



FAMILY COURT OF AUSTRALIA

The New Costs Regime after 1 July 2008

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Background to paper/topic

From 1 July 2008, the Family Court of Australia will no longer regulate lawyer/client costs in certain cases.

Generally, those cases include those that are commenced in the court after 1 July 2008. For these cases, regulation of lawyer/client costs will fall to the state or territory regulatory body.

Note – Due to time constraints, this paper is not intended to provide a summary of the state law that is going to apply following the changes. The paper addresses only how the changes to the *Family Law Rules* will impact on family law practitioners and the involvement of the Family Court in issues of costs following 1 July 2008.

Why the change?

Practitioners may recall receiving a letter from the Principal Registrar of the Family Court on or about 16 February 2007 informing them that the Judges of the Court had made an “in-principle decision that the Court should withdraw from its role in regulating practitioner and client costs”.

The Principal Registrar invited comment and feedback regarding the Judge's decision. That comment and feedback was received from, *inter alia*, the Law Society of NSW and the Family Law Section of the Law Council of Australia who were both supportive of the proposed changes.

The changes mean consistency. In most other areas of law, lawyer/client costs are regulated by a single regulatory body. The changes will also bring the Family Court in line with the Federal Magistrates Court.

Costs in the Federal Magistrates Court

Since its inception in 2000, the Federal Magistrates Court has been operating using state laws to govern lawyer/client arrangements in Family Law matters. It then raises the question – have family lawyers taken this into account when entering into costs agreements with their clients when commencing proceedings in the Federal Magistrates Court? Further, how does this impact on costs between a lawyer and client when proceedings are commenced in the Family Court, but are then transferred to the Federal Magistrates Court? Food for thought.....!

The changes bring the Family Court and Federal Magistrates Court approach to lawyer/client costs into line.

Note – Rule 21.09(3) of the Federal Magistrates Court Rules 2001 provides; “*Unless otherwise provided, these Rules do not regulate the fees to be charged by lawyers as between lawyer and client in relation to proceedings in the Court.*”

What does the change mean?

The new regime introduces the new concept of “fresh application” (see the definition below). The changes mean that for any fresh application commenced after 1 July 2008, the *Family Law Rules* will no longer cover lawyer/client costs. Accordingly, entering into costs agreements and any issues about payment of lawyer/client costs will be regulated by the state/territory regulatory body.

Family Law practitioners should be aware that the existing provisions of the Rules relating to the regulation of costs will continue in full force and effect for all pending and ongoing matters already filed in the Family Court as at 1 July 2008 (except this is now covered by Schedule 6 to the Rules rather than Chapter 19 – see below for further details), unless a client in a pending or ongoing matter on or after 1 July 2008 retains a new solicitor; or where the solicitor and client freely agree that the provisions of the Rules dealing with the regulation of costs should no longer apply to their financial relationship. If either of these things occur, the regulation of the legal costs relationship will be by the relevant State or Territory legislation.

IN SUMMARY;

For lawyer/client costs only, State/territory laws will apply to;

- 1) all fresh applications (in accordance with the definition);
- 2) where a new solicitor comes into a matter on or after 1 July 2008; or
- 3) where a lawyer and client agree in writing that the old costs rules no longer apply to their financial relationship.

What about party/party costs?

There are no changes to the rules dealing with party/party costs. In other words, the Family Court has no plans to withdraw from the area of party and party costing. **However**, party/party costs for fresh applications are covered by Chapter 19, whereas party/party costs in all other matters are now covered under Schedule 6 to the rules (refer below).

New terminology – “fresh application”

The Dictionary to the Rules will contain the definition of “fresh application” which we will be as follows;

***Fresh application** means any of the following applications, including compliance with pre-action procedures associated with them, made after 30 June 2008:*

- (a) *an Application for Final Orders;*
- (b) *an application that includes an application for final orders;*
- (c) *an Application in a Case filed in connection with a fresh application;*
- (d) *an Application for Divorce;*
- (e) *an application for consent orders;*
- (f) *a contempt, contravention or enforcement application, unless an allegation of the contempt, contravention or breach relates to an interim or interlocutory order made in a pending or ongoing Application for Final Orders filed before 1 July 2008;*
- (g) *an application relating to contempt in the face of the court arising from an event occurring after 30 June 2008;*
- (h) *an appeal, and a re-hearing following an appeal;*
- (i) *an application for review of final orders made by a Registrar or Judicial Registrar.*

The reference to “*including compliance with pre-action procedures associated with them*” means that where costs are incurred in complying with pre-action procedures before the application is actually commenced (when that application is to be commenced after 1 July 2008), the totality of the costs are dealt with together (ie. under the State/Territory laws).

How do the Rules look different?

The previous Chapter 19 of the *Family Law Rules* will colloquially be known as the “old costs rules” and will be found, in their entirety, in a new Schedule 6 to the rules.

When contemplating the rearranging of the rules, consideration was given to the fact that where work is done for a case that is pending as at 1 July 2008, lawyers and clients would need to make reference to the old costs rules for the purpose of their rights and obligations in relation to lawyer/client costs. It was recommended that that be achieved by the entirety of Chapter 19 being replicated in a schedule to the rules which expressly applies to those cases that are not regulated under the new regime. It

was considered that the structuring of the Rules in this way was the best method to avoid confusion about what rules apply to what cases.

This means that primarily, the only need for reference to Chapter 19 after 1 July 2008, is in relation to party/party costs for fresh applications (and things like security for costs, etc).

A new provision

There will also be a new rule in Schedule 6 (under Part 6.4 – Lawyer and client costs) which confirms that the Schedule does not apply for work done for a case, paid or payable by a client to a lawyer;

1. for a fresh application commenced after 30 June 2008;
2. by a lawyer who is first retained by a client on or after 30 June 2008, even if the case in which the lawyer is retained to act is pending on 30 June 2008; or
3. if the lawyer and client agree in writing, and free from undue influence, that the Rules no longer apply to the regulation of the costs to be charged.

Schedule 6

The start of Schedule 6 will look like this;

Summary of Schedule 6

Schedule 6 regulates;

(a) party/party costs in relation to applications that are not covered by Chapter 19; and

(b) the charges of lawyers in family law cases that commenced before 1 July 2008 as provided in subclause 6.01(1), except;

- a. for a fresh application commenced after 30 June 2008;*
- b. under a new agreement between the lawyer and client entered into after 30 June 2008;*
- c. under a retainer entered into by a new lawyer after 30 June 2008; and*
- d. for any part of a case in which a Family Court is exercising its bankruptcy jurisdiction.*

Chapter 26 contains provisions which regulate the charges of lawyers for a part of a case involving bankruptcy matters.

Clause 6.01 Application of Schedule 6

- (1) This Schedule only applies to costs for work done for a case, or in complying with pre-action procedures associated with a case, that commenced before 1 July 2008.*
- (2) Subject to subclause (4), this Schedule applies to costs for work done for a case, or in complying with pre-action procedures, paid or payable by:
 - (a) a client to a lawyer;*
 - (b) if paragraph (a) does not apply — one person to another person.**
- (3) For work to which this Schedule applies, a party may only recover costs from another party in accordance with these Rules or an order.*

Note A self-represented party is not entitled to recover costs for work done for a case (except work done by a lawyer) but, if so ordered, may be entitled to recover some payments.

- (4) This Schedule does not apply to costs in any part of a case in which a Family Court is exercising its jurisdiction under section 35 or 35B of the Bankruptcy Act.*

Chapter 19

Chapter 19 will now have the heading “Party/party costs” although Rule 19.01 confirms that the Chapter;

1. applies to costs for work done for a case, or in complying with pre-action procedures, in relation to a fresh application, paid or payable by one party to another; and
2. creates a duty for lawyers to give information about costs to their clients.

This means that Chapter 19 still requires lawyers to give costs notices to parties at certain times throughout a case.

Chapter 19 will still cover;

- Security for costs;
- Costs orders;
- Calculation of costs;
- Claiming and disputing costs (including the assessment process);
- Specific costs matters; and
- Review of assessment;

albeit there are some changes amongst the existing rules.

There is also a duplicate of these matters in the new Schedule 6 to the rules because don't forget, Schedule 6 is basically a "copy and paste" of the previous Chapter 19.

When did the new Rules commence?

1 July 2008

This means that practitioners should already have started to think about what costs agreements they enter into with their clients – including;

- (1) existing clients that have pending or ongoing matters as at 1 July 2008 where they consent to the lawyer/client cost relationship being governed by the state regulatory body;
- (2) new clients who have pending or ongoing matters as at 1 July 2008; and
- (3) new or even existing clients who may commence proceedings after 1 July 2008.

New definition of costs agreement

In the Dictionary to the Rules, there will be a new definition of costs agreement as follows;

Costs agreement means a written agreement between a party and the party's lawyer, about the costs to be charged by the lawyer for work done for a case for the party, in accordance with:

- (a) for an agreement entered into before 1 July 2008 – clause 6.15 of Schedule 6; or
- (b) for an agreement entered into after 30 June 2008 – the law of a State or Territory.

The practical implications for family lawyers

- Family lawyers will now need to ensure they are entering into the correct costs agreement with a client based on;
 - (a) whether the case is pending or ongoing as at 1 July 2008;
 - (b) whether they are a new lawyer for a case that is pending or ongoing as at 1 July 2008;
 - (c) if it is a fresh application; or
 - (d) if the lawyer and client agree to enter into a new costs agreement under the new regime.
- Family lawyers will still be required to give costs notices;
 - After an offer to settle is made during a property case; and
 - Immediately before each court event.
- Party/party costs will still be governed/regulated by the Family Court and Family Law Rules except some cases are covered under Chapter 19 and some cases are covered under Schedule 6.

Further changes to the costs rules

- As both the court and practitioners become accustomed to the new costs rules, and the set-up of those costs rules, further ‘cosmetic’ changes may be required. These will be monitored by the courts Rules Committee.

Costs notices

- Practitioners should be aware that there are now 2 costs notice brochures, namely;

1. A Chapter 19 costs notice – which covers only party/party costs for fresh applications; and
2. A Schedule 6 costs notice – which covers;
 - (a) party/party costs for all matters that do not fall within the definition of fresh applications; and
 - (b) lawyer/client costs for matters where the following does not apply;
 - (i) a ‘fresh application’ matter;
 - (ii) where a new solicitor comes into a matter on or after 1 July 2008;
 - (iii) where a lawyer and client agree in writing that the old costs rules no longer apply to their financial relationship; or
 - (iv) where the court is exercising its bankruptcy jurisdiction.