SUPREME COURT OF QUEENSLAND

CITATION:	*McKay v Queensland Ballet Company (No 2)* [2026] QSC 196
PARTIES:	**JUDITH MARILYN MCKAY AS EXECUTOR OF THE ESTATE OF GLENN RYCEN COOKE, DECEASED** (applicant) **v** **QUEENSLAND BALLET COMPANY** ABN 26 009 717 079 (first respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (second respondent) **AUSTRALASIAN DANCE COLLECTIVE LIMITED** ABN 12 010 545 187 (third respondent)
FILE NO:	BS 5109 of 2025
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 August 2026
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2026
JUDGE:	Hindman J
ORDERS:	**Noting the existing order that the applicant's costs of the proceeding be paid from the residuary estate of the deceased on a solicitor-own client basis, it is further ordered that:** **1. the third respondent pay the applicant's costs of and incidental to the third respondent's application fixed in the amount of $25,000;** **2. the first respondent's costs of and incidental to the originating application be paid from the residuary estate of the deceased on the standard basis;** **3. otherwise there is no order as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – COSTS OUT OF FUND OR PROPERTY – LITIGATION CAUSED BY TESTATOR, PERSONAL REPRESENTATIVE OR

BENEFICIARY – RELATING TO CONSTRUCTION OF WILL – where applicant executor of a will applied for judicial advice that she was justified in distributing the residuary to the first respondent to administer as a charitable purpose trust – where third respondent intervened to assert the residuary should be distributed to it instead, and made a related application – where third respondent was wholly unsuccessful – where applicant and first respondent's positions aligned – where first respondent participated extensively in proceedings and incurred significant additional costs – where those costs were unnecessary – where third respondent rejected offers of compromise more favourable than the outcome – whether third respondent should pay first respondent's costs – whether third respondent should pay applicant's costs of third respondent's application – whether first respondent's costs should be paid out of the estate and if so on what basis

Uniform Civil Procedure Rules 1999 (Qld) r. 681(1), r. 700A(2)

BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2) [2009] QSC 64, cited
Calderbank v Calderbank [1975] 3 All ER 333, cited
Fay v Moramba Services Pty Ltd [2010] NSWSC 725, cited
Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of New South Wales and the Australian Capital Territory (Sackville J, 17 July 1998, unreported, BC9803260), cited
Hariz v Secretary, Department of Communities and Justice [2021] NSWSC 694, cited
Hirani v Hirani [2012] EWHC 1645 (Ch), cited
Hollier v Australia Maritime Safety Authority (No 2) [1998] FCA 975, cited
McKay v Queensland Ballet Company [2026] QSC 137, cited
Metsikas v Quirk [2010] NSWSC 756, cited
Northern Territory v Sangare (2019) 265 CLR 164; [2019] HCA 25, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Re Buckton [1907] 2 Ch 406, cited
Rose v Boxing NSW Inc (Costs) [2007] NSWSC 256, cited
Warton v Yeo (2015) 15 ASTLR 462; [2015] NSWCA 115, cited

COUNSEL: R T Whiteford for the applicant
J Otto KC for the first respondent
No appearance for the second respondent
J Horton KC with W Isdale, for the third respondent (pro bono direct brief)

SOLICITORS: HopgoodGanim for the applicant

McCullough Robertson for the first respondent
No appearance for the second respondent
None instructed for the third respondent

Synopsis, parties' positions, outcome

[1] By judgment dated 24 June 2026, Dr McKay's originating application and ADC's application were determined.[1] That judgment sets out the facts relevant to the dispute, and I adopt the same defined terms. There remains an issue about costs.

[2] There is no dispute that Dr McKay's costs of the whole proceeding are to be paid from the residuary estate of the deceased on a solicitor-own client basis. That order has been made previously.

[3] Otherwise in respect of costs, the positions of the parties are as follows.

[4] First, Dr McKay seeks that her costs of ADC's application (regarding whether Dr McKay exercised real and genuine consideration and whether she should be directed to distribute the residuary estate to ADC), and her costs of the oral costs hearing of 20 August 2026 requested by ADC, be paid by ADC on the standard basis. With respect to ADC's application, in a summary way, Dr McKay contends that ADC lost that application and should pay her costs associated with it (the usual rule being costs follow the event).

[5] With respect to the oral costs hearing, that arose in circumstances where my orders of 24 June 2026 awarded Dr McKay her costs to be paid out of the estate and otherwise made no order as to costs, but with liberty to apply. After Dr McKay and QB indicated they would apply for different costs orders, I made directions for written submissions with the costs to be determined on the papers unless a party requested an oral hearing. No party other than ADC requested an oral hearing, and therefore Dr McKay contends that the costs of the oral hearing on 20 August 2026 could have been avoided and ADC should pay them.

[6] Second, QB seeks that:

(a) ADC pay QB's costs of Dr McKay's application from 22 January 2026 to 31 March 2026 on the standard basis and from 1 April 2026 on the indemnity basis (or alternatively from 22 January 2026 on the standard basis); and

(b) the difference between QB's indemnity costs of Dr McKay's application and the costs recovered by QB from ADC be paid out of the estate on the indemnity basis.

[7] Alternatively, QB seeks that QB's costs of Dr McKay's application be paid out of the estate on the indemnity basis.

[8] QB seeks no costs order in respect of ADC's application because it played no part in that application.

[9] In a summary way, QB contends, to support those sought costs orders, that ADC lost Dr McKay's application and so should pay QB's costs of that application (including

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1 *McKay v Queensland Ballet Company* [2026] QSC 137.

indemnity costs from a date at which ADC could have accepted an offer more favourable to ADC than the outcome achieved). Further, QB should not be out of pocket itself as a consequence of its participation in Dr McKay's application and so should receive costs (or any balance of costs not recovered from ADC) from the estate on the indemnity basis – Dr McKay agrees with that submission.

[10] Third, ADC seeks that there be no cost orders made adversely affecting it in either application.

[11] Fourth, the Attorney-General does not seek any cost orders and made no cost submissions.

[12] In the result, I will further order in respect of costs that:

(a) ADC pay Dr McKay's costs of and incidental to ADC's application fixed in the amount of $25,000;

(b) QB's costs of and incidental to Dr McKay's application be paid from the residuary estate of the deceased on the standard basis;

(c) there otherwise is no order as to costs.

[13] These are the reasons for the making of those orders.

Consideration

[14] Whilst costs are discretionary, the discretion is to be exercised judicially having regard to all relevant factors. As is often the case with complicated cost decisions, like this one, there are factors that pull in different directions with different weights that require consideration.

[15] I summarise those factors I consider most important to consider in this case as follows, noting there is overlap between some factors.

Costs usually follow the event

[16] First, the rules of court provide that costs follow the event unless the court otherwise orders.[2] That means that ordinarily a successful party will be entitled to a costs order in its favour against the losing party unless the successful party has engaged in some disentitling-type conduct, or other special or exceptional circumstances exist. This factor favours ADC being ordered to pay (1) QB's costs of Dr McKay's application and (2) Dr McKay's costs of ADC's application.

Unaccepted more favourable offer of settlement

[17] Second, in accordance with *Calderbank* principles,[3] and also having regard to rule 700A(2)(c) of the UCPR, an unaccepted offer made by the successful party that was more favourable to the losing party than the outcome ordered by the court may justify a higher (for example, indemnity) costs award from the date the offer could have been accepted.

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2 See *Uniform Civil Procedure Rules 1999* (Qld) r. 681(1) (**UCPR**).

3 *Calderbank v Calderbank* [1975] 3 All ER 333.

[18] In this case there are three offers to be considered. The first unaccepted offer was made by QB to ADC to resolve Dr McKay's application. The offer contemplated the necessity of the court's sanction and the other parties' consent. The second unaccepted offer was made by QB to all other parties to resolve Dr McKay's application. It was in broadly the same terms; again the offer contemplated the necessity of the court's sanction.

[19] The third unaccepted offer was in similar, but not identical, terms to earlier offers but was made by Dr McKay to all other parties, again contemplating the necessity of the court's sanction. QB accepted that offer. There is no evidence that the Attorney-General or ADC responded to that offer.

[20] The non-acceptance by ADC of any of those offers is noteworthy in circumstances where there had been an earlier offer to settle made by ADC that would not have been much more favourable to ADC than the offers it received and did not accept. But ADC has offered in evidence an explanation for why it did not accept the offers received having regard to certain concerns, including about the prospect of the scholarship to be established continuing in perpetuity if the gift were to be split, particularly in light of increased legal costs spent by that time that would deplete the gift. There is some sense in that explanation. But the offers received by ADC and not accepted were considerably more favourable to ADC than the outcome that has been ordered by the court.

[21] Dr McKay does not seek to rely upon the offers as part of her cost submissions. QB does. Therefore, consideration of this factor overall may favour ADC being ordered to pay QB's costs of Dr McKay's application at least on the standard basis and possibly on an indemnity basis from the date the offers to ADC could have been accepted.

The case concerns the administration of an estate

[22] Third, the litigation involved the administration of an estate. To that end, insofar as the advice application was concerned, the court did benefit from having a contradictor present, other than the Attorney-General, and to that extent there is an argument to be made for some part of ADC's costs to be paid from the estate. ADC does not seek any costs, but I consider this is a relevant factor to take into account when considering the costs orders sought against it. It is not a factor of significant weight though in circumstances where whilst the litigation did not commence as truly adversarial litigation, it did morph into litigation more of that nature.[4] To a real extent, both QB and ADC were seeking to propound their own personal interests in the litigation. That the litigation was substantially adversarial favours cost awards being made for and against parties involved, and not from the estate bar for the executor (at least in respect of any adversarial component).

The litigation concerned a charitable purpose gift and both QB and ADC were potential beneficiaries

[23] Fourth, the residuary of the estate was gifted for a charitable purpose. Any costs ordered to be paid from the estate, or not recovered by the estate from others (that is,

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4 The third category of case referred to by Ward JA (Emmett JA agreeing) in *Warton v Yeo* (2015) 15 ASTLR 462 at [78]-[79].

a failure to make costs orders against ADC), will inevitably lessen that charitable purpose gift. In that respect, rule 700A(2)(a) of the UCPR makes clear that I can have regard to the value of the property the subject of the proceeding.

[24] On one view, that may favour a costs order against the unsuccessful party, ADC, insofar as its involvement added to the costs of the litigation. But each of QB and ADC were potential beneficiaries of the charitable gift – ADC most squarely so as a significant Queensland dance company with an almost singular focus on contemporary dance.

[25] This is a difficult factor to take account of in this case and ultimately I conclude this factor is somewhat neutral.

The additional costs of ADC's application

[26] Fifth, there are two applications that were dealt with in the one proceeding. My impression is that ADC's application did not add too much in terms of time or expense to the overall proceeding for the parties involved; although the additional work was not *de minimus*. Nor do I consider that ADC's application was frivolous or obviously unnecessary or without any proper basis given the background facts (despite the outcome). The position of the executor in terms of her commitment to properly re-exercising her discretion, if necessary, in light of her conduct up to that time was appropriately tested in cross-examination. Consideration of this factor overall may favour no or a limited costs order in respect of ADC's application. However, this factor is not as weighty as others, including the first identified above.

ADC's position in Dr McKay's application

[27] Sixth, the issues raised by ADC in Dr McKay's application were not hopeless. There was an ambiguity in the will to be considered, as well as the scope of the executor's discretion. That may point faintly away from costs being awarded against ADC in that application. But an unsuccessful party's case does not have to be hopeless or doomed to fail for an award of costs to be the ordinary outcome.[5]

[28] ADC did pro-actively seek to participate in Dr McKay's application and brought its own application. But at least in respect of Dr McKay's application, there is no reason to conclude that was an unreasonable position to take given it acted as the only real contradictor to the relief sought in Dr McKay's application. Contradictors significantly assist the court.

[29] ADC's participation in the proceeding overall did not accomplish nought. The scholarship to be established does need to meet the purpose of the trust.[6] That is important in the context of a dispute concerning a charitable purpose trust. Further, it was not unreasonable for ADC to participate in the proceeding where it had been identified as a potential recipient of the gift and Dr McKay was seeking judicial advice from the court. Overall, I consider that combination of factors favours no costs order being made against ADC in respect of Dr McKay's application. These factors do not bear on ADC's application.

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5 *Metsikas v Quirk* [2010] NSWSC 756 at [7].

6 See *McKay v Queensland Ballet Company* [2026] QSC 137 at [73]-[74].

ADC's circumstances

[30] Seventh, the undisputed evidence shows that requiring ADC, a registered charity with employed staff and limited assets, to pay any costs would threaten its existence. That ordinarily would not be a reason not to make a costs order against it given its choice to engage in the litigation (see factor eight below).[7] Its potential impecuniosity therefore does not bear on my decision.

[31] It is also tempting to speculate that the deceased would not have wished ADC (a strong proponent of contemporary dance in Queensland) to be at risk due to cost consequences of this proceeding, but that would be speculation and should not be engaged in by a court. All that the court can properly infer is that the deceased wished this charitable fund to be established for its specific purpose, which includes advancing contemporary dance. Accordingly, this factor has very little, if any, weight.

The purpose of a costs order

[32] Eighth, costs are not a punishment imposed on the losing party.[8] Not making an award of costs against a losing party just because the losing party does not have the financial ability to pay would generally be an inappropriate exercise of judicial discretion. Even if the litigation might be ostensibly in the public interest.[9] And even if litigants involved are charitable in nature.[10] Cost orders are an ordinary part of civil litigation that parties should be aware of before entering into litigation. That each of Dr McKay and (possibly) QB might recover costs from the estate does not tell against any order for costs against ADC.[11] These matters point away from any argument that ADC should not be ordered to pay costs if otherwise appropriate.

QB's conduct

[33] Ninth, there is a good argument to be made that, first, QB was always a proper respondent to Dr McKay's application and would generally be entitled to have its costs in relation to that application paid from the estate.[12] It is relevant to note that absent ADC's involvement in the proceeding QB would likely have played a very limited role in Dr MacKay's application, and its entitlement to costs, even on an indemnity basis, would have been expected to be modest. That suggests QB's entitlement to some costs from the estate should be favourably considered. However, it ought be recalled that any costs QB receives from the estate will reduce the gift it will then receive and administer, bearing in mind the charitable nature of that gift.

[34] But given Dr McKay's position in respect of her application, I consider that there was no real necessity for QB to be involved in Dr McKay's application to the extent that

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7 *Hariz v Secretary, Department of Communities and Justice* [2021] NSWSC 694 at [44]. Note the more certain statement about relevancy (or lack thereof) in *Hollier v Australia Maritime Safety Authority (No 2)* [1998] FCA 975. See also *Northern Territory v Sangare* (2019) 265 CLR 164 at 173-174 [26]-[27].

8 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64.

9 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 122-123.

10 *Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of New South Wales and the Australian Capital Territory* (Sackville J, 17 July 1998, unreported, BC9803260 at 3); *Rose v Boxing NSW Inc (Costs)* [2007] NSWSC 256 at [7].

11 *Fay v Moramba Services Pty Ltd* [2010] NSWSC 725 at [3].

12 *Re Buckton* [1907] 2 Ch 406 at 415-6; *Hirani v Hirani* [2012] EWHC 1645 (Ch) at [32].

it was, its interests being adequately protected by the submissions made for Dr McKay. QB briefed King's Counsel to make extensive oral and written submissions advancing the same conclusion as that Dr McKay advanced (with the assistance of two counsel – one highly experienced in the area), and obtained extensive expert evidence which was largely unhelpful, although I note it may have done so in response to ADC adducing expert evidence.[13] It could have relied much more heavily on Dr McKay and not unnecessarily incurred significant additional, and to a great extent duplicative, costs. If QB wanted to engage as a proactive litigant at its own choice, then those additional costs (not properly to be considered part of the executor's costs) might be at its own risk. Why should ADC be required to pay the costs of a party whose position was already being advanced by another?

[35] Taking all those matters into account, I consider that favours a less than full indemnity allowance for QB's costs from the estate and as between QB and ADC I consider that this set of combined factors strongly tends against ADC paying QB's costs (although against that it cannot be ignored that between the two of them it would be that QB "won" , which is incorporated into early factors considered).

Decision

[36] As I indicated, this is a classic case of many factors pulling in different directions with different weight and is therefore a complicated cost position to resolve.

[37] However, in balancing all of the above factors, I conclude that the most appropriate further costs orders will be that:

(a) the third respondent pay the applicant's costs of the third respondent's application fixed in the amount of $25,000 – whilst the parties made no submissions about fixed costs, I consider myself capable of making the necessary estimation having regard to the additional costs likely to have been incurred by the applicant as a consequence of ADC's application and consider that my fixing of costs is in the interests of all parties so as to avoid the incurring of any further costs including in respect of any assessment;[14]

(b) the first respondent's costs of and incidental to the originating application be paid from the residuary estate of the deceased on the standard basis – I am not allowing recovery on an indemnity basis particularly because I consider that QB could have played a more limited role in Dr McKay's application;

(c) the parties otherwise bear their own costs.

[38] I note that I consider the costs of the oral hearing on costs, which was requested by ADC, to properly form part of the costs of the proceeding. No separate cost orders is made for that part of the proceeding. Every party has a right to request an oral hearing

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13 I do accept though that certain evidence adduced by QB would have needed to be adduced by Dr McKay if it had not been adduced by QB.

14 For reference, I calculate that figure based on the estimated standard costs of and associated with reviewing and advising on ADC's application, reading ADC's material and submissions in support of its application, preparing one additional affidavit, preparing one additional comparatively shorter set of written submissions, and the brief amount of additional solicitor and counsel time (one experienced junior counsel) (both in terms of preparation and hearing time) required for evidence and oral submissions related to ADC's application.

on the issues and therefore ordinarily such a hearing should not be specifically severed for costs purposes.

Orders

[39] Noting the existing order that the applicant's costs of the proceeding be paid from the residuary estate of the deceased on a solicitor-own client basis, I further order that:

1. the third respondent pay the applicant's costs of and incidental to the third respondent's application fixed in the amount of $25,000;

2. the first respondent's costs of and incidental to the originating application be paid from the residuary estate of the deceased on the standard basis;

3. otherwise there is no order as to costs.