Costs rules in succession proceedings

The Attorney-General has asked the Commission to review 'the application of costs rules in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court'.

This paper describes costs in succession proceedings generally. See the Commission's consultation papers on wills and family provision for more detailed discussion of the costs rules that are relevant to those topics.

Succession proceedings

Several procedural steps need to be taken before a deceased person's property (or 'estate') can be distributed to family, friends and other beneficiaries. Each step can give rise to proceedings (or 'litigation') about the control, management and distribution of the property.

The following are some examples of the reasons why succession proceedings may arise:

- The deceased person did not leave a will.
- There is a dispute about which of two or more documents is the will-maker's final valid will.
- The will does not appoint an executor or appoints someone who is unable to take on the responsibility.
- The meaning of the will is not clear.
- Someone claims that the will-maker was not of sound mind or was acting under the undue influence of someone else when they signed the will.
- The executor or administrator is having difficulty gathering in the assets of the deceased person, such as when someone living in a property that has to be sold refuses to vacate it.
- A family provision application is made by someone who wants a share of the estate, or a greater share than they otherwise would be entitled to receive.

Almost all succession law cases are heard in the Supreme Court. Family provision applications can be heard in either the Supreme Court or the County Court.

The executor appointed by the will, or an administrator appointed by the Supreme Court, represents the estate in these proceedings. They may have initiated the litigation (for example to protect some of the assets from being removed from the estate) or they may be responding to litigation that someone else has begun (for example because there is doubt about the validity of the will).

Costs orders

After deciding the outcome of the litigation, the court may make what is known as a costs order. An order of this type indicates what the parties to the proceedings have to pay.

Whether a costs order is made, and what it determines, is a decision for the court though it is guided by statutory rules and case law. The relevant statutory rules for the Supreme Court and the County Court are the same and are set out in the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) and *County Court Civil Procedure Rules 2008* (Vic).

The general rule is that costs 'follow the event'. In other words, the unsuccessful party pays the costs of the successful party. Although this rule is applied in succession proceedings there are exceptions, notably in family provision cases.

A number of standard types of costs orders are available to the court. Each covers a different combination of expenses and is calculated differently, but they rarely cover all of the expenses that the parties to the proceeding actually incur.

Party and party basis

When an unsuccessful party is required to pay the costs of the successful party, those costs are usually assessed on a 'party and party' basis.[1] As well as paying for all their own expenses, the unsuccessful party pays all costs 'necessary or proper for the attainment of justice or for enforcing or defending the rights' of the successful party.[2]

Not all of the successful party's expenses are paid by the unsuccessful party. The amount is limited in two ways:

- it is confined to costs for legal services that were necessary in order to participate in the court proceedings
- it is calculated in accordance with a scale of costs set out in the court rules and may be less than what the successful party was actually charged for those services.

Solicitor and client basis

When an unsuccessful party is required to pay costs on a 'solicitor and client' basis, they pay 'all reasonable costs reasonably incurred and of reasonable amount'[3] by the successful party. These costs extend to all or most of the costs paid by the successful party to their lawyer.

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[1] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.31; *County Court Civil Procedure Rules 2008* (Vic) r 63A.31.

[2] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.29; *County Court Civil Procedure Rules 2008* (Vic) r 63A.29.

[3] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.30; *County Court Civil Procedure Rules 2008* (Vic) r 63A.30.

Indemnity basis

The court may order the unsuccessful party to pay on the much broader basis of 'indemnity costs'.[4] This means that the unsuccessful party pays all the successful party's costs 'except in so far as they are of an unreasonable amount or have been unreasonably incurred'.[5]

When costs may be paid out of the estate

In any succession proceeding, some or all of the costs may be paid out of the estate. How much is paid will depend on the particular circumstances of the case. If there is complex or lengthy litigation, the costs can significantly deplete the amount of property available for distribution to the beneficiaries.

The court rules allow for the estate to pay the costs incurred by executors and administrators that are not paid by anyone else.[6] The costs are assessed on a 'solicitor and client' basis unless the Court orders otherwise.[7] In practice, they are often assessed on an indemnity basis. In this way, whether or not they are successful, the executor or administrator does not necessarily have to pay personally for defending the will or the estate.

In some exceptional cases, the general rule that 'costs follow the event' will not be applied. Instead, costs that would normally be paid by an unsuccessful party are met from the estate. Examples of where this may occur are:

- in so-called 'testator's fault' cases, where the litigation arises from the conduct of the will-maker, such as in cases involving the interpretation of wills
- where the unsuccessful party has reasonably been led into the litigation by a genuine belief in their case
- where the unsuccessful party does not have the means to pay, and making a costs order against them would be 'wholly symbolic'.[8]

An executor or administrator who is concerned about whether they should prosecute or defend a claim on behalf of the estate, or appeal a decision of the court, can seek the direction of the court as to whether to become involved in

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[4] If satisfied that the unsuccessful party commenced or continued a case which was so hopeless as to demonstrate 'some wilful disregard of known facts or clearly established law': *Klement v Randles* [2010] VSCA 336 (17 December 2010) [34].

[5] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.30.1; *County Court Civil Procedure Rules 2008* (Vic) r 63A.30.1.

[6] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.26; *County Court Civil Procedure Rules 2008* (Vic) r 63A.26. For an example of a case in which the Court ordered otherwise, due to the conduct of the defendant executor, see *Brown v Sandhurst Trustees Ltd (No 2)* [2009] VSC 406 (16 September 2009).

[7] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.33; *County Court Civil Procedure Rules 2008* (Vic) r 63A.33.

[8] *Klement v Randles* [2010] VSCA 336 (17 December 2010) [21]–[24].

the litigation.[9] The cost of seeking this advice is paid out of the estate on a 'solicitor and client' basis. Ordinarily, an executor or administrator who proceeds with litigation, even though the court has determined that they should not do so, and is unsuccessful, will not have their costs paid out of the estate.[10]

In a number of situations, the executor has no choice but to become involved in litigation. For example, the executor is required to act as defendant in family provision proceedings[11] and is bound to initiate legal proceedings when seeking to prove the final will and obtain a grant of probate.[12]

Consultation

As judges are privy to the legal and factual details of each case, arguably they are well placed to apply the costs rules to each case before them. At the general level under discussion in this paper, it could be said that the costs rules work well and there is no need for legislative reform. However, there may be scope to improve or clarify current rules or practices.

The Commission would be pleased to receive views about the operation of the costs rules in succession proceedings generally.

> **How, if at all, could the general application of costs rules in succession proceedings be improved?**

Further questions about cost rules as they apply in family provision and statutory wills cases are asked in the Commission's consultation papers on family provision and wills.

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[9] See *Re Beddoe* [1893] 1 Ch 547 discussed by the High Court of Australia in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* (2008) 237 CLR 66, 86–7, 93–4. For discussion of appeals by trustees, see *Australian Incentive Plan Pty Ltd v Attorney-General for Victoria (No 2)* [2012] VSCA 251 (28 September 2012).

[10] For the position where a trustee acts contrary to the court's advice, including examples where the costs have still been met by the estate, see *Australian Incentive Plan Pty Ltd v Attorney-General for Victoria (No 2)* [2012] VSCA 251 (28 September 2012) [8]–[11].

[11] *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) r 16.04 (1).

[12] *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 2A.02.