SUPREME COURT OF QUEENSLAND

CITATION:	*Albury & Anor v Sammut (No 2)* [2019] QSC 182
PARTIES:	**LEANNE FRANCES ALBURY** (first plaintiff) **TONI ANNE SAMMUT** (second plaintiff) **v** **APINYATREE SAMMUT** (defendant) **APINYATREE WUTITUM under Part IV Sections 40-44 *Succession Act* 1981** **(applicant)** **v** **LEANNE FRANCES ALBURY and TONI ANNE SAMMUT as Executors of the Estate of FRANK ANTHONY SAMMUT Deceased** **(respondents)**
FILE NOS:	BS10519 of 2017 BS13643 of 2018
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	26 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions of plaintiffs and defendant each dated 15 May 2019; defendant's reply submissions dated 1 July 2019; plaintiffs' reply submissions dated 4 July 2019; defendant's further reply submissions dated 5 July 2019.
JUDGE:	Mullins J
ORDER:	**In proceeding BS10519 of 2017:** **1. There is no order as to the costs of the application filed on 8 October 2018.** **2. The plaintiffs pay the defendant's costs of the application filed on 19 October 2018 to be assessed on the indemnity basis.** **3. The plaintiffs pay the defendant's costs of the submissions on the costs of the proceeding.** **4. The defendant otherwise pay the plaintiffs' costs of the proceeding only to the extent that costs incurred in the proceeding were additional to those incurred by the plaintiffs in connection with the family provision**

proceeding, with such costs to be assessed on the standard basis.
5. Leave to each of the plaintiffs and the defendant to appeal the orders for costs.

In proceeding BS13643 of 2018:

1. The respondents pay the applicant's costs of the application to be assessed on the indemnity basis.
2. Leave to the respondents to appeal this order for costs.

CATCHWORDS: PROCEDURES – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – where the deceased's widow challenged the deceased's last will and also applied for family provision whether it was the last or second last will that was proved – where the widow was unsuccessful in defending the probate proceeding, but was successful in her family provision claim – what costs orders are appropriate in the circumstances

Civil Proceedings Act 2011 (Qld), s 53
Supreme Court of Queensland Act 1991 (Qld), s 64

Albury v Sammut [2019] QSC 105, related
Campbell v Campbell [2012] QSC 302, distinguished
Frizzo v Frizzo (No 2) [2011] QSC 177, considered

COUNSEL: R A I Myers for the plaintiffs
M F Wilson for the defendant

SOLICITORS: I M Lawyers for the plaintiffs
Harris & Company Solicitors for the defendant

[1] On 26 April 2019 I published my reasons for pronouncing for the validity of the will of the late Mr Frank Sammut dated 23 February 2017 in the solemn form proceeding and ordering further provision pursuant to s 41 of the *Succession Act* 1981 (Qld) for the applicant Ms Wutitum who is the widow of Mr Sammut in the family provision proceeding: *Albury v Sammut* [2019] QSC 105 (the reasons). I will continue to use the same shorthand expressions that I used in the reasons.

[2] I made some observations about the question of costs in [88]-[89] of the reasons, but invited the parties to make written submissions. The parties agreed between themselves to provide me with written submissions as to costs by 15 May 2019. On that date, the plaintiffs' solicitors provided a written submission on costs and a supporting affidavit of Mr L A Ingham-Myers sworn on 15 May 2019. The written submissions included 54 pages of attachments comprising emails and other correspondence exchanged between the parties.

[3] Of significance was the fact that the plaintiffs' written submissions (without an application to that effect) sought a costs order against the defendant's solicitor personally in respect of the probate proceeding and the costs of the application to have the two proceedings heard together. Not surprisingly, as there had been no prior notice by the plaintiffs to the defendant's solicitor that a personal costs order would be sought against the defendant's solicitor, the defendant put in a reply submission on costs dated 1 July 2019. The plaintiffs put in further submissions on 5 July 2019 in response to the defendant's further submission. On the basis the plaintiffs had raised additional matters in their further submissions, the defendant put in a further reply submission dated 5 July 2019. I will therefore determine the question of the costs of each proceeding on the papers and will consider the affidavit of Mr Ingham-Myers and all submissions and attachments provided by the parties.

The orders the parties seek

[4] In order to understand the costs orders sought by the plaintiff, it is necessary to refer to the further material in Mr Ingham-Myers' affidavit. After the trial ended, but before the judgment was delivered, the plaintiffs' solicitor had the plaintiffs' costs assessed by an independent costs assessor. The costs assessor assessed the costs of Mr Baker's firm on an indemnity basis in acting for the plaintiffs in connection with the probate proceeding between 16 March 2017 and 22 August 2017 at $4,149.72 plus applicable outlays. The costs assessor then assessed the plaintiffs' solicitors' costs between 22 August 2017 and 19 March 2019 in respect of the probate proceeding on an indemnity basis at $78,952.50 plus applicable outlays. The costs assessor's assessment of the plaintiffs' costs on an indemnity basis in defending the family provision proceeding between 31 October 2017 and 8 November 2018 was $19,618.50 plus applicable outlays.

[5] The plaintiffs seek an order that the defendant's solicitor personally pays the plaintiffs' costs of the probate proceeding on an indemnity basis and the costs of the application heard on 8 November 2018 to transfer the family provision proceeding from the District Court to the Supreme Court (the transfer application) also on the indemnity basis. It appears the plaintiffs accept that it is likely a costs order will be made in the defendant's favour for the family provision proceeding, but submit that it should be fixed at $19,680.30 plus applicable outlays equivalent to the plaintiffs' costs of the family provision claim.

[6] The defendant seeks an order against the plaintiffs in the family provision proceeding that they pay her costs to be assessed on the indemnity basis. The defendant proposes that in the probate proceeding:

(a) the plaintiffs pay the costs of the transfer application heard on 22 October and 8 November 2018 to be assessed on the indemnity basis;

(b) the plaintiffs pay the defendant's costs up to and including 2 February 2018 to be assessed on the indemnity basis;

(c) other than as specified in (a) and (b) above, the defendant pay the plaintiffs' costs that were additional to those incurred by the plaintiffs in the family provision proceeding on the standard basis.

[7] The defendant also submits that she should be awarded the post-trial costs associated with the argument over costs.

The course of the proceedings

[8] In order to deal with the detail of the parties' submissions, it is necessary to set out relevant steps in the dealings between the parties and the proceedings.

[9] The plaintiffs applied for a grant of probate of the later will in common form in early May 2017.

[10] The defendant had herself lodged a caveat against any grant in the Supreme Court at Rockhampton and the usual notice was given by the Registrar on 19 May 2017 advising of the requirement to file a notice in support of the caveat within the requisite time. The defendant filed that notice dated 31 May 2017 putting forward the earlier will as Mr Sammut's last will and requiring the later will to be proved in solemn form of law. That meant that the plaintiffs could not pursue the common form grant of the later will, until the probate proceeding was resolved.

[11] By 19 June 2017 solicitors Maurice Blackburn of Cairns were acting for the defendant and had corresponded with Mr Baker. Mr Baker sent his *Larke v Nugus* statement to that firm on 7 July 2017. Clause 2.2 of that letter suggested the defendant should give serious consideration to withdrawing the caveat and that, if she did not do so and the plaintiffs were successful in proving the later will, a costs order would be sought against her. Mr Baker sent a further letter to Maurice Blackburn dated 14 July 2017 that asserted there was clear evidence that Mr Sammut was not suffering from any disorder or disability of his mind, he had testamentary capacity at the time of making the later will, and he knew and approved the contents of the will. The defendant was also put on notice that, unless the caveat was withdrawn by her, the plaintiffs proposed to file a claim and seek summary judgment on the claim and an order for indemnity costs against the defendant. (I infer from the defendant's solicitors' submission that the plaintiffs should pay the defendant's costs of the solemn form proceeding up to and including 2 February 2018, that the defendant's solicitors were not aware of the *Larke v Nugus* statement before Mr Baker's affidavit was filed on 2 February 2018. Whether or not the defendant appreciated the significance of the letter sent to her then solicitors on 7 July 2017, she was fixed with notice of contents of the *Larke v Nugus* statement from that time.)

[12] In accordance with the plaintiffs' instructions, Mr Baker referred the probate file to Mr Ingham-Myers on 22 August 2017 and his firm commenced acting for the plaintiffs. The probate proceeding was commenced by claim and statement of claim filed in this court on 10 October 2017.

[13] It was in early October 2017 that the defendant first consulted Harris & Company and that firm commenced acting for her. The family provision proceeding was commenced by the defendant filing her application and supporting affidavit in the District Court at Brisbane on 22 November 2017.

[14] Mr Ingham-Myers wrote to Mr Hansen of the defendant's solicitors on 28 November 2017 in relation to service of the family provision application and compliance with the relevant Practice Direction. On the basis the plaintiffs' solicitors inferred the defendant was no longer challenging the later will, the defendant was requested to withdraw the caveat and pay the estate's legal fees and disbursements of filing the claim and statement of claim in the probate proceeding. The defendant's solicitors responded by letter on 1 December 2017, advising that the defendant reserved her rights in respect of the validity of the later will and that the caveat should stay on pending resolution of the matter. The letter then stated:

> "In our view, the most efficient course would be for your clients' application for probate to be adjourned pending resolution of the family provision application. If your clients are not prepared to adjourn their application, our client may be compelled to go the expense of defending it, and these costs, ultimately, are likely to be borne by the estate.
>
> Accordingly, please confirm whether your clients agree to an adjournment of the application for probate to a date after mediation of the family provision claim.
>
> In any event, there is no real utility in obtaining unlimited probate of the second will before the family provision claim is resolved.
>
> If, however your client needs probate for a specific purpose – such as getting a new lease of one of the properties in the estate – our client would be prepared to agree."

[15] Mr Ingham-Myers responded by email on 4 December 2017 advising the plaintiffs would not be "adjourning" the probate proceeding and that if the defendant was not willing to withdraw the caveat, the plaintiffs' claim would be prosecuted in the ordinary course and Mr Ingham-Myers' view was that the defence of the claim lacked merit and refuted the suggestion that the costs associated with the defence of the claim would ultimately be borne by the estate. Mr Ingham-Myers returned the signed draft directions order for the family provision proceeding.

[16] Mr Hansen responded by email on 4 December 2017 inquiring about the utility in pressing for a grant of probate, given that the family provision proceeding directions provided for an expeditious progression of that application. Mr Hansen repeated the offer made in his letter of 1 December 2017 that if the plaintiffs needed to deal with estate assets (without prejudicing the family provision application) that could be arranged. The email then stated:

> "My client will put on a defence if an adjournment is not agreed but while the family provision claim is pending that is a matter which should be at our clients' risk as to costs. It is by no means clear to us how you can assert that a defence which you have not seen is 'without merit'.

> Please explain what would be the utility of your clients obtaining a grant of probate pending outcome of the family provision claim."

[17] By letter dated 5 December 2017, the plaintiffs' solicitors argued that by seeking a family provision order in respect of the later will, the defendant recognised the validity of the later will and therefore should withdraw the caveat and pay the costs incurred by the estate in seeking to prove the later will in solemn form. (It should be noted that the plaintiffs' solicitors made an assumption about the family provision being sought in respect of the later will. The defendant's family provision application sought provision out of the estate of Mr Sammut and her supporting affidavit exhibited the earlier will and the later will.)

[18] The defendants' solicitors letter dated 5 December 2017 concluded with the following paragraph:

> "Unless the caveat is withdrawn by 18 December and unless you agree to pay the estate's reasonable costs incurred to that date we intend to apply to the court seeking appropriate orders."

[19] The defendant's defence and counterclaim in the probate proceeding was filed on 15 December 2017. The defence put in contention Mr Sammut's testamentary capacity, whether the later will was procured by the plaintiffs' undue influence, and whether Mr Sammut knew and approved the contents of the later will.

[20] Mr Baker's affidavit that dealt with the circumstances in which he took instructions from Mr Sammut for the later will and the execution of that will and exhibited his *Larke v Nugus* statement was filed in the family provision proceeding on 2 February 2018. The *Larke v Nugus* statement was primarily for the purpose of the probate proceeding, but as the same solicitors were acting for the defendant in both proceedings, the fact that it was filed in the family provision proceeding is not of any significance. The plaintiffs' affidavits were filed in the family provision proceeding on 6 February 2018.

[21] A mediation of both proceedings took place on 27 March 2018 which was unsuccessful. There is a suggestion in the plaintiffs' submissions that the mediation of the family provision proceeding may have been successful, had the defendant not been pursuing the challenge to the later will in the probate proceeding. The defendant's submissions make the point that it is improper for the plaintiffs' submissions to make comment on the conduct of, and discussions in, the mediation. I agree with the defendant's submission that, to the extent the plaintiffs' submissions impliedly disclose what was said during the course of the mediation, it is not appropriate for those discussions to be disclosed in making submissions on costs, without the defendant's concurrence. cf s 53 of the *Civil Proceedings Act* 2011 (Qld).

[22] By letter dated 4 April 2018, the defendant's solicitors conveyed their view to the plaintiff's solicitors that "the two matters are so closely related that they should be heard together in the Supreme Court". The point was made that the defendant's undue influence argument and the plaintiffs' allegation of disentitling conduct in relation to the family provision claim would traverse the same evidence and that it would result in unnecessary expense for the matters to be heard separately.

[23] The plaintiffs' solicitors in their response dated 11 April 2018 advised of the plaintiffs' opposition to the transfer of the family provision proceeding to the Supreme Court and proposed a stay of the family provision proceeding, pending the resolution of the probate proceeding. As the plaintiffs had not received a response to that letter, their solicitors wrote a further letter to the defendant's solicitor on 21 May 2018 advising of the plaintiffs' concern at the drain on the estate's finances due to no income being received in respect of the matrimonial home and limited access to historic details relating to each rental property held by the estate. A request was made for access to the historic and current documents relating to estate rental properties and for the return of Mr Sammut's vehicle. The defendant's solicitors responded via email dated 23 May 2018 asserting the plaintiffs were not the executors of the estate and had no standing to make the demands for rent, the return of the vehicle and the request for documents relating to the estate properties. The email stated:

> "My client has repeatedly indicated she is prepared to discuss the terms of limited grant of probate to permit dealings with the Estate. Pending a grant of probate, the status quo should be maintained. If your clients wish to deal with an asset of the Estate please explain the nature of that dealing and it may be possible to reach an agreement."

[24] On 29 May 2018 the plaintiffs' solicitors served a request for trial date in respect of probate proceeding on the defendant's solicitors. The defendant's solicitors' response on 1 June 2018 was that the defendant was not ready for trial, because there were outstanding disclosure issues and other matters relevant to the defendant's preparation for trial and the defendant's solicitors repeated their view that both matters should be consolidated and heard together. Correspondence then ensued about the relevance of banking records the defendant was seeking. The defendant's solicitors then decided to subpoena the bank for the documents and made a request by letter dated 20 June 2018 for further disclosure in relation to other documents. A response from the plaintiffs' solicitors was forthcoming on 10 July 2018 and further correspondence ensued about disclosure of the bank documents. The defendant was seeking a particular document that the plaintiffs were unable to provide and the defendant's solicitors notified the plaintiffs' solicitors on 4 September 2018 that they would be issuing a notice for non-party disclosure on the relevant bank which was issued by the court on 10 September 2018.

[25] On 8 October 2018 the plaintiffs filed an application for an order dispensing with the defendant's signature on the request for trial date for the probate proceeding. On 19 October 2018 the defendant filed the transfer application. On 22 October 2018 Boddice J ordered the plaintiffs to provide copies of certain documents and further directions were given to progress the probate proceeding, including a further review by Boddice J on 8 November 2018. The plaintiffs were unsuccessful in their application relating to the request for trial date for the probate proceeding, but were successful in obtaining the alternative relief of directions and the costs were reserved. The transfer application had been made returnable on 5 November 2018 and was adjourned by consent to the review listed on 8 November 2018, when the defendant succeeded on her transfer application in obtaining an order that the probate proceeding and the family provision proceeding be heard at the same time. The costs of the transfer application were reserved.

The plaintiffs' submissions

[26] The essence of the plaintiffs' argument for a costs order against the defendant's solicitors is that the maintenance of the caveat by the defendant against any grant, pending the outcome of the probate proceeding, was improper and the "high-handed" approach of the defendant's solicitors to the proceedings "deprived all of the parties of the advantages that were intended to be conferred by the relevant Practice Direction" that applied to the family provision proceeding in the District Court. The plaintiffs submit that it was more likely the family provision proceeding would have settled, but for the issues raised by the probate proceeding. The plaintiffs argue that the residuary estate has been reduced by "the unwarranted way in which this case was conducted" on behalf of the defendant resulting in the costs incurred by the estate, an unascertained sum in respect of taxation due to the failure to lodge returns on behalf of the estate, and the anticipated burden of paying some of the defendant's costs associated with the family provision proceeding.

[27] The plaintiffs seek to draw an analogy between the conduct of the defendant's solicitors and that of the solicitor who was the subject of a costs order in *Campbell v Campbell* [2012] QSC 302. The respondent in *Campbell* was the deceased's second wife. The applicants were two of the deceased's children from his first marriage and his solicitor who were the executors named in his will dated 18 November 2010. The deceased died on 23 October 2011. On 16 November 2011 the respondent gave notice to the applicants of her intention to pursue a family provision application. The respondent through her solicitors then lodged a caveat on 1 December 2011 in relation to the proposed application for a grant of probate of the will of 18 November 2010. The notice in support of the caveat showed the respondent's interest as the interest of a beneficiary and an equitable interest in the estate. The solicitors for the executors by letter dated 3 February 2012 set out the circumstances in which one of the partners took instructions and prepared the deceased's last three wills and was satisfied at all times in relation to his testamentary capacity. It was pointed out that if the respondent were successful in proving the deceased did not have capacity, then she stood to receive less under the previous wills. On 14 February 2012 the applicants' solicitors provided copies of the two previous wills and sought particulars from the respondent's solicitors of the alleged incapacity of the deceased. That request was repeated on 21 February 2012. On 13 March 2012 the applicants filed an application for the caveat to be set aside that was listed for hearing on 22 March 2012. On 20 March 2012 the respondent filed a notice withdrawing the caveat. It appears that on 22 March 2012 the court pronounced for the full force and validity of the will of 18 November 2010 without a trial of the proceeding. Ann Lyons J inferred at [31] that the respondent's solicitor caused the respondent to lodge the caveat to support the family provision claim which was misconceived and found at [74] that the respondent's solicitor's conduct was inappropriate and unreasonable after 21 February 2012. The solicitor was ordered personally to pay the executors' costs on an indemnity basis from that date.

[28] The plaintiffs rely on the defendant's solicitors' letter of 28 November 2017 as justifying an order for indemnity costs against the defendant's solicitors, as they submit the conduct of the defendant's solicitors was "inappropriate and unreasonable" after receiving that letter.

[29] On the basis the plaintiffs are liable to pay the defendant's costs of the family provision proceeding, the plaintiffs seek to have them fixed in the same amount as the plaintiffs'

costs of the family provision proceeding incurred until 8 November 2018 have been assessed which was $19,680.30 plus applicable outlays and, to the extent that the defendant's actual costs may exceed that quantum, an order that her costs as between herself and her solicitor be limited to that amount. It appears this was to address a concern that I expressed that the defendant's award obtained under the will, as a result of the family provision proceeding, may be eroded by costs. (The plaintiff's response to that is therefore to impose on the defendant's solicitors the burden of the differential between the costs actually incurred by the defendant in respect of the family provision proceeding and the amount arbitrarily selected by the plaintiffs as appropriate for the defendant's costs.)

The defendant's submissions

[30] The defendant relies on her offer to cooperate with the plaintiffs in a limited grant of administration being obtained for specific purposes, until the resolution of both proceedings. The suggestion that the defendant's solicitors' letter of 1 December 2017 was "high handed" is described as "offensive and without substance". The submission is made that the existence of the caveat caused no prejudice to the estate due to the commencement of the family provision proceeding in conjunction with the defendant's offer to support a limited grant of administration.

[31] The plaintiffs were unsuccessful in their application to dispense with the request for trial date, but the defendant was successful with her application to have both proceedings heard together. The defendant submits that she should therefore have her costs on an indemnity basis of both the application to dispense with her signature on the request for trial date for the probate proceeding and the transfer application.

[32] The defendant submits that while she was ultimately unsuccessful in having the later will set aside, the probate proceeding was reasonably arguable based on the fact that Mr Sammut changed his will four days before he died, the defendant had been refused some access to Mr Sammut by the daughters in the days before he died, and there was evidence to support the argument that Mr Sammut was having a delusion about the defendants stealing large sums of money from him and transmitting them to Thailand.

[33] The defendants submit that upon the commencement of the family provision application, it was not possible for the estate to be administered and the maintenance of the caveat from that date was "entirely appropriate" and made no difference to the administration of the estate. The defendant also relies on the fact there was no finding made in the reasons that the probate claim should never have been brought by the defendant. The disclosure that was pursued by the defendant was essential to both proceedings.

Should costs be ordered against the defendant's solicitors?

[34] The point was made in the defendants' submissions that the first occasion on which the plaintiffs' solicitors threatened a personal costs order against the defendant's solicitors was in the submissions dated 15 May 2019. The defendant's solicitors have not withdrawn from acting for the defendant. I infer that the reason the defendant's

solicitors have continued to act for the defendant is that they were confident there was no basis on which the plaintiffs could succeed in obtaining an order against them. I agree with the defendant's solicitors' conclusion on this aspect. It was a surprising submission to be made by the plaintiffs, when it had not been foreshadowed in correspondence between the solicitors prior to the trial or at the conclusion of the trial when the question of costs was traversed during oral submissions.

[35] The plaintiffs' solicitors' letter of 28 November 2017 made an assumption that was incorrect that the defendant was not continuing the challenge to the later will, because she had filed her family provision application. That letter provides no basis whatsoever for making any personal costs order against the defendant's solicitors. *Campbell* is distinguishable. First, the costs order in *Campbell* was made on an application to be set aside a caveat before the probate proceeding was commenced and, second, the caveat in *Campbell* was lodged in support of an anticipated family provision application, whereas the defendant's caveat was lodged in respect of a challenge to the later will which was pursued to the conclusion of the trial. The offers by the defendant through her solicitor to agree to a limited grant, pending the resolution of the probate proceeding was reasonable. No grant of probate could be made until the question of whether it was the earlier will or the later will that was the last will of Mr Sammut was resolved. It is neither appropriate nor justifiable to make the orders for costs which the plaintiffs seek against the defendant's solicitors personally.

What orders for costs are appropriate in the circumstances?

[36] The plaintiffs successfully proved Mr Sammut's later will which meant that the defendant's family provision proceeding was successful. The defendant should have an order for costs on the indemnity basis in respect of the family provision proceeding, as her success in that proceeding was substantial.

[37] The plaintiffs are concerned about the reduction in the residuary estate and the quantum of the gifts to Mr Sammut's three daughters, as a result of the costs they have incurred in the proceedings that will not be recovered from the defendant and the costs they will be ordered to pay to the defendant. Mr Sammut's daughters appear to blame the defendant for the reduction in their inheritances. Mr Sammut's conduct in the last days of his life in making a new will contributed to the issues that had to be resolved in the probate proceeding and the making of the family provision application by the defendant. Mr Sammut's estate has been diminished, because of the challenge to whether the later will was validly made and the appropriate provision out of the estate for the defendant had to be determined.

[38] It is noteworthy that, despite the numerous threats by the plaintiffs' solicitors to strike out the probate proceeding on a summary basis, the plaintiffs wisely did not seek to do so, as they would have been unsuccessful. Although the *Larke v Nugus* statement made available to the defendant on 7 July 2017 was compelling, it arguably did not completely dispose of the defendant's challenge to the later will in reliance on the alleged delusion and undue influence which were disposed of by the factual findings in the reasons made as a result of the trial. The fact remains, however, that the defendant's challenge to the validity of the later will was going to be difficult in view of Mr Baker's evidence. The defendant therefore took the risk that she may lose the probate

proceeding by defending it which favours making some order against her for the costs of the probate proceeding.

[39] The principles that apply to ordering costs in a probate proceeding are helpfully summarised by Applegarth J in *Frizzo v Frizzo (No 2)* [2011] QSC 177 at [25]-[39]. The starting point is that costs should follow the event, but the discretion remains at large. Being cognisant of the overlap between the family provision application and the probate proceeding, I consider that the order for costs against her in the probate proceeding should be limited to the costs incurred by the plaintiffs in that proceeding that were additional to those incurred by the plaintiffs in connection with the family provision proceeding and those costs should be assessed on the standard basis. In all the circumstances of these two proceedings, I am satisfied that the limited order for costs in the plaintiffs' favour balances Mr Sammut's contribution to the need for the probate proceeding with the risk the defendant assumed in defending that proceeding.

[40] For the very reason that there was an overlap in the evidence relevant to both proceedings, the transfer application was properly brought and the plaintiffs should pay the defendant's costs of that application to be assessed on the indemnity basis. Although the defendant also sought an order for costs in her favour in respect of the plaintiffs' application filed on 8 October 2018, the plaintiffs had some success on that application in obtaining directions to advance the probate proceeding. I consider that the appropriate order in relation to that application is that there is no order as to costs. It is apparent from the number of written submissions that had to be made as a result of the plaintiffs' unsuccessful attempt to have costs ordered against the defendant's solicitors, the plaintiffs should pay the defendant's costs of the submissions on costs in respect of the probate proceeding. Because I am making a costs order in favour of the defendant in the family provision application, the defendant will recover her costs in respect of the submissions on costs relating to the family provision proceeding pursuant to the order for costs in her favour in respect of the proceeding.

Orders

[41] There has been no appeal against the orders made at the time the reasons were published. That means that if any party wishes to appeal against any of the orders for costs that are made in the proceedings, the party will require leave to appeal pursuant to s 64(1) of the *Supreme Court of Queensland Act* 1991 (Qld). Because I recognise that this decision on costs involved dealing with quite disparate submissions on the appropriate costs orders and I wish to avoid the need for either party to incur further costs in relation to an application for leave, I will incorporate the leave to appeal in the orders made. This is not intended to encourage an appeal.

[42] It follows that the orders which should be made are:

In proceeding BS10519 of 2017:

1. There is no order as to the costs of the application filed on 8 October 2018.

2. The plaintiffs pay the defendant's costs of the application filed on 19 October 2018 to be assessed on the indemnity basis.

3. The plaintiffs pay the defendant's costs of the submissions on the costs of the proceeding.

4. The defendant otherwise pay the plaintiffs' costs of the proceeding only to the extent that costs incurred in the proceeding were additional to those incurred by the plaintiffs in connection with the family provision proceeding, with such costs to be assessed on the standard basis.

5. Leave to each of the plaintiffs and the defendant to appeal the orders for costs.

In proceeding BS13643 of 2018:

1. The respondents pay the applicant's costs of the application to be assessed on the indemnity basis.

2. Leave to the respondents to appeal this order for costs.