



Legal costs in Family Law proceedings

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Proceedings in the Family Court, whether for [children and parenting](#) matters or [financial matters](#), are stressful for all parties involved without considering the added burden of legal costs. As a family lawyer, a question commonly asked by clients is, “*Can the Family Court make the other party pay my legal costs if I’m successful?*”

In other jurisdictions, such as criminal matters, costs orders are commonly made in favour of the successful party. This generally means that the unsuccessful party is ordered to reimburse (or contribute to) the legal fees of the successful party.

Can the Family Court make order for costs?

The questions of costs in family law proceedings is dealt with under section 117 of the *Family Law Act 1975* (Cth) (“the Act”).

The Family Court has broad discretion in relation to awarding costs or not.

The general rule is that each party shall bear his or her own costs. This is why the Court is sometimes referred to as a “no costs jurisdiction”.

As a rule of thumb, each party is responsible for their respective legal costs should they choose to receive legal advice or retain legal counsel to represent them. However, as with many things in the law, there are some exceptions to this rule.

When might the Court make an order as to costs?

Section 117(2A) of the Act outlines the factors the Court is to take into account when considering what order (if any) should be made, in respect of costs.

The court must have regard to the following:

- a) The financial circumstances of each of the parties to the proceedings;

For example, if a costs order were to be made, practically, does the party have the means to meet the costs order?

- 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 during proceedings including, in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admission of facts, production of documents and similar matters;

For example, did a party behave particularly poorly during proceedings such as deliberately delaying proceedings (and as a consequence, increasing the legal costs of a party) or failing to comply with interim orders or the rules of the court.

- d) Whether the proceedings were brought about by the failure of a party to comply with previous orders of the court;

This factor is particularly relevant in enforcement proceedings.

Enforcement proceedings come about when one party has not complied with previous orders of the Court. For example, an order that one party pay the other a lump sum by way of property settlement, within a specified time frame. However, such time frame has expired and the monies have not been paid.

The aggrieved party may then apply to the Court to 'enforce' the orders; for example, by forcing the sale of an asset of the non-compliance party to allow the lump sum originally ordered to be paid to them.

- e) Whether any party to the proceedings has been wholly unsuccessful in the proceedings;

It is important to note that this is just one of the factors that the court considers.

- f) Whether either party to the proceedings has made an offer in writing to the other party to settle the matter and the terms of any such offer;

This may be relevant if an offer was made to a party, which they should have reasonably accepted, and if the offer had been accepted would have left the party

with a more favourable outcome and resolved the issues in dispute at an earlier stage (again, reducing the legal costs that were otherwise incurred).

g) And any other matters as the court considers relevant.

The discretion to award costs is a “broad” one, and the various factors which can be considered by the Court are not to be read in any restrictive way.

The weight to be given to the factors is a matter for the judicial officer, but they must all be taken into account and balanced when considering whether the overall circumstances justify the making of a costs order.

Any one of the factors may be the sole foundation of a costs order. This means that not all of the factors have to be proved. For example, an unsuccessful party may be awarded costs if the other party’s conduct was especially egregious.

Award of costs is for compensation of expenses, not punishment

It is important to note that an order for costs is made to compensate a party against expenses incurred in litigation and is not punitive in nature. Costs are not a penalty or damages. For this reason, you cannot be awarded more than what you have paid in legal costs.

Whilst there are circumstances where costs can be awarded, this is not the “norm”, and litigants must be aware that the starting position is that both parties pay their own legal costs.

For this reason, at Meillon & Bright Legal, we are aware of the costs that are incurred on behalf of our clients and endeavour to keep costs as low as possible; in particular by keeping your matter out of the court system (out of litigation) wherever possible.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.