



## Précis Paper

### Cost Orders in Estate Matters

A discussion of the recent costs judgement of *Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSWSC 117.

#### **Discussion Includes**

- Background
- The probate exception
- Actions of the defendant
- Why did the 'probate exception' not apply?
- Takeaways for practitioners

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## Costs in Estate Matters

1. In this edition of BenchTV, David Palmer (Barrister – Hobart/Sydney: contact [dpalmer@chambers.net.au](mailto:dpalmer@chambers.net.au), ph.: 0414 731 127) and Peter Matthews (Associate – AR Conolly and Company, Sydney) discuss the recent costs judgement of *Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSWSC 1117.

### Background

2. The matter of *Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSW 1117 concerns a costs decision relating to a recent estate matter.
3. The judgment was strategically important for the plaintiff, Ms Zupicic as the defendant, Ms Paino had filed a Notice of Intention to Appeal and in order to continue with the appeal, it would have been critically important for the defendant to be successful in the costs decision.
4. That is, the defendant would have had to obtain an order that the costs of the litigation would be paid out of the Estate.
5. This did not happen, and His Honour ordered that the defendant was personally liable for the plaintiff's costs.
6. The cause of action in the substantive judgement was a constructive trust claim by the plaintiff over the whole of the deceased's estate
7. Ultimately, the plaintiff was successful in her claim and a constructive trust was declared over the remainder of the estate, which meant that the valid will of Mr Novick, in which all the estate was left to the defendant was disregarded.

### The probate exception

8. The probate exception arose in the costs judgement, with the defendant arguing that the probate exception should apply. This would mean that the defendant would meet an adverse costs order out of the funds of the estate.
9. The probate exception refers to the perception that when it comes to deceased estate litigation it is usual that the costs of the parties will be met out of the estate.
10. This perception is incorrect as per section 98 of the *Civil Procedure Act 2005* (NSW) prescribes that costs are discretionary. Section 98 provides that the court has full power to determine who pays the costs whether they are indemnity costs or on the ordinary costs.
11. This wide discretion must be exercised judicially and not arbitrary and further, it is subject to the rules of the court.

12. Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW), 42.1 dictates that costs follow the event, the event being success in litigation.
13. In the present case, the plaintiff argued that the perceived 'probate exception' did not apply as she had run a case which was not ordinary probate litigation. Instead, it was an equity claim for the constructive trust over the assets of a deceased estate.
14. Alternatively, the defendant argued that the matter was analogous to a probate case and therefore the costs should be met by the estate.

#### Actions of the defendant

15. One argument put forward by the plaintiff was that under the *Probate and Administration Act 1898* (NSW), it is a requirement that the executor advertise an intended distribution of an estate and then make the distribution after an elapse of time.
16. The defendant prematurely distributed the funds to herself.
17. Further, the plaintiff argued that the defendant had breached Rule 42.25 of the *Uniform Civil Procedure Rules 2005* (NSW) which states that a trustee can be indemnified out of the funds of the trust in relation to costs orders unless;
  - i. they acted improperly or
  - ii. they have acted for their own benefit and not for the benefit of the fund
18. In the present case, the defendant had transferred the whole of the estate to herself as the sole beneficiary, becoming the legal owner of the estate.
19. Therefore, ultimately, the defendant was not defending the estate as the executor of the estate but instead she was defending her own interests.
20. His Honour took a dim view of the actions of the defendant and in his costs judgement he referred to a period approaching the end of the deceased's life a reverse mortgage had been taken out noting that in relation to that account, the defendant had access to the defendant's key card and the findings were that she had accessed the account for her own benefit.
21. This also relates to His Honour's findings as to the manipulation and control of the deceased by the defendant, that she had encouraged the deceased to fall in love with her, and that the defendant had inserted herself into the deceased's life and alienated the plaintiff and her family.
22. Other discretionary factors included that His Honour found that the defendant had told lies whilst giving evidence and had been evasive as to her true financial position.
23. Another reason His Honour found for the defendant in relation to costs was that the defendant was particularly adversarial in terms of how she ran the case.
24. By challenging whether representations had been made to the plaintiff by the deceased and other contestations, the defendant was not simply acting as a disinterested executor and therefore was personally liable for costs.

25. Strategically, the decision was of vital importance to the appeals process as without the comfort of a fund to run an appeal, the prospects of the defendant being able to bring an appeal were minimal.

#### Why did the 'probate exception' not apply?

26. The probate exception often relates to testator's conduct, particularly in circumstances where it is the testator's conduct which is the cause of the litigation. This is the case in matters which involve challenging or proving a will.
27. In this case it was the court's position that a claim for equitable estoppel or breach of contract falls outside of the estate's issue of being the fault of the testator.
28. There have been some decisions where a constructive trust or equitable claim was run together with a probate claim and the probate exception was found to apply.
29. In this case, the constructive trust claim did not run together with the probate claim.
30. There have been numerous recent cases where claims for the probate exception have failed. These include *Ashton v Pratt* [2015] NSWCA 12 and *Priestley v Priestley* [2017] NSWCA 155.

#### Takeaways for practitioners

31. Practitioners should not assume that costs will be paid out of the estate.
32. Practitioners should carefully consider what is going to happen in relation to costs should their client be unsuccessful.
33. This pertains to all litigation concerning deceased estate and also increasingly relates to family provision claims.
34. The courts may correct the misconception that costs are always paid out of the estate by introducing cost capping orders either prior to the hearing or even after hearing.
35. The power of the courts to do this is rule 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW) which deals with cost capping orders prior to hearing.
36. Practitioners must also give consideration to whether their client, whether they be a claimant on the estate or the executor is behaving reasonably on an objective assessment.

## **BIOGRAPHY**

### David Palmer

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David was called to the NSW Bar in 2016. Prior to this he was a partner of the firm Bundock/Palmer Lawyers. His primary areas of practice include probate/family provision/equity, commercial law, crime, employment law, insolvency, construction law. David has conducted litigation in the High Court of Australia.

### Peter Matthews

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Peter Matthews is an associate at AR Conolly and Company and holds a Bachelor of Laws and Bachelor of Science.

## **BIBLIOGRAPHY**

### Focus Case

*Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSWSC 1117

### Cases

*Ashton v Pratt* [2015] NSWCA 12  
*Ashton v Pratt (No 2)* [2015] NSWCA 134  
*James v Douglas* [2016] NSWCA 178  
*Nowell v Palmer* (1993) 32 NSWLR 574  
*Perpetual Trustee v Baker* [1999] NSWCA 244  
*Priestley v Priestley* [2017] NSWCA 155  
*Priestly v Priestly (No 2)* [2017] NSWCA 212

### Legislation

*Civil Procedure Act* 2005 (NSW)  
*Uniform Civil Procedure Rules* 2005 (NSW)  
*Probate and Administration Act* 1898 (NSW)