Article Information

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Family provision claims: Costs and an executor's path of least resistance

Under the Succession Act 2006 (NSW) (Succession Act) an "eligible person" may apply to the Supreme Court of New South Wales to rectify a will to obtain greater benefit from a deceased person's estate than they would otherwise be entitled to. An eligible person can even apply to the Court if the deceased made no provision for them in the will.

An eligible person can include:

- a spouse or former spouse of the deceased;
- a person with whom the deceased was living in a de facto or close personal relationship with;
- a child of the deceased person; or
- a person who was, wholly or partly, dependent on the deceased person, and who is a grandchild of the deceased person.[1]

A Family Provision Application (**FPA**) must be brought within 12 months after the testator's death.[2] In deciding the application, the Court will have regard to whether the will of the deceased provides adequate provision for the proper maintenance, education or advancement in life of the plaintiff.[3] The ambit of proper maintenance includes the totality of the plaintiff's position in life including age, status, relationship with the deceased, financial circumstances, the environs to which he or she is accustomed, and mobility.[4]

If adequate provision has not been made under the will, the Court is empowered to alter the disposition of assets of the deceased person's estate. In determining this, the Court has regard to the plaintiff's needs which are to be distinguished from the plaintiff's desires. The Court will also likely consider the non-exhaustive list of matters set out in section 60(2) of the Succession Act, one of which being the financial resources and needs of the plaintiff. By way of example, the Court of Appeal in *Smith v Johnson* observed that while the plaintiff desired a two-bedroom unit, he did not need anything larger than a one bedroom unit.[5]

Usual Cost Orders

The usual costs principle in other types of cases is that costs follow the event unless it appears to the Court that some other order should be made.[6] The purpose of such an order is to compensate the successful party rather than to punish the unsuccessful party.[7]

FPA Cost Orders

Comparatively, the High Court has stated that FPAs stand apart from cases in which costs follow the event.[8] In *Baychek v Baychek*, Justice Ball noted distinctive features of FPAs relevant to the determination of costs including:[9]

1. proceedings are concerned with the proper distribution of a fixed pool of assets meaning the Court is willing to consider the overall justice of the case. In some cases, the Court is not willing to order that an unsuccessful applicant whose claim was not without merit, pay the estate's costs of the application;
2. the amount claimed or the amount the plaintiff can reasonably expect to recover may be quite small. As such, it is reasonable to expect that costs will be proportionate to the amount claimed and the nature of the issues in the

case;[10] and
3. these disputes involve considerable personal animosity where parties are often more concerned with vindicating their position rather than resolving the dispute as efficiently as possible. In such cases, it may be appropriate to cap a party's costs.[11]

Costs out of the Estate

An executor's costs of defending a FPA claim are ordinarily testamentary expenses of the estate as they are necessarily incurred by an executor in the proper performance of their duty.[12] However, the Court still has unfettered discretion and full power to determine by whom, to whom, and to what extent costs are to be paid.[13]

In *Chan v Chan* Basten AJ found that in considering an amount by way of provision in a FPA application, it is appropriate to have regard to the diminution of the estate on account of legal costs.[14] In fact, the Court has previously voiced its reluctance to make costs orders against unsuccessful plaintiffs who are impecunious[15] and have rendered such orders as counter-productive.[16] This has led the law to develop in such a way that safeguards plaintiffs through the "capping" of costs orders. This does not mean that parties should assume, in all cases, that litigation can be pursued, safe in the belief that all costs will be paid out of the estate.[17]

The Court also has power to order that only a portion of legal costs are to be paid out of the estate. In *Nudd v Mannix* the trial judge regarded the appellant's/plaintiff's costs as "grossly excessive" given the size of the estate. On appeal, the appellant received a legacy of $120,000.00 and an order was made capping her costs at $60,000.00 (reduced from $82,200.00)[18] contingent on her solicitors undertaking to the Court to not seek to recover any costs, charges, and disbursements from the appellant/plaintiff, except to the extent that those costs were recovered from the estate. Similarly, in *Poche v Poche,* costs incurred by the plaintiff were in the amount of $627,000.00.[19] Justice Henry ordered that the successful plaintiff was to receive further provision of $350,000.00 and that costs of the claim were to be paid out of the deceased's estate and capped at $125,000.00.

An executor's path of least resistance

Arguably, the law has developed to encourage plaintiffs to adopt a "nothing to lose" mentality, which can result in the filing of unmeritorious claims. This is perpetuated by the increased prevalence of solicitors operating FPA claims on a "no win, no fee" costs structure.[20] Defendants, as executors, are forced to defend proceedings in accordance with their duty of carrying out the testamentary intentions of the deceased. This might lead to a potential conflict between interest and duty if an executor is also a beneficiary under the will. For example, an executor who is also a beneficiary may be reluctant to continue defending unmeritorious proceedings in circumstances where legal costs of both parties are likely to be deducted from the estate, therefore impacting what each beneficiary is entitled to receive.

As a consequence, in order to best protect the assets of the estate, executors may feel pressured into settling unmeritorious claims. The likelihood of this occurring is magnified by the fact that Practice Note SC EQ 7 empowers the Court to refer all proceedings to a court annexed or private mediation at or after the first directions hearing. If a FPA claim does not settle, executors run the risk of the court "capping" legal costs or refusing to order that costs are to be paid out of the assets of the estate, making a settlement seem all the more attractive.

Possible cost consequences can motivate the conduct and strategy of claimants and executors in FPA proceedings. If you are an executor, or require any advice in relation to FPAs, including the cost implications of pursuing or defending such claims, please do not hesitate to contact Piper Alderman.

[1] *Succession Act 2006* (NSW) s 57(1).

[2] Ibid s 27(2).

[3] Ibid s 59(1)(c).

[4] *Alexander v Jansson* [2010] NSWCA 176.

[5] [2015] NSWCA 297, 85.

[6] *Uniform Civil Procedure Rule 2005* (NSW) r 42.1.

[7] *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33, 34.

[8] *Singer v Berghouse* [1993] HCA 35; (1993) 114 ALR 521, 522.

[9] [2010] NSWSC 987, 20.

[10] *Szlazko v Travini* [2004] NSWSC 610, 11.

[11] *Sherbone Estate (No 2)* (2005) 65 NSWLR 268, 30.

[12] *Re Lowe* [2000] NSWSC 1180, 4.

[13] *Civil Procedure Act 2005* (NSW) s 98; *Succession Act 2006* (NSW) s 99.

[14] (2016) 15 ASTLR 317; [2016] NSWCA 222, 54.

[15] *McDonald v O'Connor (No 2)* [2019] NSWSC 344, 33.

[16] *McCusker v Rutter* [2010] NSWCA 318, 34.

[17] *Carey v Robson (No 2)* [2009] NSWSC 1199.

[18] [2009] NSWCA 327.

[19] [2020] NSWSC 835.

[20] *Nudd v Mannix* [2009] NSWCA 327, 33.