

FAMILY COURT OF AUSTRALIA

SIMIC & NORTON

[2017] FamCA 1007

FAMILY LAW – COSTS – conduct of the parties and/or their legal practitioners – referral of legal practitioners to Legal Services Commissioner

APPLICANT: Mr Simic

RESPONDENT: Ms Norton

INDEPENDENT CHILDREN'S LAWYER

FILE NUMBER: SYC 6449 of 2015

DATE DELIVERED: 11 December 2017

PLACE DELIVERED: Sydney

PLACE HEARD: Sydney

JUDGMENT OF: Benjamin J

HEARING DATE: 23, 24, 27, 28, 29 and 30
November 2017 and 1
December 2017

REPRESENTATION

COUNSEL FOR THE APPLICANT: Mr Batey & Ms Beck

SOLICITOR FOR THE APPLICANT: Mr D of X Firm

COUNSEL FOR THE RESPONDENT: Ms Gilles SC

SOLICITOR FOR THE RESPONDENT: Ms M of Y Firm

**COUNSEL FOR THE INDEPENDENT
CHILDREN'S LAWYER:** Ms Murphy

**SOLICITOR FOR THE INDEPENDENT
CHILDREN'S LAWYER:** Stephen W Bell &
Associates

ORDERS

IT IS DIRECTED

1. A Registrar of this Court forward to the Legal Services Commission of New South Wales the following documents:-
 - (a) a sealed copy of this order;
 - (b) a copy of the reasons upon which this order is based; and
 - (c) a copy of the submissions made by or on behalf of each of the Applicant and Respondent in respect of the question as to whether to refer the solicitors to the Legal Services Commission of New South Wales.

IT IS REQUESTED

2. The Legal Services Commission of New South Wales investigate and consider whether the costing and approaches adopted by each of the current solicitors for the parents in these proceedings, namely Mr D for the Applicant and Ms M for the Respondent (collectively called 'the solicitors'), could constitute professional misconduct or unsatisfactory professional conduct by either one and/or other of the solicitors.
3. In that investigation the Court requests that the Legal Services Commissioner consider:-
 - (a) whether the legal work undertaken by each of the solicitors was necessary for the pursuit of these legitimate forensic needs of each of the solicitor's clients;
 - (b) whether the legal work was undertaken by each of the solicitors in a reasonable manner, bearing in mind these are proceedings on behalf of otherwise unsophisticated parties in terms of family law litigation and in highly emotional circumstances;
 - (c) whether the legal costs and disbursements claimed were, in all of the circumstances, fair and reasonable; and
 - (d) whether the costs and disbursements were proportionate to the overall issues to be determined in these proceedings.

IT IS ORDERED

4. The Court gives leave for the Legal Services Commissioner of New South Wales or his/her nominee to have photocopy access to the documents on the Court file in these proceedings, including all Exhibits.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Simic & Norton* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYC6449/2015

Mr Simic
Applicant

And

Ms Norton
Respondent

And

INDEPENDENT CHILDREN'S LAWYER

REASONS FOR JUDGMENT

1. I am not a Judge based in the Sydney Registry of the Family Court of Australia. However, I regularly hear cases filed in that Registry. I have become increasingly concerned about the high levels of costs charged by the legal profession in property and parenting proceedings and in previous judgments I have expressed these concerns in that regard. Such comments have seemingly gone unheeded.
2. In the Sydney Registry of the Family Court I have observed what seems to be a culture of bitter, adversarial and highly aggressive family law litigation. Whether this win at all costs, concede little or nothing, chase every rabbit down every hole and hang the consequences approach to family law litigation is a reflection of a Sydney-based culture by some or many litigants or whether it is an approach by some legal practitioners or a combination of both, I do not know.
3. Whichever is the cause, the consequences of obscenely high legal costs are destructive of the emotional, social and financial wellbeing of the parties and their children. It must stop.
4. In this particular proceeding, the parties were arguing over parenting arrangements for their two children, the adjustment of property and possibly a child support departure application.

5. The child support proceeding could not have been determined, given that no notice had been provided to the Child Support Registrar.
6. The parenting proceedings involved an Independent Children's Lawyer and were settled during the hearing.
7. The property proceeding was settled on the seventh day of the hearing.
8. Each of the parties was represented by competent counsel and I make no criticism of them in terms of their interaction with the Court. I am unable to make any meaningful comment as to whether their fees were appropriate or not, as I was not provided with the detail of counsels' fees.
9. The parties each provided cost statements to the Court,¹ as is required by the *Family Law Rules* 2004 (Cth) ('the Rules').
10. The mother had paid \$286,000 to the date of hearing, and had incurred further costs of \$21,851 (which fees were outstanding). It was estimated that her further legal costs for the hearing would amount to another \$120,000. This would take her total legal costs and disbursements of about \$342,744. In addition, she will be liable for another \$10,000 in legal fees, being one half of the legal costs of the Independent Children's Lawyer. Overall her legal costs will total about \$352,744.
11. The mother had been advanced \$265,000 by way of partial property orders during the course of the proceedings. These funds were the primary source for payment of her legal fees to date.
12. The father had incurred legal costs and disbursements of \$331,765 and had paid \$256,175 towards those fees to date. He had outstanding legal costs of \$75,590. The father's estimated additional costs of the hearing were a further amount of \$165,000. He will also be liable for about \$10,000, being half the legal costs of the Independent Children's Lawyer. Overall his total legal costs will amount to about \$506,000.
13. These parties will have spent about \$860,000 in legal costs in this proceeding.
14. These amounts are, on their face, outrageous levels of costs for ordinary people involved in family law proceedings.
15. Attached to the affidavits of the parties were copies of correspondence between the solicitors. Some of this solicitor correspondence was included as part of the five hundred pages of exhibits to the father's affidavit. I have read each and every one of those letters.
16. During her cross-examination of the father, senior counsel for the mother questioned him about the tone, length and appropriateness or otherwise of some of those letters.

¹ Exhibits E6 (mother's costs) and E7 (father's costs).

17. Some of those letters were inflammatory and reflected the anger of the parties or one or other of them. The letters were at times accusatory. They were often verbose and at times involved unnecessary tit for tat commentary. Some of the letters served little or no forensic purposes.
18. The father conceded in cross-examination that on some days multiple letters were sent by his solicitor to the other party's solicitor.
19. Solicitors are not employed to act as 'postman' to vent the anger and vitriol of their clients.
20. The solicitors are professional legal practitioners and charge significant hourly rates for their time and skills. To that end, they must ensure that correspondence and communication is necessary, balanced, considered and relevant.
21. Parties to family law litigation can often be distressed, anxious, angry, upset and emotional. Many have little experience in court process and this may be their one, and hopefully only, interaction with the civil legal system. They are generally unsophisticated litigants in terms of costs and rely on the provision of fair, reasonable, competent and proportional professional services by their legal representatives.
22. Given the evidence during the hearing and the correspondence between the parties, I am concerned that a fair, reasonable, competent and proportional professional service may not have been adopted by one, other or both of the solicitors acting for these parties. If that is the case it is unacceptable.
23. One of the main purposes of the Rules² is expressed to:-
Promote the main purpose' including minimising the need for the parties and their lawyers to attend court by, if appropriate, relying on documents.
24. The Rules also require that fees are 'proportionate to the issues in a case and their complexity, and the likely cost of the case' and in a manner which 'promotes savings of costs'.³
25. The family law courts have rightly been the subject of complaints about the level of costs in family law proceedings. All Judges have seen instances where the financial circumstances of the parties have been emasculated or wholly lost by the impact of legal costs. These are outrageous and often unnecessary outcomes.
26. For legal practitioners to be entitled to be paid costs in this Court, or any court for that matter, there is the following underlying criteria:-
 - (a) It needs to be reasonable to carry out the legal work to which the legal costs relate;

² Rule 1.04

³ Rule 1.07 (c)

- (b) The legal work must be carried out in a reasonable and professional manner;
 - (c) The quantum of legal costs and disbursements must be fair and reasonable, in all of the circumstances; and
 - (d) The legal costs and disbursements must be proportionate⁴ to the issues in dispute.
27. In this case the parties have spent an 'eye watering' total of about \$860,000 in legal costs and disbursements.
 28. Legal practitioners have a duty to minimise costs and to reduce conflict.
 29. The children of these parties depend upon the income and assets of their parents to support them. Yet, in this case, the costs of the proceedings have taken a terrible toll on the wealth of the parties and consequently their ability to support and provide for their children.
 30. Some of the communications appears to add 'fuel to the fire' of conflict rather than dampen it down.
 31. I raised my concerns about these costs with the legal practitioners at the conclusion of this hearing. I invited them, at their own expense, to provide written submissions as to whether this Court has the jurisdiction and power to make such referrals and if so, whether such referrals ought to be made. The legal practitioners were put on notice about these concerns after final orders were made.
 32. No issue was raised by the solicitors as to the Court's jurisdiction and power to make such referrals.
 33. In a letter dated 2 December 2017 the solicitor for the applicant made detailed submissions. I have read that submission and it did not ameliorate my concerns.
 34. The respondent's solicitor provided written submissions on 8 December 2017. I have read those submissions. At some levels they confirm my concerns about the tone of the solicitor correspondence, in particular the criticism, blame and accusatory nature of some legal communications.
 35. I have considered the submissions of the legal practitioners as part of all of the circumstances, including the public policy concerns about access to justice and the costs of these civil proceedings between individuals struggling with relationship breakdown.
 36. The level of costs and the nature of the limited material before me is such that I will refer these papers to the Legal Services Commissioner of New South Wales to ask him to investigate and consider whether the solicitors acting for

⁴ Rule 19.34

the parties in this case, in terms of their fees and approach, could amount to professional misconduct or unsatisfactory professional conduct.

37. Investigations by the Legal Services Commissioner of New South Wales are conducted pursuant to the *Legal Profession Uniform Law (NSW)* and are confidential; s 462 of that Act relevantly provides;

S. 462(1) A relevant person must not disclose to any other person, whether directly or indirectly, any information obtained in the execution or administration of this Law or the Uniform Rules unless permitted to do so under subsection (2).

Civil penalty: 50 penalty units.

38. The referral of these solicitors expresses the serious and deep concern by this Court as to the nature of the legal work undertaken and the cost charges for such work.

39. Given the submission by the solicitors, there are suggestions that the cause of excessive costs may arise from one side and not the other. I am not in a position to make a determination in that regard.

40. It may be that one or both practitioners has or have reasonable explanations in the light of all material being made available to the Legal Services Commissioner and after has assessed the solicitors' fees. If one or both solicitors are guilty of either professional misconduct or unsatisfactory conduct their names will likely be published to the community and the legal profession.

41. If there is found to be no misconduct by the solicitors, then the process should not be an alternate form of punishment. Consequently, when these reasons are published the names and practice details of the solicitors will be anonymised.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Benjamin delivered on 11 December 2017.

Associate:

Date: 11 December 2017