CASE NOTE

FAMILY PROVISION APPLICATIONS IN SMALL ESTATES: COPE V THE PUBLIC TRUSTEE OF QUEENSLAND

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I Introduction

It has been judicially observed that family provision applications are divisible into two classes.[1] One class consists of cases in which, owing to the largeness of the estate, the applicant is complaining of the failure of the testator to make sufficient provision for his/her proper maintenance. The other, more common, class consists of cases in which, owing to the smallness of the estate, the applicant is competing with other persons who also have a moral claim upon the testator. In this latter class of cases, any provision in favour of the applicant must be made at the expense of some other person or persons to whom the testator owed a moral duty of support.

Some estates are so small that, from an economic standpoint, it is difficult to justify litigation. In such cases, the costs tend to become wholly disproportionate to the end in view. For that reason, it has been suggested that the courts should discourage family provision applications where small estates are involved.[2] The recent decision of *Cope v The Public Trustee of Queensland*[3] illustrates why that suggestion has been made.

II Facts

The testator was a Polish man. He had three children who were born in Poland (and still lived there at the time of the trial). The testator abandoned his children in Poland in 1961. They never saw or heard from him again.

By 1998, the testator had immigrated to Australia. In that year, he married a woman named Leodakia Langa. Prior to the marriage, Mrs Langa was the sole owner of a residential property at Collingwood Park. The testator and Mrs Langa became registered joint tenants of the property.

Mrs Langa had a daughter from her first marriage named Wanda Cope. In

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1 *Re Allen* [1922] NZLR 218, 221-222.

2 *Re Coventry* [1980] Ch 461, 484.

3 [2013] QDC 176.

2001, Mrs Langa made a will in which she gave her estate to Ms Cope. She also signed a form severing the joint tenancy, but it was never lodged.

In 2002, Mrs Langa died. The testator became the sole owner of the Collingwood Park property. That property ended up forming the bulk of the testator's estate.

In 2006, the testator married Szczeslawa Delmaczynski. At the time of the marriage, the testator was 78 and Mrs Delmaczynski was 63 years of age. She had very little English and few assets.

In 2007, the testator executed his last will, under which he left his estate to his three Polish children.

In 2010, the testator died. His estate was relatively small. In October 2011, the estate was worth approximately $240,000. The court found that, by the end of trial, the net distributable value of the estate was likely to be about $97,000.

Ms Cope and Mrs Delmaczynski both applied for provision out of the testator's estate pursuant to s 41 of the *Succession Act 1981* (Qld).

The court found that the testator's three Polish children had a genuine need. One of them lived in circumstances of 'some hardship', another in 'quite severe hardship'. The court also found that Ms Cope had a moral claim to most of the estate. The testator's estate consisted almost entirely of a financial contribution made by Ms Cope's mother (the Collingwood Park property). Ms Cope had inherited nothing from her mother, despite the terms of Mrs Langa's will.

The court held that Mrs Delmaczynski had a moral and needs-based claim. She had had a happy marriage with the testator and had cared for him while he suffered from cancer. She had been dependent on the testator for her accommodation, her own resources being insufficient to secure alternative accommodation.

The court noted that, in a small estate such as the testator's, it was not possible to meet all the claims that had been shown to exist. There could be no truly satisfactory outcome.

The court held that, as it was inevitable that the Collingwood Park property would be sold, an award of the entire estate to Mrs Delmaczynski would enable her to rent alternative accommodation. The court decided that that would be the most appropriate outcome. The court also held that the parties' costs should be paid out of the estate on the indemnity basis.

III Costs - small estates

The outcome in *Cope* was disastrous for the beneficiaries. An estate that could have really helped the testator's children was not only taken from them but whittled away on legal costs. In the end, only Mrs Delmaczynski benefited, and then only to a relatively minor extent. The costs incurred (and recovered) by the parties were disproportionate to the size of the testator's estate.

In 2008, the New South Wales parliament enacted legislation that allowed for regulations providing for the fixing of a maximum figure for legal costs in a family provision application.[4] The Attorney-General had the following to say about the legislation:

> The bill addresses widely held concerns about the increasing and disproportionate costs of family provision proceedings… There are numerous instances of cost blowouts in family provision proceedings in New South Wales…[There] was a case in which costs approached $100,000 for an estate valued at less than $400,000. In that case, the applicant tried to appeal after failure in the first instance. The applicant's appeal was dismissed both because it was without merit and because further litigation might have left a beneficiary of the estate without her home. Another was a case regarding an estate of $412,000, which occupied a half-day hearing, where the costs were $90,000. The judge quite rightly described the costs as "excessive".
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> The majority of lawyers work hard to achieve a fair outcome for their clients. There is, however, a minority of practitioners who exploit the highly emotionally charged nature of these cases to their own benefit, on the assumption that all costs are paid out of the estate. The Supreme Court has recognised this problem and is currently implementing its own strategies, including intensive case management, the introduction of a new practice note for family provision, and a more restrictive approach to the recovery of costs.[5]

As foreshadowed by the Attorney-General, the New South Wales Supreme Court has since issued Practice Note No. SC Eq 7, which provides that a par-

4 See s 99(2) of the *Succession Act 2006* (NSW), which was inserted by the *Succession Amendment (Family Provision) Act 2008* (NSW).

5 New South Wales, *Parliamentary Debates*, Legislative Council, 26 June 2008, 9423-4 (John Hatzistergos).

ty's recoverable costs may be capped where the net distributable value of the estate is less than $500,000.[6] There are similar practice directions in Western Australia[7] and South Australia.[8]

These practice directions reflect the principle that costs should be proportionate to the amount claimed.[9] As costs orders affect the ultimate amount available for distribution, there will be some cases where it is appropriate for the court to cap the costs of a successful party, particularly where the estate is not large.[10] An order capping costs can be made at the end of the hearing[11] where it is possible for the court to make an informed assessment as to the reasonableness of the costs incurred and the appropriateness of the amount to be charged against the estate.[12]

Kossert v Ruggi (No 3)[13] is a relatively recent example of a court exercising its power to cap recoverable legal costs. In *Kossert*, the estate was worth about $225,000. The court held that the estate could not be allowed to bear legal costs of more than one-third of that amount, that is, $75,000 between all parties. The plaintiff had been successful in her application for provision out of the testator's estate and claimed $43,000 for legal costs. Of that amount, $3,000 was owed to her Northam solicitors and $40,000 was claimed by her Perth solicitors. The sum of $40,000 was less than half of what her Perth solicitors would have charged on a time billing basis. Nevertheless, the court held that the plaintiff's legal costs should be capped at $38,000. The defendant executor incurred legal costs in the sum of $61,738.70. Although the executor had, as the court acknowledged, acted reasonably in the litigation, her recoverable costs were capped at $37,000. The court made the following observations:

> A cap on legal costs will no doubt be an unpalatable result for those concerned. It is a product, in the end, without criticising anybody, of the stark economic reality of there being insufficient

6 Supreme Court of New South Wales, *Practice Note No. SC Eq 7* (26 March 2012) [24].

7 Supreme Court of Western Australia, *Consolidated Practice Direction* (2009) [9.2.2.15].

8 Supreme Court of South Australia, *Practice Directions* (2006) 8.1.

9 *Baychek v Baychek* [2010] NSWSC 987, [22]; *Sergi v Sergi* [2012] WASC 18, [50]-[52].

10 *Baychek v Baychek* [2010] NSWSC 987, [21].

11 *Nudd v Mannix* [2009] NSWCA 327; *Sergi v Sergi* [2012] WASC 18, [50].

12 *Brown v Grosfeld* [2011] NSWSC 1429, [23]

13 [2012] WASC 454.

> funds in this estate to go any further.[14]

Although there is no specific rule or practice direction in Queensland that deals with capping costs, it is clear that Queensland courts have the power to make such an order. For example, in *DW v RW (No 2)*,[15] the parties to a family provision application each had their costs capped at $80,000. The estate was worth $323,000. The applicant incurred costs of $105,203.95 whilst the respondent incurred costs of around $75,000. During the trial, the court indicated to the parties on a number of occasions that they should settle their dispute. The court held that, in light of those ignored warnings, the small size of the estate and the disproportionate nature of the claimed costs, the parties' costs should be capped. The court noted that the capped costs would still be a significant amount in proportion to the size of the estate but they would certainly be less than would otherwise be the case.

The Victorian Law Reform Commission ('VLRC') has recently recommended that Victoria's family provision legislation should specify that a court has the power to cap costs.[16] Although courts already have the power to cap costs under the *Civil Procedure Act 2010* (Vic),[17] the recommendation was made on the basis that it 'would embolden judicial officers and serve as a reminder to practitioners in the jurisdiction that [capping costs] was possible'.[18]

IV Criticisms

The VRLC noted the following criticisms (among others) about the operation of family provision law in Victoria:

- the lack of certainty that exists and the difficulties experienced by legal practitioners when advising clients about the validity and strength of the claim
- the perception of some members of the public that they do not truly have freedom to dispose of their property by will
- the high legal costs in family provision proceedings and the fact that they often borne by the estate[19]

It can be readily discerned why a decision such as *Cope* would engender simi-

14 [2012] WASC 454, [18].
15 [2013] QDC 189.
16 Victoria Law Reform Commission, *Succession Laws: Report* (August 2013) 121.
17 *Civil Procedure Act 2010* (Vic) s 65C(2).
18 Victoria Law Reform Commission, above n 16, 121 [6.116].
19 Victoria Law Reform Commission, above n 16, 99 [6.8].

lar criticisms of family provision law in Queensland. The beneficiaries in *Cope* not only had a genuine need but were undoubtedly owed moral obligations by the testator.[20] The testator decided that they were appropriate recipients of his estate. That decision was cast aside in exchange for the court's view that the testator's widow was a more deserving recipient. In the process, about 60% of the estate was consumed by legal fees.

The purpose of family provision legislation is to enable a court to override an individual's discretion with its own.[21] *Cope* brings into focus the extent to which a court should exercise its own discretion in substitution for that of the testator,[22] particularly when the size of the estate in question is small. Although the court acknowledged that it did not have jurisdiction to re-write the testator's will to accord with notions of fairness,[23] one could be forgiven for thinking that that is exactly what happened. Whether or not the result was fair, cases such as *Cope* amplify, not diminish, the criticisms of family provision applications recorded by the VRLC, namely, that they lead to arbitrary awards that limit testamentary freedom.

V Conclusion

If the proposition mentioned at the outset of this article is correct, namely that courts should discourage family provision applications in small estates, then it is hard to see how the decision in *Cope* achieves that objective. In particular, the fact that the parties were able to recover their costs on the indemnity basis may not only encourage potential applicants to make claims against small estates but it may also entice respondents to resist such claims. If there are no disincentives to litigate, the outcome can be the dissipation of the bulk of a small estate.

There is anecdotal evidence that suggests that the proportion of family provision applications that reach trial is quite small,[24] possibly as a result of the

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20 The court acknowledged those obligations: [2013] QDC 176, [84].

21 Queensland Law Reform Commission, *Report to the Standing Committee of Attorneys General on Family Provision: National Committee for Uniform Succession Laws,* Miscellaneous Paper 28 (December 2001) 1.

22 See Lee-ford Tritt, 'Liberating Estates from the Constraints of Copyright', (2006) 38 *Rutgers Law Journal* 109, 117-132, for a discussion of the benefits of testamentary freedom.

23 See *Serle v Walsh* [2006] QSC 377, [55].

24 Victoria Law Reform Commission, *Succession Laws: Consultation Paper – Family Provision* (October 2012) 17.

courts' encouragement of mediation.[25] Accordingly, it could be argued that the problem discussed in this case note is relatively insignificant. However, there is also evidence that indicates that the overall number of applications is on the rise.[26] If that is true then it is a cause for concern. A belief amongst lawyers that a claimant cannot suffer adverse costs consequences may lie behind an upswing in family provision litigation.

The possibility that a court may order that a party's costs be capped is a disincentive to litigate. In Queensland, the relevant Supreme and District Court practice directions[27] could be amended so that parties are required to acknowledge in their supporting affidavits that the court may cap their costs, even if they are successful after trial, where those costs are disproportionately large compared to the size of the estate. Judges could then make capping orders more comfortably in the knowledge that the litigants before them were aware from the outset that such an order could be made.

In *Sergi v Sergi,*[28] the court noted that a significant jurisprudence about the power to cap costs had begun to emerge. The court expressed the hope that a greater recognition of that power would become appreciated by the legal profession so that real effect could be given to the concept of proportionality.[29] Time will tell whether that hope is realised.

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25 See Supreme Court of Queensland, *Practice Direction No 8 of 2001* and District Court of Queensland, *Practice Direction No 8 of 2001*, which prompt the parties to participate in an alternative dispute resolution process.

26 John Kavanagh, 'A test of wills', *The Sydney Morning Herald* (Sydney), 28 September 2011, 4; Myles McGregor-Lowndes and Frances Hannah, 'Every player wins a prize? Family provision applications and bequests to charity', *The Australian Centre for Philanthropy and Nonprofit Studies* (Queensland University of Technology, Brisbane, Queensland) October 2008, iii.

27 Supreme Court of Queensland, *Practice Direction No 8 of 2001* and District Court of Queensland, *Practice Direction No 8 of 2001*.

28 [2012] WASC 18, [51]. The court specifically referred to *Baychek v Baychek* [2010] NSWSC 987, *Nudd v Mannix* [2009] NSWCA 327 and *Ireland v Retallack (No 2)* [2001] NSWSC 1096.

29 *Sergi v Sergi* [2012] WASC 18, [52].

BOOK REVIEWS