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THE DYNAMICS AND DILEMMAS OF COSTS ORDERS UPON AN EXERCISE OF "WELFARE" JURISDICTION

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T O P I C S

INTRODUCTION

1 A summary review of the "costs jurisdiction" of the Supreme Court of NSW in cases involving an exercise of protective, probate or family provision jurisdiction is warranted by the continuing importance of questions of costs in the operation of those idiosyncratic jurisdictions of the Court and the evolution of the Court's procedures in dealing with costs questions.

2 In this paper the expression "welfare jurisdiction" is used as a collective description of the protective, probate and family provision jurisdictions, each of which focuses upon management of the affairs of a central personality (a vulnerable person or a dead person) and the Court's engagement with the community of that personality rather than with competing claims of right by competent adversaries.

3 The focus for attention is upon costs in civil proceedings. Costs in criminal proceedings have a different history and operate according to different imperatives in a different procedural context: *Latoudis v Casey* (1990) 170 CLR 534 at 557.

4 Although the "costs jurisdiction" of the Court is essentially statutory it is informed by legal history: GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, Australia, 4th ed, 2018), paragraphs 6.1-6.13. The Common Law Courts of England are commonly thought to have possessed no inherent (non statutory) jurisdiction to award costs in civil proceedings, although costs might have been taken into account in the assessment of damages. On the other hand, the Court of Chancery exercised a wide, inherent discretion not only as to the circumstances under which costs were awarded but also as to the measure and extent of the costs: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 182-183. With the adoption of a *Judicature Act* system of court administration, courts such as the Supreme Court of NSW came to enjoy a legislative jurisdiction to award costs conceptually similar to that of the Court of Chancery.

5 Although the Court's costs jurisdiction is essentially statutory, and its statutory jurisdiction is generally construed beneficially as a judicial power to be exercised judicially, there may be scope for the supervision of costs in civil proceedings in the operation of an inherent jurisdiction (grounded in the status of the Court as a superior court of record or found in section 23 of the *Supreme Court Act* 1970 NSW) to control its own processes, to prevent abuses of process and to supervise or discipline legal practitioners as officers of the Court: see generally, *Hartnett v Bell* [2023] NSWCA 244 at [123], extracted below.

6 This paper outlines conventional approaches to costs questions upon an exercise respectively of the protective, probate and family provision jurisdictions of the Court and canvasses questions arising from current experience of those jurisdictions in practice.

7 Notice is taken of Practice Note SC Eq 7 (relating to Family Provision proceedings and, recently, Probate Proceedings) in its current form, issued on 13 June 2024 with a commencement on 17 June 2024.

8 The paper is predicated upon an acknowledgement that the Court exercises its costs jurisdiction in an institutional framework that includes legislation bearing upon:

(a) case management principles that specifically refer to questions of costs: *Civil Procedure Act* 2005 NSW, sections 56(1), 56(5), 57(1)(d) and 60.

(b) rules for the assessment of costs: *Uniform Civil Procedure Rules* 2005 NSW, rules 42.2 and 42.5, read with the definition of "ordinary basis" (an expression used in UCPR rule 42.2) defined by CPA section 3(1); and the *Legal Profession Uniform Law Application Act* 2014 NSW, sections 76, 172(1) and 172(2).

(c) costs orders against legal practitioners: *The Legal Profession Uniform Law Application Act* 2014, section 62 (incorporating Schedule 2); and CPA section 99, read with Practice Note SC Gen 5 entitled "Cost orders against legal practitioners".

(d) regulation of costs agreements entered into between lawyers and clients, and the provision of costs estimates by a lawyer to a client: *Legal Profession Uniform Law* (NSW), sections 174-178 (costs disclosure) and sections 179-185 (costs agreements); *Legal Profession Uniform Law General Rules 2015, rule 72A*

9 In a particular case, it may be necessary to navigate some or all of this contextual legislation, bearing in mind that provisions such as CPA section 99 do not displace, and may be informed by, the inherent jurisdiction of the Court in the supervision of legal practitioners admitted to practice by the Court, commonly explained by reference to *Myers v Elman* [1940] AC 282 at 319: *Re Felicity*; *FM v Secretary, Department of Family and Community Services (No 4)* [2015] NSWCA 226 at 19 at [18]-[20].

10 The focus of this paper is not upon sanctions able to be imposed on a lawyer or any other party acting badly, but upon principles and practice affecting the ordinary conduct of proceedings upon an exercise of protective, probate or family provision jurisdiction.

THE STANDARD LEGISLATION

11 The standard legislation empowering the Supreme Court of New South Wales to make an order for the payment of costs in civil proceedings (principally, the *Civil Procedure Act* 2005 NSW, section 98 and the *Uniform Civil Procedure Rules* 2005 NSW, rules 42.1, 42.2 and 42.4) can be taken, uncontroversially, to embody a regime that recognises that orders for costs are in the discretion of the Court; wide though that discretion is, it must be exercised judicially; and the starting point for the determination of a question of costs is generally that "costs follow the event"; but, in a particular case, the Court can "otherwise order".

12 In *Northern Territory v Sangare* (2019) 265 CLR 164 at 172-173 [24] the High Court of Australia summarised essential features of a statutory power to award costs such as that embodied in CPA section 98 (omitting footnotes):

> "It is well established that the power to award costs is a discretionary power, but that it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation. While the width of the discretion 'cannot be narrowed by a legal rule devised by the Court to control its exercise', the formulation of principles according to which the discretion should be exercised does not 'constitute a fetter upon the discretion not intended by the legislature'. Rather, the formulation of principles to guide the existence of the discretion avoids arbitrariness and serves the need for consistency that is an essential aspect of the exercise of judicial power."

13 So far as material, CPA section 98 is in the following terms (with emphasis added):

> **"98 Courts powers as to costs** (cf Act No 52 1970, section 76; SCR Part 52A, rules 5, 6, 7 and 8; Act No 9 1973, section 148B; Act No 11 1970, section 34)
>
> (1) *Subject to rules of court and to this or any other Act—*
>
> *(a) costs are i*
>
> *n the discretion of the court, and*
>
> *(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and*
>
> *(c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.*
>
> (2) Subject to rules of court and to this or any other Act, a party to proceedings may not recover costs from any other party otherwise than pursuant to an order of the court.
>
> (3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.
>
> (4) In particular, at any time before costs are referred for assessment, *the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to—*
>
> *(a) costs up to, or from, a specified stage of the proceedings, or*
>
> *(b) a specified proportion of the assessed costs, or*
>
> *(c) a specified gross sum instead of assessed costs, or*

(d) *such proportion of the assessed costs as does not exceed a specified amount.*

(5) …

(6) *In this section, costs include—*

(a) *the costs of the administration of any estate or trust*, and

(b) in the case of an appeal to the court, the costs of the proceedings giving rise to the appeal, and

(c) in the case of proceedings transferred or removed into the court, the costs of the proceedings before they were transferred or removed."

14 UCPR rules 42.1, 42.2 and 42.4 are in the following terms:

"42.1 General rule that costs follow the event

Subject to this Part, 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.

42.2 General rule as to assessment of costs

(cf SCR Part 52A, rule 32; DCR Part 39A, rule 10; LCR Part 31A, rule 6)

Unless the court orders otherwise or these rules otherwise provide, costs payable to a person under an order of the court or these rules are to be assessed on the ordinary basis.

42.4 Power to order maximum costs

(cf SCR Part 52A, rule 35A)

(1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.

(2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party--

(a) has failed to comply with an order or with any of these rules, or

(b) has sought leave to amend its pleadings or particulars, or

(c) has sought an extension of time for complying with an order or with any of these rules, or

(d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap--

(i) progress of the proceedings to trial or hearing, or

(ii) trial or hearing of the proceedings.

(3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap--

(a) progress of the proceedings to trial or hearing, or

(b) trial or hearing of the proceedings.

(4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1)."

15 Both CPA section 98 and UCPR rule 42 must be read in the context of the definition of "costs" in CPA section 3(1):

> "**Costs**, in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses, and remuneration".

16 The rule of practice that "costs follow the event" operates most effectively as a general rule in adversarial proceedings between competent parties engaged in a contest about competing claims of right. The determination of a common law claim to damages involving as an "event" a binary choice between outcomes (verdict for the plaintiff or verdict for the defendant) offers a simple model for a general rule that "costs follow the event".

17 Some equity proceedings involve similar binary choices (even though equitable relief is characteristically discretionary whereas, statute apart, a common law cause is characteristically otherwise) where, for example, a party, by reference to equitable principles, resists the enforcement of a legal right. However, in common with the welfare jurisdictions equity proceedings focused upon the management (administration) of a fund or other property invite broader perspectives of decision-making about costs than can be accommodated by a general rule that "costs follow the event".

18 The qualification on the general rule that the Court may "otherwise order" has much work to do. Each case must be considered on its merits. Some cases require particular consideration of the conduct of parties rather than the type

of jurisdiction exercised by the Court. Other cases, because of the type of jurisdiction exercised, require an understanding of the purpose and imperatives of a class of proceedings.

19 Where, in proceedings suited to an application of a general rule that costs follow the event, one of the parties lacks capacity to manage the proceedings that particular problem can be addressed by the appointment of a tutor for the incapacitated person. In the absence of a special order protecting the tutor from exposure to personal liability, an incident of the office of a tutor is exposure to a risk of costs if the incapacitated person represented by the tutor is ordered to pay costs. In the absence of special orders, the general rule that costs follow the event operates according to its terms.

20 Where the general rule that costs follow the event operates according to its terms, exceptional circumstances that warrant a departure from the rule are generally limited to cases in which a party otherwise "entitled" to a costs order has achieved only nominal success, unnecessarily incurred costs or engaged in misconduct that would render an unqualified order for costs against the unsuccessful party unjust.

21 The general rule is based upon the propositions that a successful party should be compensated (more commonly said "indemnified") for costs incurred in vindicating an entitlement, and that an unsuccessful party should, by an order for costs, bear the burden of the successful party's costs. Costs orders are essentially compensatory in character, not punitive.

THE "PURPOSE" FACTOR AFFECTING COSTS QUESTIONS

22 The purpose of costs orders in adversarial proceedings between competent parties engaged in a contest about competing claims of right is not only to compensate a successful party for being forced to go to Court. The known prospect of an adverse cost order serves as an incentive to parties on both sides of the record to compromise a claim.

23 The general rule that costs follow the event that operates in proceedings concerning competing claims of right by competent adversarial parties does not operate according to the same logic in a different context.

24 Notably, this is so when the subject matter of proceedings is not competing claims of right contested by competent adversaries but, in the public interest, management of the affairs of a person who, by reason of incapacity or death, is not able to manage his or her own affairs. There is a sense in which all Court proceedings involve a public interest element - the due administration of justice. But that said, competent adversaries can be left to consult their own best interests. There is a special public interest in the conduct of proceedings affecting a person who, by reason of incapacity or death, is unable to protect his or her interests. In the conduct of proceedings, they are not wholly present even if a person is appointed to represent his or her interests. Typically, proceedings of this nature may affect not only the interests of a central ("absent") personality, but the interests of people not formally parties to the proceedings.

25 Although not free of adversarial contests, proceedings of this character have a managerial flavour that distinguishes them from an adversarial contest between competing claims of right.

26 Proceedings involving an exercise of protective, probate or family provision jurisdiction (which, for want of a better name, might be labelled part of the Court's "welfare jurisdiction") are classic illustrations of a need, global rather than particular in nature, to qualify the general rule that "costs follow the event". They have generated their own special rules of practice in service of the purpose served by the jurisdiction invoked. Generically, the Court implicitly "otherwise orders" when it applies special, jurisdiction-based cost "rules", better viewed as conventional "guidelines".

27 The purposive character of these special guidelines can be seen, here, in a comparison between the purpose served by each of the welfare jurisdictions of the Court and that the guidelines conventionally applied upon the exercise

of each jurisdiction. Each head of the Court's jurisdiction is governed by the purpose for which it exists. Each has a different functional imperative that needs to be recognised in its definition and solving of problems and in the determination of disputes about the costs of proceedings.

COSTS IN PROTECTIVE PROCEEDINGS

28 The protective jurisdiction (based, historically, on the English Lord Chancellor's lunacy jurisdiction, his infancy or wardship jurisdiction or, as they may be variously described, his *parens patriae* jurisdiction) exists for the explicit purpose of taking care of those who cannot take care of themselves: *Secretary*, *Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 258-259. The Court focuses upon the welfare and interests of a person incapable of managing his or her affairs, testing everything against whether what is done or left undone is or is not in the interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.

29 The purposive nature of the protective jurisdiction dominates all decision-making upon an exercise of the jurisdiction, including decisions about costs.

30 A classic insight to procedural norms on an exercise of the jurisdiction is found in HS Theobald, *The Law Relating To Lunacy* (London, 1924) at page 382:

> "… [Assistance] may be obtained from the Chancery practice [in dealing with practice and procedure in Lunacy]. But the important distinction must be borne in mind that the Chancery practice is directed to litigation, and that the Lunacy practice should be directed to administration without strife in the simplest and least expensive way".

31 A common problem is that advocates unaccustomed to the jurisdiction allow themselves to be diverted by adversarial tactics, litigious approaches to evidence and arguments, and collateral questions about the control of, or accounting for, property - questions that often can only be addressed effectively once a decision is made about the capacity of a vulnerable person

for self-management and, if in need of protection, the identity of a protected estate manager. Contrary to the intuitive instincts of an inexperienced advocate, an aggressive assertion of a right to control the person and estate of a vulnerable person can be counter-productive, ringing alarm bells about a need for a protective regime of management.

32 Upon an exercise of protective jurisdiction, because of the purposive nature of the jurisdiction (confirmed by *Marion's Case*) and accumulated experience, the Court may proceed on the basis, not that costs follow the event, but that it is generally necessary, and appropriate, to ask, "what, in all the circumstances, seems the proper order to make in relation to costs?

33 A classic statement of, and justification for, that principle is found in the judgment of Powell J in *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640E-G (with editorial adaptation:

> "… Costs are, of course, in the discretion of the court, but that discretion, being a judicial one, must be exercised in accordance with established principle. Although the principle generally to be applied in *inter partes* litigation is that costs follow the event, questions of costs in proceedings [upon an exercise of protective jurisdiction] have, over the years, come to be regarded as exceptions to that general principle. That this should be so is due to the facts, first, that in the normal case, proceedings [upon an exercise of protective jurisdiction] are taken in the interests of those thought to be incapable of protecting themselves and their property; and, second, that those who would otherwise be concerned to act to protect [a person in need of protection] might be deterred from acting if they were to expose themselves to the risk of costs if their application, even though reasonably made, were unsuccessful. In light of these facts, the principle normally applied in proceedings [upon an exercise of protective jurisdiction] is that the court will make that order which, in all the circumstances, seems proper".

34 A further exposition of that principle, in the context of an exercise of protective jurisdiction relating to children, can be found in *CAC v Secretary, Department of Family & Community Services (No 2)* [2015] NSWSC 344 at [14]-[21]:

> "[14] The Supreme Court is not a "no costs" jurisdiction. Although the Court has a wide costs jurisdiction, the general rule remains that costs follow the event, unless the Court otherwise orders. Parties to proceedings in the Court conduct litigation at their own risk as to costs.

[15] In the protective jurisdiction, because of the purposive nature of the jurisdiction (confirmed by *Marion's Case* (1992) 175 CLR 218 at 258-259) and accumulated experience, the Court may proceed on the basis that it is generally necessary, and appropriate, to ask "What, in all circumstances, seems the proper order to make in relation to costs?"

[16] This question gives due recognition to the following factors, amongst others:

(a) The protective jurisdiction of the Court is generally governed by the "welfare principle" (that the welfare and interests of each person in need of protection, here the plaintiff's children, are the paramount consideration) and an associated concern to ensure that whatever is done, or not done, is done in the interests, and for the benefit, of the particular person in need of protection.

(b) The Court needs to be alive to the possibility that private individuals who would otherwise be concerned to act to protect a person in need of protection might be deterred from acting if bound to submit to a costs order on an unsuccessful application made by them to the Court, even though reasonably made: *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640F. Cf, *Wilson v Department of Human Services; Re Anna (No 2)* [2011] NSWSC 545 at [95]-[108].

(c) Taking into account the best interests of children the subject of proceedings, the Court needs to hasten slowly in burdening a parent with an obligation to pay costs, particularly in circumstances in which a final outcome for the children in Children's Court proceedings remains undetermined: *Re Kerry (No 2) - Costs* [2012] NSWCA 194 at [12] and [17]-[18].

(d) Proceedings relating to the welfare of children, or any other person in need of protection, are not adversarial in the sense encountered in ordinary civil litigation but, rather, are attended by a strong, special public interest element.

[17] Where proceedings in the Court invoke not only the Court's protective jurisdiction, but also its jurisdiction (presently embodied, largely, in section 69 of the *Supreme Court Act* NSW) to grant administrative law relief, on an application for judicial review, different considerations may apply than those dominant in purely protective proceedings. That is because there is a separately identifiable public interest element, and a more adversarial flavour, in the supervision of a statutory tribunal or public official, than there is in protective proceedings. Where the Court's administrative law jurisdiction is invoked, there may be more scope for operation of the policy that "costs follow the event" than there is in purely protective proceedings, where the operation of the "welfare principle" militates against adversarial litigation.

[18] That said, every case falls to be determined on its particular facts.

> [19] In these proceedings, starting from with the proposition that "costs follow the event", but moving quickly to the question "What is the costs order which, in all the circumstances, seems proper?", the supplementary question arises: What is meant by "proper"?
>
> [20] It is not necessary to attempt an exhaustive definition of that term, "proper", or to elevate it beyond its station. The Court has to deal with a wide variety of situations, as variable as the human condition, in exercise of its protective jurisdiction, and in the supervision of the Children's Court.
>
> [21] Nevertheless, in these proceedings, it might be said that costs should not follow the event if, although there is a party capable of being characterised as "the losing party" (uncontroversially, the plaintiff), that party has acted on reasonable (albeit, possibly, mistaken) grounds and has acted reasonably in the conduct of proceedings in the Court."

35 Where a party to protective proceedings unsuccessfully pursues an application for relief in an adversarial manner, it may be that the proper order is for that party to pay or bear the costs of the proceedings in whole or part or, at least, be deprived of an order which might otherwise have been made for his or her costs be paid by or out of the estate of a protected person in whose interests proceedings have been determined, as occurred in *SC v Ability One Financial Management Pty Ltd* [2024] NSWSC 637.

36 As Slattery J observed in *FC v SC (No 2)* [2023] NSWSC 376 at 18:

> "Relevant considerations in determining a proper costs order in the protective jurisdiction include the following matters. A party conducting proceedings in an unnecessarily adversarial matter may be required to bear the costs of the whole or part of the proceedings: C*AC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [131]. The making of an order for costs should not impact on the incapable person's security or wealth: *Bolton v Sanders (No. 2)* [2003] VSC 409 at [2]. The respective resources of the parties to the proceedings are relevant to the exercise of the discretion: *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [369]. The Court may refrain from imposing an obligation to pay costs, if it could adversely impact on the relationships of or care of the person in need of protection: *Re K Statutory Will* [2017] NSWSC 1711 at [17]."

37 The Court's sensitivity to the personal circumstances of an incapable person, and his or her relationships with "significant others", finds expression not only upon a consideration of what may be a "proper" order as to costs but also upon consideration of whether a breach of duty by a "guardian" (by whatever

name known) can, and should, "appropriately" be excused: *C v W (No 2)* [2016] NSWSC 945.

COSTS IN PROBATE PROCEEDINGS

38 The probate jurisdiction (formerly described as "ecclesiastical jurisdiction", historically derives from England's Ecclesiastical Courts) looks to the due and proper administration of a particular estate, having regard to any duly expressed testamentary intentions of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* (1900) P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191.

39 Perhaps the most cited, articulated statement of the principles to be applied in NSW in the determination of costs questions in probate proceedings is that of Powell J in *Re Hodges*; *Shorter v Hodges* (1988) 14 NSWLR 698 at 709D-G:

> "Costs are, of course, in the discretion of the court, but that discretion, being a judicial, and not an unfettered, one must be exercised in accordance with established principle.
>
> The general principle to be applied in adversary litigation is that costs follow the event, those costs being taxed on a party and party basis. However, over the years, a number of exceptions to this general rule have come to be recognised. In the field of probate litigation, two such exceptions have come to be recognised, they being:
>
> 1. where the testator has, or those interested in residue have, been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate;
>
> 2. if the circumstances led reasonably to an investigation in regard to the document propounded, the costs may be left to be borne by those who respectively incurred them: see, eg, *Mitchell and Mitchell v Gard and Kingwell* (1863) 3 Sw & Tr 278; 164 ER 1280; *Orton v Smith* (1873) LR 3 P & D 23; *Wilson v Bassil* [1903] P 239; *Spiers v English* [1907] P 122; *Kenny v Wilson*; *In the Estate of Holtam; Gillett v Rogers* (1913) 108 LT 732.
>
> To these exceptions to the general principle should, perhaps, be added the principle that, although a legal personal representative may be entitled to recover from a party to litigation costs only on a party and party basis, he, as a fiduciary, retains the right to an indemnity from the estate, and, thus, may

have recourse to the estate for any difference between his costs on a trustee basis and the costs recovered from a party."

40 A useful elaboration of these principles by reference to the primary authority of *Mitchell v Gard* (1863) 164 ER 1280, recognising that in practice the principles have been often honoured in the breach, is the judgment of White J in *Gray v Hart; Estate of Harris (No 2)* [2012] NSWSC 1562 at [4]-[11]:

> [4] It is well established that the principles applicable to the awarding of costs in probate litigation differ from those applicable to ordinary civil suits where the principle that costs follow the event usually means that the losing party pays the winning party's costs.
>
> [5] The reason for the difference is that in a probate suit the court is concerned to give effect to the last will of a free and capable testator or testatrix. There is a public interest in keeping faith with the wishes of a capable will-maker that requires an investigation into the validity of the propounded wills. A grant of probate in solemn form operates in rem, that is, it binds the world, or at least those affected persons who have notice of the proceedings. Irrespective of what the parties might want, the court will not pronounce against a will unless there is material to satisfy it that the deceased did not have capacity, or that there is some other reason why the will is invalid. A grant is not made or withheld solely by the consent of the parties. There is, therefore, a public interest in the incurring of some level of costs in cases where there is genuine doubt about the validity of a will.
>
> [6] In 1863, Sir JP Wilde established the principles that have been generally followed ever since and did so for the avowed purpose of assisting a suitor to foresee the penalties under which he or she launched litigation (*Mitchell v Gard* (1863) 3 Sw & Tr 275 at 277; 164 ER 1280 at 1281). His Lordship said that the basis of the principles:
>
> *"... should rest upon the degree of blame to be imputed to the respective parties; and the question, who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.*
>
> [7] His Lordship then referred to its being:
>
> *"... the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator",*
>
> and that:
>
> *"If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it."*

[8] It was for this reason that it had become common to relieve the losing party from costs, if the losing party was chargeable with no other blame than that of having failed in a suit which there was reasonable grounds to bring.

[9] The so-called rules, or more accurately, principles, were enunciated as follows (at 278):

"From these considerations, the Court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent."

[10] His Lordship acknowledged that there were two competing reasons of policy which affect the exercise of the discretion as to how costs should be ordered and said (at 279):

"It is of high public importance that doubtful wills should not pass easily into proof by reason of the cost of opposing them. It is of equal importance that parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others. These opposite reasons appear to have alternately swayed the decisions to be found in the books. It is the desire of the Court to keep both in view, while yielding to neither, and it is in this spirit that the above rules have recommended themselves for adoption."

[11] In England the learned authors of *Tristram and Coote's Probate Practice*, Butterworths LexisNexis, 29th ed, have observed at [40.13] that, although these principles are not exact rules, nor exhaustive, nonetheless, since they were first enunciated in 1863, they have been almost universally acted on. They have been frequently restated and applied also in this jurisdiction (e.g. *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 709; *Shorten v Shorten (No. 2)* [2003] NSWCA 60 at [15])."

41 In later paragraphs of White J's judgment his Honour examined judgments of the Court, at first instance and in the Court of Appeal, which appear to have qualified the principles derived from *Mitchell v Gard*, recognising that:

(a) the two principles identified by Sir JP Wilde can tend to overlap; and

(b) considerations of fairness might point to the whole of the costs of the proceedings being paid out of the deceased's estate in a

case in which the mental frailty of a testator (rather than any fault on his or her part) in the public interest reasonably calls for an investigation as to the validity or otherwise of his or her will.

42 Extracts from paragraphs [14], [15], [17] and [19] of White J's judgment summarise his response to a shift in focus from the principles enunciated in *Mitchell v Gard*:

> "[14] … [This] seems to me to be a qualification or departure from the principle stated in *Mitchell v Gard* where the principles were enunciated by reference to the question of who was at fault. It was only if the testator was at fault, such that it could be said that the testator caused the litigation, that the costs of the unsuccessful party were to be paid out of the estate. In the sense to which Sir J P Wilde was referring in *Mitchell v Gard*, one would not think that the testator could be said to be the cause of the litigation merely because he made the will when suffering from some mental frailty. …:
>
> [15] … [The] proposition that a party who reasonably but unsuccessfully propounds or challenges the will and so brings about the necessary investigation should no more have to bear his own costs than pay the costs of the other party focuses on only one of the reasons for policy described in *Mitchell v Gard* rather than giving weight to the other important policy consideration that parties not be tempted into fruitless litigation by the knowledge that their costs will be defrayed out of the estate. …
>
> [17] It is … said that the two exceptions tend to overlap. No doubt this is true, but the first exception would subsume the second in most cases if it were found that a testator who made a will when frail was for that reason the cause of the litigation. …
>
> [19] … [It] appears to me, consistently with the rationale of the principles in *Mitchell v Gard*, that where the categories do overlap, if the testator is properly seen as the cause of the litigation, the usual order is that costs be paid out of the estate. It is where the testator is not the cause of the litigation, but an investigation is reasonably called for, that there is usually no order as to the unsuccessful party's costs. Of course if there is no reasonable cause for investigation, that is, if the unsuccessful party has not acted reasonably, then he or she will pay the costs."

43 An opportunity, if not an obligation, to review the principles derived from *Mitchell v Gard* (1863), as summarised by Powell J in *Re Hodges*; *Shorter v Hodges* and explained by White J in *Gray v Hart; Estate of Harris (No 2)*, may be found in the novel provision included as paragraph 41 in the current version of Practice Note SC Eq 7:

> "[41] In probate matters, no presumption with respect to the making of an order for costs arises by reason only of the fact that the testator was the cause of the litigation or because the circumstances led reasonably to an investigation concerning the testator's will."

44 This declaration is perhaps an invitation to reassess the rationale for the probate jurisdiction's routine departure from the general rule that "costs follow the event"; but any implied assumption that the two "principles" associated with *Mitchell v Gard* bear the character of "presumptions" is open to challenge.

45 If the policy factors identified in *Mitchell v Gard* are open to review, one wonders whether a principle "enunciated by reference to the question of who was at fault" would rank prominently in any hierarchy of factors to be taken into account in the modern era of estate administration, much more complex than the comparatively simple environment of 1863.

46 Perhaps any restatement of principles governing orders for costs in probate proceedings should take the form of a general principle (such as "costs follow the event unless the Court otherwise orders"), coupled with recognition of the general width of the Court's costs jurisdiction (as reflected in CPA section 98), taking into account specific factors reflective of modern policy concerns such as the purposive nature of the probate jurisdiction; the need to accommodate reasonable inquiries about the existence of testamentary instruments, estate assets and the medical condition of a will maker; case management principles, including the just, quick and cheap determination of real issues and proportionality of costs; the reasonableness of conduct on the part of all parties; and the representative character of parties propounding a will or advancing a case for an intestacy.

47 In any event, a robust costs regime is required to deal with a wide variety of probate cases (encountered in interlocutory proceedings, not merely at the end of a final hearing) in which, although probate proceedings are "interest proceedings", even a nominal interest in an estate will suffice to give a party standing to contest a will - and because, acknowledging the public interest in

giving effect to duly expressed testamentary intentions, orders for security for costs can rarely be made or effectively enforced.

48 In approaching questions of costs in probate proceedings the idiosyncratic features of the probate jurisdiction (recognised in *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671 at [60]-[62]) demonstrate how far removed a probate suit may routinely be from a simple adversarial contest between competing claims of right:

> "[60] Probate proceedings have several idiosyncratic features (apart from an ever-present, potential need to evaluate evidence concerning the conduct or words of a person, or persons, "absent" by reason of death or incapacity):
>
> (a) If a will is to be given full legal effect, it needs to be "proved" to be the last will of a free and capable testator, proof of which is signified to the public by admission of the will to probate by an order of the court. A grant of probate, or letters of administration, represents both an order of the Court and an instrument of title: *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [228]-[233] and [275]-[283].
>
> (b) Probate litigation is "interest litigation" in the sense that one must have an identifiable (albeit not necessarily substantial) interest in the outcome of proceedings in order to be a party to them: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *Nobarani v Maricote* [2018] HCA 36; (2018) 92 ALJR 806 at [49].
>
> (c) Probate proceedings involve a strong public interest element focussed upon a need for probity, order and reliability in succession to property, and directed towards effect being given to the competent wishes and intentions of a deceased person: *Photios v Photios* [2019] NSWCA 158 at [77] (ii) and [79]. A grant of probate or administration is a public act, an act "in rem". In a general sense, a grant "binds the world" because of its function as an instrument of title.
>
> (d) The concept of "parties" to proceedings differs in the context of probate proceedings compared with ordinary civil proceedings. A person interested in the outcome of probate proceedings may be bound by the outcome even though not a party to the proceedings if on notice of the proceedings and possessed of a reasonable opportunity to intervene in them: *Osborne v Smith* (1960) 105 CLR 153 at 158-159. For that reason, in the interests of an orderly succession to property, the Court encourages notice of proceedings to be given to all persons

potentially interested in the proceedings. Unless this is done, a will cannot be admitted to probate in solemn form.

(e) The procedure for a person interested in a deceased estate to file a caveat against a grant of probate or administration in respect of the estate is directed not to provision of notice to a particular person but, rather, to provision of notice to the Court not to allow proceedings to be taken without notice to the caveator: *Moran v Place* [1896] P 214 at 216-217 and 219-220; *In re Emery* [1923] P 184 at 187; *In the Will of Mary Ann Clarke* (1922) 22 SR (NSW) 228.

(f) Because of the public interest in an orderly succession to property, no form of privilege necessarily attaches to evidence about the circumstances in which a will was executed: *In the Estate of Fuld, deceased; Hartley v Fuld (Attorney General intervening* [1965] P 405 at 409-411; *Re Estate Pierobon, deceased* [2014] NSWSC 387; *Boyce v Bunce* [2015] NSWSC 1924 at [145] *et seq*.

(g) Principles governing the finality of litigation can operate differently in the context of a determination of an application for probate compared to other civil proceedings, focusing attention on the distinction between a grant of probate "in common form" and a grant of probate "in solemn form" and the circumstances in which a grant can be revoked: *Estate Kouvakas* [2014] NSWSC 786 at [236]-[274] and [284]-[317]. A grant in common form (customarily made, administratively, in non-contentious proceedings) is more readily revoked than a grant in solemn form (customarily associated with contested proceedings).

(h) Although legislation (currently, principally the *Succession Act* 2006 NSW, section 6) prescribes formal requirements for a valid will, it also (currently, by the *Succession Act* 2006, section 8) authorises admission to probate of an "informal will" which bears the character of a "will" if the Court is satisfied that statutory criteria have been met: *Hatsatouris v Hatsatouris* [2001] NSWCA 408 at [141]; *Estate Angius* [2013] NSWSC 1895 at [260]; *Estate Moran; Teasel v Hooke* [2014] NSWSC 1839 at [26]-[28]. An "informal will" can be made via a video or other form of electronic recording: eg, *Re Estate of Wai Fun Chan, deceased* [2015] NSWSC 1107. Informal wills are not uncommonly found on a deceased person's computer or mobile phone.

(i) Probate proceedings might be pursued as a preliminary to, or in tandem with, an application for family provision relief under Chapter 3 of the *Succession Act*. In family provision proceedings Practice Note SC Eq No. 7 governs procedures for the disclosure of information about a deceased estate. Paragraph 9.1 of that Practice Note requires the administrator of an estate to make prescribed disclosures verified by affidavit. At the margins of those disclosure requirements,

consideration of what is required is governed by what is reasonable, in light of what is required for a just determination of a claim for family provision relief, in all the circumstances: *Estate Grundy; La Valette v Chambers-Grundy* [2018] NSWSC 104 at [120] et seq. An administrator can be examined on the sufficiency or otherwise of his or her disclosures: *Re Estate Grundy (No. 2)* [2018] NSWSC 1495. The procedure followed on such an examination may adapt those applicable to an examination into the adequacy of answers to a subpoena or notice to produce: *Pyoja Ltd v 284 Bronte Road Developments Pty Ltd* (2006) NSWLR 1.

(j) Pleadings in proceedings for admission of a will to probate are action-based, "issue pleadings" (as distinct from narrative pleadings of material facts, "fact pleading") in which questions of onus of proof and "presumptions" loom large and the grounds for challenging the validity of a will are, in practice, confined to comparatively few standard grounds, usually pleaded in the form of a general statement elaborated by particulars and supported by affidavits directed to contested issues.

(k) The ultimate (legal) onus on the propounder of a will to prove that it was the last free will of a free and capable testator carries with it the consequence that any contradiction of such a case is, in theory, available as a defence to an application for its admission to probate. In practice, a challenge to the essential (as distinct from formal) validity of a will is generally limited to standard grounds: (i) an allegation that the will-maker lacked testamentary capacity at the time the will was made; (ii) an allegation that the will maker lacked knowledge and approval of the contents of the will at the time it was made; (iii) an allegation that execution of the will was procured by fraud; and (iv) an allegation that execution of the will was procured by undue influence (meaning, in probate, coercion) by another person or persons. The propounder of a will generally bears the onus of proof on the first two issues (that is, an onus to prove testamentary capacity and knowledge and approval) as an incident of the ultimate onus. The onus of proof on an allegation of fraud or undue influence lies on the person making the allegation: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [55]. An allegation that execution of a will was attended by "suspicious circumstances" is not an independent ground of challenge to a will, but an allegation that informs consideration of the standard grounds of challenge, particularly "knowledge and approval". It is no less common for that.

(l) A challenge to "testamentary capacity" is commonly accompanied by a challenge to "knowledge and approval". An allegation of a want of "knowledge and approval" is not uncommonly used as a vehicle for an allegation of "suspicious circumstances" as a means of displacing a presumption of validity arising from due execution of a will. Forensically, an

> allegation of "suspicious circumstances" is sometimes used as a bridge to allegations of "fraud" or "undue influence", or as a substitute for them, although it needs to be recognised as falling a long way short of any allegation of "fraud" or "undue influence", each of which must be pleaded explicitly, if advanced at all.
>
> [61] In the disposition of probate proceedings, an exercise of the Court's costs jurisdiction may require the Court to make an allowance for the possibility that the circumstances of the particular case led reasonably to an investigation of a document propounded as a will. In NSW, the costs jurisdiction in probate is generally described by reference to *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 709F. As White J explained in *Gray v Hart; Estate of Harris (No. 2)* [2012] NSWSC 1562, the Court's approach has historical origins in *Mitchell v Gard* (1863) 3 Sw & Tr 257; 164 ER 1280.
>
> [62] Probate proceedings commonly require preliminary inquiries that not only involve a cost, but also require curial assistance. That assistance is commonly sought via the issue of subpoenas for the production of documents, the service of notices to produce to court, orders for the filing of affidavits on contentious issues and directions generally."

COSTS IN FAMILY PROVISION PROCEEDINGS

49 The family provision jurisdiction (conferred and governed by legislation) operates as an adjunct to the probate jurisdiction, looking to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants (out of a deceased person's estate or notional estate) in whose favour, because they have been left without "adequate provision for their proper maintenance, education or advancement in life", an order for provision "ought" to be made.

50 Whereas the probate jurisdiction, by its focus on a deceased person's testamentary intentions, privileges the "testamentary freedom" of an individual living in community, the family provision jurisdiction, by its focus on the "adequacy" of testamentary provision and related concepts, privileges the perspective of the deceased's community, through a prism of constraints of "wisdom and justice", whilst endeavouring at the same time to respect his or her intentions.

51 In common experience (in a case in which a deceased person's estate, or notional estate, is ample enough to accommodate a family provision order and orders for all costs of proceedings to be paid out of the estate or notional estate) the usual orders for costs are to the effect that:

(a) a successful plaintiff's costs be paid out of the estate (or notional estate) of the deceased; and

(b) the costs of the deceased's legal personal representative(s) be paid out of the estate (or notional estate) on the indemnity basis.

52 An unsuccessful plaintiff for a family provision order must be prepared to face an order that he or she pay the estate's costs on the ordinary basis; but, exceptionally, he or she might escape with an order simply requiring him or her to pay his or her own costs and, even more exceptionally, he or she might get costs out of the estate notwithstanding a failed application for a family provision order. Ordinarily, absent misconduct or the like, a legal personal representative can generally expect to be paid his or her costs out of the deceased's estate on the indemnity basis.

53 The routine nature of much family provision litigation disguises the complexity inherent in the determination of a claim for a family provision order.

54 That complexity derives from:

(a) the purposive character of the family provision jurisdiction and the possibility that an exercise of jurisdiction may be frustrated by costs orders that do not accommodate the needs of a *bona fide* claimant for a family provision order;

(b) a need to take into account the respect due to a deceased person's intentions and claims on the bounty of the deceased by persons entitled to benefit under a will or intestacy;

(c) limitations imposed on decision-making of the Court by the size and nature of an estate (with or without a designation of notional estate), recognising competing claims to testamentary provision and the costs of proceedings; and

(d) differences between entitlements arising from the distinction between "party and party" costs and "lawyer and client" costs; and conflicts between interests and between duty and interest in any case in which a plaintiff's entitlements (whatever they may be) are substantially diminished by a liability to pay his or her lawyer's costs.

55 The practical reality, not reflected in theoretical jurisprudence, is that the dilemma that often presents itself in the determination of a family provision claim is whether a deceased estate (a "distributable fund") can, and should, be redistributed as between claimants, beneficiaries and lawyers in an imperfect world.

56 A common problem encountered in confronting this dilemma is that parties allow themselves to be deflected from the purpose of the family provision jurisdiction and blinded by collateral disputes about the availability and enjoyment of estate property and moral (dis)entitlements.

57 An additional problem (not necessarily unique to an exercise of family provision jurisdiction, but perhaps more likely to require examination in a family provision context if the jurisdiction is not to be abused by the magnitude of claims for costs) is whether the Court's costs jurisdiction extends to regulating "lawyer-client" costs in the absence of misconduct.

58 The jurisdiction of the Court to make an order that costs payable out of a deceased estate in family provision proceedings be capped, and the jurisdiction to make an order that costs be summarily determined in a lump sum, are well settled: *Detheridge v Detheridge* [2019] NSWSC 183 at [174]-[177]; *Wheatley v Lakshmanan* [2022] NSWSC 851.

59 A jurisdiction in the Court to impose a limit on the costs recoverable by a lawyer from a client, in the absence of misconduct on the part of the lawyer, may exist in principle but it appears not yet to have been recognised in practice. It may be found in CPA section 98(1)(b) and the definition of costs in CPA section 3(1) or it may depend upon an exercise of the Court's inherent jurisdiction.

60 In any event, any such jurisdiction must be exercised with particular caution lest the determination of proceedings be deflected by collateral disputes about costs and conflicts between lawyers and clients, recognising (as in *Law Society of NSW v Foreman* (1994) 34 NSWLR 408 at 435-437) that in negotiating a costs agreement with a client a lawyer occupies a fiduciary position vis-à-vis the client and must act within acceptable, professional limits.

61 One way of dealing with conflicts between lawyers and clients about cost entitlements (in a way which might influence the determination of *inter partes* claims on a deceased estate) might be to hold lawyers to their costs estimates, allowing them and their clients, after orders have been made disposing of the principal proceedings, to move the Court for a variation of the amount of costs payable by the client to the lawyer, coupled with the Court's jurisdiction, summarily, to make lump sum costs orders.

62 Questions about the costs of family provision proceedings can be profoundly difficult because proceedings of that type bear different characters, each potentially in tension with the others.

63 Unlike the classic common law action in which all affected persons are ordinarily named as *parties* in proceedings, family provision proceedings are constituted not merely by parties but *interests*, of which there are at least three.

64 The central personality in family provision proceedings, as in probate proceedings, is a deceased person whose testamentary intentions, so far as known, must be respected.

65 The applicant for a family provision order has a separate interest (adversarial in nature) but he or she must be conscious that he or she seeks an order against the estate, or notional estate, of a deceased person - notionally, a form of property of the deceased within the control of the Court in transmission to the deceased's successors-in-title.

66 The legal personal representative of the deceased (usually, in the absence of a Court order specifically appointing a person as a representative for the purpose of particular proceedings, an executor or administrator of the deceased's estate) holds an office to which obligations attach for the purpose of securing the due administration of the estate.

67 Those obligations include a notional obligation to uphold the deceased's testamentary intentions (or, at least, those intentions as expressed in a will or other testamentary instrument admitted to probate) and, more particularly, an obligation to consult with the deceased's beneficiaries, to whom the legal personal representative is accountable for due administration of the estate.

68 Although it is commonly said that an executor's authority is derived from a will admitted to probate naming him, her or it as executor and an administrator's authority is derived from an order appointing him, her or it as administrator, the two offices are similar in nature and both are bound to administer the estate of the deceased with due respect to the deceased's formally expressed testamentary intentions.

69 In the ordinary course, a function of the legal personal representative of a deceased person in family provision proceedings is to serve as *the* representative of the deceased's estate. Exceptionally, a beneficiary may be joined in proceedings on his or her own application and at his or her own risk as to costs.

70 In *Baychek v Baychek* [2010] NSWSC 987 at [21]-[26] Ball J identified "three features of *Family Provision Act* matters that are often not present in other

cases" and considered their significance in relation to costs (here, with emphasis added):

> "[21] *One of those features is that Family Provisions Act proceedings* [now proceedings under Chapter 3 of the *Succession Act 2006 NSW] are concerned with the proper distribution of a fixed pool of assets – that is to say, the deceased's estate – between a number of people who may at least be thought to have a moral claim to a share of that pool. Consequently, in awarding costs in Family Provisions Act cases the court is willing to consider the overall justice of the case*: *Singer v Berghouse* (1993) 114 ALR 521 at pp 521–2 per Gaudron J. In many cases, that will still mean that an unsuccessful party will have to pay costs: see *Moussa v Moussa* [2006] NSWSC 509; *Jvancich v Kennedy (No 2) [2004] NSWCA 397*; *Carey v Robson* [2009] NSWSC 1199. However, in some cases, the court is willing, for example, not to order that an unsuccessful applicant, whose claim was not without merit, pay the estate's costs of the application. Similarly, *it is often difficult to separate the claim or claims from the costs orders that follow from them, since, for example, those costs orders when made out of the estate in favour of a party have some of the characteristics of a distribution to that party and, at the same time, affect the ultimate amount available for distribution to others. Consequently, there will be cases where, when considering the overall justice of the case, it is appropriate to make no order for costs in favour of a successful party or, more often, to cap those costs – particularly where the estate is not large. Of course, another way of dealing with this second type of case is to make an adjustment to the amount awarded to the applicant having regard to the fact that the applicant will also recover costs. However, there seems to be no reason why either avenue should not be open to the court. Practice Note SC Eq 7 recognises that fact.*
>
> [22] *A second feature of Family Provisions Act matters is that the amount claimed or that the plaintiff can reasonably be expected to recover may be quite small, either because the estate is small or because the claim itself does not justify the award of a more substantial amount. In those cases, it is reasonable to expect that the costs will be proportionate to the amount claimed and the nature of the issues in the case*. As Palmer J pointed out in *Sherborne Estate (No 2)* (2005) 65 NSWLR 268 at [30] (referring to Lord Wolfe's comments in *Lownds v Home Office* [2002] 1 WLR 2450), "[p]roportionality of costs to the value of the result is central to the just and efficient conduct of civil proceedings". As I have pointed out, that principle is reflected in the CPA s 60. It is also reflected in the structure of our court system and in rules that apply in particular areas of the law – such as UCPR r 42.30, which provides that an applicant in a claim under the *Property (Relationships) Act 1984* is not normally entitled to recover costs in this court if the amount the applicant recovers is less than the jurisdictional limit of the Local Court. *In the case of Family Provisions Act matters, the principle that costs should be proportionate to the amount claimed is also reflected in Practice Note SC Eq 7, para 24*.
>
> [23] *A third feature of Family Provisions Act matters is that*, as Palmer J pointed out in *Sherborne Estate (No 2)* (2005) 65 NSWLR 268, *they*

often involve considerable personal animosity. In disputes of that type, parties are often more concerned to vindicate their position than to resolve the dispute as efficiently and as cost effectively as possible. In those cases, it may well be appropriate to cap such a party's costs.

[24] None of what I have said is intended to suggest that the discretion in relation to costs in *Family Provisions Act* matters need not be exercised judicially or that it need not be exercised in accordance with well established principles concerning the award of costs. Rather, the point is that the special nature of *Family Provisions Act* matters means that the court may be more willing in appropriate cases to depart from the rules that normally apply in order to give proper effect to those principles.

[25] *One point follows from what I have said is that I do not think that an order fixing costs in Family Provisions Act matters should be seen as any more exceptional than an order capping costs. Where the court makes an order capping costs, the effect of the order, if it is to have any effect at all, will be to limit the amount that the costs applicant can recover on assessment to the amount of the cap. To put the point another way, the cap will normally be fixed at an amount that is less than the amount that it might reasonably be expected that the costs applicant will recover on assessment. Were it otherwise, there would be no point in fixing the cap in the first place. If the court makes an order fixing costs at the cap – and the cap is a true cap – the effect of that order is to permit the costs applicant to recover costs without the need for assessment but still to limit the amount that the costs applicant might otherwise expect to recover on assessment. The advantage, then, of fixing costs in this way is that the amount fixed still operates as a cap but it does so in a way that makes assessment unnecessary.* In doing so, it gives effect to the overriding purpose identified by the CPA s 56 – that is, to facilitate the just, quick and cheap resolution of the proceedings. In fixing costs as a cap rather than as a substitute for an assessment, it seems to me that the court should take into account the same matters that it takes into account in determining an appropriate cap. That is, what the court must be satisfied of is that the costs are excessive having regard to matters such as the nature of the case, the size of the estate and the amount that the costs applicant has recovered and could reasonably be expected to have recovered at the time proceedings were commenced. If the court is satisfied that the costs are excessive, then it will need to determine what amount to fix. But, as I have said, the nature of that enquiry seems to me to be no different from an enquiry concerning what amount to fix as a cap. I return to this matter below.

[26] Before dealing with the specific facts of this case, there is one other point that I should mention. As I have said, the order that I indicated that I proposed making in this case was to make no order as to costs – not an order capping or fixing costs, although that was the result of what I proposed. I should say two things about this. First, I can see no reason in principle why a court cannot take into account the fact that the costs applicant has recovered a proportion of her costs through some other means in determining what costs order should me [sic] made, and in deciding in an appropriate case to make no order for costs at all having regard to that fact. Indeed, it seems to me that it

> would be wrong not to do so. Secondly, and this is connected to the first point, I do not think that the result should depend on the particular approach that is taken. In the present case, one approach is to conclude that an appropriate measure of the provision that should have been made for the plaintiff was the amount of her mortgage (subject to the adjustment I have mentioned), to recognise that, in applying the *Family Provisions Act*, it is necessary to have regard to the position at the time that judgment is given and therefore to conclude that the plaintiff should be awarded $183,000, and then to consider the question of costs having regard to that conclusion. Another approach is to recognise that the mortgage includes an amount of costs relating to these proceedings, to exclude that amount from the judgment and then to consider what order should be made in relation to costs. Those two approaches should produce the same result. It follows that the principles relevant to costs capping and costs fixing are also relevant to the discretion whether to award costs at all if part of the costs are already included in the amount of the judgment."

71 Practice Note SC Eq 7 has taken different forms. However, each form of the Practice Note has to date included a provision in the same terms as Ball J described as "paragraph 24". In the Practice Note issued on 14 May 2009, which commenced on 1 June 2009, it was paragraph 24. In a Practice Note issued on 12 February 2013, with a commencement on 1 March 2013, it was paragraph 24. In the Practice Note, issued on 16 June 2023 with a commencement on 1 July 2023, it was paragraph 37. In the current Practice Note, issued on 13 June 2024 with a commencement on 17 June 2024 it is paragraph 40.

72 Save that the nominated sum was increased from $500,000 to $1 million in the current form of the Practice Note, those paragraphs have consistently read as follows:

> "Orders may be made capping the costs that may be recovered by a party in circumstances including, but not limited to, cases in which the net distributable value of the estate (excluding costs of the proceedings) is less than $1,000.000."

73 Other now-standard provisions of Practice Note SC Eq 7 impose upon parties and their lawyers obligations to disclose to the Court and other parties verified estimates of costs and disbursements and the like with the implicit acceptance that "costs" might be a relevant factor in the Court's determination of

proceedings and, optimistically, encouraging all parties to contain the quantum of costs and disbursements incurred in proceedings.

74 Specifically, Practice Note SC Eq 7 contains provisions requiring a disclosure of costs and disbursements up to and including a mediation (paragraphs 15.3 and 18.13); an updated disclosure of estimates of costs and disbursements shortly before the conduct of a final hearing (paragraphs 35 and 36); a disclosure by an administrator of costs paid out of the estate (paragraphs 18.7 and 37); and disclosure by a plaintiff of any fee agreement, in the nature of a conditional costs agreement, containing an uplift factor (paragraph 36).

75 The foundational theory underlying a routine disclosure of estimates of costs and disbursements, rendered compellable by reference to Practice Note SC Eq 7, was that a public exposure of cost estimates would cause parties to look for an early resolution of proceedings (either at a formal mediation or in private settlement negotiations) rather than having to bear the burden of foreshadowed costs, as well as encouraging lawyers to exercise moderation in the costs and disbursements incurred.

76 In practice, in the absence of court orders specifying or capping costs, parties and their lawyers appear alike to have lost any sense of embarrassment about excessive costs.

77 Nevertheless, by means of a Practice Note, the Court (in the absence of historical “costs scales” used to tax costs) has endeavoured to regulate costs as between lawyer and client without proscription.

78 In dismissing an application made by the executor of a deceased estate for an order that an applicant for a family provision order under the *Family Provision Act* 1982 NSW (since repealed and replaced by Chapter 3 of the *Succession Act* 2006 NSW) provide security for the costs of her appeal to the High Court of Australia (which culminated in an unsuccessful appeal reported as *Singer v Berghouse* (1994) 181 CLR 201, in which her Honour published a dissenting judgment) Gaudron J, in *Singer v Berghouse* (1993) 67 ALJR 708; 114 ALR

521, made the following observations which have generally been taken as insightful, if not authoritative (omitting footnotes, with emphasis added):

> "In most cases, costs follow the event in the sense that, save in special or extraordinary circumstances, costs are awarded in favour of the successful party and against the unsuccessful one. …
>
> Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under [the Family Provision Act 1982] which, in section 33, makes special provision in that regard, *costs 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. …"

79 It was to these observations Ball J referred in *Baychek v Baychek* [2010] NSWSC 987 at [21], extracted above.

80 Section 33(1) of the Family Provision Act 1982 was in substantially the same terms as section 99(1) of the Succession Act 2006 currently in force (to which express reference is made below) save that it was subject to two qualifications (found in sections 33(2) and 33(3)) not found in section 99.

81 Section 33(2) provided that an order for costs to be paid out of the estate or notional estate of a deceased person could *not* be made in favour of a person who was an "eligible person" (that is, eligible to make an application for a family provision order) by reason only of the equivalent of section 57(1)(d) or (e) of the Succession Act 2006 (that is, a former spouse, or a dependent grandchild or member of the deceased's household) *unless* the Court had made an order for provision in favour of the eligible person *or* there were "special circumstances" which made it "just and equitable for the Court to do so".

82 Section 33(3) provided that *no* order for costs to be paid out of the estate or notional estate of a deceased person could be made in favour of an eligible person *by reason only* that the eligible person was the spouse, *de facto* spouse or child of the deceased (identified by criteria similar to those found in

section 57(1)(a)-(c) and (2) of the Succession Act 2006) *or* the fact that the Court had made a family provision order in favour of the eligible person.

83 Gaudron J's observation in *Singer v Berghouse* (1993) that "costs in family provision cases generally depend on the overall justice of the case" is consistent with a traditional approach to an exercise of equity jurisdiction.

84 *Daniell's Chancery Practice* (5th ed, 1871), Volume II at pages 1243-1244 contains the following observations against the marginal note "General rule: costs follow the result" (with footnotes omitted):

> "It was the rule of the Civil Law, that *victus victori in expensis condemnatus est.* This is the general rule adopted by the Court of Chancery; but if the unsuccessful party can show the existence of circumstances sufficient to displace the *prima facie* claim to costs given by success to the party who prevails, or to satisfy the Court that it would be against the ordinary principles of justice that he should pay the costs of the proceedings, he will not be ordered to do so; and the Court will even, under certain circumstances, not only excuse the unsuccessful party from payment of costs of his opponent, but will actually throw his costs upon the party succeeding. Cases of the latter kind, however, a very limited."

85 In *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 65 [34] the High Court picked up the following passage of *Danielle's Chancery Practice* (at page 1239) as bearing a similarity with the modern treatment of costs applications:

> "[The discretionary nature of the award of costs by Chancery] is not like the ordinary Courts, held inflexibly to the rule of giving the costs of the suit to the successful party; but that it will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion with reference to those points. In exercising this discretion, however, the Court does not consider the costs as a penalty or punishment; but merely as a necessary consequence of a party having created a litigation in which he has failed; and the Court is, generally, governed by certain fixed principles which it has adopted upon the subject of costs, and does not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried."

86 Spence, *The Equitable Jurisdiction of the Court of Chancery* (London, 1846), volume 1, at page 392, contains the following Delphic observation (omitting a footnote):

> "The amount of the costs to be paid by either party was sometimes determined at the hearing, and conscience was applied to the fixing of the amount so to be paid."

87 In *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 85-86 Gaudron and Gummow JJ drew to attention the following observations in *Andrews v Barnes* (1888) 39 ChD 133 at 138 as descriptive of equity practice (here reproduced without footnotes):

> "The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. 'The giving of costs in equity', said Lord Hardwick in *Jones v Coxeter* (1742) 'is entirely discretionary, and is not at all conformable to the rule at law'. 'Courts of Equity' said the same great Judge in another case, 'have in all cases done it' (ie, dealt with costs) 'not from any authority' (ie, as we understand, from any statutory or delegated authority) – 'but from conscience and *arbitrio boni viri*, as to the satisfaction on the one side or other on account of vexation:' *Corporation of Burford v Lenthall* (1743)."

88 As noted by Hallen J in *Koellner v Spicer* [2019] NSWSC 1571 at [37]-[38], Basten JA in *Chan v Chan* [2016] NSWCA 222; 15 ASTLR 317 at [54] commented that "[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".

89 In the same judgment, Hallen J cautioned parties against an assumption that family provision litigation can be pursued safe in the belief that all costs will be paid out of the estate, and emphasised the necessity for parties to bear in mind the proportionality of costs, the importance of making appropriate settlement offers, and that if one wishes, or both wish, to adopt an approach that may have the effect of reducing the value of the estate, then they should not proceed on the basis that all of the costs and disbursements will necessarily be borne by the estate: [2019] NSWSC 1571 at [38] and [47].

90 Notice should also be taken of the accumulated experience of Hallen J summarised in *Blendell v Byrne (No 2)* [2019] NSWSC 798 at [71]-[74]:

> "[71] Section 99 of the *Succession Act 2006* (NSW) provides for an unfettered discretion as to how the costs of the proceedings for a family provision order may be borne. However, that section does not

apply to costs as between party and party, but rather to costs to be paid out of the estate.

[72] In *Harkness v Harkness (No 2)* [2012] NSWSC 35 at [17]-[18], I wrote:

> "I have identified, in a number of other cases in which a family provision order has been sought (see, for example, *Smith v Smith* (No 2) [2011] NSWSC 1105, *Mikan v Velcic* (No 2) [2011] NSWSC 505), after referring to the legislation, which I have again set out above, the general principles I considered relevant.
>
> For the assistance of the parties and others reading this judgment, I repeat the principles stated previously which I consider relevant to the present case:
>
> (a) In *Singer v Berghouse* [1993] HCA 35; (1993) 114 ALR 521, Gaudron J, said, at 522:
>
> 'Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under the Act which, in s.33, makes special provision in that regard, costs 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.'
>
> (b) Despite the above statement, which, of course, was written in the context of a security for costs application, and in respect of proceedings under the *Family Provision Act*, s 99 of the *Succession Act* provides a wide discretion in relation to costs ('in such manner as the Court thinks fit').
>
> (c) The view of some practitioners advising a potential applicant contemplating a claim for a family provision order, that there is little risk, and probably much to be gained, in making a claim, however tenuous, because even if the claim fails the applicant will, very likely, get his, or her, costs out of the estate and that he, or she, will not be significantly out of pocket, and the legal practitioner will receive his, or her, costs and disbursements in any event, has been thoroughly discredited.
>
> (d) 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: *Carey v Robson (No 2)* [2009] NSWSC 1199; *Forsyth v Sinclair (No 2)* [2010] VSCA 195. 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 (*Lillis v Lillis* [2010] NSWSC 359 at [23]) and be disallowed his, or her, own costs.

(e) Where, as here, the issue is whether the unsuccessful applicant should bear the costs of the successful Defendant, s 98 of the *Civil Procedure Act*, and the rules quoted above, will apply, and, in the absence of some good reason to the contrary, there should be an order that the costs of the successful defendant be paid by the unsuccessful plaintiff: *Moussa v Moussa* [2006] NSWSC 509 at [5].

(f) An unsuccessful plaintiff will, usually, be ordered to pay costs where the claim was frivolous, vexatious, made with no reasonable prospects of success, or where she, or he, has been guilty of some improper conduct in the course of the proceedings: *Re Sitch (No 2)* [2005] VSC 383.

(g) In small estates particularly, the court should be careful not to foster the proposition that obstinacy and unreasonableness will not result in an order for costs: *Dobb v Hacket* (1993) 10 WAR 532, at 540.

(h) Proceedings for a family provision order involve elements of judgment and discretion beyond those at work in most inter partes litigation: *Jvancich v Kennedy (No 2)* [2004] NSWCA 397; *Re Sherborne Estate (No 2)*; *Vanvalen v Neaves* [2005] NSWSC 1003.

(i) In exercising its discretion in relation to costs, the court will have regard to 'the overall justice of the case': *Jvancich v Kennedy (No 2)*. The 'overall justice of the case' is 'not remote from costs following the event'. However, the court may be more willing to depart from the general principle in proceedings for a family provision order than in other types of case: *Moussa v Moussa*; *Carey v Robson (No 2)*; *Bartkus v Bartkus* [2010] NSWSC 889 at [24].

(j) As proceedings for a family provision order are essentially for maintenance, a court may properly decide to make no order for costs, even though it were otherwise justified, against an unsuccessful applicant, if it would adversely affect the financial position which had been taken into account in dismissing the application: *Morse v Morse (No 2)* [2003] TASSC 145; *McDougall v Rogers; Estate of James Rogers* [2006] NSWSC 484; *McCusker v Rutter* [2010] NSWCA 318 at [34].

(k) There are also other circumstances that may lead the court to order payment out of the estate of the costs of

an unsuccessful Plaintiff. The court may allow an unsuccessful plaintiff costs out of the estate, if in all the circumstances the case was meritorious, reasonable or 'borderline': *McDougall v Rogers; Estate of James Rogers*; *Re Bodman* [1972] Qd R 281; *Shearer v The Public Trustee* (NSWSC, Young J, 21 April 1998, unreported)."

[73] In *Bruce v Greentree (No 2)* [2015] NSWSC 1636 at [43], I wrote:

"In addition to the above principles, I should note that the usual costs rule in an unsuccessful family provision application 'reflects the policy embodied in s 56 Civil Procedure Act that litigation must be conducted responsibly and should only be commenced by a plaintiff after careful evaluation of the costs consequences likely to attend to failure': *Carey v Robson*; *Nicolls v Robson (No 2)* [2009] NSWSC 1199, per Palmer J, at [20], and that '[t]here is a public policy in the usual practice as well as the element of justice reflected in the rule that costs follow the event': *Friend v Brien (No 2)* [2014] NSWSC 614, per White J, at [20]."

[74] I referred to all of these principles, more recently, in *Penfold v Predny* [2016] NSWSC 472, at [161]-[166] and in *Stojanovski v Stojovski* [2016] NSWSC 976, at [265]."

91 As noted by Hallen J in *Blendell v Byrne (No 2),* chapter 3 of the *Succession Act* supplements the standard legislation empowering the Court to make costs orders with special provisions, the central one of which is SA section 99, which is in the following terms, with emphasis added:

"Costs

(cf FPA 33 (1))

(1) *The Court may order that the costs of proceedings under this Chapter* in relation to the estate or 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*.

Note—

Section 78 sets out the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person.

(2) *The regulations may make provision for or with respect to the costs in connection with proceedings under this Chapter, including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person*.

(3) *This section and any regulations under this section prevail to the extent of any inconsistency with the legal costs legislation* (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*). An assessment under that legislation of any costs in respect of which provision is made by a regulation under this section is to be made so as to give effect to that regulation.

(4) In this section, legal services has the same meaning as in the *Legal Profession Uniform Law (NSW).*"

92 No regulations appear to have been made under SA section 99(2) regulating the legal costs of parties or legal practitioners involved in the conduct of family provision proceedings. That such regulations could be made is suggested by the terms of SA section 99(3). Whether (and, if so, to what extent) sections 99(2) and 99(3) are limited is a moot point. The *Succession Regulation* 2020 NSW deals with prescribed fees payable (under SA section 51) upon deposit of a will in the office of the Registrar for safe keeping. It does not address costs orders.

93 SA section 99 is to be read together with SA sections 78 and 98, which are in the following terms (with emphasis added):

"78 Notional estate order may be made only if family provision order or certain costs orders to be made

(1) *The Court may make an order designating property as notional estate* only —

(a) for the purposes of a family provision order to be made under Part 3.2, or

(b) *for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person*.

Note—

Section 63(5) enables a family provision order to be made in relation to property designated as notional estate of a deceased person.

Section 99 enables the Court to order that costs be paid out of the notional estate of a deceased person.

(2) The Court must not make an order under subsection (1) (b) for the purposes of an order that the whole or part of an applicant's costs be

paid from the notional estate of the deceased person unless the Court makes or has made a family provision order in favour of the applicant.

…

98 Mediation, orders with consent and costs (cf FPA 33 (1))

(1) The object of this section is to encourage the settlement by affected parties of disputes concerning the estate of a deceased person.

(2) Unless the Court, for special reasons, otherwise orders, it must refer an application for a family provision order for mediation before it considers the application.

(3) The Court may make a family provision order in terms of a written agreement (***a consent order***) that—

(a) is produced to the Court by the affected parties in relation to an application after mediation, or on the advice of a legal practitioner, and

(b) indicates the parties' consent to the making of the family provision order in those terms.

(4) The regulations may make provision for or with respect to the following—

(a) mediations and consent orders under this section,

(b) regulating or prohibiting advertising concerning the provision of legal services in connection with mediations and other proceedings under this Chapter in relation to the estate or notional estate of a deceased person.

(5) In this section, ***legal services*** has the same meaning as in the *Legal Profession Uniform* Law (NSW)."

ANALOGOUS CASES

94 The purposive nature of the Court's costs jurisdiction is demonstrated by two examples of cases on the fringe of an exercise of protective or probate jurisdiction.

95 In dealing with an application for a "statutory will" (governed by sections 18-26 of the *Succession Act*) the Court of Appeal in *Small v Phillips (No 3)* [2020] NSWCA 24 at [2]-[3] made the following observations by reference to *Re K's Statutory Will* (2017) 96 NSWLR 69; [2017] NSWSC 1711 at [14]-[18] and implicitly Powell J's judgment in *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640F (omitting footnotes):

> "[2] In exercising the protective jurisdiction, the Court does not necessarily apply the principle that costs should follow the event. Rather, the Court should determine the proper order for costs to be made in all the circumstances. When exercising the protective jurisdiction, the welfare and interests of the protected person are paramount. Individuals who would otherwise be concerned to act in the case of a person who is in need of protection should not be deterred from acting by the possibility of a costs order if the application is unsuccessful. Family members of a protected person should not be burdened with an obligation to pay costs in circumstances where the imposition of such an obligation might have an adverse effect on relationships with, or care for, the protected person. That is to say, proceedings in the exercise of the protective jurisdiction are not adversarial in the way that ordinary civil litigation is adversarial. Rather, proceedings in the exercise of protective jurisdiction have a strong public interest element.
>
> [3] Proceedings for the making of a statutory will for an incapacitated person are of a character similar to proceedings in the protective jurisdiction. Thus, there is a public interest in making a statutory will to ensure the orderly distribution of the assets of an incapacitated person on the death of such a person. Further, a person who has a legitimate interest in an application to authorise a statutory will should not be dissuaded from assisting the Court to exercise its jurisdiction in a fully informed manner by reason of concern that the person may be obliged to do so at his or her own expense. In addition, a defendant, even if unsuccessful in opposing a statutory will, should ordinarily be given his or her costs from the estate of the incapacitated person on the indemnity basis if it was reasonable to resist the claim for a statutory will."

96 A similar approach was taken in *Brown v Weidig* [2023] NSWSC 281 in the determination of a dispute within a family about disposal of the dead body of a family member in a context in which no application had been made to the Court, upon an exercise of probate jurisdiction, for a grant of administration of the deceased's intestate estate. After a review of the nature and purpose of the Court's "inherent jurisdiction" to decide such a dispute I wrote the following in paragraph [83]:

> "As presently advised, I propose to make no orders as to costs. That said, if I were to be called upon to consider the question of costs, I would be minded to apply a general rule applied in protective proceedings; namely, that costs do not "follow the event" but are awarded, or not, in response to the inquiry, "What, in all the circumstances, is the proper order for costs that should be made?" That approach is calculated to accommodate the purpose of the jurisdiction exercised by the Court and the public interest imperative attending the proceedings."

THE COURT'S INHERENT JURISDICTION

97 In *Hartnett v Bell* [2023] NSWCA 244, Bell CJ at [123] articulated "[S]everal statements of authority … in relation to the Court's inherent and supervisory jurisdiction" (here reproduced with full case citations):

> "(1) The Court's inherent jurisdiction "can be exercised in any circumstances where the requirements of justice demand it and thus cannot be restricted to closed and defined categories of cases": *McGuirk v University of New South Wales* [2010] NSWCA 104 at [178] (**McGuirk**); *Reid v Howard* (1995) 184 CLR 1 at 16; [1995] HCA 40 (**Reid**); *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 344; [1966] 1 NSWR 354 at 360-361;
>
> (2) "The juridical basis of [the inherent jurisdiction] is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner": IH Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 27-28, as cited in *McGuirk* at [185];
>
> (3) "The inherent power of a court to control and supervise proceedings includes the power to take appropriate action to prevent injustice": *Hamilton v Oades* (1989) 166 CLR 486 at 502; [1989] HCA 21;
>
> (4) The inherent jurisdiction "is not confined to a situation in which there is no statute or rule of court that could possibly apply to what is to be done in that regard. The true rule is that a court may exercise its inherent or implied powers in a particular case, even in respect of matters that are regulated by a provision of a statute or rules of court, so long as it can do so without contravening any such provision": *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421 at 427; [1993] FCA 171 (**Landsal**) (with added emphasis), citing *Taylor v Attorney-General* [1975] 2 NZLR 675 at 680, 687-688 and 692-693;
>
> (5) The Court can do whatever "may be necessary to prevent any injustice occurring with respect to matters which come within its cognizance": *Ex parte Farren; Re Austin* (1960) 77 WN (NSW) 743 at 744, cited in *Dwyer v National Companies & Securities Commission* (1988) 15 NSWLR 285 at 287;
>
> (6) The inherent jurisdiction of the Court overlaps with, but is not displaced by, s 23 of the Supreme Court Act 1970 (NSW): *McGuirk* at [177];
>
> (7) On the other hand, "the inherent power and the jurisdiction conferred by s 23 of the Supreme Court Act are to be exercised only as necessary for the administration of justice", and "the power is not at large": *Reid* at 16-17;
>
> (8) The inherent jurisdiction cannot authorise the making of orders excusing compliance with statutory obligations or preventing the

exercise of authority deriving from statute: *Reid* at 16; *Commonwealth Trading Bank of Australia v Inglis* (1974) 131 CLR 311 at 318-319; [1974] HCA 17; *Doyle v The Commonwealth* (1985) 156 CLR 510 at 518; [1985] HCA 46;

(9) The inherent jurisdiction does not extend to making orders simply because the Court believes it would be fair to do so: see, for instance, *Moore & Anor v Assignment Courier Ltd* [1977] 2 All ER 842 at 846; see also *The Siskina* [1979] AC 210 at 262;

(10) The Court has an inherent or general jurisdiction to regulate the costs, charges and disbursements claimed by officers of the Court, and to prevent exorbitant demands: *Woolf v Snipe* (1933) 48 CLR 677 at 678;

(11) The Court may exercise its inherent jurisdiction in relation to a solicitor's costs "in the way it might think fit": *Storer & Co v Johnson* (1890) 15 App Cas 203 at 206.

(12) This well-established supervisory jurisdiction is designed to impose on solicitors higher standards than the law applies generally. The jurisdiction is disciplinary and compensatory. It is not exercised for the purposes of enforcing legal rights, but for the purpose of ensuring honourable conduct on the part of the Court's own officers. It is distinct from any legal rights or remedies of the parties, it is unaffected by anything which affects the strict legal rights of the parties, and it is not limited to technical principles: *Atanaskovic First Instance* at [29]-[30], approved in *Atanaskovic* at [127];

(13) Statutory provisions dealing with the issue of lawyers' costs are complementary to this inherent jurisdiction, and do not oust it: *Woolf* at 678; *Pryles & Defteros (a firm) v Green* [1999] 20 WAR 541; [1999] WASC 34 at [24] (**Pryles**); see also *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106 at [46] (**Re Jabe**) and s 264 of the *Legal Profession Uniform Law 2014* (NSW). The two jurisdictions are enlivened by different acts and must be analysed separately: *Whyked Pty Limited v Yahoo!7 Pty Limited* [2008] NSWSC 477 at [18];

(14) Further, "there is an overlap between the Court's general jurisdiction to review solicitors' remuneration and the doctrines of undue influence, unconscionable transaction and fiduciary conflict as they apply to solicitors and clients": *Malouf v Constantinou* [2017] NSWSC 923 at [136]; see also *Kowalski* at [25];

(15) More specifically, "there remains an inherent jurisdiction of the Court to make orders that a legal representative personally pay the opposing party's costs directly for unnecessary or wasted costs, that power arising out of the Court's supervisory jurisdiction with respect to legal practitioners admitted by the Court": *NHB Enterprises Pty Ltd v Corry (No 5)* [2020] NSWSC 1838 at [44], citing *Re Felicity; FM v Secretary, Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [20];

(16) The purpose of the jurisdiction of the Court with respect to costs charged by its officers is "to secure that the solicitor, as an officer of

the court, is remunerated properly, and no more, for work he does as a solicitor" (emphasis added): *Electrical Trades Union* at 734; see also *Re Jabe* at [44];

(17) The exercise of supervisory jurisdiction over officers of the Court is not governed by "strict legal rights and duties or matters of technicality." Rather, "in exercising supervisory jurisdiction, the Court does not engage in a final determination of legal rights but determines whether one of its officers should be held to ethical and honourable behaviour": *Atanaskovic First Instance* at [80]-[81];

(18) The jurisdiction to scrutinise the remuneration of officers of the Court is not limited to cases of exorbitant overcharging: *Atanaskovic* at [145]. Nor is it limited by any contractual arrangements made between the parties: *Pryles* at [24], which will engender "jealous" scrutiny by a Court: *Clare v Joseph* [1907] 2 KB 369 at 376;

(19) The inherent jurisdiction extends to making orders for solicitors to repay an amount charged to their own client: see, e.g., *Harrison* at 538."

98 The High Court's discussion of cases in which a broadly expressed statutory jurisdiction to make costs orders against a non party or the like might cast light upon the nature of any inherent jurisdiction to make orders regulating costs as between lawyer and client in the absence of misconduct on the part of a client. A number of cases of this nature were noted in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 187-188.

99 At 188, Mason CJ and Dean J wrote specifically:

> " … it is artificial to attribute the orders for costs against solicitors to an exercise of the disciplinary power rather than to an exercise of the jurisdiction to award costs of the proceedings".

100 SCA section 23 (referred to in *Hartnett v Bell* and elsewhere) is in the following terms:

> **"23 Jurisdiction generally**
>
> The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales."

COMMON PROBLEMS

101 Many problems confronted in dealing with applications for costs orders (nominally directed towards an allocation of liability for costs and

quantification of them) arise from the way proceedings are conducted upon an exercise of protective, probate or family provision jurisdiction.

102 There is a fundamental need on the part of parties and the Court to recognise the public interest element upon an exercise of protective, probate or family provision jurisdiction and to work towards the purpose for which the particular jurisdiction exists. The public interest element manifests itself in a need to ensure that all "interested parties" are given notice of proceedings and an opportunity to participate in them, which, of itself, highlights the need for an approach to costs that differs from ordinary adversarial proceedings between particular named parties.

103 In protective proceedings notice needs to be given to a vulnerable person's "significant others" in aid of the vulnerable person, not to advance the interests of the significant others. In probate proceedings notice generally needs to be given to persons who have a proprietary interest in the outcome of proceedings so that they have an opportunity to intervene, failing which they will be bound by the Court's determination of the proceedings. In a family provision case notice needs to be given to all "eligible persons", and beneficiaries need to be consulted, so that competing claims to estate property can be settled in an orderly way.

104 Questions about "notice of proceedings" implicitly recognise the difference between an exercise of "welfare jurisdiction" and ordinary civil proceedings in which competent parties submit to a judicial determination that binds only them and their privies.

105 Some of the problems with costs in welfare cases arise from a modern tendency to embrace complexity by including in the one set of proceedings different types of case without an orderly separate determination of pivotal questions. Claims involving an exercise of welfare jurisdiction, to different degrees, involve managerial decision-making, requiring a mindset different from that involving a determination of competing claims of right. In common

experience, a probate suit and a family provision claim (or claims) are commonly joined in the one set of proceedings.

106 Almost as commonly, those two types of case are combined in a single proceeding with a "trust" claim involving an exercise of equitable jurisdiction focusing upon competing claims of right. In essence, such trust claims might be regarded as essentially, or related to, accounting claims. Some equitable claims are designed to *augment* an estate; eg, a claim that the deceased's enduring attorney misapplied the deceased's funds so as to attract an equitable remedy by reference to principles governing undue influence, unconscionable conduct or breaches of fiduciary duty. Some equitable claims are designed to *diminish* an estate on the basis that what is ostensibly "estate property" is held on trust outside the operation of a will or intestacy rules, calling in aid, for example, principles governing a contract to make a will, a common intention trust or proprietary estoppel. The complexity of modern litigation, with indiscriminate hearings of "all questions in dispute", complicates containment of costs.

107 Lumping everything together blurs jurisdictional boundaries which, if observed, might facilitate an early determination of disputes. This might occur, for example, if competing claims to probate were to be determined in advance of a family provision or trust claim so that an undisputed representative of a deceased estate might be identified in a timely manner as a true contradictor, and parties contemplating a family provision or trust claim might reflect seriously upon whether the additional expense of a probate dispute is warranted.

108 An early determination of a probate claim might also facilitate the conduct of proceedings on behalf of an estate against those who have engaged in "elder abuse" against the deceased.

109 Looking at the practical reality of the way proceedings are currently conducted, one wonders whether the principles governing proprietary estoppel (based upon an *inter vivos* promise, representation or other conduct

of a deceased person) are being used in much the same way as allegations of an informal will are being used to circumvent the formal requirements for execution of a valid will. The transaction costs of engagement of the law of succession by way of litigation rather than a well drafted will appear to be no deterrent to expectant claimants on an estate.

110 Costs consequences flow from a failure on the part of parties to recognise the imperatives of a just, quick and cheap conduct of proceedings, with proportionate costs, rising from a need for:

(a) an early recognition of orders sought and the reasons relied upon in justification of proposed orders (in short, a case theory);

(b) an early disclosure of facts material to an exercise of the jurisdiction invoked in proceedings (reflected in current management of probate proceedings by procedures for "disclosure statements" and "discovery affidavits");

(c) an economical preparation of evidence directed to the real questions in dispute and avoiding collateral issues such as accounting disputes or contested social history.

(d) a realisation that a professional obligation on lawyers is to contain the enthusiasm of clients within acceptable limits and to limit the extent to which an estate (large or small) is charged with, or consumed by, costs.

111 In theory the Court's powers to cap and fix costs provide a foundation for lawyers to restrain the enthusiasm of litigious clients. This can only happen, though, if the profession steels itself to the duty of appropriately saying "no" to a client pushing against reasonable boundaries of what is necessary to advance a case.

112 One may readily imagine that some clients (hopefully, never lawyers) allow themselves to be blinded or distracted by the existence of a fund (in the form of an unadministered estate) available for a speculative claim. Such an attitude of mind, if it exists, should be discouraged and, perhaps, can be so by a timely mention of the risk of adverse costs orders.

113 Minds may differ about whether mandatory mediation processes before a final hearing aid the containment of costs or, in the absence of a mediated settlement, dramatically increase them.

CONCLUSION

114 Questions of costs inevitably arise when the jurisdiction of the Court is invoked. The nature of those questions and their determination in an economical and just way depends upon an appreciation of the purpose, nature and extent of the Court's jurisdiction.

GCL
5/9/24