



# A Conversation About Estate Disputes: Part 6 – Disputes about Costs in Provision Claims

Following on from our fifth installment in our Estate Dispute series last week on [whether there is a minimum provision for a spouse in an estate](#), this week, we discuss disputes about costs in family provision claims.

Cost disputes is often the second battle ground in litigation. It's not just about the disagreement that the parties have about the issues, but who should be footing the legal bills at the end of that argument.

In particular, we look at two cases that have been decided in the New South Wales court of appeal in the last 5 years. Perhaps we have picked these cases to highlight the astronomical costs associated with some of these disputes. However, these cases also highlight a number of factors that the Court would consider when awarding costs

against a party.

### **Harris v Harris (2018) NSWCA 334:**

This case involved a family provision claim by the son of the testator under the *Succession Act 2006* (NSW), the claim being dismissed by the primary judge and an order made for the parties to pay their own costs. The primary judge was not persuaded that inadequate provision had been made by the testator for the proper maintenance, education and advancement in life of the appellant.

The judge stated that the appeal, even if competent, would be dismissed with costs, and that it is unfortunate the matter did not first come before the Court by way of an application for leave to appeal. If that occurred, the Court could have determined whether the matter should have been dealt with by way of leave only before the costs of a full appeal were incurred, also allowing the court to impose a costs-capping order to avoid the incurring of costs disproportionate to the importance and complexity of the subject matter in dispute.

Within this case, the testator's estate was valued at under \$8,000 but the available assets from which to make provision was \$600,000, described as the 'notional estate'. Interestingly, the costs incurred at trial exceeded 20% of the notional estate's total value and almost ten times the amount the primary judge may have awarded. This shows the careful need for a holistic consideration of the potential costs associated with the lodging or pursuing of a claim.

In addition to other conduct by the applicant, he also failed to attend a mandatory settlement conference, meaning the appellant was ordered to pay the respondent's costs.

**Olsen v Olsen (2019] NSWCA 278:**

This case involved a provision claim by the adult son of the deceased (the appellant), where the deceased had only lived with the son for the first 9 months of his life and having little contact thereafter, before separating with the applicant's mother, re-marrying and having three additional children.

The deceased left his entire estate to his wife (and the three children if she was to pass away) and made no provision at all for the applicant in the estate worth over \$379,000. The applicant was a solicitor who had a successful law practice and was financially sound, whilst the beneficiaries had drastic health issues and were in need of financial assistance. The judge dismissed the applicant's appeal, upholding the original decision, that there is no legal or moral justification for an able-bodied adult son clinging to a sense of entitlement to necessarily benefit from his parent's estate.

The primary judge here made no order as to costs on the basis that the estate was better able to absorb the respondent's legal costs than the appellant was able to afford them; the appeal was also dismissed with costs.

Quite notably, the appellant's counsel made an illusion to the appellant's attempts at settlement having been met with the 'proverbial wall' which then consequently sparked the primary judge to warn the respondents' solicitor that if the respondent's position had been unreasonable, they would have a costs order made against that; this shows the need for compromise and bona fide attempts to reach an agreement in settlement negotiations.

## **How can Andersons help?**

If you are needing advice on a claim against an estate, whether as a claimant or a beneficiary, contact today's author [Lynn Pham](#) or anyone in our specialist [Estates team](#).

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