At what cost?

By Maria Kazmierow, barrister, O'Connell Chambers

Traditionally, the Family Court has been reluctant to award costs *after the event* to the successful party, let alone adopt a scale costs award for quantum. It emphasises its statute-based unfettered discretion to make the costs call based in the 'special nature' of the Family Court context.

This approach has collided with the amendment of the *District Court Rules* 2004 (DCR), as they came into effect in February 2005. The amendment imported rules 40-47(g) into the *Family Court Rules* 2002 (FCR), thereby introducing to the Family Court the principle that the loser pays the winner costs, determined by the scale.

Should general statutory discretions to award costs override the costs scale scheme and rule-based discretion? Is the statutory discretion and rules-based discretion now one and the same? Does the general statutory discretion impose a higher discretionary threshold?

Statutes with unfettered discretions to award costs

A number of statutes in the Family Court's jurisdiction provide the Court with a broad discretion as to costs. They provide that the Family Court "may make any order as to costs that it sees fit". BD Inglis, in *NZ Family Law in the 21st Century* (Thomson Brookers, 2007), saw the jurisdiction to make costs awards as "discretionary and unfettered", as "the Rules, as subordinate legislation, cannot override a specifically enacted statutory unfettered discretion in the relevant family law Acts" (at p 131). The recent cases interpreting this discretion have not been so clear cut.

Statutes lacking discretion to award costs

The *Family Protection Act* 1955 and *Mental Health (Compulsory Assessment and Treatment) Act* 1992 make no statutory provision for costs. The *Domestic Violence Act* 1995 has no specific costs provision, but does apply the FCR and the procedure pursuant to section 126(1A) and (2)(j); the *Adoption Act* 1955 has no specific costs provisions, but allows for general FCRs, per section 28A. Academic commentators suggest that where the relevant family law Act does not make any provision for an award of costs, the provisions of the DCR as to costs apply. The DCR provides for 'scale costs', but also provides a discretion to depart from the scale.

The amendments

The amendment responsible for the current uncertainty in determining costs is found in rule 207 of the FCR. It provides that rule 45, excepting subclause 2(c), of the DCR will apply so far as applicable and with all necessary modification. Rule 45(2) no longer contains subclause (c). The Court's overriding statutory discretion does not appear to apply. On the face of it, the amended costs regime in the District Court would apply to the Family Court.

The conflict

The Courts have had a varied response to this apparent conflict.

The decision of Chief High Court Judge Justice Randerson in *Radisich v Taylor* (16 April 2008, High Court, Auckland CIV-2007-404-7578) represents the view that DCR scale costs apply to the Family Court.

In this *Property (Relationships) Act* 1976 (PRA) case, Justice Randerson noted that the Family Court has a broad statutory discretion to award costs the Court thinks fit, *subject to any rules of procedure made for the purposes of the Act*. The statutory framework includes in the purpose section that matters under the Act should be resolved "as inexpensively, simply and speedily as is consistent with justice".

Justice Randerson stated at [21]-[23] that by applying rule 45 of the DCR to the proceedings in the FCR (so far as were applicable and with all the necessary modifications), rules 46-47G of the DCR would also apply, since the general discretion under rule 45 was subject to the specific costs rules which followed. His Honour also found the legislative intent clear: "[I]n proceedings in the Family Court, costs are to be dealt with in accordance with the [DCR] as applicable, and with all necessary modifications, subject ... to any contrary statutory provision" (at [23]).

His Honour distinguished other High Court authorities (such as *L v W* [2003] NZFLR 961) contrary to this as being given prior to the DCR amendments. He applied the principles established by the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897.

Care of Children Act 2004

In *Care of Children Act* 2004 (CoCA) cases, there has been an exploration of the issue of costs on appeal and at first instance. The approach has been different to varying degrees to the scale-based approach found in *Radisich*. The focus of the decision is the "paramountcy principle" of the best interests and welfare of the children being observed.

In June 2008, the Court of Appeal in *Hawthorn v Cox* [2008] NZCA 146 considered costs and the impact of the DCR amendment on appeal. The decision did not refer to the *Radisich* decision, made some two months earlier. Their Honours applied the paramountcy principle contained in section 4 when considering costs in relation to proceedings under CoCA.

The Court was of the view (at [26]-[27]) that:

> "[T]he starting point must be section 4(1) of the [*Care of Children Act*]. This provides that the welfare and best interests of the child must be the first and paramount consideration both in the administration of the [CoCA], including any proceedings under the Act and in any other proceedings involving the guardianship of, day to day care of or contact with the child. The High Court Rules, as subordinate legislation, have to be interpreted in accordance with that principle... [T]he welfare and best interests of the child may well legitimately override the normal rules as to costs."

The decision points to a discretion to depart from the rules for costs and the scale for CoCA cases on appeal and at first instance.

Of a similar ilk is a decision of Judge Brown in the Family Court. Judge Brown gives consideration to the exercise of the discretion under rule 45 in *KGD v AJS* (2007) 26 FRNZ 340.

As with *Hawthorn*, Judge Brown applies the section 4 paramountcy principle. In Judge Brown's view, this went to the exercise of the discretion, rather than a wholesale need for departure from the regime. This does not appear to conflict

with *Hawthorn*. Judge Brown does particularise how any departure of the costs scale should occur in *KGD v AJS* at [13]-[15]:

> "[A]ny departure from the new costs regime [is required] to be principled and particularised. There are in fact two possible departures from the regime in the Family Court proceedings. The first is whether there should be a departure from the proposition that costs normally follow the event. The second is whether there should be a departure from the regime's central proposition that costs should be established by the formula of the scales.
>
> The test for the first departure will be whether the fact that the proceeding concerned the welfare of children *and* the way those proceedings have been conducted combine to justify departure from the [DCR] primary proposition that costs follow the event.
>
> If it is concluded that there should be no departure, the second issue will ask whether there is a principled reason why costs should be awarded other than according to scale."

In *NRT v RB* (25 February 2008, High Court, Auckland CIV 2007-404-7353), Justice Stevens endorsed the approach of Judge Brown in *KJD v AJS* at [18]. "Judge Brown correctly noted that the approach to costs in cases involving the care of children was firmly established both by the authorities and as a matter of principle." However, the Court of Appeal in *Hawthorn* referred to none of these decisions.

It would appear the approach taken by the Court of Appeal and Judge Brown in the CoCA cases is to recognise the statutory discretion; its direct link to section 4 of CoCA is critical in the Court exercising its discretion. However, neither state that the scale is redundant or simply a guide. It simply may be departed from.

An important factor in the statutory discretion to award costs in child-related matters was made in *B v B* (26 August 2008, High Court, Auckland CIV 2007-404-5016, Justice Duffy). At [15]-[16], Justice Duffy said an award of costs can be "a positive influence on the child's welfare and interests… [A]n inability to recover costs through a Court's reluctance to award costs in these types of cases can be a disincentive to bring genuine and responsible arguments that are in a child's best interests. The Court has to be careful to guard against the occurrence of such disincentives just as much as it needs to ensure that a potential award of costs is not a disincentive to a party making such arguments." This is a very relevant consideration in these recessionary times.

Protection of Personal and Property Rights Act 1988

In contrast, in *CVCR v GER [costs]* [2008] NZFLR 478, Judge Burns preserves the unfettered statutory discretion in the face of rule 45 of the DCR. A decision under the *Protection of Personal and Property Rights Act* 1988 (PPPR Act), it represents the view that the traditional but principled exercise of judicial discretion in relation to costs should prevail and that the scale was a guide only.

Judge Burn's reasons were many. Of concern was the fact that delegated legislation would bind and fetter a wide statutory discretion as to cost. His Honour observed that when considering administrative law principles, "a rule which purported to lay down a mandatory directive as to how the Family Court must proceed where statute had directed the Court was to decide an unfettered discretion is invalid for repugnancy to statute… [N]ew rule 45(3) is 'subject to the provision of any Act'" (at [19]).

His Honour included the following considerations when exercising the statutory discretion for costs:

- The objects of the PPPR Act as set out in section 8;
- The outcome of the proceedings;
- The material issues;
- The way the parties have conducted proceedings, whether the proceedings were complicated/protracted because of tactical or procedural positions adopted by any party;
- The means of the parties;
- The actual costs incurred; and
- The overall interests of justice.

The Court of Appeal in *Hawthorn* and the High Court in *Radisich* did not refer to Judge Burn's judgment, and academic commentators do not support this traditional stance, where the costs scheme can be treated as only a 'guide'.

Academic perspective

Current academic commentary in *Brookers on Family Law* focuses on the High Court and Court of Appeal, with careful reference to principled exercise of discretion. *Brookers* takes a stance removed from that expressed in *CVCR v GER*.

In CD1.2, paragraph 18, the author expresses the view that "[i]n light of the legislative change, the preferred approach is to treat costs according to scale under the regime as the norm, but to bear in mind that the regime is still subject to the exercise of the discretion under 45 [of the DCR]. Factors such as the type of proceeding, the way a proceeding is conducted and access to justice issues all bear obvious relevance to the exercise of that discretion."

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Senior counsel find the uncertainty surrounding the amendments unhelpful. They perceive the current divergence of approaches to costs and unpredictability as being directly contrary to a straightforward amendment. In Mark Vickerman's view, the current approach incentivises "bad behaviour" from Family Court litigants, regardless of the arena.

"It is naïve to pretend that all family law cases are conducted from the purest motives and on tenable grounds. Whilst many, if not the majority, are a genuine appeal to the Court to resolve issues the parties are reasonably unable to determine themselves, the Family Court would benefit from the default costs provisions of the District and High Courts which, whilst preserving the Court's overall discretion, signal the likelihood of unmeritorious applications resulting in a significant award of costs.

"Apart from the beneficial effect on the Court's workload, this would be a salutary reminder to the recalcitrant, the vexatious, and those who 'game' the system through superior resources that costs consequences will follow.

"Practitioners will, however, struggle to fit the steps listed in the schedule to the [DCR] within the processes of the Family Court and a tailored schedule is required. Nevertheless, practitioners would welcome a consistent approach from the Family Court both as to when costs are awarded and quantum."

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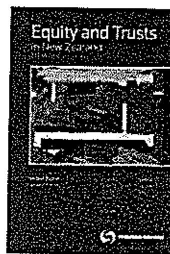

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