FAMILY LAW APPEAL COSTS OF APPEAL Death of husband prior to the filing of application for propertysettlement- Federal Magistrate ordered that the wife pay costs of therespondents Estate Appeal dismissed. Family Law Act 1975(Cth) s 117 Federal Magistrates Court Rules r 2.05(2) W & E [2006] FamCA 854 APPELLANT: MS DIPLOCK RESPONDENT: MR DIPLOCK (DECEASED) FILENUMBER: BRC 470 of 2007 APPEAL NUMBER: NA 66 of 2007 DATE DELIVERED: 15 November 2007 PLACE DELIVERED: Brisbane JUDGMENT OF: May J HEARING DATE: 15 November 2007 REPRESENTATION COUNSEL FOR THE APPELLANT: Mr Morgan SOLICITOR FOR THE APPELLANT: Mr Sharma COUNSEL FOR THE RESPONDENT: Mr Drysdale SOLICITOR FOR THE RESPONDENT: Mr Gleeson ORDERS (1) Thatthe appeal be dismissed. (2) That the appellant pay the respondent's costs of and incidental to theappeal to be assessed. IT IS NOTED IN CONNECTION WITH THESEORDERS that the judgment of the Full Court delivered this day will for allpublication and reporting purposes be referred to as Diplock andDiplock. FAMILY COURT OF AUSTRALIA AT BRISBANE FILE NUMBER: BRC470 of 2007 APPEAL NUMBER:NA66 of 2007 MS DIPLOCK Appellant And MR DIPLOCK Respondent REASONS FOR JUDGMENT Thisis an appeal filed on 5 October 2007 against paragraph 2 of the Order made on 7September 2007 by Wilson FM where he orderedthat the applicant wife pay thecosts of the Estate of the respondent as and from 10 August 2007 to betaxed unless otherwise agreed. Onthe same occasion the Federal Magistrate dismissed the application of the wifefiled on 20 February 2007. Thereasons for judgment explain that dismissal of the application. Those reasonsneed to be understood to appreciate why the orderfor costs was made. It wasargued before me this morning by Mr Sharma, the solicitor who appears for theappellant, that in someway it was unnecessary for his Honour to provide thesereasons for judgment because it was always conceded that once they becameawareon 13 August of the time of death of the husband, the application in thisCourt could not proceed. Thefacts are very simple. In the afternoon of 16 February 2007 the solicitors forthe wife attended and lodged with the Federal MagistratesCourt an applicationfor property settlement. The respondent was Mr Diplock. At that time thesolicitors and the wife were unawarethat at 6:00 am that day, Mr Diplockdied. Theapplication was sealed by the Court on 20 February 2007 and in

accordance withRule 2.05(2) of the Federal Magistrates Court Rules,that is the date of filing. Forsome reason, which has never been explained, the application was not served onthe solicitors for the estate or the respondent'ssolicitors until7 August. Thefirst knowledge the wife had of the death of her husband was the next day, 17February 2007 when she was apparently informed bythe hospital. She thought thather husband had died on the evening of 16 February. Thewife told her solicitors of the death, who one might think should have thenrealised that it might be no longer possible to continuethe proceedings in theFederal Magistrates Court. In addition, the solicitors for the husband's estatewrote, on 9 August 2007, informingthe wife's solicitors that as the applicationwas filed three days after the death it should be withdrawn. In the lastparagraphof that letter the solicitors invited the withdrawal of thatapplication. Thesolicitors for the appellant wife then wrote back and said this: Asregards the application for property settlement, it was lodged with the Registryon 16 February 2007. Indeed, in our accompanyingletter, we had requested anearly interim hearing, and it would appear that our letter was submitted to theRegistrar for consideration,and the filing date may be the date whenconsideration was given by the Registrar to our request. We will be seeking that16 February2007 be the deemed filing date. As to service on the executor, itwas done on the basis that you act in relation to the estate matter,and thisapplication is for property settlement. Itis accepted that the solicitors did not, even at that time, know of the time ofdeath of the husband. In a letter dated 20 August2007 the solicitors for therespondent and for the estate wrote and said this: We invited you towithdraw your Federal Court application by our open letter to you dated 9 August2007. This was rejected by youin your letter dated 10 August 2007 where youalso stated that you would be seeking a deemed date for filing as opposed to ameremention. Due to your rejection of our invitation and your advices that youwould be seeking the Court to make an order about dateof filing, we thenbriefed Counsel. You then forwarded a facsimile transmission to our office at11.13pm Sunday 12 August 2007 referringto the matter as being a mentionand a suggested course be taken. You then made an offer by telephone to withdrawyour client's applicationon the basis that both parties bear their own costswhile you were on the train to Court. We had already briefed Counsel and it wasfor that reason that our client did not accept your client's offer

todiscontinue the proceedings on the basis that each party beartheir own costs.It was for this reason that our offer was made to you that each party bear theirown costs with the exception ofyour client being responsible for our Counsel'sfees. Itseems that the solicitors for the wife formed the view that there was someargument that as the documents had been delivered tothe Court on the day of 16February 2007 it was possible to continue that application. On16 August 2007 the estate filed a Response seeking that the application bedismissed and asked for costs. Despite the correspondenceto which I havereferred and the other correspondence provided to me and referred to me byMr Sharma, the wife through the solicitorscontinued to maintain theposition. For the reasons contained in the judgment the application wasdismissed. There is no appeal fromthat order. Theonly question to which I have referred and is somewhat confusing is what theissue really was before the Federal Magistrate. TheFederal Magistrate wasprovided with submissions from counsel, Mr Morgan, in relation to the matterbefore him and the first submissionis dated 22 August 2007. It does seem to belargely focused on the question of costs and as Mr Sharma correctly said,reference wasmade to paragraph 12 where it was said: It is concededthat proceedings need to be on foot at the time of death if they are to continueagainst the personal representatives. However,it is all somewhat confusing because many other pages of this submission appearto argue the question of whether the Courthad some power to deem that theapplication had been filed on 16 February 2007 and a subsequent submission whichmay well have beenas a result of a request from the Federal Magistrate seems tocontinue to argue the matter. Inany event I am only concerned with the reasons for costs given by the FederalMagistrate. In paragraph 12 of his judgment he saidthis: At generallaw, the court has a discretion as to the award of costs. In the present casethe solicitor for the executors of the respondent'sestate wrote to thesolicitors for the applicant on 9 August 2007, two days after being served withthe initiating application andsupporting documents and invited the applicant towithdraw her proceedings. The applicant's solicitor, and the applicant herself,did not know of the time of the respondent's death until the matter came beforethe court on 13 August 2007. It was argued in thosecircumstances that theapplicant should not have to pay the costs of the executors prior to thatday. Soit is quite apparent from what his Honour said that all the matters

placedbefore me this morning by Mr Sharma were entirely understoodby his Honour. Hethen went on to say this: However, in my view the proceedings shouldhave been discontinued on receipt of the letter from the executor's solicitor. Ihave concludedthat the proceedings were not filed until 20 February 2007, andthat such defect cannot be saved. Had the proceedings been discontinuedby theapplicant when the fact of late filing was drawn to their attention, theexecutors would not have incurred any significantlegal costs. HisHonour then ordered that the wife pay the costs of the estate from 10 August2007, being the day after the letter was writtenby the solicitors, and left itto the taxing officer to decide about counsels fees. Theother matter of some significance that has taken place in these difficulties wasthat the solicitors for the appellant wife filedan application in the SupremeCourt of Queensland under the Family Provision legislation on 30 March 2007. Itis somewhat difficultto understand how those two proceedings could havecontinued. In any event, that seems to now be the course of litigation. Ihave lengthy submissions by the appellant and I have heard further fromMr Sharma this morning. The appellant's submissions filedon 13 November2007, continue to deal with the question about the circumstances of thismaterial being filed and are somewhat argumentative,as are the subsequentsubmissions called supplementary submissions that were filed, two of them filedyesterday. However, it isargued that the order for costs ought not to havebeen made. Itis not immediately apparent from these submissions how it is said that there wassome error in the Federal Magistrate's exerciseof his discretion other than theassertion to which I have already referred that because the time of death wasnot known until 13August, an order for costs ought not to have been made. As Isaid that was a matter that was entirely taken into account by the FederalMagistrate. Theprovisions in relation to costs and the circumstances in which an order can bemade for costs are well understood. The legislationprovides clearly that theremust be circumstances that justify an order for costs and clearly the FederalMagistrate had those mattersin mind. MrDrysdale generously refers to W & E [2006] FamCA 854, a judgment ofmine recently given. It is perhaps not necessary to refer at any great length tothe provisions of s 117 or some ofthe very well known cases other than to sayfirst that this is an appeal from a discretionary judgment and it is necessaryfor anappeal to be successful to demonstrate that the Judge was plainly wrong,that his decision was no proper

exercise of his discretion. Inmatters such as this where there is an appeal against an order for costs, theprinciples are quite clear that there is a very widediscretion to make an orderfor costs. In this case there can be no doubt that the Federal Magistrateprovided substantial reasonsfor his order for costs and it cannot be said thatthe reasons he gave were erroneous or that the order he made was not within hisdiscretion and I would dismiss the appeal. Atthe conclusion of this appeal an application was made on behalf of therespondent for the costs of the appeal. In my view an orderfor costs should bemade. I appreciate that the appellant's circumstances are that she is dependenton Centrelink and may financiallybe in relatively poor circumstances, however,this is an appeal, it was an appeal against a discretionary judgment and I wouldhaveto say that there were very few merits of the appeal and consequently anorder should be made for costs. I certify that the precedingtwenty-four (24) paragraphs are a true copy of the reasons for judgment of theHonourable Justice May Associate: Date: 15 November 2007 AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2007/1393.html