SUPREME COURT OF QUEENSLAND

CITATION:	*Yeomans v Yeomans & Anor* (*No 2*) [2011] QSC 415
PARTIES:	**ROBYN JOY YEOMANS** **(applicant)** **v** **ROBYN JOY YEOMANS and GREGORY EARLE SMITH (as executors of the will of Gregory Edward Stanley Smith deceased)** **(respondents)**
FILE NO:	BS899 of 2010
DIVISION:	Trial Division
PROCEEDING:	Submissions on costs
DELIVERED ON:	22 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	Applicant's submissions filed 30 November 2011; respondents' submissions filed 6 December 2011
JUDGE:	Mullins J
ORDER:	**1. The applicant's costs of the proceeding be assessed on the standard basis and paid from the estate of Gregory Edward Stanley Smith deceased.** **2. Pursuant to section 253 of the Supreme Court Act 1995, each party has leave to appeal this costs order.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – PROCEDURE, ORDERS AND OTHERS MATTERS – other procedural matters – orders for costs following delivery of reasons for judgment – where applicant successful in her application for further provision – where executors had made an offer to settle that was $2,500 less than what the applicant obtained by way of further provision – where applicant's approach to the proceeding was unreasonable – where applicant's costs to be paid from the estate ordered to be assessed on the standard basis rather than the indemnity basis
COUNSEL:	G R Dickson for the applicant C J O'Neill for the respondents
SOLICITORS:	Crilly Lawyers for the applicant Bennett & Philp for the respondents

[1] I delivered my reasons for judgment in this family provision application on 22 November 2011: *Yeomans v Yeomans & Anor* [2011] QSC 344 (the reasons). In accordance with directions made on that date, the applicant filed submissions on costs on 30 November 2011 together with a supporting affidavit from the applicant's solicitor, Mr Crilly, and the respondents filed submissions on costs on 6 December 2011 together with a supporting affidavit of the respondents' solicitor, Mr Young. No party gave notice requiring an oral hearing to argue costs, so that I will determine costs on the basis of the parties' written submissions together with the additional affidavits that were filed with those submissions.

Offers to settle

[2] Three formal offers to settle were made which were not accepted.

[3] On 15 October 2010 the respondents made an offer to settle the applicant's claim for about $10,000 less than the further provision that the applicant has been ordered to receive. The offer was for the applicant to retain the Nissan Navara, the caravan and all jointly purchased house assets from the Forestdale property and receive a lump sum of $40,000.

[4] The respondents made a second offer to settle on 19 April 2011 which was even closer to the ultimate provision obtained by the applicant in the proceeding, as it allowed for the applicant to retain the moneys which were distributed to her from the safe. It was therefore effectively only $2,500 less than what the applicant ultimately obtained by way of further provision (without taking into account costs implications) in the proceeding.

[5] On 8 August 2011 the applicant made an offer to settle which largely incorporated the April 2011 offer by the respondents, except that the cash payment that the applicant sought was $250,000 rather than $40,000 and she also sought to retain the boats. That offer in relation to the quantum of further provision far exceeded the provision that was ultimately obtained by the applicant.

[6] None of the offers to settle engaged any of the provisions of Part 5 of Chapter 9 of the *Uniform Civil Procedure Rules* 1999, but the attitude of the parties to the litigation reflected by the terms of the offers and the responses to them are not irrelevant to the determination of the costs of the proceeding.

Parties' submissions

[7] The applicant seeks an order that her costs of the proceeding be assessed on the indemnity basis and paid out of the residuary estate. It is submitted that the usual order for costs for a successful applicant in a family provision application is that costs are paid on an indemnity basis from the estate. It is also submitted that a costs order on the standard basis for the applicant would undermine the provision made for her by reducing the modest additional buffer provided for her.

[8] The executor Mr Smith on behalf of the respondents (and I will refer to him as the respondent) submits that there should be no order of costs in favour of the applicant from the estate. The respondent relies on the applicant's lack of candour about the superannuation ([52] of the reasons) which it is submitted made the mediation on 1 June 2010 a largely nugatory exercise. The respondent submits that the applicant's demands as to what further provision should be made for her (as

reflected by the August 2011 offer to settle) were wholly unreasonable and outside what she could realistically expect a court to award. Although she succeeded in the sense that she has obtained an order for further provision that was $2,500 more than the respondent's last offer, the additional costs that were incurred by both parties for the applicant to achieve that additional sum of $2,500 should not be ignored.

Costs orders

[9] Despite the fact that there is a fund in the form of the estate which is available for the making of costs orders in most family provision applications, the behaviour of the parties in the conduct of the litigation remains a relevant consideration in determining the issue of costs. In the reasons, I made observations about the conduct of both parties to this litigation. Parties to a family provision application remain amenable to the court's exercise of discretion in relation to the making of costs orders, despite what is considered to be the "usual" costs order for a successful applicant in a family provision application.

[10] The respondent does not require an order for costs, as the respondent as the executor has the right to be indemnified from the estate for the costs incurred in connection with the proceeding.

[11] The applicant had to pursue the proceeding to finality, in order to obtain a slightly better result than that which was offered by the respondent by way of a settlement offer. The applicant's approach to the litigation as reflected in her desire to live in a much larger home than was adequate for her needs ([45] of the reasons) and her unrealistic settlement offer was unreasonable and not conducive to the earlier and less costly resolution of this proceeding. Her lack of candour at the outset of the proceeding contributed to additional costs for the respondent ([52] of the reasons). The suspicions of Mr Smith and Mrs Thacker that resulted in lengthy correspondence during the proceeding ([52] of the reasons) for no benefit to the estate contributed, however, to additional costs for the applicant.

[12] In all the circumstances, the unreasonable approach of the applicant to what she thought she was entitled from the proceeding should not deprive her of a costs order in her favour, but can be accommodated by giving her costs on the standard basis only. Although the fact that the applicant does not recover her costs from the estate on an indemnity basis may undermine the further provision that she has obtained in the proceeding, that should not prevent court from exercising the discretion in relation to making costs orders which takes account of the conduct of a party to the litigation.

[13] The orders I make are:

1. The applicant's costs of the proceeding be assessed on the standard basis and paid from the estate of Gregory Edward Stanley Smith deceased.
2. Pursuant to section 253 of the *Supreme Court Act* 1995, each party has leave to appeal this costs order.