Proportionality of costs in *Family Provision Act* matters

By Phillipa Alexander

Increasingly, the NSW Supreme Court has become concerned about the legal costs incurred in *Family Provision Act* 1982 (NSW) (FPA) proceedings, particularly where the value of the estate is modest. Supreme Court Practice Note SC Eq 1, announced on 17 August 2005, made it clear that in cases where the estate is worth less than $500,000, the costs of a successful claim may be capped. Orders limiting a party's costs may be made under s98(4) of the *Civil Procedure Act* 2005 (CPA) and r42.4 of the *Uniform Civil Procedure Rules* 2005 (UCPR). At the outset of proceedings, a plaintiff should be made aware that if his or her costs are limited in this way, there may be a significant shortfall between the costs payable to his or her solicitor and the costs recoverable from the estate. Solicitors may also need to consider this issue when providing estimates of recoverable costs under s309(1)(f)(i) of the *Legal Profession Act* 2004.

RULE 42.4 *UNIFORM CIVIL PROCEDURE RULES* 2005

Rule 42.4 UCPR allows the court of its own motion or on the application of a party to specify the maximum costs that may be recovered by one party from another. The court has held that the rule was 'designed to put into the court's hands a brake on intemperate and disproportionately expensive conduct of proceedings,'[1] and is intended as a means to 'curb the tendency of one or all parties to engage in disproportionate expenditure on legal costs by making it clear, at an early stage of the proceedings, that beyond a certain limit the parties will have to bear their own costs – win or lose'.[2]

This rule should be invoked early in proceedings as it cannot be used to limit excessive expenditure at the time of the final costs order.[3]

SECTION 98(4)(C) *CIVIL PROCEDURE ACT* 2005

The court's power to order maximum costs at the time of the final costs order is vested in s98(4)(c) of the CPA, which enables the court to make an order for a 'specified gross sum instead of assessed costs'.

In 2004, Young CJ in Eq made some general observations about costs in FPA matters. He stated, 'I think the position has now been reached where judges will not allow more than $35,000 in costs to any party in this type of case unless there is some special justification.'[4] His Honour also considered that no success premium should be allowed in FPA matters.

However, the Court of Appeal indicated later that year that 'it has not been the practice in Australia for the court to fix the amount of costs'.[5] Giles JA did not think a general ceiling could be stated, even where there is 'special justification', and that reasonableness of costs should be considered at the time of assessment. While the court did not rule out ever making a fixed or maximum amount costs order, it noted that 'normally the court will not be in a position to know whether or not costs to or in excess of that amount were reasonably incurred'.[6]

In *Sherborne*,[7] Palmer J considered that the use of s98(4) – to make a maximum costs order where a successful party's costs are grossly excessive – was not restricted to circumstances in which it had been used in the past (that is, to avoid an expensive and lengthy costs assessment). Any such restriction would be 'contrary to the mandate in CPA s56(1) and (2) which obliges the court, in interpreting any provision of the CPA or the UCPR, to give effect to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute'.

Although the Court of Appeal had not ruled out the making of a capping order in any circumstance, his Honour held that such an order would be very rare, and the court's decision would have to be 'founded on a consideration of the costs actually incurred, the circumstances at the time at which they were incurred, whether they were reasonable in those circumstances, and what would have been a reasonable amount to have incurred'.[8] His Honour was concerned that a costs-capping application would lead to greater expense, and that such an order should be made only where it would resolve the issue more 'quickly, cheaply and justly' than an assessment under the *Legal Profession Act*. Ultimately, the application for a costs-capping order failed in *Sherborne* because there was insufficient evidence of the costs before the court to enable a fair and reasonable estimate of an appropriate gross sum.

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Despite these judicial reservations, several costs-capping orders have recently been made. In *Blanchfield v Johnston*[9] the estate was valued at $70,000 and the plaintiff had incurred costs of $74,000. The plaintiff's costs were capped at $25,000, after the plaintiff's solicitor had indicated to the court that they would not charge the plaintiff more than the capped amount.

An unfortunate outcome occurred in *Zappia v Parelli & Anor*[10] where there was a net estate of $130,349, and the plaintiff's costs of the FPA proceedings were $197,494. The plaintiff received further provision from the estate in the sum of $100,000; however, her costs payable out of the estate were limited to $100,000. This effectively negated the benefit of the further provision, even had the estate held funds to meet these orders.

The costs-capping principle was extended to a defendant executor's costs in *Dinnen v Terrill*,[11] on the basis that the proceedings had been conducted as adversarial proceedings between two siblings, with a nominal defendant having an interest in the outcome. The estate was valued at $338,642, and the defendant's costs of $92,000 were capped at $55,000.

In *Abrego v Simpson*,[12] despite the fact that the estate was valued at more than $500,000 (namely, $619,029), Windeyer J considered the plaintiff's costs of $60,000 to be excessive and capped them at $50,000.

Indications are that costs-capping orders in FPA matters are now firmly established, and can extend both to a defendant's costs and to an estate that exceeds the $500,000 threshold in Practice Note SC Eq 1. In FPA matters, practitioners may need to consider expenditure carefully to avoid incurring costs that are not recoverable from the estate. To resist such an order, it would be prudent to make available to the court detailed particulars of the costs incurred, together with evidence justifying the fairness and reasonableness of the costs.

LOSS OF BENEFICIARIES' ENTITLEMENT TO APPLY FOR ASSESSMENT

When the *Legal Profession Act* 2004 (NSW) was introduced, s350(6)(f) included in the definition of a 'client', who was entitled to apply for assessment, 'a person interested in any property out of which a trustee, executor or administrator who is liable to pay legal costs has paid, or is entitled to pay, those costs'. Beneficiaries of an estate were therefore entitled to apply for assessment of the costs of administering the estate.

However, with the introduction of the amendments relating to the rights of third-party payers to apply for assessment, s350(6) was amended to provide for a non-associated third-party payer to have the right to apply for assessment. As defined in s302A(1)(c) of the Act, a person will be a non-associated third-party payer if they are under a legal obligation to pay all or any part of the legal costs for the legal services. As a beneficiary is not under such an obligation, they no longer appear to have the right to apply for assessment. ■

Notes: **1** *Sherborne Estate (No. 2): Vanvalen v Neaves; Gilroy v Neaves* [2005] NSWSC 1003 (10 October 2005) per Palmer J [at 26]. **2** *Ibid,* at [29]. **3** *Ibid,* at [31]. **4** *Moore v Moore* [2004] NSWSC 587 (30 June 2004) per Young CJ in Eq at [43-6]. **5** *Jvancich v Kennedy (No. 2)* [2004] NSWCA 397 (3 November 2004) per Handley, Giles and McColl JJA. **6** *Ibid,* per Giles JA at[6]. **7** *Sherborne Estate (No. 2)* See Note 1, per Palmer J at 40. **8** *Ibid,* at 42. **9** *Blanchfield v Johnston* [2007] NSWSC 143 (1 March 2007) per Macready AJ. **10** *Zappia v Parelli* [2007] NSWSC 972 (31 August 2007) per Windeyer J. **11** *Dinnen v Terrill; Terrill v Dinnen* [2007] NSWSC 1405 (5 December 2007) per Macready AJ. **12** *Abrego v Simpson* [2008] NSWSC 215 (13 March 2008) per Windeyer J.

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