

Costs orders in family law

Author: Jane Holford
Email: jane@smithfamilylaw.com.au
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In most matters, each party involved in family law proceedings in the Federal Circuit and Family Court of Australia will pay their own costs. There are some exceptions to this rule and some circumstances where the Court may order one party to pay the legal costs of another. In this blog, we explore when the Court makes costs orders, how they make them, costs in contravention proceedings (where certain prior orders of the Court have been breached) and how to apply for a costs order.

Special note - changes to the Family Law Act

The information on this webpage may no longer be current. On 6 May 2024, significant changes to the *Family Law Act 1975* (Cth) will come into effect. These changes may impact your family law matter.

Contact us to discuss how these changes could affect your family law matter: 03 8625 8957

When will the Court make a costs order?

The Court will make an order for costs if it is of the opinion that it is just to do so in the circumstances.

When considering what order (if any) should be made, the Court will take into account the following factors:

- The financial circumstances of each of the parties to the proceedings – for example, if a party has capacity to pay in the first place;

- 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;
- The conduct of each party in relation to the proceedings – for example, the parties' compliance with requests to produce relevant documents, whether the parties' admitted certain facts or refused to make concessions etc;
- Whether the proceedings were commenced because of another party's failure to comply with previous orders of the Court – that is, if the parties would even be at Court and incurring costs if one party had simply complied with previous orders;
- Whether a party has been wholly unsuccessful through the proceedings;
- Whether either party has made an offer in writing to the other party in an attempt to settle the proceedings. This includes the terms of the offer, especially in circumstances where a party has rejected an offer and does not achieve a better outcome at trial; and
- Any other matters that the Court deems relevant.

While it is not usual for the Court to make an order for costs in family law proceedings, is it certainly not unheard of.

How will the Court make a costs order?

When the Court decides to make a costs order, it will usually be done in accordance with the costs scale.

Unless ordered otherwise, the amounts payable for a costs order are set out in Schedule 3 of the Family Law Rules. The schedule sets out costs allowable for a lawyer's work done and services performed in a matter (for example, drafting documents, reading documents, scanning, photocopying and reasonable time spent on work).

If the Court makes an order for your costs to be paid by another party, it may be in accordance with the amount detailed in the schedule. This means that even if your lawyer charged more than the amount allocated in the schedule for doing the work, the Court will only make a costs order in accordance with the schedule (so not all of your costs are necessarily recoverable).

Sometimes, the Court may order that a specific amount of costs be paid or may apply another method for determining the amount of costs.

In most cases, the Court will only make an order for a party to recover a portion (but not all) of their costs. However, in some rare cases, the Court will make an order for a party to recover all of their costs. These are known as indemnity costs.

When will indemnity costs be ordered?

Orders for indemnity costs (that is, orders for the entirety of a parties' costs to be paid) are only made in exceptional circumstances. There must be some unusual circumstances to persuade the Court to depart from its usual practice and order that **all** costs are to be paid.

Examples of circumstances where indemnity costs have been ordered include:

- Where a party has made false allegations of fraud and knew they were false and/or irrelevant;
- Where there is evidence of misconduct which causes loss of time to the Court and the other parties;
- Where proceedings were commenced or continued for an ulterior motive or in complete disregard of clearly established law;
- Where the proceedings were unnecessarily prolonged by irrelevant allegations and/or arguments with no basis;
- Where there was an unreasonable refusal of an offer to settle or compromise; and/or
- Where a party is in contempt of Court, meaning activity that interferes with the ability of the Court to perform their role.

It is important to keep in mind that it is extremely rare for a Court to make a costs order in family law on an indemnity basis. So, if you are successful in obtaining a costs order in your favour, it will likely not be for the full amount of costs.

Costs in contravention proceedings affecting children

Contravention proceedings affecting children are proceedings where a party bound by an order (for example, a parenting order previously made by the Court), intentionally fails to comply with the order (without a reasonable excuse) or makes no reasonable attempt to comply with the order.

Costs orders in relation to contravention proceedings are awarded differently to normal costs. If the Court decides that a 'more serious' breach of an order has occurred, it **must** order costs against the person who breached the order (but only if it is in the child's best interests to do so).

Where the Court dismisses a contravention application (or finds that no further action is required) and a similar finding has been made previously in relation to the same matter, it must consider ordering costs against the person who filed the contravention application. This is to deter parties from continually bringing contravention applications before the Court if they are not necessary.

You can read more about the consequences of failing to comply with parenting orders and contravention applications more generally here.

How do I apply for costs?

You can apply for costs by filing an application with the Court seeking a costs order. In some circumstances, you can also make an oral application for costs on the day of your Court hearing.

We can assist in you to complete and file an application seeking costs. Call us for an initial free consultation – 03 8625 8957

Do not assume that you will be able to recover your legal costs

Remember that it is not usual for the Court to make an order for costs in family law matters. You cannot assume that at the end of your family law matter you will automatically be able to recover all (or even some) of your costs from another party.

Even where a cost order is made in your favour, it does not necessarily affect your liability to pay your lawyer's fees. The costs you may recover from another party are unlikely to cover the whole of the legal costs that you are obligated to pay to your lawyer. If you cannot recover legal costs from the other party (for example, the party goes into liquidation or becomes bankrupt), you will still be liable for your own legal costs.

This is why it is so important to make sure you are aware how much your lawyer is charging at each step of your family law matter. At Smith Family Law, we are transparent and upfront in how we charge. You can read more about how we charge here.

How a family lawyer can help

Smith Family Law can assist you to determine whether an application for costs is likely to be successful in the circumstances of your matter, and assist in the making of such an application. Any application for costs should be considered carefully, and it is prudent to seek legal advice before taking any action.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.