THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 10

COSTS IN FAMILY LAW MATTERS

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The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) [“LPUL”]

Legal Profession Uniform Law Application Act 2014 [“LPULAA”]

Legal Profession Uniform Law Application Regulation 2015 [“LPULAR”]

Legal Profession Uniform General Rules 2015 [“LPUGR”]

Prior legislation referred to:

Legal Profession Act 2004 [“LPA 2004”]

Legal Profession Regulation 2005 [“LPR”]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 (LPUL Schedule 4 clause 18).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 (LPULAR clause 59).

10.1 INTRODUCTION

The Family Court of Australia is fundamentally different to almost all other courts and tribunals in Australia because costs do not follow the event. Rather, section 117(1) of the Family Law Act 1975 (Cth) (FLA), sets out the general principle that each party to proceedings bears their own costs. This is intended to make access to the Family Court as easy as possible, and to forestall parties being put off by the possibility of having to bear another party's costs.

While the general principle is adhered to, the court does have the power to award costs if the circumstances warrant such an order. Section 117(2A) of the FLA sets out the criteria that the Family Court should consider when deciding whether such an order should be made. As a general rule, an order that one party pay another party's costs will only be made where the conduct of one of the parties has led to an increase in costs for the other party or an unreasonable prolongation of the proceedings, or where a party has been wholly unsuccessful or an offer of settlement was unreasonably refused.

The Family Law Amendment Rules 2008 were proclaimed on 23 April 2008 and the relevant parts amending Chapter 19 of the Family Law Rules 2004 (FLR) came into effect on 1 July 2008.

The amendments to the FLR transferred all practitioner/client costs assessments from the Family Court to the different state systems. Chapter 19 of the FLR now outlines the rules governing party/party costs.

10.2 LAW PRACTICE/CLIENT COSTS

10.2.1 COSTS FOR MATTERS WHERE INSTRUCTIONS WERE GIVEN OR THE APPLICATION WAS MADE BEFORE 1 JULY 2008

The Family Court assessed and taxed solicitor/client costs disputes for those matters where instructions were first taken on or before 30 June 2008.

These costs were calculated in accordance with any valid costs agreement between the lawyer and the client for the work, or if there was no costs agreement, in accordance with the scale of costs in Schedule 3 of the FLR.

The former provisions of Chapter 19 are contained in Schedule 6 of the FLR, titled: "Costs – rules before 1 July 2008".

Information about costs for matters that fall within this category is contained in earlier editions of the *Costs Guidebook*.

10.2.2 COSTS FOR MATTERS WHERE INSTRUCTIONS WERE GIVEN AFTER 1 JULY 2008

Law practices are required to disclose costs issues to their clients in accordance with the relevant state legislation. In NSW, this will require mandatory disclosure under Division 3 of Part 4.3 of the "Uniform Law", and a costs agreement that complies with this act (see Chapter 3). A precedent for costs disclosure and costs agreement can be found in the Appendices and on the Law Society's website.

Chapter 19 of the FLR contains two requirements with respect to costs as between law practice and client.

Practitioners are required to inform the client of the costs incurred to date and anticipated costs to complete the case, should a settlement offer be made by the other side (rule 19.03).

In addition to this, practitioners are required to provide the client with written notice of the actual costs and expenses incurred to date and anticipated future costs at certain court events, including the conciliation conference and the first day of the trial (rule 19.04).

A dispute between a practitioner and a client about costs charged by the practitioner in a family law matter will be dealt with in accordance with the state or territory legislation governing the legal profession in the state or territory where the practitioner practices. See Chapter 4, which deals with costs assessment.

10.2.3 SCHEDULE 3 – SCALE OF COSTS NO LONGER APPLIES TO PRACTITIONER/CLIENT COSTS

Rule 19.18 of the FLR was amended in 2008 so that the scales of costs set out in Schedule 3 only apply if the court orders that costs are to be paid and does not fix the amount.

If a practitioner does not disclose as required in a matter in NSW, costs will be assessed in accordance with the provisions of section 172 of the Uniform Law, according to the fair and reasonable value of the legal services provided.

10.3 PARTY/PARTY COSTS

10.3.1 CHAPTER 19 OF THE FAMILY LAW RULES – PARTY/PARTY COSTS

Disputes between parties about costs are dealt with by the Family Court Registrars, in accordance with the provisions in Chapter 19 of the FLR.

The procedure for quantification and assessment of party/party costs ordered by the Family Court is set out in Chapter 19 of the FLR.

10.3.2 HOW ARE COSTS CALCULATED

Party/party costs

Unless the court orders otherwise, party/party costs are calculated in accordance with Schedule 3 of the FLR. The court can also order that a party is entitled to costs of a specific amount; that they be assessed on a practitioner and client basis or an indemnity basis; or be calculated in accordance with the method stated in the order.

Indemnity costs

While neither ss. 117(2) or 117(2A) of the FLA expressly state that the Court can order payment of costs on an indemnity basis, the court is empowered to make "such orders as to costs ... as the Court considers just".

Rule 19.18(1)(b) of the FLR provides that the court may make an order that a party is entitled to costs assessed on a practitioner and client basis, or an indemnity basis. In either case, the costs set out in Schedule 3 of the FLR may not apply, and such costs are usually allowed in accordance with any costs agreement between the practitioner and client.

Bills of costs in the Family Court are known as itemised costs accounts. The form for an itemised costs account is on the Family Court website.

An itemised costs account is a court document and must specify each item of costs and disbursements claimed. The profit costs and disbursements are claimed together in chronological order, rather than disbursements appearing at the end of the bill. The summary to the account appears at the front of the itemised costs account.

Rule 19.22 sets out the requirements for an itemised costs account. A lawyer must give a costs notice to a client when serving an account or an itemised costs account (rule 19.21).

10.3.3 SERVING AN ITEMISED COSTS ACCOUNT

An itemised costs account is served, together with the costs notice, on the person liable to pay the costs **within four months** after the end of the case (rule 19.21).

Time is therefore of the essence when preparing a Family Court itemised costs account.

10.3.4 DISPUTING AN ITEMISED COSTS ACCOUNT

If the paying party disputes the costs, they have 28 days from receipt of the itemised costs account to serve a Form 15 Notice Disputing Itemised Costs Account (rule 19.23). If no Form 15 is received, and the costs are not paid, the person entitled to the costs can seek a costs assessment order (rule 19.37).

The parties disputing the costs must make a reasonable and genuine attempt to resolve the dispute. If this fails, then either party may file the Form 15 within 42 days after the Form 15 was served. The notice must be served on each person claiming the costs (rule 7.04).

Rule 19.24 requires the parties to a dispute to make a reasonable and genuine attempt to resolve the dispute and if they are

unable to resolve the dispute, either party may ask the court to determine the dispute by filing in the filing registry of the court where the case was conducted the itemised costs account and the Notice Disputing Itemised Costs Account no later than 42 days after the Notice Disputing Itemised Costs Account was served.

Under rule 1.14 of the FLR, a party may apply to the court for an extension of time to serve an itemised costs account to dispute an itemised costs account or to request that the court determine the dispute.

Once the documents are filed, the court will usually appoint a time for a preliminary assessment. The date fixed must be at least 21 days after the filing of the Form 15 (rule 19.26). The court may fix a date for a settlement conference to facilitate negotiations and where the parties will identify the issues in dispute (rule 19.28).

10.3.5 PRELIMINARY ASSESSMENT OF COSTS

At the preliminary assessment, the Registrar will, in the absence of the parties, calculate the likely cost of the costs assessment order. The parties are notified in writing of the preliminary assessment amount (rule 19.29). If there is no objection to the amount assessed, the Registrar will make a costs assessment order for this amount (rule 19.31).

10.3.6 DISPUTING PRELIMINARY ASSESSMENT AMOUNT AND ASSESSMENT HEARING

If either party is unhappy with the preliminary assessment amount, they can object in writing to the Registrar and to the other party. They have 21 days after receiving written notice of the preliminary assessment amount to do so. An amount equalling 5 per cent of the amount claimed must be paid to the court as security for the cost of the assessment. On receiving the objection and the payment of security, the Registrar will fix a date for the assessment hearing (rule 19.30).

An assessment hearing is heard before the Registrar (rule 19.32). The Registrar must:

- determine the amount (if any) to be deducted from each item included in the Form 15
- determine the total amount payable for the costs of the assessment (if any)
- calculate the total amount payable for the costs allowed
- deduct the total amount (if any) of costs paid or credited; and
- calculate the total amount payable for costs.

At the end of the assessment hearing, the Registrar must:

- make a costs assessment order; and
- give a copy of the order to each party.

Note under rule 19.32: “At an assessment hearing, the onus of proof is on the person entitled to costs. That person should bring to the hearing all documents supporting the items claimed.”

10.3.7 REVIEW

A party may seek a review of a costs assessment order by filing, within 14 days of the costs assessment order, a Form 2 Application in a Case. The form must be supported by an affidavit stating the item number of the itemised costs account that the party objects to, the reason for the objection and the decision sought from the court (rules 19.54 and 19.55).

Assessment principles in family law matters

Principles applicable to party/party costs are set out in Chapter 19 of the FLR.

Rule 19.34 of the FLR sets out the assessment principles that the Registrar must apply when assessing costs. The Registrar must not allow:

- costs incurred because of improper, unnecessary or unreasonable conduct by a party or a party’s practitioner
- costs for work (in type or amount) that was not reasonably required to be done for the case; or
- unusual expenses.

Unless the court orders otherwise, costs are calculated in accordance with Schedule 3 and Schedule 4 of the FLR. Part 2 of Schedule 3 sets counsels' fees.

If the court has ordered costs on an indemnity basis, the Registrar must allow, as set out in rule 19.34, all costs reasonably incurred and of a reasonable amount, after considering among other things:

- the scale of costs in Schedule 3
- any costs agreement between the party to whom costs are payable and the party's practitioner; and
- charges ordinarily payable by a client to a practitioner for the work.

10.3.8 COSTS OF ASSESSMENT

Registrars have the power at an assessment hearing to make an order for costs (rule 19.33).

The party objecting to a preliminary assessment may be ordered to pay the other party's costs of the assessment from the date of their objection, unless the itemised costs account is assessed with a variation in the objecting party's favour of at least 20 per cent of the preliminary assessment amount (rule 19.30).

10.4 COSTS IN FEDERAL CIRCUIT COURT– FAMILY LAW PROCEEDINGS

The Federal Circuit Court was established with the aim of handling less complex matters in family law and general federal law. It shares jurisdiction with the Family Court and the Federal Court.

The Federal Circuit Court can hear most family law matters with the exception of applications for adoption, nullity or validity of marriage.

The FLR does not apply to costs in family law matters in the Federal Circuit Court, unless a judge makes a costs order that specifically refers to Chapter 19 of the FLR (although s. 117 of the FLA does apply to proceedings in the Federal Circuit Court).

Unless the court orders otherwise, party/party costs are determined according to the event-based scale in Schedule 1 of the Federal Circuit Court Rules 2001. If the court makes an order that the costs be assessed in accordance with Chapter 19 of the FLR, the same procedure applied by the Family Court as outlined above is followed by the Federal Circuit Court.

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