

## **DO COSTS ALWAYS FOLLOW THE EVENT?**

### **Deceased Estate Property Claims**

Claims by eligible persons for a share or an increased share in a deceased person's estate in NSW are brought under the Family Provision Act 1982 (NSW) (the FPA). People who are "eligible" to bring proceedings under the FPA are generally limited to the immediate family of the deceased, a person living in a domestic relationship with the deceased or a dependent of the deceased.

It has long been generally felt that the costs and expenses of proceedings under the FPA will inevitably be paid out of the deceased person's estate. But costs of the proceedings will not always be awarded out of the estate. Firstly, the Court cannot order that the costs of the application be paid out of the estate unless:

1. the application for provision out of the estate has been successful. However, the Court is not obliged to make a cost order out of the estate just because the applicant was successful in obtaining an order that the estate make provision for them; or
2. there are special circumstances which make it "just and equitable" for the cost to be paid out of the estate.

Secondly, a series of recent cases indicate that the Courts will continue to jealously guard their overall discretion whether to make costs orders in favour of one or other of the parties or to order that each party pay his or her own costs themselves.

The Civil Procedure Act 2005 (NSW) provides that costs are in the discretion of the Court. The starting point is that each party should bear their own costs and that there must be sufficient reason to depart from the starting point. The Uniform Civil Procedures Rules (NSW) also provide that unless the Court orders otherwise, the plaintiff in proceedings is not entitled to payment of his or her costs of the proceedings. Accordingly, it is open to the Courts to begin from the position that each party should pay their own costs and then decide whether the other party or, in the case of proceedings under the FPA, the deceased's estate should bear all or some of the costs.

The cases in this area have mostly concerned applications under the Property (Relationships) Act 1984 (NSW) (the "Act"). The Act generally deals with the rights and obligations of persons in de-facto relationships or other close personal relationships where domestic support and personal care is provided. The Act claims in relation to both heterosexual as well as same sex couples.

In recent proceedings for de-facto property adjustments, the Courts have tended not to follow the ordinary principle that “costs follow the event”. Rather, they have looked at a number of additional factors including:

1. whether any party has been wholly or substantially successful or has “bettered” an offer of compromise; and
2. the conduct of the parties in the proceedings.

The Courts have also taken particular notice whether any of the parties had been disproportionately responsible for incurring costs through the manner in which they conducted the proceedings.

In the recent cases, the Courts have tended to look at how reasonable or otherwise the parties have been in conducting the proceedings and in making realistic offers of settlement. They have also not only considered whether a party was successful in obtaining what they wanted, but also whether they were successful in obtaining more than the other party offered. As a result, it has been increasingly usual for the Courts to order that each party pay their own costs of the proceedings.

In principle there is no reason why the Courts in proceedings for orders out of deceased estates would not take the same approach as they have in proceedings for de-facto property adjustments. As a matter of public policy, both the Courts and the government would prefer to reduce rather than increase the number of court cases that are commenced each year. It appears more and more likely that the Courts will become increasingly reluctant to order that a deceased estate should bare an applicant’s cost, even where the applicant has been successful.

If you have any queries about, or would like more information concerning deceased estates including proceedings under the Family Provisions Act, please contact Norbert Schweizer at [nschweizer@schweizer.com.au](mailto:nschweizer@schweizer.com.au).

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