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Article Information

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Estate Litigation Costs. Supreme Court of SA gives a caution

In our Wills Watch February 2016 edition (read here), we made observations about the treatment of costs by Australian Courts in disputed Will cases.

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Recently, our Private Clients team, on behalf of an executor, pressed costs submissions *In the Estate of Francis Ponikvar (deceased) (No. 2) (2016) SASC 166*. The initial judgment concerned the executor's application to admit to probate a copy of a lost Will. This was the subject of our July 2016 Wills Watch edition (read here).

On behalf of the Executor, we submitted that there was no sufficient reason for the Court to depart from the general rule that costs follow the event and that none of the exceptions in the field of probate litigation applied.

The intervener, Ms Novak, submitted that as the Willmaker was the cause of the litigation (the original of the copy Will not being able to be located), and notwithstanding her unsuccessful opposition to the Executor's application, her costs ought to be paid out of the estate.

Justice Stanley held that these principles no longer apply to probate litigation in South Australia. Justice Stanley noted that, whilst there is a public element to the resolution of disputes over estates, it is for that reason that the probate costs rule is framed to generally apply when there are reasonable grounds in doubtful cases to require the executor of a Will to make out their case before a Judge in a contested hearing. He further noted that the bottom line is that such disputes are often between private parties advancing their competing claims against the Willmaker's estate for their private financial benefit. The probability of the payment costs of all parties out of the estate, irrespective of the result, gives the parties little incentive to make appropriate decisions as reasonable self-funded litigants about their prospects of success and the proportionality of the expense incurred in bringing or defending proceedings. He could not see any utility in putting the beneficiaries to the expense of a contested hearing and depleting the estate in cases in which the ultimate result of litigation is clear, notwithstanding the suspicion or ambiguity clouding the Will.

Justice Stanley concluded that the probate cost rule is arguably anachronistic in modern times in which there is a greater concern with the need for proportionality in litigation. He further opined that it may soon be necessary to reconsider that rule.

Justice Stanley did so, noting that Ms Novak opposed the Executor's application in the hope that if the Executor did not rebut the presumption that the original of the copy Will had been destroyed by the deceased, she would be a beneficiary of an intestate estate. It was no longer a relevant consideration that the deceased's conduct contributed to the stance adopted by Ms Novak.

Even though the Executor needed to prove to the Court that the presumption of revocation had been rebutted, Justice Stanley held that the trial was longer than it would otherwise had been had Ms Novak not opposed the Executor's application and was ordered to pay the additional costs that had been incurred by the Executor as a result of her opposition to the orders sought.

Justice Stanley observed that the general rule for exemptions to costs following the event in probate actions (as outlined *In the Estate of Hodges*[1]) is no longer applicable to probate litigation in South Australia. This should be regarded as a caution to litigants needlessly opposing applications that have little prospect of success in the hope of achieving a greater benefit at the expense of the estate.

1. *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698