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The 2023 Intensive Conference

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Conference papers

Some aspects of lawyers' ethical and professional obligations in estate matters

1. Introduction

1.1 This paper considers recent decisions in NSW and the ACT in respect of litigation involving deceased estates. The focus is on the ethical and professional standards of conduct expected of legal practitioners in respect of estate matters. In particular, practitioner's obligations in respect of the following issues are considered:

(a) assessing whether a client has testamentary capacity when preparing a will for a client;

(b) whether a solicitor who has prepared a will can act in litigation involving a challenge to the testator's testamentary capacity;

(c) the preparation of affidavit evidence in estates litigation;

(d) when the Court is asked to make orders to give effect to a settlement of a family provision claim;

(e) the potential cost risks to plaintiffs of making unmeritorious family provision claims; and

(f) the need to manage and monitor costs in estates litigation.

2. Obligations in relation to assessing testamentary capacity

2.1 The relevant considerations in relation to whether a testator had testamentary capacity at the time of making their will were conveniently stated by Lindsay J in *Estate Stojic, Dec'd* [2017] NSWSC 168 at [86] as follows:

> The ultimate question, on the facts of the particular case, is whether the Court is satisfied that a particular testamentary instrument represents the last Will of a free and capable testator: *Woodley-Page v Symons* (1987) 217 ALR 25 at 35. The proponents of a Will bear the onus of proving that fact on the balance of probabilities, taking into account the nature of the case and the gravity of matters

> alleged: *Evidence Act 1995* NSW, section 140; *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361. The effect of an initial doubt about the validity of a Will is to require a vigilant examination of the whole of the evidence which the parties place before the Court; that examination having been made, a residual doubt is not enough to defeat a claim for probate unless it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the last Will of a free and capable testator: *Worth v Clasohm* [1952] HCA 67; (1952) 86 CLR 439 at 452–453.

2.2 When an elderly person engages the assistance of a solicitor to change their will, the Courts expect the solicitor to make a careful assessment as to whether such a person has testamentary capacity and to document their assessment in this respect.

2.3 In *Ryan v Dalton* [2017] NSWSC 1007, the deceased changed his will from leaving his estate to be divided equally between his 3 children (under a 2011 Will) to the estate being divided equally between his 3 children and his de facto partner (under a 2013 Will). There was contemporaneous evidence (in particular, notes kept by the nursing home where the deceased was residing) that the deceased was prone to being confused, forgetful, agitated and delusional around about the time of making his new will.

2.4 The Court found that the deceased lacked testamentary capacity in relation to the 2013 Will. This conclusion was partly informed by the fact that the solicitor who prepared and witnessed the will did not prepare a detailed file note setting out the basis of her assessment that the deceased had testamentary capacity. It was also of significance that the solicitor did not ask the deceased non-leading or open-ended questions when preparing his will. The reason for this is that it is generally considered that if a testator is asked to explain their motive or rationale for changing their will, that will provide a sound basis for assessing whether they have testamentary capacity. In the present case, there was evidence that the deceased had previously said that he did not intend to benefit his de facto partner as they had always kept their finances separate. An explanation from the deceased as to why he changed his mind in this respect in relation to the 2013 Will might have provided valuable insight on the question of testamentary capacity.

2.5 Kunc J concluded his decision by setting out the flowing helpful guidance for solicitors who are engaged to prepare a will for an elderly client:

[106] Questions of testamentary capacity are necessarily fact sensitive. No rule or procedure will cover every case to avoid the possibility of litigation. Nevertheless, the effort involved in paying attention to questions of capacity at the time instructions for a will are taken and the will is executed (including, where necessary, obtaining an assessment of the client where it is thought one is called for) pales into insignificance with the expense, delay and anxiety caused by litigation after the testator's death. Bearing that in mind, and without wishing in any way to derogate from, for example, the desirability of all solicitors being familiar with the guidelines, the recent experience of the Court suggests that proposing some basic rules of thumb (which, as such, are necessarily arbitrary) may be of assistance.

[107] It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

(1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.

(2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.

(3) ***In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note***. [emphasis added]

(4) In case of anyone:

(a) over 70;

(b) being cared for by someone;

(c) who resides in a nursing home or similar facility; or

(d) about whom for any other reason the solicitor might have concern about capacity,

the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file

notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

(5) Where there is any doubt about a client's capacity, then the process set out in subparagraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

[108 I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. ***In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely***. [emphasis added]

2.6 Another reason why a solicitor should ask a testator to explain the reasons for their testamentary intentions is to assess whether they should be advised to make a statement in support of their testamentary intentions in the event that the adequacy of provision for a beneficiary made under the will is challenged. Courts are required by s 22 of the *Family Provision Act 1969* (ACT) take into account a testator's statement of reasons for their testamentary intentions: see, for example, the observations of Mossop M in *Peter Kulczycki v Public Trustee* [2013] ACTSC 230 at [110].

2.7 In *LP 202001 v Council of the Law Society of the ACT* (Appeal) [2022] ACAT 80, the Appeal Tribunal in ACAT considered that the Original Tribunal's decision was correct in finding that a solicitor should have advised the clients of their right to make a statement under s 22 of the *Family Provision Act* and that the solicitor's failure to do so showed a lack of competence and diligence: at [32] and [115].

3. Obligation to avoid position of conflict where there is a challenge to testamentary capacity

3.1 A solicitor who has prepared a will and assessed whether the testator has testamentary capacity for this purpose generally cannot act in litigation where the validity of the will is challenged on the basis that the deceased lacked testamentary capacity. That is likely to be the case even where the solicitor has followed the guidance of Kunc J in *Ryan v Dalton* set out above.

3.2 In *Estate of Shirley Eileen Kendall* [2020] ACTSC 42 Crowe AJ identified the position of conflict that a solicitor who had prepared a will would be placed in if they also acted in litigation challenging the validity of the will.

3.3 At [52], his Honour said:

> … it seems to me that in circumstances where disappointed beneficiaries raise real issues as to a testator's capacity and as to his/her knowledge and approval of the contents of the will, the evidence of the solicitor who took instructions and witnessed the will is likely to be crucial. This is particularly so where the will was made many years before the time at which its validity must be determined. A good example of this is the case of *Drivas v Jakopovic* [2019] NSWCA 218 in which the NSW Court of Appeal upheld the decision of the trial judge preferring the evidence of the testator's solicitor over that of the expert medical witnesses. In the course of his judgment Macfarlan JA (Bell ACJ and McCallum JA agreeing) said:
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> > [52] …I consider that the primary judge was correct to place significant weight on Mr Taylor's evidence. Mr Taylor was a solicitor of considerable experience, including in dealing with elderly clients and their testamentary wishes. As Young J indicated in *Re Crooks Estate* (14 December 1994, unreported, at 29), such evidence is valuable evidence of testamentary capacity because:
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> > > [a]n experienced solicitor or solicitor's secretary gets used to dealing with people making wills and are usually attuned to the red lights that flash when a person who is of suspect capacity comes across their paths [sic].

3.4 At [56] – [57], his Honour continued:

> [56] Against this background, it does seem to me that continuing to act for the Executor will place [the solicitor] in the situation where she will be testifying in circumstances where she owes an obligation of loyalty to [the Executor], at the same time having an interest in defending her own conduct and credibility, and discharging her obligations as an officer of the Court. While these conflicts cannot be totally resolved it seems to me that they would be greatly lessened if [the solicitor] was giving evidence other than as the solicitor for the Executor in the litigation in which that evidence is relied upon to support the validity of the will.

> [57] In my view, fair-minded and reasonably informed members of the public would conclude that the due administration of justice, including the appearance of the process, would require that [the solicitor] should, in the circumstances of this case, be prevented from continuing to act as the solicitor for the Executor in this litigation.
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> [58] I am conscious of the exceptional nature of the jurisdiction and the need for caution. However, I take into account the particular circumstances of this case and the need for the Court to be able to rely to the greatest extent possible on the independent evidence of the solicitor who took instructions from the Testator, and who drew and witnessed the making of the Testator's will. A member of the public observing the cross-examination of a solicitor for the Executor as a critical witness in the case in relation to controversial matters would in my view have an understandable sense of disquiet in relation to the integrity of the judicial process.

4. Obligations in relation to the preparation of evidence

4.1 Whenever in litigation there is a dispute as to the terms of any oral statement or conversation, solicitors need to take steps to ensure that a particular witness' recollection is not influenced (often unconsciously) by the recollections of another witness of the alleged oral statement or conversation. This is all the more important in estates litigation. Oral promises allegedly made by the deceased about his or her testamentary intentions may ground a proprietary estoppel claim: see *Nenes v Armouti* [2021] ACTSC 53 at [20]. This raises difficulties in establishing the precise timing, terms and quality of the promise, if any, especially as the deceased is not available to give evidence either confirming or contesting the plaintiff's version of what was said.

4.2 The above difficulties are exacerbated if strict measures are not taken to proof witnesses separately, if witnesses are not advised that they should not discuss their evidence with each other and also advised that they should not be privy to each other's draft or final affidavit evidence prior to giving oral evidence.

4.3 In *Nenes v Armouti*, the plaintiffs challenged the will of the deceased on the basis that he had made oral promises during his lifetime that his estate would be left to the plaintiffs. They also sought an order for provision to be made out of the deceased's estate pursuant to the provisions of *Family Provision Act 1969.* Both plaintiffs set out the alleged oral promises in identical terms. Ordinary human experience would indicate that two persons will not recall oral statements made many years previously in identical terms.

4.4 At [25] – [29], Crowe AJ made the following comments:

> [25] In the course of cross-examination on the first affidavit affirmed by each plaintiff it became clear that there were many paragraphs in the two affidavits which were identical. The explanation given by the plaintiffs for this was that the two of them had worked together preparing the draft affidavits. Michael could not type so Stella typed both draft affidavits. They discussed with each other what they were going to say and then agreed on a particular form of words.
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> [26] By reference to this conduct (and some further conduct involving Mr Toufexis and the plaintiffs) Mr Moujalli submitted that I should reject their evidence as unreliable. He relied particularly on comments by Ball J in *Williams v ATM & CPA Projects Pty Ltd* [2015] NSWSC 703 where his Honour said:
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> > [4] Before setting out the relevant background, it is necessary to say something about the affidavit evidence given by Mr Morison and Mr Williams. Both depose to a number of conversations they had with Mr Merhi in almost identical terms. Both denied that they had discussed their evidence with one another. I accept those denials. However, the likelihood is that the remarkable similarity between the evidence given by them arises from the fact that their affidavits were drafted by the same solicitor who chose the words in which to express the conversations each say he was a party to. Each witness was then asked to agree that those words represented the witness's recollection of events, which each did.
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> > [5] As McLelland CJ in Eq explained in *Watson v Foxman* (1995) 49 NSWLR 315 at 318 –319 when considering oral representations, evidence of oral statements given some years later need to be treated with considerable caution because recollections fade and may be altered by subsequent events. That problem is exacerbated in this case by the way in which the evidence of Mr Morison and Mr Williams was obtained. I have concluded that little weight can be placed on their evidence except to the extent that it is inherently probable, corroborated by documents or objective facts or involves admissions.
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> [27] ***It is highly undesirable in a case concerning contested factual events that parties and/or witnesses put their heads together to formulate their evidence.*** At one extreme, of course, such conduct might amount to outright concoction. At the other extreme it may be a relatively innocent means of cross-checking the

accuracy of differing memories. However, even in the latter case, such conduct calls into question the integrity of the evidence.

[28] It seemed to me that both Michael and Stella were surprised by the questioning about the commonality of their affidavits. I infer that neither of them was aware that they should not have been collaborating in the production of their draft affidavits. ***It is disappointing that the solicitor who was acting for the plaintiffs at the time did not bring to their attention the undesirability of collaboration in the drafting of statements or affidavits.***

[29] Having regard to the collaboration, I commence from a starting point of approaching the evidence of each plaintiff with considerable caution. [emphasis added]

4.5 The broad evaluative nature of the decision making involved in a family provision claim can make it difficult to determine the nature and extent of the evidence which is likely to advance a party's case in any real or meaningful manner. There is a tendency in family provision proceedings for affidavits to include much evidence of historic family events, often going back many decades, which, at best, might be marginally relevant and can often be irrelevant.

4.6 The Courts have stated that lawyer's have an obligation to filter such evidence. Such evidence can waste time and money; and by adding to legal costs, it further diminishes the size of the estate.

4.7 In *Olsen v Olsen* [2019] NSWCA 278, the NSW Court of Appeal dealt with complaints about some comments expressed by the trial judge about the nature and length of the plaintiff's affidavits. At [64]–[65], White JA (Meagher JA and Emmett AJA agreeing) wrote:

> The primary judge also expressed the following concern (Judgment at [45]):
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> > [45] When I complained about the plaintiff's affidavit evidence being unhelpful and far more extensive than it needed to be, junior counsel disavowed responsibility. She said 'The plaintiff insisted on drawing his own [affidavits]'. She added 'We did not have control. It was a difficult situation'. This is, I am afraid, an abdication of the responsibility of the plaintiff's legal representatives. No matter how determined a plaintiff may be to unburden himself of memories of real or imagined distant

> family events, ***his solicitor and counsel are duty-bound to restrain his enthusiasms***. [emphasis added]
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> Nor does this paragraph give rise to any apprehended, let alone actual, bias against the plaintiff. The primary judge's concern was legitimate. His statement that solicitor and counsel were duty-bound to restrain the appellant's enthusiasm to unburden himself of his memories was correct. The appellant's principal affidavit dealt not only with his relationship with the deceased, but also in irrelevant detail with property purchased by the deceased for his half-siblings and stepmother and with the maintenance paid by the deceased to the plaintiff's mother when he was a child. By way of example, the appellant deposed that when he became interested in girls (apparently sometime after he was 12) he was often embarrassed about his state of dress.

5. Obligations to the Court where a family provision claim settles

5.1 It is important to remember that when a Court is asked to make orders to give effect to a settlement of a family provision proceeding, it is not the role of the Court to simply rubber stamp any settlement agreed between the plaintiff and the executor/administrator. That is because family provision orders have the effect of unsettling a testator's intentions as to the distribution of their estate. They can also adversely impact beneficiaries who the testator intended to benefit. These are not matters to be treated lightly.

5.2 In *Richardson v Richardson* [2022] ACTSC 363, Mossop J declined to make orders giving effect to a settlement of a family provision claim in circumstances where the executor sought to resile from the settlement agreement.

5.3 At [39], his Honour summarised the correct approach to be adopted when the Court is asked to make orders to give effect to a settlement of a family provision claim:

> (a) The statute requires certain thresholds to be met before an order can be made adjusting property interests.
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> (b) Those thresholds must be met even where there is agreement compromising a claim.
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> (c) The fact of an agreement is a very significant matter for the court in determining whether to make orders in accordance with that agreement, even where one party to the agreement opposes giving effect to it.

(d) That is particularly so where the parties to the agreement were represented by a solicitor and counsel at the time that the agreement was entered into.

(e) The significance of the agreement arises because:

(i) settlements of such proceedings are to be encouraged as a matter of policy; and

(ii) the parties, rather than the court, will have the best knowledge of the facts of the case and the interests of the parties.

(f) The orders proposed by an agreement must be assessed in light of the fact that:

(i) it has been reached without a trial in circumstances that relieve the parties from the risks and costs of proceeding further with their dispute; and

(ii) a range of outcomes are possible having regard to the evaluative nature of the judgment required by the FP Act and the range of judicial officers who may hear the case.

(g) The circumstances in which agreements to compromise a claim will not be implemented by orders of the court are not closed. However, if the proposed orders lie outside the range of possible outcomes, that may indicate that the compromise is for a purpose extraneous to those of the Act and should not be implemented.

(h) Where one party opposes the making of orders in accordance with a previously made compromise agreement, that will require the court to consider the underlying facts to a greater extent, in order to ascertain whether there would be some injustice in giving effect to the agreement. But mere opposition from a party that previously entered such an agreement is insufficient to require trial of the action or indicate that it is unjust to give effect to the agreement.

5.4 At [107] – [108], his Honour concluded as follows:

[107] The evaluative exercise required in determining the threshold question — whether adequate provision has been made — is one which must be made in light of the considerations in s 8(3) of the FP Act. However, it has a normative component which reflects the moral obligation or community expectations in relation to a parent making testamentary provision for an adult child.

> [108] Given that the court is ultimately being asked to exercise a statutory power to adjust property interests which may only be done where the statutory threshold is met, the court must be satisfied of that fact. Notwithstanding the agreement of the parties and applying what I considered to be the proper principles in relation to testamentary freedom and the determination of any testamentary obligation of a parent to an adult child, I am not satisfied on the material before me that the threshold has been met.

5.5 To assist the Court in determining whether it is appropriate to make orders to give effect to a settlement of a family provision claim, an executor has a duty to the Court to bring to its attention the circumstances of any beneficiary that might be adversely affected by a family provision order. It follows that the estate's lawyers have a corresponding duty as their duty to the Court would require them to ensure that the executor complies with his or her duty.

5.6 In *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [94], Meagher JA (with the agreement of Basten and Campbell JJA) said:

> As executors of Lily's Will, and because of an executor's role as protector of the Will, the obligation of Albert and Morris was to place before the court all evidence which bore on the issues raised by the appellant's claim. That duty extended to presenting to the court evidence as to their own financial resources and needs: In *Re GR Newell (dec'd)* (1932) 49 WN (NSW) 181 at 182; In the *Will of WF Lanfear* (1940) 57 WN (NSW) 181 at 182–183; *Re SJ Hall (dec'd)* (1959) SR (NSW) 219 at 226–227; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497 at 503–504. ***The fact that an executor has not led evidence as to the financial position of any beneficiary or beneficiaries will often provide a basis for the court to infer that each has sufficient income and resources to meet his or her needs***: see, for example, *Anderson v Teboneras* [1990] VR 527 at 535–536; *Mason v Permanent Trustee Co Ltd* (unreported, Macready M, 5 December 1996 at 6). The justification for that inference is an assumption that the executor has acted in accordance with his or her duty to lead such evidence, if relevant. [emphasis added]

5.7 As the Court will be concerned to ensure that any family provision orders made with the consent of the plaintiff and executor do not adversely affect any beneficiary or beneficiaries who lack sufficient income and resources to meet their needs, it is always prudent to seek the written consent of the beneficiaries prior to asking the Court to make orders by consent.

6. **Obligations to ensure that the costs of litigation are reasonable and proportionate**

6.1 In a family provision proceeding, the Court should know the amount of legal costs which have been incurred. There is not a specific requirement in the ACT for the costs of family provision litigation to be disclosed to the Court at the commencement of a hearing as there is in NSW pursuant to Practice Note No. SC EQ 7, specifically paragraphs 17.1 and 17.2. However, such evidence needs to be provided to the Court to allow it to assess the net distributable value of the estate, which is one of the factors which the Court is required to consider by virtue of s 8(3)(e) of the *Family Provision Act 1969* (ACT).

6.2 As Basten JA (Simpson and Payne JJA agreeing) put it in *Chan v Chan* [2016] NSWCA 222 at [54]:

> In considering an amount by way of provision, it is appropriate also to have regard to the diminution of the estate on account of legal costs.

6.3 This means that unlike other litigation, evidence of the costs incurred in a family provision proceeding will be a critical part of the evidence in the proceeding. In NSW, and more recently in the ACT, this has resulted in judicial concern about the level of costs in family provision proceedings.

6.4 The defendant as executor/administrator, irrespective of the outcome of the proceedings, is normally entitled to an order that its costs on the indemnity basis be paid out of the estate: *Grover v NSW Trustee & Guardian* [2015] NSWSC 1048 at [24]; *Penfold v Predny* [2016] NSWSC 472 at [18]. However, this is not the invariable case. In *Horne v Horne* [2001] NSWSC 50 (Hodgson CJ in Eq), the executor's costs were capped on the basis that the executor had not been cooperative in the conduct of the litigation.

6.5 A successful plaintiff is normally entitled to an order that its costs on the ordinary basis be paid out of the estate: *Penfold v Predny* at [18].

6.6 The costs outcome for an unsuccessful plaintiff is less straight-forward.

6.7 Gaudron J said in *Singer v Berghouse* [1993] HCA 35 at [6]:

> 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.

6.8 More recently, Ward CJ in Eq said in *Karpin v Gough (No 2)* [2022] NSWSC 682 at [14] the following:

> In that regard, I note that it has been said that while "family provision claims stand apart from cases in which costs follow the event", the appropriate order as to costs depends on the overall justice of the case (see *Singer v Berghouse* (1993) 114 ALR 521; [1993] HCA 35 at 521 –2 per Gaudron J). The Court making an order that an unsuccessful party has his or her costs paid out of the estate in light of the circumstances and overall justice of the case, albeit not as a matter of course. 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 (*Purnell v Tindale* [2020] NSWSC 746 at [333] per Henry J; *Penfold v Predny* [2016] NSWSC 472 at [167] per Hallen J). Furthermore, it is not uncommon for the (reasonably incurred) costs of all parties (successful or unsuccessful) to be borne by the estate (see, for example, *Wardle v Wardle (No 2)* [2021] NSWSC 1663 at [12] per Slattery J).

6.9 While accepting that the Court's discretion in relation to costs in family provision claims can give rise to considerations that do not apply in other litigation, Gaudron J's comments in *Singer v Berghouse* should be approached with some circumspection in the current climate where there is increasing concern about the level of costs in family provision litigation. It has been said that cases in which a family provision plaintiff is not required to pay the defendants' costs when the claim is dismissed are rare in NSW: *Ray v Greenwell* [2009] NSWSC 1197 at [17].

6.10 In *Penfold v Predny*, Hallen J at [165] re-stated a number of considerations (earlier stated in *Harkness v Harkness* (No 2) [2012] NSWSC 35) that apply to the costs of proceedings for a family provision order. Those considerations include:

(a) parties should not assume that this type of litigation can be pursued, safe in the belief that costs will be paid out of the estate;

(b) it is now much more common than it previously was for an unsuccessful applicant to be ordered to pay the defendant's costs of the proceedings and be disallowed his, or her, own costs; and

(c) absent some good reason to the contrary, there should be an order that the costs of the successful defendant be paid by the unsuccessful plaintiff.

6.11 The claimant in *Penfold v Predny* was unsuccessful. She had a legacy under the will of $50,000. Her costs were estimated at over $90,000. The Court ordered that she should bear her own costs but (and "with some hesitation") did not order her to pay the defendants' costs. The effect of the litigation for the claimant was to negate the benefit of her legacy and put her out of pocket for an additional $40,000 odd in legal fees. The outcome would have been even worse for her if she had been ordered to pay the defendants' costs estimated at about $76,000. The case serves as a sobering reminder of the need to assess carefully the consequences likely to result in failure of a family provision application.

6.12 Recent cases in the ACT indicate that judges are developing the same concerns in relation to the costs of family provision litigation that have been expressed repeatedly and stridently in NSW. I expect that judges in the ACT will be more likely than may previously have been the case to exercise their discretion in relation to costs adversely to a claimant especially where there has been unreasonable conduct on the part of the claimant.

6.13 In *Ross v Gordon* [2021] ACTSC 41 and *Ross v Gordon (No 3)* [2022] ACTSC 289 (on remittal) Loukas-Karlsson J ordered an unsuccessful family provision claimant to pay the defendant's costs. This case is complicated by the fact that the plaintiff unsuccessfully sought relief on bases other than pursuant to s 8 of the *Family Provision Act*, including for breach of fiduciary duty and damages for the tort of devastavit. The question of costs did not received any detailed consideration in the Court of Appeal in respect of the appeal from the first decision: *Ross v Gordon* [2022] ACTCA 21.

6.14 In *Talent v Talent (No 2)* [2020] ACTSC 294, McWilliam AsJ determined the costs of a family provision proceeding where the plaintiff had declined settlement offers which would have resulted in a more favourable outcome for the plaintiff than that obtained on judgment. McWilliam AsJ said at [21]:

> The courts are particularly concerned to discourage delinquency or unreasonable conduct where the litigation involves the distribution of an estate or matters related to family provision out of an estate.

6.15 Her Honour considered that the plaintiff was unreasonable in declining to accept the executor's offers of settlement. He was ordered to bear his own costs. The plaintiff's legal costs would therefore have had to be paid from the provision ordered to be made for him from the estate, the practical effect of which would have been to diminish the value of such provision.

6.16 In *Richardson v Richardson* [2022] ACTSC 363, Mossop J considered whether the Court should make orders giving effect to a settlement of a family provision claim in circumstances where the executor sought to resile from the settlement agreement. The estate was valued at less than $1 million and the evidence indicated that the plaintiff had incurred costs in the order of $220,000.

6.17 At [114] – [116] his Honour said

> [114] I have referred above at [99] to the evidence as to the costs incurred by the plaintiff in pursuing this claim. It must be noted that those costs reflect the costs unaffected by the decision on the present application which will inevitably mean that the costs of the proceedings will be increased. I have indicated above that, notwithstanding the complexities of the case up to the point where they were estimated, those costs were disproportionate to the requirements of the case. When regard is had to the significant solicitor and client component within the solicitor's costs, the amount that would have been recovered by the plaintiff had the settlement agreement been approved would have been reduced to a very modest amount. If the legal expenses incurred by the estate are added in, the overall cost-effectiveness of the dispute resolution process (or lack of it) could be estimated.
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> [115] The extent of legal costs incurred in family provision claims creates distorted incentives that encourage the making of claims and has the potential to significantly affect smaller estates where, as here, a single residential dwelling is the principal asset of the estate. In other areas of the law there are costs constraints designed to achieve particular public policy goals. Examples are r 1725 of the *Court Procedures Rules* and s 181 of the *Civil Law (Wrongs) Act 2002* (ACT). Further, where there is the facility available under court rules, costs limitation orders are an available mechanism to impose some costs discipline in family provision claims in smaller estates: for example, *Uniform Civil Procedure Rules 2005* (NSW) s 42.4, New South Wales Supreme Court Practice Note No SC Eq 7 at [24].
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> [116] If the costs incurred in this case are reflective of the quantum of costs arising from the current regime for claims under the FP Act, then it is likely to be indicative

of a discontinuity between community expectations of what might be appropriate outcomes in relation to such claims and what is occurring in practice. In my view, some consideration of these issues by the legislature and the rules committee would be appropriate.

6.18 Rule 1721(1) of the *Court Procedures Rules 2006* (ACT) provides that costs are in the discretion of the Court. Rule 1720(3)(c) provides that the Court may determine the amount of costs payable by one party to another. In view of the concerns expressed by Mossop J in *Richardson v Richardson*, it remains to be seen whether the Court will utilise these rules in a future case to limit or cap the costs recoverable by a successful family provision claimant where there is a concern that the costs incurred have been disproportionate to the amount at stake or the size of the estate.

6.19 The above cases indicate that solicitors have an obligation to evaluate carefully the merits of a family provision claim before proceedings are commenced and, if proceedings are commenced, to manage costs so that they are reasonable and proportionate. The Courts have now made it clear on a number of occasions that any failure on the part of solicitors to observe these obligations can result in unfavourable costs orders having a seriously detrimental effect on a plaintiff's financial position.

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March 2023

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