P, a person alleged to lack capacity

Between

(1) WLR
(2) WLS

… *Plaintiffs*

And

(1) WLT
(2) WLU

… *Defendants*

Originating Summons (Mental Capacity Act) No 3 of 2022

In the Matter of Section 20 of the Mental Capacity Act (Cap 177A)

And

In the Matter of P, a person alleged to lack capacity

Between

WLT

… *Plaintiff*

And

(1) WLR
(2) WLU

… *Defendants*

Originating Summons (Mental Capacity Act) No 4 of 2022

In the Matter of Section 20 of the Mental Capacity Act (Cap 177A)

And

In the Matter of P, a person alleged to lack capacity

Between

(1) WLU
(2) WMB

… *Plaintiffs*

And

(1) WLR
(2) WLT

… *Defendants*

Originating Summons (Mental Capacity Act) No 5 of 2022

In the Matter of Section 20 of the Mental Capacity Act (Cap 177A)

And

In the Matter of P, a person alleged to lack capacity

Between

WLU

… *Plaintiff*

And

WLR

… *Defendant*

JUDGMENT

[Family Law—Procedure—Costs]

WLR and another
v
WLT and another and other matters

[2023] SGHCF 20

General Division of the High Court (Family Division) — Originating Summonses (Mental Capacity Act) Nos 2, 3, 4 and 5 of 2022
Choo Han Teck J
2 May 2024

3 May 2024 Judgment reserved.

Choo Han Teck J:

1 Originating Summonses (Mental Capacity Act) Nos 2, 3, 4 and 5 of 2022 ("the Applications") were commenced by three siblings (J, W and T) in respect of their mother, P, who suffers from severe Alzheimer's disease and lacks mental capacity. The Applications, commenced in 2021, were tussles to appoint a deputy for P (the "Deputyship Applications"), as well as an application commenced in June 2022 to revoke a Lasting Power of Attorney ("LPA"), executed in 2019 (the "LPA Revocation Application"). The consolidated Applications were heard on 10 April 2023. Judgment was handed down on 11 May 2023: see *WLR and another v WLT and another and other matters* [2023] 5 SLR 1372 (the "Judgment"). For ease of reference, I adopt the same abbreviations for the present dispute which concern the issue of costs.

2 The parties are in general agreement on the principles governing an

award of costs in proceedings under the Mental Capacity Act 2008 (2020 Rev Ed) ("MCA") and the Family Justice Rules 2014 ("FJR"), namely:

(a) that costs of and incidental to all proceedings are in the discretion of the court, who has the full power to determine by whom and to what extent the costs are to be paid: ss 40(1) and 40(2) of the MCA; r 851(2) of the FJR;

(b) that costs should generally 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: r 852(2) of the FJR;

(c) that the costs of proceedings under the MCA shall be paid by P or charged to his estate unless the Court otherwise directs: r 190(1) of the FJR; and

(d) that the Court should have regard to the relevant circumstances, including but not limited to the situations highlighted in s 40(3) of the MCA and rr 854 and 856 of the FJR.

3 None of the parties submitted that costs should not follow the event. The essence of my orders was as follows:

(a) HCF/OSM 2/2022 ("OSM 2"), the application of J and Ms Low Seow Ling (a qualified professional deputy and a lawyer by profession) to be appointed as joint deputies, which was granted in part;

(b) HCF/OSM 3/2022 ("OSM 3"), W's application to be appointed as deputy jointly with J and Ms Low, which was granted in part;

(c) HCF/OSM 4/2022 ("OSM 4"), T's application for Mr Lau Chin Huat (a qualified professional deputy and a chartered accountant by profession) to be appointed as sole deputy, which was dismissed; and

(d) HCF/OSM 5/2022 ("OSM 5"), T's application to revoke P's LPA on the basis that P lacked capacity when it was executed, which was granted.

4 I begin with the isolated issue in OSM 5, concerning the question whether P lacked mental capacity at the time the LPA was executed. That was separate from the Deputyship Applications. As T was successful in his application, costs should follow the event, and accordingly T is entitled to costs. Counsel for T, Ms Anna Oei, says that costs should be borne by the estate of P pursuant to r 190(1) of the FJR. Counsel for J, Ms Lim Lei Theng, prayed for no order as to costs. W, who was not a party to OSM 5, took no position.

5 The crux of the issue in OSM 5 is whether costs should be borne by J or by P's estate. In this regard, J had proceeded to have P's LPA executed despite Dr Adrian Wang's observations in two consultations on 7 December 2018 and 10 January 2019 where he was of the opinion that P lacked the mental capacity to execute an LPA: Judgment at [55] to [60]. Although the revocation of the LPA undoubtedly benefitted P by revoking an LPA which did not meet the legal requirements under the MCA, OSM 5 could have been avoided entirely had J not unilaterally disregarded Dr Wang's professional opinion. In the

circumstances, J, and not the estate, should bear the costs of OSM 5.

6 As for the quantum, Ms Oei says that a sum of $12,000 all in would be appropriate in the circumstances. Although investigative work had to be undertaken in the form of pre-action interrogatories to uncover the truth of the matter, I am of the view that the LPA Revocation Application was a relatively minor part of the dispute in the Applications. I think that $8,000 is a more reasonable sum, and I so order.

7 I now consider the Deputyship Applications. Ms Oei in her written submissions suggests that "none of the [a]pplicants were entirely successful in their respective applications". That observation is not incorrect, but the determination of the "event" for the purposes of costs goes beyond the formal labelling of the outcome of an application, to the substantive outcome in the proceedings: *VVB v VVA* [2022] 4 SLR 1181 at [13] to [15] ("*VVB*"). In these proceedings, the substantive outcome is that J and W have succeeded in their applications, while T's application was entirely dismissed. In the circumstances, J and W should be entitled to costs of the Deputyship Applications.

8 Having decided the "event", I address the first of two key issues — who ought to bear the costs of the Deputyship Applications. Ms Oei submits that the costs of the Deputyship Applications should be borne by P pursuant to r 190(1) of the FJR, which she says adopts the "mandatory form 'shall'". Counsel for W, Ms Hu Huimin, says that the costs of OSM 3 should be borne by P, but that her client is further entitled to costs from J and T for their opposition of W's application. Ms Lim, on the other hand, submitted on behalf of J that T should bear the costs of OSM 2 and 4, while no order should be made as to W's

application.

9 The rationale behind r 190(1) of the FJR is that where proceedings are instituted under the MCA for the benefit of P, the party who acts in the best interests of P, as necessitated by s 3(5) of the MCA, should not have to unduly shoulder the costs of such legal proceedings.

10 Yet, as is often the case where proceedings are acrimonious, the initial intentions of applicants to commence proceedings in the best interests of P, may be suborned by mutual distrust and suspicion. The result is that the proceedings, bearing the façade of determining what is best for P, in fact descend into a bitter crusade to vindicate each one's belief, and perhaps, ego.

11 As I had observed in the Judgment (at [51]), the truth in such matters involving long-standing familial disputes is often submerged in the murky past, where the available oral evidence tends to be self-serving. As I had also observed, the determination of P's best interest can be resolved, without the need to consider personal grievances, by simply looking to who had been looking after P's well-being all these years — which in this case, is J. In such situations, r 190(1) of the FJR is rightly departed from, for P should not have to bear the costs of proceedings in which her best interest, though eventually upheld by the court's determination, is throughout the proceedings subjugated to the self-interests of applicants.

12 Although the Deputyship Applications were, on paper, a three-way contest between the siblings, the battle lines were clearly drawn from the very beginning, with J and T as the main protagonists locked in a head-on

confrontation, with W only peripherally involved in the litigation: Judgment at [1]. It became clear from the account of the family history which J and T sought to put forth that their dispute is fuelled by deep distrust between each other complicated by the size of P's estate and the family business, which rears its ugly head in their opposition to each other's applications: Judgment at [12] to [24]. W's application, on the other hand, speaks nothing toward P's estate, but is solely based of the history of W's caretaking efforts toward P: Judgment at [39].

13 The court is a trier of fact and, in so far as intention is concerned, it can only draw inferences based on the objective evidence before it. In my view, the contrast between W on the one hand, and J and T on the other, neatly illustrates how r 190(1) of the FJR should be applied. It is clear that W's application, OSM 3, is motivated predominantly by the best interest of P. The grant of OSM 3 and the costs thereof should be rightly borne by P pursuant to r 190(1) of the FJR.

14 From the way that J and T advanced their cases, they seemed to have laboured under the impression that it was not unreasonable for them to defend their personal points of view, which, they must be made to realise, are subjective and may not be reasonable after all. More is required: *VVB* at [23], following the Court of Appeal's decision in *Chan Choy Lin v Chua Che Teck* [1995] 3 SLR(R) 310 at [22]). I agree with the view of Debbie Ong J (as she then was) in *VVB* at [26] that "awarding costs in fact signals that adversarial stances are not acceptable in a family justice system that adopts therapeutic justice", a system that seeks to heal and not to wound.

15 For the above reasons, I am of the view that the costs of OSM 2 and OSM 4, should be borne by T and not by P. For completeness, I address counsel for W's contention that W should be also entitled to costs from J and T in respect of OSM 3 because of their invalid objections. The fact that J and T had objected to OSM 3, however, does not deserve costs being ordered against them personally. The question is whether their objection was made in such a manner which unnecessarily protracted the proceedings such as to make it unfair for W's legal costs incurred in OSM 3 to be borne by P. In this regard, flowing from my finding that W was always at the periphery of the litigation, I am not of the view that J and T's objection to OSM 3 had unduly complicated proceedings. If anything, their objection was simply a necessary corollary of the positions which they sought to advance by their own applications in OSM 2 and OSM 4, for which the appropriate costs orders would be made in favour of W in fixing costs for those applications.

16 Finally, I turn to the quantum of costs for the Deputyship Applications. I begin with OSM 3, for which I have decided that P should bear the costs. W submits that a sum of $35,000 is appropriate, relying on the need to review the objections of J and T. In view of my decision above (at [15]) that these matters are best addressed when determining the quantum of costs for OSM 2 and OSM 4, I am of the view that a sum of $20,000 inclusive of disbursements is reasonable in the circumstances to be paid by P's estate to W.

17 Turning to OSM 2 and OSM 4, I am of the view that a single costs order as between J and T would be appropriate given that the submissions filed and evidence adduced show that they are very much cross-applications along the same lines of contention. Ms Lim submits that costs should be fixed at $100,000

all in to be paid by T to J, while Ms Oei submits that no order be made as to costs between T and J.

18 Flowing from my holding on the "event" in respect of the Deputyship Applications (at [7]) I am unable to agree with Ms Oei that no order should be made as to costs. That said, I find that $100,000 is excessive considering that physical cross-examination was, rightly, dispensed with, and parties generally ran symmetrical cases. In the circumstances, I am of the view that a sum of $40,000 to be paid by T to J is reasonable for the costs of OSM 2 and OSM 4 as between J and T.

19 Lastly, I accept that costs were incurred by W in defending against OSM 4, for which P's estate should not have to bear the costs. Ms Hu says that a sum of $25,000 is appropriate, while Ms Oei urged me to fix costs at $7,500. W's costs of defending OSM 4 should not be lower than the costs of the LPA Revocation Application, which is factually and procedurally less complex than OSM 4. However, I do not think $25,000 as submitted by Ms Hu is appropriate either. In the circumstances, it would be fair for costs of $12,000 to be paid by T to W, and I so order.

20 In summary, I make the following costs orders:

(a) In respect of OSM 5, costs are fixed at $8,000 inclusive of disbursements, to be paid by J to T.

(b) In respect of OSM 3, costs are fixed at $20,000 inclusive of disbursements, to be paid by P to W.

(c) In respect of OSM 2 and 4, as between T and J, costs are fixed at $40,000 inclusive of disbursements, to be paid by T to J.

(d) In respect of OSM 4, as between T and W, costs are fixed at $12,000 inclusive of disbursements, to be paid by T to W.

21 No order is made as to the costs of this hearing for the determination of the costs of the Applications.

- Sgd -
Choo Han Teck
Judge of the High Court

Lim Lei Theng (Allen & Gledhill LLP) for the Nominal 1st and 2nd Plaintiffs;
Hu Huimin and See Tow Soo Ling (CNPLaw LLP) for the Nominal 3rd Plaintiff;
Oei Ai Hoea Anna (Tan Oei & Oei LLC) for the Nominal Defendant.