Family Lawyers – What is the Correct Scale?

GREG MAY, LEGAL PROFESSION CONDUCT COMMISSIONER

Everyone should by now be aware of the requirements of Schedule 3 of the *Legal Practitioners Act* (LP Act) in relation to costs disclosure. For the purposes of this article, a family lawyer must disclose to a client:

- the basis on which legal costs will be calculated, including whether a scale of costs of applies to any of the legal costs (clause 10(1)(a));
- if the law practice will not be calculating legal costs in accordance with an applicable scale of costs—that another law practice may calculate legal costs in accordance with the scale (clause 10(1)(b)); and/or
- if the matter is a litigious matter, an estimate of the range of costs that may be recovered if the client is successful in the litigation, and the range of costs the client may be ordered to pay if the client is unsuccessful (clause 10(1)(g)).

Family lawyers would also be aware of the costs disclosure requirements in the *Family Law Rules 2004* at the time of various court events, such as conciliation conferences (rule 19.04) and offers of settlement (rule 19.03).

The awarding of party/party costs in matters in the Family Court is of course the exception rather than the rule, given that section 117(1) of the *Family Law Act* provides that "*each party to proceedings under this Act shall bear his or her own costs*". Rule 19 of the *Family Law Rules 2004* deals with how party/party costs, if awarded, are to be assessed (which, unless otherwise ordered, is in accordance with Schedule 3 of the *Family Law Rules 2004*).

Importantly however, the Family Court is not responsible for solicitor/client costs in relation to fresh applications commenced after 30 June 2008 or under costs agreements/retainers enter into after 30 June 2008.

As to family law matters in the Federal Circuit Court, rule 21.09(3) of the *Federal Circuit Court Rules 2001* makes it clear that those Rules "*do not regulate the fees to be charged by lawyers as between lawyer and client in relation to proceedings in the Court*". Also, the note to rule 21.09 states that "*for any dispute between a lawyer and a client about the fees charged by the lawyer, see the State or Territory legislation governing the legal profession in the State or Territory where the lawyer practises*". That means the scale of fees that is set out in Schedule 1 of the *Federal Circuit Court Rules 2001* is a scale applicable to party/party costs rather than to solicitor/client costs.

Therefore, the only relevant court scale that has anything to do with the costs between a family lawyer and his or her client is the Supreme Court scale, which allows for a much higher level of charging than do the party/party scales of the Family Law Courts.

I am therefore somewhat surprised that we are still seeing costs disclosures / agreements in family law matters that say such things as:

- the rates that the practitioner will charge "*are different from the rates set out in the scale of fees published by the Family Court*"; and
- "*our rates may, and in some cases will, result in a higher charge than if the Family Court scale of fees were used*".

In my view, those statements come very close to being misleading, given that almost every firm's fees will be based either on a specified hourly rate or on the Supreme Court scale – and, if there isn't a costs agreement, then they will in any event be based on the Supreme Court scale (as a result of clause 21(b) of Schedule 3 of the LP Act). And both of those methods of charging will invariably result in a substantially higher fee than if the Family Law Courts' scales were to be used.

Some costs disclosures / agreements also refer to the court making an order requiring the other party to "*pay your costs of the proceedings*" – but without mentioning section 117 of the *Family Law Act* and the unlikely prospects of the family law client getting a costs order in his or her favour.

In my view, the only reference in a costs agreement to the Family Law Courts' scales should be in the context of the level of fees that could, in exceptional circumstances, be recovered from the other party. Those scales should **not** be referred to in the context of the amount of fees that the lawyer will charge his or her own client, or as the basis on which another law practice might calculate its costs.

The comments I have made in this article don't apply in Family Court matters where the retainer was first entered into before 1 July 2008 or the applications in question were commenced before 1 July 2008, but hopefully there aren't too many of those matters that are still ongoing! B

Queen's Birthday Honours List

The Law Society congratulates Michael O'Connell AM and Kelvyn Prescott OAM for their deserved inclusions on the Queen's Birthday Honours List.

Michael O'Connell AM, Commissioner for Victims' Rights, received the award of Member in the General Division for "significant service to public administration in South Australia, particularly in the area of criminal justice, and to victims' rights."

Kelvyn Prescott OAM received a Medal in the General Division for "service to target shooting and to the law".

A former Chief Magistrate and Youth Court Judge, Mr Prescott edited the South Australian State Reports (for 14 years, from 2000-2013 and then afterwards as a consultant editor) and the Law Society Judgment Scheme - 57 volumes - from 1992 to 2002. He made other significant contributions, including to the publication of Caseweek and the Law Society's CPD Program.