

AT WHAT COST? Recovering Legal Expenses in Parenting Matters

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The costs associated with contested parenting disputes are frequently significant and, where the subject of the dispute is unquantifiably precious, many parents find that reaching a satisfactory compromise prior to incurring significant costs is far from easy.

The costs involved in pursuing a parenting application to trial are rarely limited to solicitor's expenses and may include costs for Counsel, private Family Dispute Resolution Practitioners, Family Report Writers, other expert witnesses including psychiatrists, psychologists and teachers and even contributions towards the costs of the Independent Children's Lawyer. Meeting these expenses involves payment from "after tax" dollars and doing so can be particularly challenging where, in contrast to property settlement disputes, there is no share of assets from which to recover those expenses. How to meet and potentially recover these costs rapidly becomes a subject at the forefront of all parents', and most practitioners', minds when it appears impossible to resolve matters by alternate means of dispute resolution.

This paper considers the fundamental requirements for arrangements between solicitors and their clients and the circumstances in which costs orders may be made by the court in contested parenting matters.

BASIC REQUIREMENTS

Costs Agreements, Estimates and Advices

It is essential that lawyers ensure clients execute valid Costs Agreements prior to engaging in work of any nature. Each State and Territory's *Legal Profession Act* (or equivalent) sets out the requirements for practitioners to enter into a written Costs Agreement with the client. That agreement must detail the basis upon which costs will be incurred on the client's behalf.

Conducting work on behalf of a client in the absence of a valid retainer is always fraught but particularly in contested parenting matters where it can be notoriously difficult to accurately predict the total costs a client can expect to incur, where costs can be incurred very quickly and where, in the absence of a binding Costs Agreement, the amount a lawyer can recover for the work they have undertaken is limited to the amounts set out in the Scales annexed to the Family Law Rules 2004 and the Federal Magistrates

Court Rules 2001. The amounts payable pursuant to the scale can be significantly less than the actual costs incurred.

Chapter 19 of the Family Law Rules describes the costs solicitors may charge for work done in family law proceedings in the Family Court. Under Rule 19.18, costs may be charged in accordance with a costs agreement or, if there is no costs agreement, in accordance with the Itemised Scale of Costs (Family Law Rules, *Schedule 3* or Federal Magistrate Court Rules *Schedule 1*).

Costs agreements where charges depart from the scale are permitted by the Rules in accordance with Rules 19.14 and 19.15. When making a costs agreement with a client, a lawyer must advise the client to obtain independent legal advice about the costs agreement and if the client does agree to enter into a costs agreement, the costs to be charged must be set out in a written agreement signed by the client and the solicitor.

When preparing a costs agreement in a parenting dispute, it can often be difficult to give anything but a very wide ranging estimate of the potential costs that may arise, particularly if the full breadth of the dispute is not yet known. Practitioners should therefore be prepared to give regular written updated estimates of the costs likely to be incurred in progressing the matter through each of the stages of negotiation and litigation.

As a result of significant amendments made to the Family Law Rules in 2008 the Family Court of Australia divested itself of its role in assessing the quantum of costs payable between lawyers and clients. Those disputes are now dealt with pursuant to the relevant State/Territory laws. Despite the 2008 changes the Family Court still requires practitioners to give their clients a costs notice (written confirmation of the costs incurred to date and the amount of costs likely to be payable up until the end of the next court event) immediately prior to each court event.

The Family Court retains the power to determine the sums payable where the quantum of party/party costs cannot be agreed.

Each of the relevant *Legal Profession Acts* sets out the time period within which clients can contest their accounts. In Queensland at least, parties can contest their accounts for up to 12 months from the date of issue (even where those accounts have been paid). The absence of a valid Costs Agreement and appropriately updated (and documented) estimates makes responding to such issues difficult, particularly if the passage of time since the work was conducted is significant.

COSTS ORDERS

The Law – Part XV of the Family Law Act 1975 ("the Act")

Generally, each party to proceedings under the Act is expected to bear their own costs.

Section 117(1) provides that:

“subject to subsection (2), subsection 70NFB(1) [contraventions] and sections 117AA [overseas enforcement], 117AB [knowingly false allegations], 117AC [convention countries] and 118 [frivolous/vexatious proceedings], each party to proceedings under this Act shall bear his or her own costs”.

In the event the court is of the view that there are justifying circumstances, it may make such orders as to costs as it considers appropriate, including security for costs (s.117(2)) and, in doing so, must, pursuant to section 117(2A), have regard to the following:

- “(a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
- (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
- (g) such other matters as the court considers relevant.”

Although the High Court made it clear in *Penfold v Penfold* (1980) FLC ¶90-800 that the circumstances must justify a costs order, the court’s discretion to make orders for costs pursuant to section 117 is wide and ought not be fettered (see *I and I (No 2)* (1995) FLC 92-625).

The Act also specifies that the court has the discretion to make orders that the parties bear, in such proportion as may be deemed appropriate, the costs of the Independent Children's Lawyer (section 117(4)), in which case the fact that the ICL is funded by Legal Aid must be disregarded. Such an order is often, in practice, linked significantly to the conduct and success of a party to the proceedings consistent with s 117(2A)(c) and (e).

In addition to these discretionary powers, there are some circumstances prescribed in the Act in which the court must make an order for costs in parenting matters and these include:

1. where knowingly false allegations or statements are made in the proceedings (section 117AB). This section was originally intended to apply only in relation to allegations regarding violence and child abuse but, in practice, has far wider application; and
2. where a party is found to have committed a contravention of an existing parenting order without reasonable excuse and demonstrating a serious disregard for their obligations under an order (section 70NFB(1) and (2)(g)) unless the making of a costs order would not be in the best interests of the child concerned. Again, one of the most significant considerations for the court will be the impact of the costs order on the inter-parental relationship and the potentially deleterious impact on the children.

In any event, the court ought only make costs orders once all relevant parties have had the opportunity to be heard as to do otherwise is effectively a denial of natural justice (see *Black and Kellner* (1992) FLC 92-287) and *Eure and Tidwell* (1995) FLC 92-622).

What sort of Orders can be made?

The Explanatory Guide to the Family Law Rules provides the following definitions in relation to costs:

Lawyer/client costs: the costs payable by a client to the client's lawyer.

Party/party costs: the costs payable by one party to another party under these Rules or by order.

Indemnity costs: an entitlement to costs, including costs under a costs agreement, for all costs incurred, other than costs that are unreasonable in amount or that have been incurred unreasonably.

The Federal Magistrates Court offers the following definitions

Solicitor/client costs: private fee arrangements between a lawyer and client. The FMC is not responsible for overseeing these costs arrangements.

Party/party costs: the Court may order one party to pay the legal costs

of another. These are known as party-party costs. The court may order a specific amount of costs be paid under a party/party costs order.

Indemnity costs: Where the conduct of a party warrants it, the Court can award all costs that a party reasonably and properly incurred. These costs are known as indemnity costs.

Circumstances in which costs orders are likely to be made

There are comparatively few reported decisions regarding the making of costs orders in parenting matters and costs orders are generally made in these sorts of cases far less frequently than in other proceedings under the Act.

In parenting cases, one of the most significant matters to which the court will have regard, pursuant to section 117(2A)(g), is the impact that a costs order will have on the parties' ongoing co-parenting relationship and whether the making of such an order is effectively contrary to the best interest of the child – which remains the paramount consideration in all parenting matters. In cases where it is invariably in the best interests of the child for the parents to maintain a capacity to work together and communicate constructively, imposing a significant financial burden on one parent may place him/her under such financial strain and generate sufficient ill-will to prejudice their ability to promote the best interests of the children above all else.

Although not strictly speaking a "parenting case", the recent decision by Federal Magistrate Scarlett in *Green & Green (No.2) [2011] FMCAfam 473* identifies matters of which practitioners should be aware where correspondence prepared in the course of negotiations makes reference to an intention to seek costs in the event an application to court is necessary. That case involved the Wife's application for sole use and occupation of the former matrimonial home, the Wife arguing that her application was brought for the intention of minimising conflict for the benefit of the children.

Prior to filing her application the Wife had instructed her solicitors to write the Husband's solicitors, in a letter marked "without prejudice save as to costs" advising that they were instructed to bring a sole use and occupation application in the event the Husband did not vacate the property by a certain date. The correspondence confirmed that costs would be sought if the application was required. In reply the Husband's solicitors set out why they regarded the foreshadowed application as likely to fail and, after the application was filed, wrote to the Wife's solicitors urging their client to withdraw the application in which case no costs orders would be sought. The Husband's solicitors also placed squarely on the record an intention to seek indemnity costs if the application proceeded and failed. The application was dismissed (although the parties were restrained from approaching each other save in relation to the children). The Husband subsequently applied for indemnity costs in the sum of approximately \$18,000.

In considering the s.117 factors and the principals enunciated in *Colgate Palmolive* (see below) FM Scarlett made an order for costs against the Wife and noted, inter alia:

1. neither party was in receipt of legal aid and the Wife could absorb a costs order if given time to pay;
2. the Wife persisted in bringing an application where it must have been obvious that her chances of success were slim at best;
3. the Wife was wholly unsuccessful; and
4. the Husband's solicitors had written and offered the Wife an opportunity to withdraw the application with no costs consequences.

The Federal Magistrate was not of the view that indemnity costs were warranted and, exercising the discretion to depart from the Scale of Costs, fixed, pursuant to Rule 21.02 of the Federal Magistrates Court Rules 2001, the costs payable in the sum of \$7,000 to be paid at the conclusion of the substantive application.

Whilst it is important for practitioners to make "without prejudice" offers in the course of negotiations and to confirm that all relevant correspondence will be tendered in support of an application for costs, *Green's case* is a timely reminder that "hopeless applications" which waste the court's time risk consequential costs orders.

Costs in parenting matters are most frequently ordered in **contravention cases**. The principles for making costs orders in these circumstances were summarised by Justice Cronin in *Chan & Wui [2011] FamCA 615*.

The relevant facts were:

1. the parties were both born in Taiwan. The Father came to Australia in 1995. The parties commenced cohabitation in 1998 and were married in 2001. Their two children were born in 2006 and 2008;
2. the parties physically separated in September 2009 but were separated under the one roof from January of that year;
3. Consent Orders were made in the Federal Magistrates Court providing for the children to spend equal time with each parent prior to the Father and the children moving to Taiwan to live;

4. the Orders provided for the children to spend 10 weeks each year with the Mother during their school holidays;
5. the Orders were to be mirrored in the appropriate courts in Taiwan although there was subsequently some difficulty in ensuring that occurred;
6. the Father failed to facilitate the children's visits and telephone communications with the Mother. The Father failed to respond to the Mother's application or to appear at Court; and
7. the Mother sought costs on an indemnity basis.

Once satisfied that there was nothing preventing the application of the Family Law Act (both parents having indicated they were Australian citizens at the time the consent orders were made), his Honour found that the Father had breached the orders without reasonable excuse (pursuant to Subdivision E of Division 13A of the Act). His Honour identified that s70NEB(1)(f) empowered him to make a costs order and indicated that he was satisfied that the Father's conduct alone justified an order for costs.

In considering the categories of circumstances that might give rise to an indemnity costs order, as identified by the Full Court of the Family Court in *Yunghanns* (2000) FLC 93-029, his Honour noted (at paragraph 62):

"In Yunghanns ... the Full Court said that the categories of circumstances that might give rise to an indemnity order are not closed. The court said at 87,471:

'...and it is not a condition precedent to the exercise of the discretion that some collateral purpose or species of fraud be established against the party against whom such an order is sought. All that is required is that the court asked to exercise the discretion be satisfied that some 'particular facts and circumstances of the case in question warrant the making of an order for repayment of costs other than on a party/party basis'.

At paragraphs 63 and 64 of his judgment, Cronin J confirmed that:

"[63] Indemnity costs orders in a parenting case should be reserved for cases where the conduct of a party is anything but child-focussed, is calculated to cause emotional harm to the other parent or conducted in circumstances where there could be no justification for the orders sought or for the conduct of the litigation itself. The husband's behaviour here causes me concern such that there are circumstances warranting an order. I find there are special and indeed unusual matters or facts in this case.

[64] Section 117(2A) also provides that it is important for the court to consider whether the proceedings before it were necessitated by the failure of a party to comply with previous orders. That is exactly what has happened here and to that extent, having regard to the fact that there is a "defence" not proposed by the husband and to which I have referred above, it must be said that the husband has been wholly unsuccessful."

The following orders were made:

- “4. That until further order, the Husband be restrained by injunction from transferring, selling, further encumbering or otherwise dealing with the real property at D.
5. That by 1 August 2010, the Husband pay to the Wife:
 - (a) \$50,000 by way of security for the Husband's future compliance with the parenting orders made on 9 September 2009 (as amended by these orders) and that the Wife be at liberty to use those funds held on her behalf by her solicitors to pursue:
 - (i) any future enforcement/contravention proceedings in any Australia court arising out of the orders of 9 September 2009; or
 - (ii) enforcement of the orders in any Taiwanese court;
 - (b) the sum of \$1080 by way of reimbursement for the Wife's airfares to Taiwan in December 2009;
 - (c) \$1215 by way of reimbursement for the Wife's airfares to Taiwan of 15 June 2010;
 - (d) \$1200 being legal costs for the proceedings in the Taiwan Shihlin District court;
 - (e) \$7570 for the Wife's costs of the divorce proceedings as ordered by Riley FM on 4 June 2010; and
 - (f) \$12,800 being costs thrown away in respect of these contravention proceedings.
6. That if the Husband fails to make the payments to the Wife by 1 August 2010 referred to in para (5) above then a registrar of the court sign all such documents as may be required in the name of the Husband to transfer the interest of the Husband in the D property upon a trust for sale and the Wife thereafter forthwith sell the said property and upon the settlement of the sale, the proceeds be distributed as follows:
 - (a) first, to pay all costs, commission and expenses of the sale;

- (b) secondly, to discharge the mortgage secured over the property;
 - (c) thirdly, to pay the amount due to the Wife pursuant to these orders; and
 - (d) fourthly, to pay the balance to the Husband.
7. That the Husband have liberty to apply to set aside these orders on appropriate notice to the Wife and upon condition that he files an application in this court explaining why he has failed to attend the proceedings”.

A recent series of unreported decisions by Federal Magistrate Jarrett in a parenting matter (contravention) confirms the court’s approach.

The relevant facts were:

1. The parents separated when the only child of the relationship was 12 months old and shortly thereafter the Father commenced proceedings in the local court.
2. In the first 12 months following separation the Mother moved twice with the child – each time a considerable distance away from the Father.
3. The Father commenced proceedings in the Family Court and final orders were ultimately made by consent in 2008. The orders provided for the child to live with the Mother and spend regular time with the Father at his home.
4. Approximately 7 months after the Orders were made the Mother failed to facilitate the child’s time with the Father and he filed an application for contravention.
5. After the Father’s application was served but before the date of hearing, the Mother further contravenes the order. The Father filed an amended application for contravention and continued to experience difficulty with telephone communications with the child pursuant to the orders.
6. At the hearing of the application, the Federal Magistrate found the mother contravened the Order on 14 occasions and, in addition to ordering make up time, secured the mother’s undertaking not to breach any further orders. The mother was ordered to pay compensation to the father (for airfares) and costs in a fixed sum of approximately \$2,000.
7. The father made a proposal of periodic payments in satisfaction of costs order. Mother did not respond.

8. The mother then breached the Order less than 2 months after the hearing of the Father's initial contravention application. The father filed a further contravention application as well as an application for orders varying the primary order such that the child live with him.
9. The mother was again found to have further contravened the primary orders without reasonable excuse and with a serious disregard for her obligations under the Orders (pursuant to Subdivision F of Division 13) and was ordered, inter alia, to nominate a family report writer from the panel requested by the father, to enter into a bond of \$500 and, despite her assertions in relation to her financial circumstances, to pay indemnity costs fixed in the sum of approximately \$18,000.
10. The parties subsequently agreed to reduce the father's child support assessment by 15% until the initial costs order was satisfied. The mother proposes a similar arrangement in relation to the indemnity costs owing. That proposal is rejected.
11. The mother then offered monthly instalments of \$85 until the costs order is satisfied. The proposal is rejected.
12. The mother failed to attend for the ordered psychiatric reports and frustrated the family report writer's ability to meaningfully observe the father with the child.
13. Interim orders were made providing for the child to live with the father.
14. The mother again failed to attend for psychiatric assessment and final orders were made for the child to live with the father and spend supervised time with the mother. The father ultimately regarded pursuit of the outstanding costs order as a futile exercise.

The making of costs orders against apparently impecunious parties is challenging. The costs of pursuing a costs order may quickly surpass the quantum of the costs order itself. Practitioners should, in such cases, be prepared to think creatively about how such costs orders might be satisfied. One option is to adjust any amount paid or received by way of child support until the obligations under the costs order have been satisfied.

Significantly, and as a means of deterring unmeritorious contravention applications, the court may, and in some circumstances must, consider making a costs order against an applicant where no sanctions for the alleged contravention are imposed. Pursuant to s70NDC(1) the court may make a costs order against an applicant where a contravention has been proved but where the respondent has been found to have a reasonable excuse. Section 70NDC(2) compels the court to consider making an order for costs against the applicant where repeated applications for contravention have been filed but where no sanctions have been imposed on the respondent. Further, where a contravention has been proved and there has been no reasonable excuse but no other orders are made in relation to the contravention, the court may also consider making a costs order against the applicant (s70NEB(1)(g)).

Independent Children's Lawyers Costs

The financial circumstances of the parties and their conduct in the proceedings are the two most significant factors in determining whether parties should be required to meet the costs of the Independent Children's Lawyer ("ICL"). Matters involving ICLs frequently involve parties whose conduct is generally concerning and less than co-operative however, the impecuniosity of such parties is frequently a significant factor influencing the making of a costs order.

In *PEL & NAL [2006] FMCAfam 594* the ICL made an application for costs, consistent with the relevant Legal Aid Guidelines and s117(4), following the making of final orders for children aged 12 and 9. The Mother did not appear at the final hearing, but had been represented until 2 weeks prior to the trial, and had repeatedly failed to appear at court events. The Mother had previously been ordered to bring the children to the court at the time that the Family Report was to be released but she did not do so and failed to attend at all. Ultimately, the court was satisfied that the evidence *"raised such serious concerns for the children's physical and emotional health that the clear status quo in the mother's favour up to that point had to be reversed"* [paragraph 11]. The trial judge ultimately concluded that it was, notwithstanding the Mother's absence, in the children's best interests to determine the matter on a final basis. The orders ultimately made were for the children to live with the Father and have supervised visits with the Mother at a contact centre. The ICL sought a contribution of \$3,250 from each party by way of a costs order but the application was not granted in circumstances where both parents had no capacity to meet the payment while they were caring for 2 children each. The trial judge noted that the Father had made significant expenditures on the children prior to the hearing including to meet their most immediate and basic needs and the Mother's only known source of income was Centrelink benefits.

Costs on an indemnity basis

The key authority for orders for costs on an indemnity basis is the case of *Colgate Palmolive Co v Cussons* (1993) 46 FCR 225 in which the factors to be considered in making an indemnity costs order were articulated by Sheppard J (at 233-234) as follows:

- “(a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;*
- (b) evidence of particular misconduct that causes loss of time to the Court and to other parties;*
- (c) the fact that the proceedings were commenced or continued for some ulterior motive ... or in wilful disregard of known facts or clearly established law;*
- (d) the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions;*
- (e) an imprudent refusal of an offer to compromise; and*
- (f) an award of costs against a contemtor”.*

The Full Court of the Family Court recently considered the *Colgate Palmolive* and *Penfolds* decisions in the unreported decision of *Coopers v Eagles (Costs)* [2011] FamCAFC. In that case the Mother's counsel proposed to call as a witness the Father's previous wife whose evidence would have confirmed that the Father's evidence as to where he was living was false. The issue of the Father's living arrangements was material to the decision about what time he ought spend with a very young child. The Father's counsel successfully objected to the witness giving oral evidence (no affidavit having been sworn by her) and the Mother appealed. The appeal was conceded.

Her Honour Justice May, hearing the question of costs, confirmed that *“there is no presumption in this court that the successful party will receive an order in their favour for the other party to pay their costs. The court is at liberty to make an order for costs where there are justifying circumstances”* [at paragraph 10]. The Mother relied upon s.117AB(2) which compels the court to make a costs order where a party to proceedings knowingly makes a false allegation or statement.

The Mother submitted that:

'although the Federal Magistrate was in error at first instance, the fundamental error arose from the conduct of the father. This is said to be due to the fact that the father sought to conceal from the court "his true location and residence". In support of this submission it is said that:

8. *It is to be remembered that the [father] is the person who without doubt:*
 - * *knows where he is living and residing*
 - * *knows what contact he is having with his other children*
 - * *knows of the conversations he has had with his previous wife as to these matters.*
9. *The [father] is possessed of the information and there can be no doubt that he is actively seeking to curtail the information being provided to the court."* [paragraph 21]

In making an order that the Father pay the Mother's costs on an indemnity basis despite his limited financial circumstances, the Court noted that the decision of *Fitzgerald (as Child Representative for A (Legal Aid Commissioner of Tasmania) v Fish & Anor* (2005) 33 Fam LR 123 confirms that there is nothing to prevent any one factor being the sole determinate for an order of costs to be made. Her Honour accepted the Mother's submissions that the appeal *"was generated by a determined resistance by the [father] to reveal the truth which ultimately let the court ... into error"* [paragraph 46].

The Court found it was not ultimately necessary to rely upon s.117AB because the crucial error was that of the trial judge but, in circumstances where the Father's conduct led, at least in part to that error, orders were made for the Father to pay the Mother's costs of the appeal which she had no choice but to pursue.

Practitioners may wish to consider the following scenario and the significance of relying upon the most apposite sections of Part XV of the Act:

1. The Mother was the Applicant for an order facilitating the relocation of the child from a capital city to a country town. Her application was prompted by a new relationship. The Father believed that the relationship was in a stage of infancy but in any event he opposed the relocation.
2. The Mother gave evidence that she had obtained employment or an offer of employment in the country town. The Father regarded that scenario as highly unlikely – suspecting that she would not give up her employment unless her relocation application was successful. The Father's solicitors wrote to the Mother's solicitor indicating they were instructed to subpoena the new

employer and asked the Mother to provide the name and contact details. The Mother refused to do so and gave no compelling reason.

3. The Mother's relationship ended and she filed a Notice of Discontinuance. The Father brought a costs application on the basis that he was wholly successful in the proceedings and that the conduct of the Mother in the proceedings, particularly as to frustrating a legitimate litigation process ie the subpoena, was inappropriate. No s.117AB ground was expressly raised.
4. The costs application was dismissed on the basis that the Mother was not to know her relationship was likely to end and that she ought not be unduly criticised for discontinuing her application in those circumstances.

Costs against practitioners

Both the Family Court (Family Law Rules 2004 Reg 19.08) and the Federal Magistrates Court (Federal Magistrates Court Rules 2001 Rule 21.07) have the power to make costs orders against practitioners.

The factors to be taken into account in determining whether or not to make a costs order against a solicitor were articulated in *Ridehalgh v Horsfield* [1994] All ER 848 and *White Industries (Qld) Pty Ltd v Flower & Hart (A firm)* (1998) 156 ALR 169.

In *Ridehalgh v Horsfield* the court made it clear that:

"... [L]awyers should not be deterred from pursuing their client's interests by fear of incurring a personal liability to their client's opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that a wasted costs order should not become a back-door means of recovering costs not otherwise recoverable by a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease."

In *White Industries* Goldberg J confirmed (at page 239):

"... the jurisdiction to order costs against the unsuccessful party's solicitors is enlivened when they have unreasonably initiated or continued an action when it had no or substantially no prospects of success but such unreasonableness must relate to reasons unconnected with success in the litigation or to an otherwise ulterior purpose or to a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice. Further, the cases establish the proposition that it is a relevant serious dereliction of duty or misconduct not to give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success."

The Full Court of the Family Court considered the issue of costs orders against a practitioner in *Cassidy v Murray* (1995) FLC ¶92-633 and, referring to the principles in *Ridehalgh v Horsefield*, confirmed that:

- “1. Pursuant to s 117(2) Family Law Act, the Court has jurisdiction to make an order for costs against a solicitor or a non-party.
2. The court should not make such an order without giving the person to be affected by the order an opportunity to be heard.
3. The Court may make an order for costs against a solicitor without the necessity to establish that the solicitor has been guilty of serious professional misconduct.
4. The solicitor has a duty to the Court to promote the interests of justice whilst at the same time attending to the needs of the solicitor's client.
5. A mistake or error of judgment would not justify an order for costs against a solicitor. However, misconduct, default or negligence, any of which are found by a Court to be of a serious nature, may be sufficient to justify an order.
6. The jurisdiction is compensatory.”

These issues were recently considered by the Full Court of the Family Court in the context of a parenting case in *Burns & Caldwell and Anor* [2011] FLC 93-465. The case involved the weighing of the competing public interest of a lawyer being penalised for pursuing their client's interests versus the public interest of client being financially prejudiced by unjustifiable conduct of litigation by their lawyer or their opponent's lawyer in circumstance where the Mother's application to expedite the hearing of her appeal against an interim parenting decision was dismissed. The maternal grandmother sought an order for costs against the Mother's solicitor on the basis that the application had no reasonable prospects of success and no practical efficacy.

Although the Full Court (Coleman J) was highly critical of the approach taken by the Mother's solicitor and questioned whether they, or the Mother, fully understood the basis upon which the Full Court rejected the application to expedite the hearing of the appeal, the Court ultimately accepted the solicitors' assertions that they had "at all times ... acted on instructions from the Mother who has received appropriate advice in respect of all stages of the proceedings". Whilst acknowledging that the application had little prospect of success the Full Court was not persuaded that filing or prosecuting the application fell within the kind of conduct contemplated in *White Industries* and no costs order was made against the solicitor.

This decision, and the terms of Rule 19.10(1)(d) and clause 6.10(1)(c) of Schedule 6 to the Family Court Rules, confirms that the conduct, or negligent conduct, of practitioners must be "improper and unreasonable" and beyond what might be described as the robust prosecution of a client's case, before a personal costs order will be made against a lawyer.

As the intention of costs orders against solicitors are compensatory not punitive, no costs orders will be made against practitioners where no pecuniary loss has been incurred (see *Z (a Solicitor) & Limousin* (2010) FLC ¶93-433). Negligent or unprofessional conduct on the part of a practitioner should otherwise be dealt with by the relevant legal disciplinary body.

Solicitors should however remain aware that the onus is on the practitioner to ensure they are in a position to comply with the provisions of the Act and the Rules of the relevant courts (including by being intimately familiar with each case they appear in) and that a failure to do so may result in a costs order or referral to the regulatory body for sanction.

Recovering the Costs once ordered

Costs orders in the **Federal Magistrates Court** and the **Family Court** are generally made pursuant to the scale set out in Schedule 1 to the Federal Magistrates Court Rules 2001 scale and Chapter 19 of the Family Court Rules 2004 or fixed (with the Federal Magistrates and Judges frequently exercising their discretion rather than facilitating a costing exercise). However, where the conduct of a party warrants it, the court order payment of all costs reasonably incurred (ie indemnity costs).

All disagreements as to costs payable by clients to their legal representatives are dealt with pursuant to the relevant State and Territory laws for all matters proceeding in the Federal Magistrates Court and those in the Family Court from 1 July 2008. Family Court proceedings predating 1 July 2008 are dealt with under the "Old Costs Rules" now contained in Schedule 6 to the Family Law Rules.

FAMILY LAW RULES 2004 - REG 19.08

Order for costs

- (1) A party may apply for an order that another person pay costs.
- (2) An application for costs may be made:
 - (a) at any stage during a case; or
 - (b) by filing an Application in a Case within 28 days after the final order is made.
- (3) A party applying for an order for costs on an indemnity basis must inform the court if the party is bound by a costs agreement in relation to those costs and, if so, the terms of the costs agreement.

Note 1 The court may make an order for costs on its own initiative (see rule 1.10).

Note 2 A party may apply for an order for costs within 28 days after the filing of a notice of discontinuance by the other party (see subrule 10.11 (4)).

Note 3 A party may apply for an extension of time to make an application (see rule 1.14).

- (4) In making an order for costs, the court may set a time for payment of the costs that may be before the case is finished.

Costs orders against lawyers

- (1) A person may apply for an order under subrule (2) against a lawyer for costs thrown away during a case, for a reason including:
 - (a) the lawyer's failure to comply with these Rules or an order;
 - (b) the lawyer's failure to comply with a pre-action procedure;
 - (c) the lawyer's improper or unreasonable conduct; and
 - (d) undue delay or default by the lawyer.
- (2) The court may make an order, including an order that the lawyer:
 - (a) not charge the client for work specified in the order;
 - (b) repay money that the client has already paid towards those costs;
 - (c) repay to the client any costs that the client has been ordered to pay to another party;

(d) pay the costs of a party; or

(e) repay another person's costs found to be incurred or wasted.

FEDERAL MAGISTRATES COURT RULES 2001 RULE 21.07 ORDER FOR COSTS AGAINST LAWYER

21.07(1) [Considerations]

The Court or a Registrar may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs:

- (a) to be incurred by a party or another person; or
- (b) to be thrown away;

because of undue delay, negligence, improper conduct or other misconduct or default.

21.07(2) [Defaults of lawyer]

A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

- (a) to attend, or send another person to attend, the hearing; or
- (b) to file, lodge or deliver a document as required; or
- (c) to prepare any proper evidence or information; or
- (d) to do any other act necessary for the hearing to proceed.

21.07(3) [Who may apply for order]

An order for costs against a lawyer may be made on the motion of the Court or Registrar, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

21.07(4) [Contents of order]

The order may provide:

- (a) that the costs, or part of the costs, as between the lawyer and party be disallowed; or
- (b) that the lawyer pay the costs, or part of the costs incurred by the other person; or
- (c) that the lawyer pay to the party or other person the costs, or part of the costs, that the party has been ordered to pay to the other person.

21.07(5) [Duties of Court or Registrar]

Before making an order for costs, the Court or Registrar:

- (a) must give the lawyer, and any other person who may be affected by the decision, a reasonable opportunity to be heard; and
- (b) may order that notice of the order, or of any proceeding against the lawyer be given to a party for whom the lawyer may be acting or any other person.