

**BETWEEN**

**AD**  
APPLICANT

**AND**

**ZW**  
FIRST RESPONDENT

**AND**

**ZWZ**  
SECOND RESPONDENT

Date of Order:

27 May 2014

Referee:

Referee Ashcroft

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim is dismissed.**

## **Facts**

[1] This is an unhappy dispute between family members.

[2] The applicant (AD) and first respondent (ZW) are two of four surviving adult children of AA and BB. Their mother died in 1983 and in 1986 their father AA remarried ZWZ, the second respondent. In 2009 AA appointed ZW his enduring power of attorney. AA and ZWZ lived together in their family home in Z town until April 2012 when it was sold and an occupation right to an apartment at a retirement village was purchased in their joint names. AA did not live in the apartment as he was placed in care in the rest-home part of the village.

[3] In August 2012 ZW, acting as AA's attorney, applied unsuccessfully to the Family Court for an order to divide AA and ZWZ's relationship property, on the basis that they were separated, and to obtain their father's half share of the apartment.

[4] In January 2013 AD who lives in Y town was so concerned about their father's rest home care that she brought him to Y town to live with her. ZW, who lives in X town, was not in favour of their father being moved to live with AD and complained to Aged Concern and NASC. A capacity assessment was carried out in March 2013 and AA was assessed as suffering from geriatric dementia at 91 years old. In April 2013 AD obtained an ex parte interim personal order from the Family Court that AA live with her. In April ZW again unsuccessfully sought an order from the Family Court that AA and ZWZ's relationship property be divided on the basis that they were separated.

[5] AA died on 29 May 2013. In his will he appointed ZW and ZWZ as his trustees and executors. After AA's death AD and ZW again locked heads over their father's wishes with ZW proposing that AA be cremated in Y town and AD insisting that he be flown to Z town to be buried with their mother in the family plot. The will was silent on matters of burial and cremation and provided only that the Trustees were to pay the funeral expenses. Despite a flurry of disagreement and conflict at the time, AA was returned to Z town, buried in the family plot and his estate met those funeral costs.

[6] AD says that she incurred solicitor's costs of \$2,162.50 in ensuring that her father's burial wishes were honoured. The estate has refused to pay AD's legal costs and she seeks to recover them here. AD also claims \$2,803 which is approximately half of AA's

superannuation as reimbursement for the cost of the care she provided to him and as recompense for the unnecessary stress placed on her by ZW's actions.

[7] In August 2013 AD was awarded court costs of \$5,155 on the personal order which ZW and the estate solicitors are appealing.

[8] ZWZ, who is in her late eighties, did not attend the Tribunal or wish to participate in this dispute.

### **Issues**

[9] The issues are:

- (a) Whether the Tribunal has jurisdiction to hear this claim?
- (b) If so, whether AD can establish her claim?

### **Law and Decision**

*Does the Tribunal have jurisdiction to hear this claim?*

[10] AD's claim is brought against ZW in his capacity as AA's enduring power of attorney (EPOA) and from there against ZW and ZWZ as the trustees and executors of AA's estate.

[11] The Tribunal has jurisdiction in contract, quasi contract and tort. The Tribunal may not hear claims concerning the entitlement of any person under a will. Determinations of whether powers of an executor, trustee or attorney have been exercised improperly; are matters more properly for the High Court to consider.

AD's legal costs

[12] AD's claim for legal costs is formulated on the basis that she incurred \$2,162.50 to ensure that her father's burial wishes were respected. However the legal costs claimed by AD are in fact for other matters all of which arose some time after her father's death in May and burial arrangements had been completed. The legal costs claimed are:

Invoice Costs Issue (on personal order) dated 30 June 2013	\$590.00
Invoice PPPR issues dated 2 September 2013	\$460.00
Invoice estate issues dated 21 December 2013	<u>\$1,112.50</u>
	\$2,162.50

[13] AD's claim for legal costs cannot be established in contract, quasi contract or tort. Nor are her legal costs proven to have been incurred to secure her father's funeral wishes. The legal costs were AD's choice to incur and cannot be recovered from AA's estate in the Tribunal.

*Living costs and reimbursement for stress*

[14] AD claims reimbursement for costs incurred in bringing AA to Y town, the living expenses of providing around-the-clock care for him in her home and clothing him. She seeks half of AA's government superannuation which is approximately \$2,803 from that time as reimbursement for the care provided and unnecessary stress placed on her by ZW's actions.

[15] The Tribunal does not have jurisdiction to make an award of general damages for stress per se.

[16] ZW denies any agreement to pay AD for AA's care. He maintains that he only ever agreed to reimburse their father's actual medical expenses which totalled \$581.62 and which he has done.

[17] AD argues that ZW's actions were throughout motivated by what he would inherit and that as EPOA he did not act in their father's best interests and did not financially or emotionally support him. She argues that ZW agreed, as AA's EPOA, to financially support their father while he lived in her care in Y town. However this appears unlikely on all the evidence given the very high discord between them. Particularly as ZW did not agree to AA's moving to Y town, that he tried to have him removed from AD's home once there and AD had to seek an order from the Family Court that he stay with her.

[18] Throughout AA's stay there is no evidence of payments for anything but medical costs. On the contrary it is clear that AD provided for all of AA's living costs and clothed him. It is equally clear that at the time she did not expect reimbursement as AA arrived with \$10 in his wallet and left with the same.

[19] AD cannot establish a contract to recover living costs or reimbursement for stress. For AD to successfully claim this sum she would need to establish a quasi contract by showing that ZW received an unjust enrichment and some specific provision connecting that to an amount equivalent to half of AA's super. Alternatively, a quantum meruit type argument to show that the sum claimed of \$2,803 was a reasonable value for the services

rendered. However there is no evidence that tends to establish either of those matters or that would allow me to reach that conclusion in a principled way.

[20] While AA lived with AD his weekly superannuation was paid into a bank account over which ZW had the sole control. Although objectively it might seem fair to expect some contribution from AA's superannuation towards his actual day to day care and living costs this cannot be implied into the circumstances of this family. ZW, who was acting on AA's behalf as his EPOA at the time, clearly did not agree to make that contribution.

[21] Ultimately I am not persuaded that AD can establish a claim in quasi contract, and she as the applicant has the onus to do so on the balance of probabilities. The claim is dismissed.

[22] While I understand that this has been a particularly stressful time for AD arguably the whole family has been affected by AA's loss and the conflict arising over the last year of his life. Looking back AD will be able to take comfort in the fact that she acted with her father's best interests at heart and had precious time with him while he lived in her care that she can treasure.