

*Step v Northern Territory of Australia* [2007] NTCA 6

PARTIES: STEP, Anthea Kandapuma  
v  
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: COURT OF APPEAL OF THE NORTHERN TERRITORY

JURISDICTION: APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION

FILE NO: AP 5 of 2007 (20214852)

DELIVERED: 25 October 2007

HEARING DATES: 15 October 2007

JUDGMENT OF: MARTIN (BR) CJ, MILDREN and RILEY JJ

APPEAL FROM: *Step v Northern Territory of Australia* [2007] NTSC 21

**CATCHWORDS:**

Costs – Taxation – Litigant in person – Preparation and presentation of case – Out of pocket expenses – Agreement or voluntary service – appeal allowed in part.

*Cachia v Hanes* (1993-1994) 179 CLR 403, followed  
*Cachia v Hanes* (1991) 23 NSWLR 304, applied  
*Griffiths v Kerkemeyer* (1977-1978) 139 CLR 161, distinguished  
*Rowan v Cornwall (No 6)* (2002) 220 LSJS 187, referred to  
*CSR Limited v Eddy* (2005) 226 CLR 1, referred to  
*Tyson v Webb* (1906) 7 SR (NSW) 91, referred to

**REPRESENTATION:**

*Counsel:*

Appellant: Va'clav Step (the Appellant's father  
with leave of the Court)

Respondent: I Morris

*Solicitors:*

Appellant: Self-represented

Respondent: Halfpennys

Judgment category classification: B

Judgment ID Number: ril0719

Number of pages: 11

IN THE COURT OF APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Step v Northern Territory of Australia* [2007] NTCA 6  
No AP 5 of 2007 (20214852)

BETWEEN:

**STEP, Anthea Kandapuma**  
Appellant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

**CORAM:** MARTIN (BR) CJ, MILDREN & RILEY JJ

**REASONS FOR JUDGMENT**

(Delivered 25 October 2007)

**Martin CJ:**

- [1] I agree with the decision of Riley J and with his reasons.

**Mildren J:**

- [2] I have had the advantage of reading a draft of the judgment of Riley J with which I generally agree except as to one issue.
- [3] Under Part 15 of the Local Court rules an infant must bring proceedings by a litigation guardian rather than by a next friend. Rule 15.07 provides that the

litigation guardian is liable for costs in the same manner as if he or she were the plaintiff in the proceeding.

- [4] Until the appellant became of age, she could not enter into a binding agreement with her father to reimburse him for his expenses in running the litigation on her behalf. Thereafter, it was open to her to agree to meet his expenses which she in fact agreed to do.
- [5] Whilst it is true that the agreement originally made did not specifically refer to remunerating Mr Step for his time in attending to service of documents or photocopying documents, it is clear that before the matter came on for taxation the appellant in fact paid her father the amount of \$5031 for these items. In my opinion, the proper inference to be drawn is that there was a further agreement to reimburse him for his time for those items, as well as for the expenses he incurred. That, in my opinion, distinguishes this case from *Rowan v Cornwall (No 6)* [2002] SASC 234 where the assistance given was given voluntarily with no expectation of reimbursement: *c.f. Cachia v Hanes & Anor* (1991) 23 NSWLR 304, where the litigant in person paid his wife for her work and travelling expenses involved in attending to filing and serving court documents: see pp 318-319.
- [6] I agree with the other members of the Court that, rather than send the matter back, the Court should in the circumstances of this case adopt a broad and practical approach to determinate the amount payable. If my view had prevailed I would have allowed \$4000.

**Riley J:**

- [7] This appeal raises for consideration the nature and extent of costs recoverable as the “out of pocket” expenses of a successful litigant in person.
- [8] In October 2002 the appellant made an application for assistance under the then existing Crimes (Victims Assistance) Act arising out of a crime committed by John Joseph Collins which caused the death of her mother. At the time proceedings were commenced the appellant was a juvenile and her father, Mr Va’clav Step, was appointed her litigation guardian. On 10 June 2004 she attained her majority. Initially she was represented by a legal practitioner but that arrangement came to an end and, for reasons that are not clear, she was unable to retain another legal practitioner to represent her. After the legal practitioner withdrew, her father was given leave to represent her and he has done so throughout these proceedings, including appearing in this Court. He has managed and presented the case on her behalf at all relevant times.
- [9] The claim for assistance was settled as between the parties and, on 6 May 2005, the Chief Magistrate made a consent order that an Assistance Certificate in the sum of \$25,000 issue to the appellant. This was the maximum amount payable under the legislation. It was further ordered that the present respondent pay the appellant’s costs to be taxed in default of agreement. The costs were taxed and the taxing officer disallowed various

items including those that are now the subject of dispute. The appellant unsuccessfully challenged the disallowance in the Local Court and then appealed to the Supreme Court where she was again unsuccessful. She now appeals to this Court.

[10] The disputed items are detailed in the judgment of the Supreme Court. It is sufficient for present purposes to note that they relate to attendances by the father of the appellant, Mr Step, to file and serve various documents for the purposes of the proceedings and the carrying out by him of tasks such as photocopying and posting materials. The claims included an amount for the time of Mr Step and an amount calculated at 63 cents per kilometre for the use of his vehicle. The total amount disallowed for items of this nature was \$5031.

[11] The evidence placed before the Court below revealed that after the commencement of the proceedings and before the making of the consent orders the appellant agreed with her father that she would repay him “for any money that he spent assisting her with her application for Claims Victims Assistance”. It was acknowledged that there was no separate agreement that she would pay him for his time or for the use of his motor vehicle. After she had recovered the sum of \$25,000, she did pay to her father a sum which included \$5031 for those items.

[12] It is clear that a successful litigant in person is entitled to recover reasonable out of pocket expenses: *Cachia v Hanes* (1993-1994) 179 CLR 403.

[13] When *Cachia v Hanes* was before the New South Wales Court of Appeal (*Cachia v Hanes* (1991) 23 NSWLR 304) Handley JA said (at 321):

“The total amount recoverable by a litigant in person should never be allowed to exceed what would have been recoverable if solicitors had been retained. However there is no principle which requires the out of pocket expenses of a litigant in person to be restricted item by item to the amounts recoverable on taxation by solicitors. A litigant in person is entitled to employ agents to perform necessary work and to recover reasonable out of pocket expenses thus incurred. In this way a litigant in person can avoid loss of personal time and mitigate the effect of the rule that denies recovery for such loss.”

[14] In many cases it will be necessary for a litigant in person to use an agent to carry out tasks required for the proper presentation of his or her case. For example, a litigant in person may engage process servers, typists and the like and recover the reasonable costs of those people as out of pocket expenses. However, difficulties arise when the work is not carried out by independent commercial operators but rather by family members, supporters or friends. The question arising in such cases is whether the services were provided voluntarily or whether an obligation to pay was created leading to a right to recover the money payable as an out of pocket expense of the litigant in person.

[15] In *Cachia v Hanes* the appellant engaged his wife as his agent to file some documents in the court registry. This process involved his wife undertaking

a lengthy trip by public transport and spending some two hours at the court registry. The time involved amounted to some 5½ hours. The appellant agreed to reimburse his wife the cost of the public transport and also paid her \$54. The taxing officer disallowed this claim but allowed an amount of \$8.60 being the cost which would have been recoverable if the service had been provided by a legal practitioner. Handley JA (with whom Clarke JA agreed) observed that a litigant in person is entitled to employ agents to perform necessary work and to recover reasonable out of pocket expenses thus incurred. Handley JA concluded that the matter should be referred back to the taxing officer who should consider “what amounts are reasonably and properly allowable for the work comprised” in the particular item rather than restricting himself to the scale fees. The matter went on appeal to the High Court but there was no challenge to this part of the decision.

[16] The decision in *Cachia v Hanes* is to be compared with that of DeBelle J in *Rowan v Cornwall (No 6)* [2002] SASC 234 at par [16] where his Honour said:

“The plaintiff also sought to recover costs for clerical assistance. It was obvious that during the trial the plaintiff was receiving considerable clerical assistance from a number of people including her niece, her friends and former colleagues at the Christies Beach Women’s Shelter, Ms McSkimming and Ms Lachlan. The greater part of that assistance was rendered by her niece. It is not clear whether the plaintiff has incurred any actual expense for the assistance rendered by these people. It appears that the assistance was given voluntarily. There is no reasonable basis for allowing the plaintiff to recover costs for this assistance. ... However, if the plaintiff had incurred clerical costs in having material typed or copied by a person or an organisation such as a secretarial agency or the like, she is entitled to recover that out of pocket expense.”

- [17] The difference between the two decisions is that in *Cachia v Hanes* there was a clear agreement by the litigant in person to pay the agent whereas, in *Rowan v Cornwall*, the services were determined to have been provided on a voluntary basis with no expectation of reimbursement.
- [18] The issue for determination in the present case is whether the costs claimed by the appellant relating to the work performed by her father fall into one category or the other. The conclusion of the Judge on appeal was that the services of Mr Step were provided voluntarily. This conclusion was reached in circumstances where Mr Step advised the Court that there had been a general discussion between himself and the litigant in person and an agreement reached that he was to be compensated for any money he spent on her behalf. The conclusion drawn by the presiding judge from that specific agreement and from the surrounding circumstances was that Mr Step was not to be compensated for assisting his daughter beyond recouping money actually spent.
- [19] This case differs from *Cachia v Hanes* and *Rowan v Cornwall* in that Mr Step acted throughout as the lay advocate for his daughter. He was not the litigant in person. In effect he had the conduct of the case on behalf of the litigant in person once the legal practitioners withdrew from proceedings. He carried out all of the preparatory work on her behalf and presented the case for her. He is not and never has been a legal practitioner and is not entitled to the remuneration that would be available to a legal practitioner. The tasks for which he seeks to be compensated in respect of

his time and the use of his motor vehicle are those which did not involve the exercise of professional skill but, rather, were undertakings which may have been referred to commercial operators by the litigant in person. The claims were not included in the original bill of costs prepared by Mr Step for taxation but were included by way of addendum. Mr Step reviewed all of the tasks that he had performed on behalf of his daughter and extracted those which may lead to a right of recovery if they be accepted as out of pocket expenses.

[20] Mr Step was frank with the Court below and again with this Court in acknowledging that, prior to the awarding of the certificate of assistance, there was no agreement between himself and the appellant that he should be remunerated for this work. Prior to preparing the bill of costs he had not been aware of any possibility that the litigant in person may have been able to recover some monies in respect of his services as out of pocket expenses. In his written submissions he acknowledged that he provided “gratuitous services” to his daughter and he said that his “intention was that the appellant should benefit from his services, not the wrongdoers”. Subsequently he sought to convert those gratuitous services into items of out of pocket expenses.

[21] Mr Step sought to draw a parallel with the principles expressed in *Griffiths v Kerkemeyer* (1977-1978) 139 CLR 161. Reference to the decision in *Griffiths v Kerkemeyer* is unhelpful in the present circumstances. In that case the High Court ruled that an award of damages for bodily injuries may

include a sum representing the value of services rendered to, and to be provided for, the plaintiff by members of his family. The Court was concerned with an assessment of damages, not with questions of the costs of litigation. In the later case of *CSR Limited v Eddy* (2005) 226 CLR 1 a majority of the High Court (Gleeson CJ, Gummow and Heydon JJ) observed that the principle in *Griffiths v Kerkemeyer* should be regarded as an “anomaly” and should not be applied to other classes of case. In the present case we are not dealing with issues of damages but, rather, with the recovery of costs of litigation in circumstances where a litigant appears in person. The situations are not comparable.

[22] The learned Judge below concluded that the appellant did not incur a liability to pay the cost of the items the subject of dispute. He found that there was a specific agreement as to the amounts that were to be repaid and they were confined to money Mr Step had spent assisting his daughter with her claim. There was a strong evidentiary basis for so concluding.

[23] It must be borne in mind that the appeal available to the appellant is, by virtue of s 19 of the Local Court Act, limited to a question of law and, in this regard, I see no error in the approach adopted by his Honour.

[24] However there is an issue not addressed by his Honour which leads to a need to interfere with the judgment to a limited extent. There is no dispute that Mr Step used his motor vehicle for the benefit of the appellant. They lived together at a location remote from both the court registry and other parties

and it was necessary for papers to be filed and served. In my view, subject to issues of reasonableness, the costs incurred by Mr Step in the use of his vehicle for the identified purposes fell within the scope of the agreement entered into between Mr Step and the appellant for her to repay him money spent assisting her. She subsequently made payment to Mr Step in this regard and that was an out of pocket expense which was able to be claimed from the respondent.

[25] Whilst the amounts involved in this issue must be significant to the appellant they are, in the scheme of these proceedings, not great. It would be unfortunate to send the matter back to the taxing officer for further inquiry. In my view this Court should adopt a broad and practical approach to determine the amount payable. It should endeavour to bring these proceedings to an end. The respondent agreed with this view.

[26] The total claimed in respect of motor vehicle expenses was \$2744. That amount was reached by using figures extracted from the Tax Pack 2005 produced by the Australian Taxation Office. The respondent accepts the rate per kilometre so determined to be a reasonable rate for present purposes. The only issue remaining is whether all of the journeys were reasonably undertaken for the purposes of the proceedings of the litigant in person. Adopting the approach I have foreshadowed I would allow the sum of \$2500 in this regard.

[27] It was faintly suggested on behalf of the respondent that the figure should be further reduced because, for some part of the period, Mr Step was the litigation guardian of the appellant. Reference was made to some remarks of Street J in *In Re Tyson: Tyson v Webb* (1906) 7 SR (NSW) 91 at 98. Whilst a litigation guardian may not be entitled to receive remuneration for acting in that capacity, the services to which reference has been made were not carried out by Mr Step in his role as the litigation guardian. They were a separate and independent exercise and I see no reason why his role as litigation guardian should preclude from recovery out of pocket expenses incurred by the litigant in person in this regard.

### **Orders**

[28] I would make the following orders. The appeal be allowed in part. The appellant be entitled to further costs in the sum of \$2500 representing the claimed travel expenses of Mr Step.

-----