Article Information

Authors: Donna Benge, Rod Jones
Service: Estate & Succession Planning
Sector: Private Clients

Not every player wins a prize

In commercial litigation matters, legal costs are said to "follow the event". Consequently, the losing party will usually have to pay their own legal costs plus the legal costs of the successful party.

In commercial litigation matters, legal costs are said to "follow the event". Consequently, the losing party will usually have to pay their own legal costs plus the legal costs of the successful party. Ultimately, this forces both parties to give careful consideration to the merits of their case and any potential offers of settlement.

Historically, litigation involving a deceased's estate has often attracted a different approach when considering the question of who should pay the legal costs. The courts have expressed the view that a deceased's estate should pay all legal costs of the litigation because the willmaker failed to give proper consideration to their estate planning. These costs can frequently be in excess of the financial award an applicant might achieve in the litigation. The consequence has been that some claims with dubious merit are pursued and sensible offers of settlement are rejected because an applicant takes a view that they essentially have nothing to lose and everything to gain.

More recently, the courts have started to crack down on applicants that are simply rolling the dice to see if the court will award them a bigger slice of the pie. The court is also beginning to penalise applicants for not accepting reasonable offers of settlement that may have avoided the cost of a trial. In a number of recent decisions, the courts have considered the question of whether legal costs should be paid by the deceased's estate or whether the applicant has been unreasonable and therefore, liable for costs.

Lowe v Lowe (No 3) [2015] NSWSC 1800

In this case, Mr Francis Lowe died leaving an estate worth just under $3,000,000. In his Will, he gave his widow Mrs Diana Lowe his personal effects, a limited right to reside in his house and his Mercedes-Benz car. The bulk of his estate was then divided equally between his children from his first marriage. Mrs Lowe made a claim for further provision from Mr Lowe's estate.

Mrs Lowe had been in a relationship with Mr Lowe for 8 years and she was 82 years old at the time of making her claim. The court determined that Mrs Lowe was entitled to an additional sum of $100,000 from Mr Lowe's estate. The court then needed to resolve the question of who should pay the legal costs of the proceedings.

The executors of Mr Lowe's estate submitted that they had attempted to resolve Mrs Lowe's claim.

On 27 July 2014, the executors verbally offered Mrs Lowe the sum of $300,000. That offer was rejected and Mrs Lowe proceeded to file her claim in the Supreme Court of New South Wales on 8 September 2014.

On 22 May 2015, a further offer was made to Mrs Lowe of $230,000, in addition to the right to reside in Mr Lowe's property until 2105 and the estate would pay her legal costs. That offer remained open until Monday 8 June 2015. However, Mrs Lowe chose not to accept that offer.

The court noted that although Mrs Lowe's claim was successful, she had previously received two offers from the executors that were both in excess of the amount that she was ultimately awarded by the court. The court held that Mrs Lowe's unreasonable rejection of the executors' offers meant that Mrs Lowe should bear the responsibility for the parties having incurred the costs of the proceedings.

In a remarkable judgment, the court ordered that Mrs Lowe was to pay part of the executors' costs up until the last offer expired on 8 June 2015 but she was also ordered to pay ALL of the executor's costs from 8 June 2015 until the finalisation of the matter.

We anticipate that this costs order has left Mrs Lowe in a worse financial position then if she had decided not to proceed with her claim in the first instance.

Semmler v Todd (No 2) [2015] VSC 609

Ms Marilyn Semmler was the former domestic partner of the deceased, Mr Gary Todd. Ms Semmler made an application for provision out of Mr Todd's estate. The net value of Mr Todd's estate was approximately $350,000 and pursuant to the terms of his Will, it was to be divided equally between Mr Todd's children.

In the end, the court held that Ms Semmler's claim was unsuccessful because the Judge did not consider that Mr Todd had a responsibility to make provision from his estate for Ms Semmler. The court then considered the question of who should pay the legal costs of the proceedings.
In the lead up to the trial, the executor of Mr Todd's estate had written to Ms Semmler's solicitor on two occasions with two potential offers of settlement.

In the first offer, the executor proposed that Ms Semmler receive one-fifth of the net value of Mr Todd's estate and the estate would pay her legal costs. That offer was rejected and Ms Semmler's solicitor made a counteroffer of $175,000 on the basis that Ms Semmler would pay her own costs. That offer was rejected by the executor and a counter-proposal was made to Ms Semmler that she receive the sum of $125,000 from the estate and she pay her own legal costs. Again, that offer was rejected by Ms Semmler.

The Judge noted that although Ms Semmler's claim was unsuccessful he did consider that Ms Semmler and Mr Todd did have a loving and close relationship. However, at the time of the trial, the Judge did not think that Ms Semmler had any significant financial need, as opposed to Mr Todd's children who were the beneficiaries of his estate. The court held that due to all factors it would be unjust for Ms Semmler to have to pay her costs in addition to the estate's costs but the court also found that it would not be just for the estate to pay Ms Semmler's costs.

Therefore, the court concluded that Ms Semmler was to pay her own legal costs and the executor's costs could be paid from Mr Todd's estate.

Carluccio v Ruiz [2015] NSWSC 1721

Mrs Pila Ruiz died leaving seven children. Pursuant to the terms of her Will, the applicant and one of the daughters of the deceased, Mrs Maria Carluccio received a legacy of $500 and the majority of Mrs Ruiz's estate was divided equally between five of her children.

Mrs Carluccio made a claim for further provision from her mother's estate.

At the time of the final hearing it was agreed that after $110,000 had been paid for the executors' legal costs, the net value of the estate available for distribution was approximately $375,000. At that stage, Mrs Carluccio's legal costs were estimated to be $84,000.

After considering the evidence, the court concluded that Mrs Carluccio was entitled to further provision from her mother's estate in the amount of $50,000.

However, the court ordered that each party's costs to be paid from the estate were capped to ensure that the estate was not completely depleted. Mrs Carluccio's legal costs were capped at $70,000. Consequently, Mrs Carluccio was personally liable for any outstanding legal fees owing to her solicitor.

It is clear from these recent cases that the court is sending a message that careful consideration should be given when proceeding with a claim for provision out of a deceased's estate. It is important that anyone considering a claim against a deceased estate seeks proper legal advice; otherwise, they could be at risk of being liable for not only their own legal costs but also the legal costs of the other parties.