General principles relevant to the question of costs in unsuccessful family provision applications

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Introduction

1. In New South Wales, the court is given a wide discretion as to the award of costs in family provision applications brought under Ch 3 of the *Succession Act 2006* (NSW) ("**SA**"). In exercising the discretion in cases in which the plaintiff's application has been dismissed, many judges of the Supreme Court of New South Wales are now guided by a number of general principles which Hallen AsJ (as his Honour then was) in *Harkness v Harkness (No 2)*[1] identified as relevant to the question of costs in unsuccessful family provision applications.

2. It is clear from these general principles that the current practice of the Supreme Court in such cases is to apply the usual rule as to costs that the unsuccessful plaintiff pay the costs of the successful defendant. While the Court may depart from the usual rule in a particular case, it should not be assumed that it will do so.

3. A legal practitioner acting for a potential plaintiff in a family provision application should be familiar with these general principles and ensure that the potential plaintiff is properly advised of the risk as to costs in the event that he/ she is unsuccessful in the application.

Relevant costs provisions

4. Under s 98(1) of the *Civil Procedure Act* 2005 (NSW), subject to rules of court and to the *Civil Procedure Act* itself or any other Act, costs are in the discretion of the court. The court is given full power to determine by whom, to whom and to what extent costs are to be paid and may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

5. Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) ("**UCPR**") provides that, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs. This means that the "usual" order as to costs is that the unsuccessful party is to pay the costs of the successful party.

6. In addition, r 42.20(1) of the UCPR provides that, if the court makes an order for the dismissal of proceedings, then, unless the court orders otherwise, the plaintiff must pay the defendant's costs of the proceedings to the extent to which the proceedings have been dismissed. This means that, upon dismissal of proceedings, an

[1] [2012] NSWSC 35 at [17]-[18].

unsuccessful plaintiff is to be required to pay the defendant's costs unless the court, in the exercise of its discretion, decides otherwise.

7. Section 99(1) of the SA is also relevant to the question of costs because s 98(1) of the *Civil Procedure Act* is subject to any other Act. Section 99(1) of the SA provides that the "Court"[2] may order that the costs of proceedings under Ch 3 of the SA in relation to the estate or the notional estate of a deceased person (including costs in connection with mediation) be paid out of the estate or notional estate, or both, "in such manner as the Court thinks fit." Section 99(1), therefore, confers a wide discretion on the Court in relation to costs in family provision applications.

General principles as to costs

8. There are eleven general principles which Hallen AsJ identified, most notably in *Harkness v Harkness (No 2)*,[3] as relevant to the question of costs in unsuccessful family provision applications. His Honour has since repeated these general principles in a number of cases[4] and many other Supreme Court judges at first instance have adopted them.[5]

9. The first general principle comprises statements by Gaudron J in *Singer v Berghouse*[6] which were made by her Honour in 1993 in the course of rejecting an application for security for the costs of an appeal from a dismissal of an application made under the former *Family Provision Act 1982* (NSW). Those statements were as follows:

> "*Family provision cases stand apart from cases in which costs follow the event. …[C]osts in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position. …And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate. ...*"

10. However, if it was the practice in New South Wales in 1993 under previous legislation for no order to be made as to costs in unsuccessful family provision applications and even for the unsuccessful party to have his/her costs paid out of the estate, general principles two to seven make it clear that this is no longer the case and that the

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[2] The Supreme Court or, in relation to a matter under Ch 3 for which it has jurisdiction under s 134 of the *District Court Act 1973* (NSW), the District Court: see s 3 of the SA.
[3] Above, n 1.
[4] See, for example, *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 702 at [33]-[34]; *Harrisson v Skinner (No 2)* [2013] NSWSC 762 at [15]; *Bruce v Greentree (No 2)* [2015] NSWSC 1636.at [41].
[5] See, for example, *Toth v Graham* [2014] NSWSC 393 at [73]-[74] (Kunc J); *Bayssari v Bazouni* [2014] NSWSC 910 at [62] (Ball J); *In the Estate of Marras (Costs)* [2014] NSWSC 1307 at [70]; [74] (Bergin CJ in Eq); *Sung v Malaxos (No 2)* [2015] NSWSC 290 at [8] (Pembroke J); *McCleary v Metlik Investments Pty Limited (No 2)* [2015] NSWSC 1361 at [12]; [17] (Darke J).
[6] [1993] HCA 35 at [6]; (1993) 114 ALR 521 at 522.

current practice is to apply the usual rule as to costs in an unsuccessful family provision application.[7] Those principles are to the following effect:

- Despite Gaudron J's statements, s 99 of the SA provides a wide discretion in relation to costs ('in such manner as the Court thinks fit').

- The view of some legal practitioners advising a potential plaintiff contemplating a family provision application, that there was little risk, and probably much to be gained, in making an application, however tenuous, because even if unsuccessful the plaintiff would, very likely, get his/ her costs out of the estate and would not be significantly out of pocket, and the practitioner would receive his/ her fees in any event, has been "thoroughly discredited."[8]

- It should not be assumed that a family provision application can be pursued safe in the belief that costs will be paid out of the estate.[9] It is now more common than it previously was for an unsuccessful plaintiff to be ordered to pay the defendant's costs of the proceedings[10] and be disallowed his/ her own costs.

- Where the issue is whether the unsuccessful plaintiff should bear the costs of the successful defendant, s 98 of the *Civil Procedure Act* and rr 42.1 and 4.20(1) of the UCPR will apply, and, in the absence of some good reason to the contrary, the court should order that the costs of the successful defendant be paid by the unsuccessful plaintiff.[11]

- A plaintiff who is unsuccessful will usually be ordered to pay costs where the claim was frivolous, vexatious or made with no reasonable prospects of success, or where the unsuccessful plaintiff was guilty of some improper conduct in the course of the application.[12]

- In the case of small estates, in particular, the court should be careful not to foster the proposition that obstinacy and unreasonableness will not result in an order for costs.[13]

11. Nevertheless, it is recognised that family provision litigation differs from many other types of civil litigation. The SA provides no definite criteria for the court to determine

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[7] In *Nicholls v Hall* [2007] NSWCA 356 at [57], the Court of Appeal noted that, in the past, adverse costs orders had occasionally been withheld against unsuccessful plaintiffs but that the Court had been informed that this was no longer the practice and that the general costs principles applied. The Court of Appeal neither endorsed nor disendorsed the apparent change of practice, saying that the point did not arise for consideration in the appeal before it.

[8] See *Carey v Robson (No 2)* [2009] NSWSC 1199 at [21]. In that case, it was said that this discredited view had promoted much wasteful litigation and was not supported by authority.

[9] See *Forsyth v Sinclair (No 2)* [2010] VSCA 195; (2010) 28 VR 635 at [27].

[10] See *Lillis v Lillis* [2010] NSWSC 359 at [23].

[11] See *Moussa v Moussa* [2006] NSWSC 509 at [5].

[12] See *Re Sitch (No 2)* [2005] VSC 383.

[13] See *Dobb v Hacket* (1993) 10 WAR 532, at 540.

whether a family provision order ought to be made and the nature of any such order. Thus, a "large element of subjective assessment" is involved and different judges may see the same set of facts differently.[14] As a result, the court may be more willing to depart from the usual rule as to costs in a particular case. Thus, general principles eight to eleven are to the following effect:

- A family provision application involves elements of judgment and discretion beyond those at work in most *inter partes* litigation.[15]

- When exercising the costs discretion, the court will have regard to "the overall justice of the case", a concept which is "not remote from costs following the event."[16] However, the court may be more willing to depart from the usual rule in a family provision application than in other types of cases.[17]

- As family provision applications are essentially for maintenance, a court may properly decide to make no order for costs against an unsuccessful plaintiff, if it would adversely affect the financial position which had been taken into account in dismissing the application.[18]

- There are also other circumstances that may lead the court to order the costs of an unsuccessful plaintiff to be paid out of the estate. The court may make such an order if, in all the circumstances, the unsuccessful plaintiff's case was meritorious, reasonable or borderline.[19]

Rationale for the current practice

12. In *Carey v Robson (No 2)*,[20] Palmer J explained that the current law and practice in New South Wales of applying the usual costs rule in an unsuccessful family provision application reflected:

> "*the policy embodied in s 56 Civil Procedure Act*[21] *that litigation must be conducted responsibly and should only be commenced by a plaintiff after careful evaluation of the costs consequences likely to attend failure.*"

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[14] *Re Sherborne Estate (No 2); Vanvalen v Neaves* [2005] NSWSC 1003; (2005) 65 NSWLR 268 at [57].
[15] See *Moussa v Moussa* [2006] NSWSC 509 at [8]; *Re Sherborne Estate (No 2); Vanvalen v Neaves* [2005] NSWSC 1003; (2005) 65 NSWLR 268 at [56]-[58]; [64].
[16] See *Jvancich v Kennedy (No 2)* [2004] NSWCA 397 at [11].
[17] See *Moussa v Moussa* [2006] NSWSC 509 at [8]-[10]; *Carey v Robson (No 2)* [2009] NSWSC 1199 at [7] and [17]; *Bartkus v Bartkus* [2010] NSWSC 889 at [24].
[18] See *McDougall v Rogers; Estate of James Rogers* [2006] NSWSC 484 at [57]; *McCusker v Rutter* [2010] NSWCA 318 at [34].
[19] See *Morse v Morse (No 2)* [2003] TASSC 145; *McDougall v Rogers; Estate of James Rogers* [2006] NSWSC 484 at [57]; *Re Bodman* [1972] Qd R 281; *Shearer v The Public Trustee* [1998] NSWSC 1017.
[20] [2009] NSWSC 1199 at [20].
[21] Section 56 provides that the overriding purpose of the *Civil Procedure Act* and rules of court is to facilitate the "just, quick and cheap" resolution of disputes.

13. In *Friend v Brien (No 2),*[22] White J said that there was a public policy in the usual practice of the court ordering that costs follow the event, as well as the element of justice in the usual rule as to costs.

Final words

14. The costs orders which are actually made in a case in which the plaintiff has been unsuccessful will always depend on all the facts and circumstances of the case including whether any, and what, offers to settle the proceedings were made.[23]

15. However, a family provision application should not be brought unless there appears to be reasonable prospects of success and the potential plaintiff understands and accepts the risk of an unfavourable costs order if the matter proceeds to a final hearing and he/she should be unsuccessful. It cannot be assumed that the court will depart from the usual rule as to costs that the unsuccessful plaintiff pay the costs of the defendant.

16. If a family provision application is brought, then it should be conducted in a sensible, efficient and timely way[24] and every effort made to resolve the dispute.

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[22] [2014] NSWSC 614 at [20].
[23] Note that if the defendant made an offer of compromise in accordance with r 20.26 of the UCPR, then r 42.15A of the UCPR may apply.
[24] Parties should not get carried away by the desire to vindicate their positions publicly in a court of law: see *Re Sherborne Estate (No 2); Vanvalen v Neaves* [2005] NSWSC 1003; (2005) 65 NSWLR 268 at [27].