Magic money – estate litigation and cost orders

"But don't you just take your costs out of the estate?" demands the righteous caller, scoping for a solicitor to take on their estate litigation.

There is a belief amongst lay people and some lawyers, albeit mistaken, that a deceased estate bears the burden of the costs of litigation.

This belief likely finds its origins in the seminal family provision decision of *Singer v Berghouse* in which her Honour Gaudron J noted that "family provision cases stand apart from cases in which costs follow the event. Costs in such a case depend on the overall justice of the case."[2] The premise for this is that family provision applications are a unique creature of statute which exist to right the actions of a testator who was not "wise and just".[3] Accordingly, it is usual that the estate of the testator shoulders much of the costs burden in a family provision claim.

However, this approach in family provision matters has always been tempered by the concept of 'proportionality' in litigation. Referencing the New South Wales' court rules on costs, Palmer J has stated that rules as to costs "were designed to put into the Court's hands a brake on intemperate and disproportionately expensive conduct of proceedings".[4]

It is trite law, but nevertheless noteworthy, that litigation is conducted according to the rules of the court[5] and those rules generally dictate that the unsuccessful party pays the successful party's costs of the litigation.[6] The amount of a costs order will depend upon a complex intersection of the court rules and the conduct of the litigation, with the court retaining "a wide discretion on the issue of costs and each case depends on its own facts".[7]

> "People should know when they're conquered."
>
> – Quintus, *Gladiator*[1]

In recent years, there has been a shift towards a more restrictive approach to costs orders in family provision claims. In *Carroll v Cowburn*,[8] while acknowledging that "practically speaking the court has little control over costs in family provision matters", Young J cautioned that as a general guideline an applicant would not receive an order for costs any larger than the award from the estate. So, for example, "if the estate is $700,000, the plaintiff's costs $200,000, and the plaintiff receives of legacy of $50,000, the plaintiff's costs would be capped at $50,000".[9]

Fifteen years has passed since Young J advanced the warning that costs capping is a risk to litigants in family provision matters, "particularly for those claimants who are not particularly concerned about how much they get out of the estate as long as they ruin it for everybody else".[10] Since then family provision litigation has significantly increased, with reports of increases in Victoria of 73% in the last 13 years, in New South Wales of 52% in the last seven years.[11] In response, the courts have applied cost-capping orders to applicants[12] and respondent personal representatives[13] alike.

However, it should be noted that estate litigation is not merely confined to claims for further provision. Estates can be the subject of all manner of litigation that traverse a variety of causes of action. Most recently the Victorian Supreme Court demonstrated the grave risks relentless litigants take in pursuing court proceedings in a gladiatorial way.

In the matter of *Molnar v Butas (No.4)* [2018] VSC 165, McMillan J ordered a plaintiff to personally pay costs on an indemnity basis for pursuing a hopeless case. "On 22 November 2017, the Court dismissed the plaintiff's application for the removal of the defendant as the executor of the estate of the deceased. The Court determined that the plaintiff's grounds for the removal of the defendant as the executor of the estate were contrived, without substance and there was no proper basis for the removal of the defendant."[14]

Relying on a number of decisions[15] in concluding that a special order as to costs was appropriate, McMillan J cautioned that:

"Where an action has been commenced or pursued in circumstances where an applicant, properly advised, should have known he had no chance of success it may be presumed to have been commenced or continued for some ulterior motive or in wilful disregard of the known facts or established law. It is not a prerequisite to the power to award special costs that a collateral purpose or a species of fraud be established. The discretion is enlivened when, for whatever reason, a litigant persists in, what on proper consideration should be seen to be, a hopeless case."[16]

This caution was not confined to litigants but also their legal representatives. At paragraph 13, McMillan J went on to warn:

"Practitioners and litigants must also have regard to the overarching obligations contained in the *Civil Procedure Act 2010* and the overarching purpose of the Act to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'. These obligations include not making a claim that does not have a proper basis."

back to contents

with Christine Smyth

These decisions demonstrate a trend – when litigants do not self-regulate, the court will do so via costs orders. If this does not temper the eagerness of estate litigants to pursue their grievances, then it will be but a matter of time before Parliament steps in.

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Notes

[1] *Gladiator* (2000), directed by Ridley Scott.

[2] [1993] HCA 35; (1993) 114 ALR 521; (1993) 67 ALJR 708 at [6].

[3] *Allardice v Allardice* (1910) 29 NZLR 959.

[4] *Sherborne Estate (No.2) (Vanvalen v Neaves)* (2005) 65 NSWLR 268.

[5] *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) – made under the *Supreme Court of Queensland Act 1991* – as at 24 November 2017 – Reg.111 of 1999 (UCPR); *Uniform Civil Procedure Rules 2005* (NSW) – made under the *Civil Procedure Act 2005* (NSW) – As at 7 April 2017 – Reg.418 of 2005; *Supreme Court (General Civil Procedure) Rules 2015* (Vic.) – made under section 25 of the *Supreme Court Act 1986* (Vic.); *Supreme Court Civil Rules 2006* (SA); *Rules of the Supreme Court 1971* (WA); *Supreme Court Rules 2000* (Tas.); *Supreme Court Rules* (NT); *Court Procedures Rules 2006* (ACT).

[6] For Queensland the applicable rule is r681(1) UCPR.

[7] *Cerneaz v Cerneaz & Anor (No.2)* [2015] QDC 73 at [50].

[8] [2003] NSWSC 248.

[9] At [36].

[10] Ibid.

[11] theaustralian.com.au/news/inquirer/its-a-battle-of-wills-when-estates-are-contested/news-story/87ccb8b42cb74f683b5376ebf0fbb61c.

[12] *Gill v Smith* [2007] NSWSC 832; *Underwood v Underwood* [2009] QSC 107; *Jones v Jones* [2012] QSC 342.

[13] *Manly v Public Trustee* [2007] QSC 388 at [114]; DW v RW (No.2) [2013] QDC 189; *Cerneaz v Cerneaz & Anor (No.2)* [2015] QDC 73

[14] At [2] citing *Molnar v Butas (No.3)* [2017] VSC 711 (22 November 2017) [35].

[15] Cited within [12] of the judgment.

[16] Ibid.