



# Dixie Ann Middleton & ASSOCIATES

Family Law & Estate Administration

## Costs Checklist

### Part 2

#### 1. WHO PAYS YOUR LEGAL COSTS

##### Costs in Family Law Proceedings

The usual position is that each party to proceedings under the Family Law Act (FLA) pays his or her own legal costs (see section 117 of the FLA). The factors that the Court will take into account when considering whether to change the usual position, are the following:-

- The financial circumstances of each of the parties;
- Whether any party is receiving Legal Aid;
- The conduct of the parties;
- Whether the proceedings were necessitated by the failure of a party to comply with previous Orders of the Court;
- Whether any party has been wholly unsuccessful;
- Whether either party has made any offer in writing to the other to settle the proceedings and the terms of any such offer; and
- Such other matters the Court considers relevant.

##### Costs in Parenting Cases

In the case of *Hawkins and Roe* the Full Court of the Family Court of Australia stated that, “*the occasions on which such an Order (Costs Orders) should be made in a parenting dispute should have some particular features. Where there is a complete absence of preparedness to compromise in the face of unambiguous expert evidence, where false allegations are made, or where one is clearly motivated by self-interest rather than the best interest of the child, then a Judge may well conclude that there are circumstances justifying an Order for costs.*”

In that case it was found that an order for costs should not have been made, taking into account there was no allegation or finding of dishonesty nor were there any adverse findings about the father’s conduct of his case at the trial.

## **Party and Party Costs**

Where the Court makes an Order that one party pay legal costs to another, these are referred to as party and party costs.

In the Federal Circuit Court the amount payable under a party and party costs order are set out in schedule 1 of the Rules of that Court. This sets out the costs payable in respect of each event or stage in the proceedings. The Court has the discretion to depart from the scale by ordering that costs be paid in a specific amount, adopting the Family Court scale or by applying some other method.

The Family Court has its own scale of costs although it may order that a scale of costs does not apply.

## **Costs in Contravention Proceedings**

There are specific provisions governing how costs are awarded in contravention proceedings that effect children. Division 13A of the *Family Law Act 1975* sets out how costs are ordered in these types of proceedings.

If the Court dismisses a contravention application or finds that no application was required, and such finding has been made previously, it must consider ordering costs against the Applicant. Even if a contravention is alleged but not established in the first application of this type, the Court may make an order for costs against the Applicant. Where there has been found to be a contravention without reasonable excuse, it must order costs against the person breaching the order, unless it would not be in the child's best interests (see section 70NCV).

## **Indemnity Costs**

An order for the payment of costs on an indemnity basis is exceptional in Family Law proceedings. Indemnity costs means that all the Applicant's legal fees and outlays are to be paid by the other party.

The principles or guidelines that a Court would consider in the exercise of its discretion as to whether or not to award indemnity costs, include the following:-

- Whether the other party had made false allegations.
- Whether there is evidence of particular misconduct that causes loss of time to the Court and to other parties.
- The fact that the proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or established law.
- The making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions.
- An imprudent refusal of an offer to compromise.
- Some evidence of unreasonable conduct albeit that it need not rise as high as vexation.

- The proposition that simply instituting or maintaining a proceeding on behalf of a client which has no or substantially no prospect of success will not, of itself, invoke the jurisdiction. There must be something more, namely, carrying on that conduct unreasonably.

*Colgate-Palmolive Co –v– Cussons Pty Ltd (1993) 46FCR225*

*Johnstone –v– Herrod [2012] QCA361*

## **2. HOW TO FUND YOUR LEGAL COSTS**

If you are unable to pay your legal costs, funding options include:-

1. Legal Aid — you can obtain further information about eligibility for Legal Aid on the Legal Aid Queensland website at [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au). However, please note we do not do work funded by Legal Aid; OR
2. Private loans; OR
3. Borrowing money from litigation funding financiers. These financiers don't normally require security so can often be attractive. Their interest rates, however, reflect their risk and the delay in repayment of principal; OR
4. File an Application to the Court for an Order that your spouse pay monies to you to enable you to meet your anticipated legal fees in the form of an interim or partial property settlement.

The factors the Court will take into account when considering this Application include the following:-

- The position of relative financial strength of each party;
- The capacity of each party to meet their own legal costs from their current resources;
- Whether, if financial relief is granted, there are sufficient assets to meet both parties' claims for final property settlement. In the final property orders, is the Applicant likely to receive monies or assets greater than the amount sought to meet their legal costs; and
- There does not need to be compelling circumstances for the order to be made.

The order for monies to pay legal costs must be for a fixed amount. The Court, however, must be conservative when determining the amount payable pursuant to the Order.

We aim to provide a cost effective service to you. See our article, Costs Checklist: Part 1 on our website [www.middletonlawyers.com.au](http://www.middletonlawyers.com.au) to find an explanation of how we charge for our legal service.

## **WARNING**

This article reflected the state of the law at the time of publication. But the law is a living creation which is constantly changing and adapting. These articles should be treated as an information resource only and not as a substitute for specific legal advice in respect to your particular problems and circumstances.

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