Costs in Family Law

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Costs

Surprisingly, some family lawyers are baffled by the whole question of costs in family law proceedings, being confused about such things as:

a) When should they seek a costs order;

b) Whether costs should be on an indemnity or party and party basis;

c) When should they seek security for costs; and

d) When should a costs order be sought against a party's solicitor or counsel.

In my view, there are many occasions where lawyers do not seek an order for costs where the situation cries out for such an order. It may be that some less experienced practitioners believe that it is a general rule that parties pay their own costs in family law proceedings or that costs are not awarded in children's matters, or, perhaps, if they do not seek a costs order at the outset they are forever precluded from doing so.

Costs generally are covered by s.117 of the *Family Law Act 1975.* Certainly, subsection 117(1) contains the general rule:

Subject to subsection (2), subsection 70NFB(1) and sections 117AA, 117AC and 118, each party to proceedings under this Act shall bear his or her own costs.

Subsection 117(1) establishes the principle that costs do not automatically follow the event in family law proceedings, but it is only a starting point. Sections 117AA and 117AC relate to costs and security for costs in proceedings relating to overseas enforcement and international Conventions and are not relevant to this paper, but subsection 70NFB(1) effectively excludes contravention proceedings from the general rule. This will be covered later in the paper.

Subsection 117(2) permits the court to make such order for costs and security for costs as the court considers just, if "*the court is of opinion that there are circumstances that justify it in doing so*".

Subsection 117(2A) requires the court, in considering what order (if any) should be made, to have regard to the matters in paragraphs (a) to (g) of subsection 2A. They are, in summary:

(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;

(c) The conduct of the parties to the proceedings in relation to the proceedings;

(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 any party to the proceedings has made an offer in writing to the other party to settle the proceedings; and

(g) Such other matters as the court considers relevant.

The various paragraphs give a very wide range of factors that can be used to ground an application for costs. Importantly, only one of these factors is required to ground an order for costs. In *PBF as Child Representative for AF (Legal Aid Commission of Tasmania) & Ors* [2005] FamCA 158, the Full Court of the Family Court held at [41]:

"Nowhere in subsection (2A)[1] or elsewhere in section 117, is there any prescription that more than one factor must be present before an order for costs is made nor of comparative weight of the factors set out in subsection (2A). As a consequence, there is nothing to prevent any factor being the sole foundation for an order for costs."

[1] Typographical error in original corrected

The financial circumstances of the parties

The court will take into account the parties' financial circumstances, but it is an inquiry to enable the court to have some concept of the relative financial positions of the parties, not to conduct inconsequential arguments over the value of each party's assets (*Browne & Green* (2002) 29 Fam LR 428; FLC 93-115; [2002] FamCA 791).

The fact that a party is comparatively impecunious is not necessarily a bar to the making of an order for costs if there is another factor that would justify the making of an order (*In the Marriage of Schwarz* (1985) 10 Fam LR 235; FLC 91-618). It is always open to a court to allow time to pay or to order that costs should be deducted from any amount that a party may receive by way of a property order.

Legal Aid

It was also held in *Schwarz* that the fact that a party is in receipt of legal aid is not of itself a bar to the making of a costs order and to refuse to make an order on that ground alone may cause a gross injustice to the other party.

If a party is in receipt of a grant of legal aid, it would not be appropriate to make a costs order in favour of that party unless the party is required to pay the amount awarded to the Legal Aid Commission or is under an obligation to reimburse the Commission (*In the Marriage of Conroy* (1976) 2 Fam LR 11,223 at 11,228).

The conduct of the parties

This factor can often be highly relevant. Parties who fail to file material on time or to attend court when required to do so can waste time and result in the non-defaulting party incurring the burden of costs "thrown away" (*In the Marriage of Jensen* (1982) 8 Fam LR 594; FLC 91-263).

Failure to comply with previous court orders

This is clearly an important matter, which explains why the legislature has seen fit to make specific provision for costs to be awarded in contravention proceedings under s.70NFB.

Offers of Settlement

The failure by a party to accept an offer of settlement in circumstances where the party does not obtain a better result than the offer is an important consideration and can even lead to an order for costs on an indemnity basis, as in *Lad & Gittins* (2014) 52 Fam LR 71; [2014] FamCA 439. In that case, the husband was not only wholly successful in the proceedings but achieved a substantially better result than his settlement offer, to the extent of some $300,000.00.

In his decision Austin J said at [27]:

"*Undoubtedly, the husband was wholly successful in the proceedings. Conversely, the wife was wholly unsuccessful in the proceedings…*"

His Honour decided that the wife should pay the husband's costs from the day after the letter conveying the husband's settlement offer was sent to the wife. Following *Colgate-Palmolive Company v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225, his Honour held at [31]:

"*The costs will be paid on an indemnity basis, rather than a party/party basis, from that date because of the substantial amount by which the ultimate result was better than the husband's very reasonable offer…*"

The settlement offer must be made in writing, in accordance with the applicable Rules (see s.117C).

Where a party is wholly unsuccessful

This appears to be close to a situation that costs will follow the event, which contradicts the general rule in s.117(1). Whilst it has been suggested that the mere fact that a party has been wholly unsuccessful does not of itself justify the making of an order for costs, relying on *Re Collins and the Victorian Legal Aid Commission* (1984) FLC 91-508, this does not sit well with the more recent decision of *PBF & AF* referred to earlier, which held that only one factor was sufficient to justify an order.

It seems that the words "wholly unsuccessful" must be taken at face value, as there are many cases where one party is substantially unsuccessful but not completely so. It was held in *Medlon & Medlon (No.6)*(2015) 54 Fam LR 1; [2015] FamCAFC 157 that a party who was entirely unsuccessful should pay the costs of the other party, on an

indemnity basis, because the party had made serious but entirely unverified allegations and should have known that she had no prospect of success. Again, see *Lad & Gittins (supra)* at [27].

Such other matters as the court thinks relevant

This paragraph illustrates that the court has a very wide discretion in making orders for costs.

Indemnity costs and party and party costs

It is well established that the general rule is that costs will awarded on a party and party basis rather than on an indemnity basis, also known as "solicitor/client costs". Party and party costs are those which are assessed as fair and reasonable and include disbursements reasonable incurred. The party may in fact have incurred significantly greater professional costs.

Indemnity costs cover the party's actual professional costs and disbursements.

The authorities make it clear that indemnity costs will only be incurred in exceptional circumstances. The principles involved are set out in the decision of Sheppard J in *Colgate Palmolive Co. v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 at 232-234.

The principles, in summary, are:

(a) where a party persists in what should on proper consideration be seen as a hopeless case;

(b) where unsuccessful proceedings have been brought to achieve an ulterior or extraneous purpose;

(c) making allegations of fraud knowing them to be false and making irrelevant allegations of fraud;

(d) particular misconduct that causes loss of time to the court and to other parties;

(e) proceedings commenced in wilful disregard of known facts or clearly established law;

(f) making allegations which ought never to have been made;

(g) the undue prolongation of a case by groundless contentions;

(h) an imprudent refusal of an offer to compromise; or

(i) where a party is in contempt of court.

The decisions of *Kohan & Kohan* (1992) 16 Fam LR 245; FLC 92-340, and *Munday & Bowman* (1997) 22 Fam LR 321; FLC 92-784 are useful authorities. More recently, the Full Court of the Family Court reviewed the law in *Prantage & Prantage* [2013] FamCAFC 10; (2013) 49 Fam LR 197; FLC 93-544. Their Honours affirmed the principle that costs are usually ordered on a party and party basis and it is only in exceptional circumstances that costs will be ordered on the indemnity basis.

A trend developed amongst some practitioners in the Sydney Registry of the Court to include applications for costs on an indemnity basis in Applications Initiating Proceedings. These were routinely met by Responses seeking a similar order. Why was this done? On what possible basis could an order for indemnity costs be made in favour of the Applicant on the first return date of the Application? It is just silly.

The trouble with routine and unjustified applications for indemnity costs is that the practice gives an aggressive and antagonistic tone to the litigation, which is not conducive to settlement negotiations. Again, there are likely to be awkward questions from the Bench about the purpose of seeking such an order in an initiating Application.

It could be argued that pressing an unjustified application for indemnity costs at an inappropriate stage of the proceedings is of itself an abuse of the court's process, which could be a reason for awarding costs against the Applicant. An abuse of process is a clear basis for indemnity costs.

Costs in Contravention Proceedings

Subsection 70NFB(2) provides an exception to the general rule about costs in s.117(1), saying that where a more serious contravention of a parenting order without reasonable excuse has been established:

"…the court must, in relation to the person who committed the current contravention:

> *(a) make an order under paragraph (2)(g), unless the court is satisfied that it would not be in the best interests of the child concerned to make that order;"*

Paragraph (2)(g) provides that the court is:

> *"(g)to make an order that the person who committed the current contravention pay all of the costs of another party, or other parties, to the proceedings under this Division;"*

There appears to be a presumption in favour of making an order for costs upon finding a contravention – not quite costs following the event perhaps, but a presumption that the person pay *"all of the costs"* of the other party. If the court does not make an order under paragraph (2)(g), it may make an order under paragraph (2)(h) that the person pay *"some of the costs"* of the other party.

Security for Costs

The court may make an order in an appropriate case for an applicant give security for costs. There must be circumstances that justify the making of such an order.

The Full Court in the well-known case of *In the Marriage of Luadaka* (1998) 24 Fam LR 340; FLC 92-380 suggested that these factors may be relevant:

(a) The history and conduct of all litigation between the parties;

(b) The merits of the claim of the party against whom an order for security for costs is sought to be made;

(c) The financial circumstances of the parties;

(d) Any delay in bringing the application against whom an order for security for costs is sought;

(e) The likelihood of higher than usual costs because of the way the party is likely to present his or her case;

(f) Whether an order for security for costs will stifle the litigation; and

(g) the likely amount of costs to be incurred any possible difficulty in enforcing an order for costs after the event.

When making an application that the applicant in the case give security for costs, regard should be had to rules 19.05 and 19.06 of the *Family Law Rules 2004* or rule 21.01 of the *Federal Circuit Court Rules 2001,* as the case may be.

Orders for costs against lawyers

There is a power to make a personal costs order against a lawyer under both the *Family Law Rules* and the *Federal Circuit Court Rules.*

Rule 19.10 of the *Family Law Rules* allows a party to apply for costs against a lawyer for costs thrown away during a case for:

(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.

The Federal Circuit Rules, at Rule 21.07, permit the Court or a Registrar to make an order for costs against a lawyer because of undue delay, negligence, improper conduct or other misconduct or default in circumstances where 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.

A discussion of the principles in involved can be found in *Cassidy & Murray* (1995) 19 Fam LR 492; FLC 92-633. It is not necessary for the court to be satisfied that the solicitor concerned has been guilty of serious professional misconduct. However, a mistake or an error of judgment would not normally justify an order for costs against a solicitor.

Opportunity to be heard

Even lawyers are entitled to be given the opportunity to be heard as to why an order for costs should not be made against them personally (*Cassidy & Murray (supra)*).

The general principle is that it is not generally open to a court to make an order for costs against a person without giving that person an opportunity to be heard (see *Black & Kellner* (1992) 15 Fam LR 343; FLC 92-287).

When can you apply for an order for costs?

You can apply at any time during the case or within 28 days after the final order is made, by filing an Application in a Case (*Family Law Rules 2004,* r. 19.08; *Federal Circuit Court Rules 2001,* r.21.02). The Federal Circuit Court Rules also allow an application to be made within any further time allowed by the Court. The Family Law Rules do not allow this further extension.

The *Family Law Rules* also provide that 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 and, if so, the terms of the agreement (r.19.08(3)).

Kramer and Anor & Ward[2] – a cautionary tale

The facts in this case are astonishing, and some of the submissions made to the court were no less so.

It appears that between 9 December 2012 and 9 February 2015 there was some sort of a relationship between Mr Harrison and Ms Ward. Mr Harrison was later to assert that it was a de facto relationship. In May 2015 Ms Ward sold a piece of real property in Western Australia which she had owned in her sole name since 1995. However, at some time before the sale Mr Harrison lodged a caveat over the title to the property. In order to have Mr Harrison remove the caveat so that the sale could be settled, Ms Ward agreed to deposit the nett proceeds of sale into the trust account of Mr Hamilton's solicitor, Mr Kramer, who practised under the name of Kramer Law. She signed an authority addressed to the settlement agents acting for her in respect of the sale authorising them to pay certain sums out of the proceeds and acknowledging that *"funds pertaining to the caveat will be held by Kramer[3] Lawyers acting on behalf of Mr Harrison pending court action."* Accordingly, the balance of purchase money, some $197,133.17, was placed into the trust account of Kramer Law.

There was no court action on foot at that time. Indeed, it was not until 18 May 2016, nearly a year after the money was placed into the Kramer Law Practice Trust Account, that Mr Kramer, on behalf of Mr Harrison, filed an initiating application in the Federal Circuit Court in Brisbane seeking property orders arising out of the breakdown of what Mr Harrison claimed was his de facto relationship with Ms Ward. In that application, as well as seeking orders that he should retain certain items as his sole property, Mr Harrison sought the payment to him of a lump sum of $150,000.00 to reflect what he claimed were cash advances and other financial and non-financial contributions. This amount was to be paid to him out of funds held in the trust account of "Kramer Tax Pty Ltd".

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[2] [2017] FamCAFC 270

[3] The parties, including Mr Kramer, were given pseudonyms by the Court in the published judgment.

How did the money get there?

How did the money mysteriously move from the trust account of Mr Kramer's law practice to the trust account of Mr Kramer's tax practice? At some time, but obviously before the application was filed on 18 May 2016, Mr Kramer took it upon himself to transfer the money, which had risen to the sum of $197,266.77, out of his law practice trust account into the trust account of Kramer Tax Pty Ltd, another entity which he operated. He apparently did not feel the need to inform Ms Ward of this action.

The money did not stay there very long. Mr Kramer subsequently placed the money into a Westpac Term Deposit entitled *"ATF [Mr Harrison]"*. Ms Ward's name was not mentioned.

But wasn't it Ms Ward's money?

Yes, it was. Not only did Ms Ward not know that her money had been transferred to another account, but the entire proceeds were being held ostensibly on behalf of Mr Harrison, who subsequently claimed *only a part* ($150,000.00) of the total sum in his Application.

The De Facto relationship that wasn't

When the Application came before Judge Vasta in the Federal Circuit Court in Brisbane in October, it was apparent that there was a dispute between the parties as to whether or not they had ever been in a de facto relationship. His Honour set the matter down for hearing on that discrete issue on 2 November 2016.

Mr Harrison's affidavit did not contain any evidence to establish a de facto relationship between the parties, so he was given the opportunity to give some oral evidence. That evidence was that:

(a) on 9 December 2012 Ms Ward asked Mr Harrison to assist her in a dispute with her next-door neighbour;

(b) on 11 December Mr Harrison commenced sleeping in a bus parked at the back of the premises;

(c) the parties subsequently had sexual relations on one or more occasions; and

(d) Mr Harrison continued to live in the bus until March 2013.

Curiously, at no time in his oral evidence did Mr Harrison ever assert that he had provided any money to Ms Ward, yet in his affidavit he described a purported financial relationship in which he claimed to have expended the staggering amount of $366,000.00 for Ms Ward's household expenses and bills over a period of 15 months up to April 2014. He claimed to have funded this expenditure from an inheritance of $414,984.49. As Mr Harrison did not receive this inheritance until 28 March 2014 and deposed in his affidavit that his only source of income from February 2013 was by way of Centrelink payments, it is hardly surprising that Judge Vasta was unconvinced that the Applicant had made out a case for a de facto property adjustment at all. His Honour said to Mr Harrison's counsel:

"There's no cohabitation realistically at all and even if one were to really generalise what cohabitation means, we're looking at three months…"

Significantly, Judge Vasta commented:

"There's money, $197,266.77, sitting in a trust account which has not been properly accounted for."

Counsel for the Applicant conceded that there was no evidence of a de facto relationship.

Consequently, his Honour ordered that:

(a) The sum of $197,266.77 held in the trust account of Kramer Law be released to the Respondent within seven days; and

(b) The Application would be dismissed.

There was no appeal at that time. However, on 3 November Mr Kramer the solicitor sent an email to Judge Vasta's associate saying that the orders needed to be amended because the figure of $197,266.77 was

incorrect. The amount held in the third party trust account was in fact $199,673.97. The reason for this discrepancy was said to be because Kramer Law did not have the correct information from the third party (*i.e.* Kramer Tax Proprietary Limited) until that day.

One might think, and the Full Court did think, that this reference to the "*third party*" was a bit misleading. The Kramer of Kramer Law and the Kramer of Kramer Tax were the one person.

How much money was there again?

Curiously, that very same day, Kramer Law came back with a further email saying that the earlier figure of $199,673.99 was wrong and that the correct amount was really only $184,673,97, a difference of exactly $15,000.00. Kramer Law blamed Kramer Tax for giving them the wrong information. No explanation was ever given by either of the Kramers as to where the missing $15,000.00 went.

Well, how much money was actually paid to Ms Ward?

Nothing was paid to Ms Ward at that stage, actually.

Instead, on 8 November 2016, Mr Harrison withdrew his instructions from Kramer Law and served a notice seeking to withdraw all of the funds held on trust on his behalf. Notwithstanding the fact that Mr Kramer of Kramer Law did not have any funds in trust on behalf of Mr Harrison, or even a trust account, Mr Kramer of Kramer Tax promptly paid the sum of $184,000.00 or thereabouts to Mr Harrison. Mr Kramer (in whichever guise he was in at the time) did not find it necessary to inform Ms Ward of that fact. Mr Kramer apparently did not see the Court Order that the money should be paid to Ms Ward as any impediment to that course of action.

But wait, it gets worse!

On that same day, Mr Harrison commenced proceedings against Ms Ward in the Queensland District Court. There is no explanation as to what possible claim Mr Harrison could have against the unfortunate Ms Ward.

On 10 November Mr Kramer sent an email to Judge Vasta's associate advising that he no longer held instructions to act for Mr Harrison and

the Court should direct any inquiries directly to him. However, Mr Kramer said that he was unable to provide any contact details for his former client.

Mr Kramer, perhaps not surprisingly, did not see fit to tell Judge Vasta's associate that the money had been paid out to Mr Harrison, contrary to Judge Vasta's order.

Ms Ward sought the assistance of the Women's Legal Service to seek to pursue the money she was entitled under the Federal Circuit Court Orders. When the WLS wrote to Mr Kramer, he:

(a) told them he no longer acted for Mr Harrison; and

(b) asked them for Ms Ward's address for service (!).

Mr Kramer did not tell the Women's Legal Service, or the Court, that he had taken the missing $15,000.00 from the trust account and paid it to himself.

On 6 December 2016 Ms Ward filed an Application in a Case seeking to enforce the orders of 2 November 2016. The Application sought to join Kramer Tax as 2nd Respondent and sought injunctive orders against them. The Application also sought an order that if the funds had already been paid out to Mr Harrison then he should pay the sum of $197,133.17 plus interest to Ms Ward.

The Application came before Judge Vasta on 14 December 2016. There was no appearance by or on behalf of any of the various Kramers. His Honour noted that there as an entity whose name appeared on the letterhead of correspondence sent to the Court as "Kramer Law Lawyers and Accountants Pty Ltd" and joined that entity to the proceedings.

His Honour, who had clearly taken a dim view of the blatant disobedience of his orders, ordered that the principal of this Kramer entity show cause why he should not be dealt with for contempt of court and referred the matter to the Queensland Law Society and the Legal Services Commission. His Honour adjourned the Application to 19 December and noted that if there was no appearance on the next occasion he would consider issuing an arrest warrant.

On 19 December, when the matter was back before the Court, Mr Kramer was represented by counsel, who said that Mr Kramer himself was overseas. Judge Vasta ordered that Mr Kramer and Mr Harrison must attend personally on the next occasion on pain of a warrant for their arrest and that the second Respondent should file an affidavit.

On 20 January 2017, Mr Kramer appeared before the Court unrepresented. In his affidavit, Mr Kramer submitted that there was no liability for contempt because:

(a) Mr Harrison was in court when the original orders were made;

(b) Kramer Law did not hold any money in its trust account because it had closed the account 18 months previously;

(c) Kramer Law was not a party to the orders;

(d) Kramer Tax was not a party to the orders; and

(e) Despite knowing about the content of the orders, Mr Harrison instructed Kramer Tax to release the money to him ***"and he had the capacity to do so".***[4]

Incredibly, Mr Kramer gave oral evidence about how and why the money as disbursed from the trust account, none of it consistent or convincing. Judge Vasta found Mr Harrison and Mr Kramer jointly and severally liable for the payment of $197,266.77 to Ms Ward. He ordered that they should pay that amount by 27 January.

Judge Vasta subsequently on 31 January directed that the Marshal of the Court make application that Mr Harrison and Mr Kramer be dealt with for contempt of the Orders of 2 November 2016. An oral application for a stay of those Orders was dismissed.

Appeals and Leave to Appeal out of time

Mr Kramer sought leave to appeal against the orders of 20 January. Mr Harrison sought leave to appeal against the orders of 31 January.

[4] *Kramer and Anor v Ward* [2017] FamCAFC 270 at [53]

Mr Harrison later sought an extension of time to appeal against the Orders made by Judge Vasta on 2 November 2016. The Application was heard by Kent J on 30 May 2017 (*Harrison & Ward and Anor* [2017] FamCAFC 99). Mr Harrison was represented by counsel but neither Mr Kramer nor Ms Ward appeared.

The extension of time was granted on condition that Harrison pay into court the sum of $50,000.00 the following day and that Ms Ward should have leave to apply to the Court that the money be paid out to her. Kent J took a dim view of Mr Kramer's actions in respect of the monies paid into his trust account, saying at [11]:

"The stark difficulty with that is that no consent or authority was ever given by Ms Ward to Mr Kramer for withdrawal of the trust monies held in the Kramer Law Practice Trust Account. That is, Ms Ward did not authorise or consent to the withdrawal of the funds nor did she authorise or consent to the funds being deposited into a non-legal firm trust account. Indeed it would seem that these events transpired without her knowledge."

His Honour then went on to refer to s.8 of the *Trust Accounts Act 1973* (Qld), which prohibits certain transactions and provides for a penalty of 100 penalty units or 1 year's imprisonment. He further referred to the provisions of Part 3.3 of the *Legal Profession Act 2007* (Qld), which also regulates trust money and trust accounts operated by a law practice and provides for a penalty of 50 penalty units on a breach being established.

His Honour expressed the view that Ms Ward would seem to have a case worthy of investigation concerning a potential claim upon the Legal Practitioners Fidelity Guarantee Fund administered by the Queensland Law Society. Accordingly, he authorised publication of the reasons for judgment to the Bar Association of Queensland, the Queensland Law Society and the Family Law Practitioners Association of Queensland with a request on behalf of the Court that she should be considered for legal assistance.

The three Appeals

The Appeals were heard on 19 July 2017 before the Full Court of the Family Court, comprising Strickland, Kent and Cronin JJ. All three of the parties were represented by counsel.

Harrison asserted three broad errors on the part of the trial judge, namely:

(a) denial of procedural fairness in making the declaration that there was no de facto relationship between the parties and making orders releasing the funds;

(b) failing to provide adequate reasons for releasing the trust funds; and

(c) the order releasing the trust funds was beyond jurisdiction or power.

Kramer's grounds of appeal were similar, saying the trial judge erred:

(a) in making an order releasing the trust funds without jurisdiction;

(b) if his Honour did have no jurisdiction, then the order releasing the trust funds was erroneous in that the funds were held on trust on trust for Mr Harrison and not Ms Ward, and the order releasing the trust funds was an erroneous exercise of discretion.

Not surprisingly, these arguments did not find favour with the Full Court. Their Honours said of Mr Harrison's "denial of procedural fairness" ground at [85]:

"Neither this Court, nor justice, is served by the making of grossly inaccurate submissions as to facts such as those made to us in this respect by counsel for Mr Harrison."

Mr Harrison's "failure to provide adequate reasons" fared little better, being described as having no merit.

The argument by both Appellants that the Federal Circuit Court lacked jurisdiction to order the release of the funds in the trust account was dismissed at [105] in this way:

It could not possibly be argued…that releasing the trust funds to Ms Ward created or enforced new rights. The release of the funds merely gave effect to Ms Ward's existing rights."

The argument on behalf of Mr Kramer that the trial Judge erred in his construction of the terms of the trust was wholly rejected.

The other appeals suffered a similar fate.

The Orders for Costs

The Full Court noted at [185] that Mr Harrison had been wholly unsuccessful in respect of each of his appeals. Their Honours were satisfied that Mr Harrison should pay Ms Ward's costs on an indemnity basis, following *Kohan and Kohan* (supra) and *Prantage & Prantage* (supra). Apart from the fact that Mr Harrison had been wholly unsuccessful, their Honours gave these reasons for making such a costs order:

186. More fundamentally though, and relevant to subparagraphs (d) and (g) of s 117(2A), if Mr Harrison had ensured the order of 2 November 2016 had been complied with, as it should have been, Ms Ward's position of being kept out of money to which she was solely entitled would not have been compounded by having to respond and deal with meritless appeals, at financial and no doubt emotional cost.

187. It is obvious, relevant to subparagraph (a) of s 117(2A), that Ms Ward's financial circumstances are bereft without the return of her funds and, even with that, Mr Harrison's financial circumstances are superior.

188. The subject matter of these proceedings and the conduct of Mr Harrison in bringing them about, starting with his non-compliance with a solemn order of the Federal Circuit Court, dictate the conclusion that Ms Ward ought not be out of pocket in having to resist these appeals.

Mr Kramer did not fare any better. Whilst the Full Court varied the Orders of 20 January 2017, this partial success was outweighed by Mr Kramer's behaviour generally. Their Honours held:

190…. Mr Kramer utilised his appeal as the vehicle by which he mounted a collateral attack upon the orders made on 2 November 2016. That collateral attack has been wholly unsuccessful and it occupied the work involved in these appeals collectively, in terms of Ms Ward's costs incurred and the appeal hearing, to a far greater extent than that part of the appeal directed to the orders made on 20 January 2017 in respect of which Mr Kramer enjoyed partial success.

191. Relevantly, Mr Kramer's complicit conduct enabled the non-compliance that occurred with respect to the original orders of 2 November 2016. Notably, Mr Kramer was at all times an officer of the Court. Further, Mr Kramer obtained a personal benefit via his removal of some part of the trust funds for his own benefit. Obviously, had the original orders of 2 November 2016 been complied with, as they ought to have been, the subsequent orders, including those of 20 January 2017 the subject of Mr Kramer's appeal would never have been made.

In what the Full Court described[5] as *"the extraordinary circumstances of this case"*, Mr Kramer was ordered to pay Ms Ward's costs on an indemnity basis. Their Honours also directed that their reasons should be provided to the Legal Services Commission of Queensland and the Queensland Law Society for consideration of any disciplinary measures that ought to be taken against Mr Kramer.

What can we learn from *Kramer and Anor & Ward*?

Applications for costs should rely specifically on one or more paragraphs of section 117(2A) of the *Family Law Act,* remembering that only one is necessary to ground a costs order.

The Full Court reiterated that indemnity costs are still *"a very great departure"* from the general rule that costs are awarded on a party and party basis, but in *"extraordinary circumstances"* the Court will not hesitate to order costs on an indemnity basis.

Non-compliance with a court order and meritless appeals will attract an order for costs on an indemnity basis.

Kramer's complicity in Harrison's non-compliance and his apparent professional misconduct leading to a referral to the Law Society and the Legal Services Commission were sufficient to ground a personal costs order and, moreover, indemnity costs.

Whilst apparent professional misconduct is not necessary to ground a personal costs order against a solicitor, it certainly helps.

References:

[5] At [193]

Practitioners will benefit by referring to *Annotated Family Law Legislation* 4th Edition by Chisholm, Christie and Kearney, (2017) Lexis Nexis Butterworths.

Biographical Note

Stephen Scarlett retired as a Judge of the Federal Circuit Court of Australia on 28 July 2016, having served in that Court and its predecessor, the Federal Magistrates Court, from 19 June 2000. Previously, he was a Magistrate of the Local Court of New South Wales from 7 November 1988 and the Senior Children's Magistrate of the Children's Court of NSW from 1995 until June 2000.

He was a solicitor in Parkes NSW from 1971 until his appointment to the Local Court in 1988.

He was accredited as a Mediator under the NMAS on 2 December 2016. He commenced practice as a barrister on 1 July 2017 and is now at Edmund Barton Chambers in Sydney (telephone (02) 9220 6100; email scarlett@ebc44.com)

In 2015 Stephen Scarlett was awarded the Medal of the Order of Australia for service to the Judiciary, to the law and to professional organisations.