FAMILY LAW COSTS wifesapplication for indemnity costs where the husbands case in thesubstantiveproceedings was without merit matters justifying departurefrom general proposition that each party shall bear his or herown costs matters justifying an order for costs matters justifying an assessmentof costs on a basis which is a hybridof practitioner/client and party/partycosts payment of costs, once assessed, from monies held in trust husband topay costs of this application for costs Prantage & Prantage [2013] FamCAFC 105; (2013) 49 FamLR 197 APPLICANT: Mr Prantage RESPONDENT: Ms Prantage INTERVENOR: INDEPENDENT CHILDRENS LAWYER: FILENUMBER: MLC 11263 of 2008 DATE DELIVERED: 9 September 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Bennett J REPRESENTATION COUNSEL FOR THE APPLICANT: In person SOLICITOR FOR THE APPLICANT: COUNSEL FOR THERESPONDENT: Ms Smallwood SOLICITOR FOR THE RESPONDENT: Lampe Family Lawyers ORDERS Thehusband pay the wifes costs of and incidental to his application filed 27December 2012 and the wifes response filed26 April 2013 calculated asfollows:- Withoutincluding the proceedings on 17 July 2014; Withoutregard to the reasonable costs of Dr NZ attending court to giveevidence; Withcosts referrable to the perusing and copying the husbands affidavitssworn on 27 December 2012 and 6 April 2013 and takinginstructions for evidencein response and drawing, engrossing and filing any evidence in response theretoto be assessed on an indemnitybasis; Withcounsels fees to be assessed at the top of the scale for fees for counselfor work done as provided for in Schedule 3to the Family Law Rules (theRules); As tothe balance, to be assessed in accordance with Schedule 3 to the Rules; Forthe avoidance of doubt, in respect of the costs referred to in 1(e), 1(d) and 4,the Registrar may make such allowance as he/sheconsiders appropriate, inaccordance with rule 19.35, in relation to matters not specified in Schedule 3to the Rules. Thewife serve an itemised costs account on the husband within 21 days. Inthe event that the husband disputes any item of the itemised costs account thenwithin 28 days of service upon him of the wifesitemised costs account,the husband serve a Notice Disputing Itemised Costs Account in accordance withrule 19.23 of the Rules. Inthe event that the husband fails to comply with paragraph 3, the wife haveliberty to apply to the Registrar for an order pursuantto rule 19.37 of theRules.

Thehusband pay the wifes costs of, and incidental to, this costsapplication, such costs to:- Accompanybut appear separately from the itemised costs for the purpose of paragraph 2 ofthis Order; Beassessed in accordance with Schedule 3 to the Rules save that the work ofcounsel be assessed at the top of the scale for feesfor counsel for work doneas provided for in Schedule 3 to the Rules ; Beassessed together with the costs payable pursuant to paragraph 1 of thisOrder. Oncethe costs are assessed, the wife be, and is hereby, entitled to have paid to herfrom the monies held on trust for the partiesby Gadens Lawyers funds notgreater that the amount of the costs assessment order of the Registrar and forthis purpose:- Thewifes practitioners serve a sealed copy of the costs assessment order onthe husband by sending same by pre-paid post tohis address for service undercover of a letter specifying that the wife will require Gadens Lawyers to pay toher lawyers moniesnot exceeding the amount of the costs assessment order; Thewifes practitioners send to Gadens Lawyers:- i) asealed copy of this Order; and ii) the costs assessment order; and iii) a copy of any letter sent pursuant to sub-paragraph 5(a) of this Order under cover of a letter requesting that an amount not greater than the amountof the costs assessment order be paid to her lawyers. Anymonies paid to the wife pursuant to paragraph 5 of this Order are hereby deemedto be funds paid for and on behalf of the husband. Nothingin paragraph 5 of this Order prevents the wife from recovering part or all ofthe costs to which she is entitled pursuantto this Order from the husbanddirect without recourse to the funds held by Gadens Lawyers. Pursuantto rule 19.50, I certify that it was reasonable to engage either counsel or alawyer (whichever was the case) to attend forthe wife to take judgement. IT IS NOTED that publication of this judgment by thisCourt under the pseudonym Prantage & Prantage (Costs) has beenapproved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER: MLC 11263 of 2007 Mr Prantage Applicant And Ms Prantage Respondent REASONS FOR JUDGMENT Introduction On23 July 2014 I dismissed the husbands application for parenting ordersand acceded to the wifes application thatthe husband not be entitled toinstitute further parenting proceedings without leave of the court. I alsoordered that:- (3) Any partywishing to make an application for costs in this proceeding do so by writtensubmission filed and

served not later than14 days hence and any party againstwhom costs are sought file and serve any submissions in response in writingwithin 14 days ofservice upon them of the other partys submissions. (4) Thesubmissions as to costs are to be not longer than four single sided pages ofdouble spaced text in a font not smaller than13 point. Thewife now seeks an order for costs. The applications Thewife seeks[1] that the husband pay hercosts of and incidental to the husbands application filed on 27 December2012, such costs to be calculatedon an indemnity basis. The wife quantifies hercosts on an indemnity basis, as at 1 August 2014, at $99,003.83. In thealternative,the wife seeks that the husband pay her costs on a party/partybasis. In the wifes amended response filed 26 April 2013 thewife seeksthat any costs awarded be deducted from the monies held on trust for the partiesby Gadens Lawyers. Thehusband seeks[2] that each party paytheir own costs. The law Costsorders are governed by s 117 of the Family Law Act 1975 (Cth) (theAct). That section relevantly provides as follows: (1) Subject to subsection (2), subsection 70NFB(1) and sections 117AA, 117AC and118, each party to proceedings under this Act shall bear his or her own costs. (2) If, in proceedings under this Act, the court is of opinion that there arecircumstances that justify it in doing so, the courtmay, subject to subsections(2A), (4), (4A), and (5) and the applicable Rules of Court, make such order asto costs and securityfor costs, whether by way of interlocutory order orotherwise, as the court considers just. (2A) In considering what order (if any) should be made under subsection (2), thecourt shall have regard to: (a) the financial circumstances of each of the parties to the proceedings; (b) whether any party to the proceedings is in receipt of assistance by way oflegal aid and, if so, the terms of the grant of thatassistance to thatparty; (c) the conduct of the parties to the proceedings in relation to the proceedingsincluding, without limiting the generality of theforegoing, the conduct of theparties in relation to pleadings, particulars, discovery, inspection, directionsto answer questions,admissions of facts, production of documents and similarmatters; (d) whether the proceedings were necessitated by the failure of a party to theproceedings to comply with previous orders of thecourt; (e) whether any party to the proceedings has been wholly unsuccessful in theproceedings; (f) whether either party to the proceedings has made an offer in writing to theother party to the proceedings to settle the proceedingsand the terms of anysuch offer;

and (g) such other matters as the court considers relevant. Application of the law to the facts Themajority of the High Court in Penfold v Penfold (1980) 144 CLR 311clarified that s 117(1) of the Act expresses a general rule, that each partybear their own costs, but that it is not paramount to s 117(2). Section 117(1)is expressed as subject to subsection (2) and will yield to it in a particularcase if the court is satisfied that there are circumstancesjustifying an orderthat one party pay part or all of another partys costs. Inorder for the wifes to succeed with her application, the court must besatisfied that:- theprinciple contained in s 117(1), that each party should bear his or her owncosts is displaced; it isjust to make a costs order; and theassessment of costs on an indemnity basis isappropriate. The wife bears the onus of persuading thecourt of each element. A positive finding in relation to (a) enlivens thecourtsdiscretion to make a costs order. If the wife satisfies me of (a)and (b) but not (c), costs may be calculated on another basis.For instance, ona lawyer and client basis or a party/party basis or by a specified method or inaccordance with Schedule 3 of theFamily Law Rules. Neither party has asked meto fix the costs so I do not consider that it is open to me to order costs in aspecificamount. Itis appropriate to identify the matters which justify a costs order being madeprior to, and discretely from, a consideration ofthe specific factors which mayaffect what order (if any) is to be made. Conflating the two steps must beavoided, however the factorswhich can inform the exercise of the discretion maybe the same or similar to the factors in s 117(2A) just differently applied (seeBevan and Bevan [2013] FamCAFC 116 [89]). Inthe present case, the facts that support a departure from the principle thateach party should bear their own costs are; thehusband was wholly unsuccessful in his application to reopen the parentingproceedings; thehusband conducted his case so as to require the wife to incur significantexpense in responding to it; thehusbands application was a discrete application insofar as the partieswere not before the court for any other reason; thehusband failed or neglected to adduce evidence in support of his case, otherthan his own evidence which was largely his opinionand not probative; thewife was successful in her application for the husband to be enjoined fromissuing further parenting proceedings without firstobtaining leave of the courtto do so; and thewifes solicitors put the husband on notice that costs would be sought.They wrote to the husband on 21 January 2013 asfollows: We

refer to your Application for parenting orders filed 27th December2012. We are of the opinion that your Application will fail in its entirety and shouldyou proceed with the Application we submit thatit should be dismissed withcosts for the following reasons: YourAffidavit has not demonstrated a material change in circumstances that wouldwarrant the re-opening of the parenting proceedings;and Theproceedings are frivolous or vexatious. We invite you to file a Notice of Discontinuance of the proceedings in theirentirety by close of business 22nd January 2013. Should you fail todo so our client will file and serve a Response and Affidavit in support. Our client will seek to have the Application currently listed for hearing on the1st February 2012 heard by Justice Cronin on that date or the firstavailable date. She will seek to have the Application dismissed asoutlinedabove and will seek an order pursuant to Section 118 of the Family Law Act thatyou not be entitled to institute proceedings seeking further parenting orderswithout leave of the Court. In addition, our client will seek an order that you pay her costs of andoccasioned by the Application on an indemnity basis or alternativelyon scale. Acopy of this letter will be produced to the Court in support of theApplication. Iam comfortably satisfied that the circumstances of this case justify the makingof an order for costs. This leads me to a considerationof the matters referredto in s 117(2A) for the purpose of deciding what (if any) order ought to bemade. Mydiscretion in relation to costs is wide. The court is not bound to require anapplicant for costs to satisfy me that every factorapplies to her case. TheFull Court in Brown v Brown [1998] FamCA 115; (1998) FLC 92-822 and, in particular, theleading judgment of Kay J, held that the Court may consider just one, or morethan one, of the factors unders 117(2A) when determining what (if any) orderfor costs ought to be made: In many cases there will be anoutstanding feature of the case that makes an order for costs appropriate, afeature which so dominatesthe scene it can outweigh any of the other s 117 (2A)considerations. In those cases the Court may readily infer that the trial Judgehas given appropriate consideration to the aspectsof s 117(2A) but in theshadow of each of the required aspects has appropriately determined thatoverwhelmingly the case demands an order forcosts be made. Thedecision in Fitzgerald (as Child Representative for A (Legal Aid Commissionof Tasmania)) v Fish (2005) 33 FLR 123 reiterates that nowhere in s 117(2A)is there any requirement that more than one factor under

that subsection must bepresent for a costs order to be made and that thereis nothing to prevent justone factor being the sole basis for an order for costs. Fromthe respective written submissions of the parties, the following matters emergeas matters to which I should have regard inconsidering what (if any) thatorder should be:- the financialcircumstances of each party (s 117(2A)(a)); the conduct ofthe parties in relation to the proceedings (s 117(2A)(c)); and whether eitherparty has been wholly unsuccessful in the proceedings (s117(2A)(e)). Sub-section117(2A)(g), requires me to have regard to such other matters as the courtconsiders relevant. This enablesa variety of matters to be addressedprovided, of course, that those matters are relevant. In this case, the husbandhas includedin his submissions numerous matters which I do not consider arerelevant to the issue of costs. I will distinguish between the othermatters raised by the husband which are relevant to the question of costsand to which I will, therefore, have regard andthe other matterswhich are not relevant to the question of costs and to the substance of which Iwill not have regard. Financial circumstances of the parties Bothparties have concentrated on the detail of their respective financialposition. Thewife submits that she has been unable to work since she has had the full-timecare of the children since March 2012 and particularlydue to the specialneeds of the children. The wife submits that the husband did not commencepaying child support untilNovember 2013 and as at July 2014 was in arrears of$16,025.64. The wife submits that the husband earns approximately $120,000 perannum and currently pays child support of $443.50 per week. Thehusband submits that the wife receives an income of $190 to $200 from heremployment at Y School on Monday and Friday evenings.The husband submits thatthe wife additionally receives distributions from the OS Family Trust ofapproximately $42,000 per annum,child support in the sum of $493.50 per weekand an unknown sum in social security payments. The husband submits that thewife receivesan income of approximately $2,000 per week in contrast to the $750per week he receives from his employment. The husband does notprovide evidenceto support his assertions in relation to the wifes income. Forthe purpose of s 117(2A)(a), my consideration of the parties financialsituation cannot stop at a comparative analysis of their incomes. Thepartiesapplications for final property orders are yet to be determined.In my reasons for decision I discussed some financial

aspects ofthe case, inparticular at paragraphs 139 to 144 (inclusive) and paragraphs 211 to 215(inclusive). I take those matters into account. Theparties have spent a fortune on legal costs since separation in 2008 includingfor proceedings in the Federal Magistrates Court(as it then was) in 2008,proceedings in this Court for financial orders and parenting orders over elevendays in 2010, interim parentingorders in June 2011, contravention proceedingsin September 2011, parenting proceedings in March 2012, proceedings in relationtocosts in August 2012 and the hearing before me in May 2013. There have alsobeen two successful appeals to the Full Court being thehusbands appealagainst Cronin Js property order in July 2011 for which a decision wasdelivered June 2012 and thehusbands appeal against Cronin Jscosts order in June 2013 for which a decision was delivered July 2013. As wellaslegal fees, the parties have met the expense of psychologistsassessments, being those from Mr O and Dr NZ, and of supervisedtime. By thetime of the parties second appeal, but prior to these proceedings inwhich the wife seeks her costs, the FullCourt referred to the proceedings asprotracted and ruinously expensivelitigation[3]. Thewife already has a costs order against the husband, for $175,000. Thewife estimates her costs of these proceedings, which extended over 7 days, atnearly $100,000. Prospectively, there is the re-hearingof the competingapplications for final alteration of property interests on remittal from theFull Court. Neitherparty can afford costs of the magnitude which have been incurred in this case. Iam satisfied that the respective financialsituations of the parties support anorder being made which will relieve a party who has incurred costs unnecessarilyfrom havingto meet the burden of those costs. The wife is such a party. Conduct of the parties in relation to theproceedings Thewife submits that the husbands conduct in relation to the proceedingsjustifies an order for costs because the husbandmade untruerepresentations to the Court by way of affidavit deposition, and submission fromthe bar table. The wife relieson my finding at paragraph 78 of myreasons for judgment that, The [husband] is an unreliable witness who isprepared to lieor misrepresent facts where he perceives that it is in hisinterests to do so. I gave examples. Insofaras the husband lied about matters such as the piano and the childrenspossessions, that dishonesty was relevant tomy findings in relation to thesubstantive application. Deception of that nature is not relevant to costs inthis proceeding.

Costsorders are restorative and not punitive in nature.However, insofar as the husband represented to the court that Department ofHumanServices were about to publish a report (when it wasnot)[4] and that it was necessary tohear from the Department in relation to the wifes unsatisfactory care ofthe children (with whichcare the Department took no issues), those wererepresentations by the husband which were incorrect and which prolonged theproceedings.It transpired that the Department were not intending to prepare areport but did, ultimately and after complaints by the husband,publish aletter. These inaccuracies in the representations by the husband are relevant tothe question of costs because they necessitateda further hearing day in whichto hear from the Department which, in turn, increased the costs of the wife ofthe proceedings. Itake into account that the husband abandoned two very long affidavits, first inApril 2013 and second on the second day of the finalhearing. The affidavits andannexures were hundreds of pages long. I accept that this was the case and thatthe wife was put to considerableexpense in having it read by her lawyers and inresponding to the material as well. When the first affidavit was withdrawn, thecounselfor the wife announced that the wifes costs associated with theaffidavit (withdrawn) were in the vicinity of $20,000. Itcould not then haveescaped the husbands contemplation that refiling a second affidavit ofsimilar length would not put thewife to a comparable further expense. This is afactor which favours an order for costs being made against the husband. Thewife submits, correctly in my view, that the evidence which the husbandultimately relied upon in these proceedings was not evenin existence at thetime the husband filed his application to reopen the parenting proceedings onthe basis that there had been achange of circumstance. The evidence relied uponby the husband was:- theBS Contact Service reports of the supervised time between the husband and thechildren, which even the husband alleged did notaccurately reflect theconversations he had with the children; reportof Dr NZ dated 10 May 2013; and hiscross-examination of Dr NZ. The wife submits, and Iaccept, that the husband led no evidence which was relevant to establishing achange of circumstance at thetime he instituted proceedings. Thewife submits that the husband knew or should have known that the [anabbreviation of Dr NZs given name] emailwhich he alleged waswritten by Dr NZ and upon which he relied to support his application over muchof the four days of hearing inMay 2013, was false. The

husbands case wasthat he would be able to prove the provenance of the email as being Dr NZ, whichthe wife and Dr NZ have each consistently denied was the case. In an email to DrNZ and Mr X sent by the husband on 10 October 2012,which was annexed to thereport of Dr NZ dated 10 May 2013 upon which the husbandrelied,[5] he wrote the following inrelation to the alleged email: You see Ms. [NZ] and Mr. [X], it isnot how one spells their name that is important, as one would be stupid to writesuch an emailand spell their name correctly as one WOULD NOT want toincriminate oneself. However, it is the Social-linguistic analysis ofoneswords that is important here and the consistency of onesoverall speech and flow of conversation. Something that has costme an arm and aleg, literally sent me broke, to get analysed by the Worlds leadingSocial-Linguistic analyst and compareit to known Ms. [NZ] articles, reports(like her report against me and my children) etc. for proof of consistency whichcame backTRUE, BEYOND ALL DOUBT. Therefore, this email was well and trulywritten by Ms. [NZ] and certain things found in my Gadens file willbe used toconfirm what every single collaborator has being (sic) denying in the FamilyCourt of Australia all along. For this, Ms.[NZ] better start explaining herreasons why she obliterated my childrens and my life, otherwise she islooking at a looooong(sic) term behind bars. Putting it quite simply, both ofyou never imagined my daughter [M] to be so clever as to uncover your perjuringways, and [the wife] to be so stupid as to hold on to such damning evidence. ButLO and BEHOND, the TRUTH always has a way of surfacingno matter what attemptsare made to keep it from surfacing. This is now a BLATANT ALIENATION of my children from myself and my entirefamily and friends!!!!! So both of you seriously think itis fine for mychildren not to be able to see me for the past 18 MONTHS. Do you???? Do you????Do you think this is a healthy situation????Well, soon when you will front acriminal court to explain yourselves, the entire universe will see what you haveto say againstall the stuff Ive found in my Gadens file. Therefore, somestraight answers ASAP please!!!!! Also, a reminder...yet again..... to everyone, that I am not stupid,Im highly intelligent (in the top 1% of society, a MensaGenius) andswitched on and will not stop until my children are returned to me where theyare very much loved and desire to be. Iwill not be silenced because now I haveall the proof.... because we Greeks say that ..... Nothing can hide fortoo long underthe sun!. I trust you will all now comply appropriately

with my demands. It would be inall your best interests to FINALLY start RightingyourWrongs!!!....You see....everyone under estimated my capability to provemy own and my childrens innocence.....unlessyou all believe thatCoronial Inquests into all this would be a better and more appropriateapproach. FINALLY, the RING OF TRUTH AND INNOCENCE is tightening around theperjurers (sic) and liars (sic) by the minute. Iaccept the wifes submission that the husband failed to adduce anyevidence to prove that the email was from Dr NZ. It wasa lynchpin of his caseand yet he barely cross-examined Dr NZ about it and, in fact, my impression isthat he only cross-examinedher at all after being prompted by me that this washis opportunity to do so. I found at paragraph 74 of my reasons for judgmentthat there is no cogent evidence that Dr NZ wrote the email. I amsatisfied that the husbands bombastic expressionand extravagant claimsmeant that the wifes practitioners had no choice but to read all evidencethat the husband submittedbecause, to ignore his voluminous documentation,would be to act at their peril or, more precisely, to the potential peril oftheirclient. Forthe purpose of the wifes application for costs, I do not have regard tothe fact that the husband required Dr NZ for cross-examinationand that thecross- examination did not advance his case. This is because I have alreadyordered that the husband be responsiblefor payment of Dr NZs costs toattend court for the hearing and to be cross-examined by him. Thewife submits that the husband was abusive in his communications andcorrespondence with the wifes solicitors during theproceedings. As anexample, she relies upon an email sent to her solicitors by the husband on 21January 2013, in response to theletter from Mr Lampe saying that the wife wouldseek indemnity costs unless the husband withdrew his further application(extractedat paragraph 9(f) of these reasons). The husbands letter readsas follows[6] (originalemphasis): Dear Mr. Lampe, I am not withdrawing anything!!!!! I have so much evidence against yourclients behaviours, and criminal activities by Dr.[NZ] and policeviolence reports against your client wrt (sic) to my children that therepercussions for your client will be disastrous.I suggest you come to thenegotiating table fast. I will not be bullied by anybody!!!!!!!!!!This matter will turn into a serious criminal activity investigation and lawsuitagainst your client. All this evidence was uncoveredby myself when I came intopossession of my entire Gadens file. You see Gadens no longer represent

me andare no longer on matesrates with you. Post 1 Feb 2013 hearing inthe presence of Senior Registrar Fitzgibbon get set to defend your client oncriminalcharges. I mean business Mr. Lampe.... as Ive been telling theENTIRE TRUTH from day ONE!!!! This case will be heard on 1st Februaryby Senior Registrar Fitzgibbon. It is obvious you and your client are runningscared. Yet another underhanded attempt by you and your firm to discredit me but thistime you will fail because the evidence I now have isseriously stacked againstyour client. Off (sic) course you want Justice Cronin as hes (sic) ruled100% in your clientsfavour by dismissing me completely but this time Mr.Lampe the evidence will speak for itself. Even Justice Cronin will not denymeafter I present all the facts. Off (sic) course you would consider it vexatiousas that is the only way you can silence me sothe TRUTH and your underhandedways are never exposed!!! If that happens Mr. Lampe, get set for a High Courtbattle of your lifeunder a Prerogative Writ!!!! And....since this will nolonger be a Family Court issue of sorts, I will alert the media and all hellwill break loose as the entire case will be blown wide open based on thecriminal activities that were going on that I have discovered. Bring it on Mr. Lampe!!!!!! Regard, [The husbands name] Iagree that the husbands letter was abusive but do not accept that theabusive nature of the letter is a matter which soundsin my consideration of theparties conduct in the context of s 117(2A)(2)(c). It is more relevantthat the letter is of numerous folios, had to be read by the wifessolicitors and copied to the wife but,in fact, says nothing of import orsignificance. It is relevant that the husbands correspondence results inthe wife incurringunnecessary costs rather than that the content of thecorrespondence is rude and discourteous. It is nothing more than the husbandventing his spleen and, in that sense, it is a microcosm of the husbandsconduct in these proceedings in which the wife seekscosts. Thefirst four days of the hearing in this proceeding were spent on thehusbands grievances but without his case, in whichhe had to demonstratea change of circumstance, being advanced. A further two days were occupied withthe current involvement ofDepartment of Human Services which, contrary to thehusbands representations, demonstrated that the husband had agitatedcontinuallyfor the Department to make interventions on the basis ofnotifications and complaints which the Department came to court and statedthatit had found not to be substantiated and to lack any substance. A

seventh day(17 July 2014) was devoted to securing the returnof the children to the wifewhen they had allegedly run away to the home of their paternal grandparents. Thehusbands behaviouron the seventh day is not a matter relevant forconsideration on the wifes current application for costs. I have alreadymadea costs order about that day which was referrable to the husband notimmediately returning the children to the wife as the then extantordersrequired him to do. The husband has filed a notice ofappeal[7] in relation to mydetermination of 17 July 2014 so the costs aspect of that decision for theevents of 17 July 2014 will be consideredby the Full Court on appeal. Withthe benefit of hindsight, it is easy to find, as I do, that the husbandscase was misconceived or amounted to nothing.However, it was necessary to dealcomprehensively with the husbands submissions and evidence because therewas a possibilitythat he may adduce something which was probative or relevantwhich the interests of the children would require the court to takeintoaccount. Iam satisfied that the conduct of the husband in relation to the proceedings issupportive of the wifes application for costsand is totally unsupportiveof the husbands proposition that each party should bear their own costs. Whether a party has been wholly unsuccessful in theproceedings Thewife correctly submits that the husband was wholly unsuccessful in theproceedings. Other relevant matters Itake into account that, to the extent that the wife sought relief from thecourt, for an order pursuant to s118(1)(c) (now repealed), that:- shewas wholly successful; and sheprosecuted the application efficiently and without prolonging thehearing. Itake into account that, by letter dated 21 January 2013 (discussed at paragraph9(f) earlier in these reasons), the wife put thehusband on notice that shewould claim costs in the event that his application was dismissed because hefailed to demonstrate thenecessary change in circumstances required to re-openthe parenting litigation and/or his application was considered frivolous andvexatious. Both issues there contemplated by the wife came to pass which, in myview, is relevant to the question of costs and issupportive of the wifesucceeding with her application. Iwill now turn to some of the other matters raised by the husbandwhich I am satisfied are not relevant to the questionof costs. Thehusband is critical of my determination. However, there is a distinction betweenmatters which are relevant on the question ofcosts and matters for which he canlegitimately seek appellate intervention. I make this decision in

relation tocosts in the expectationthat the husbands appeal against this costsdecision can be heard at the same time as his appeal against my decision on 23July 2014[8] in the substantiveproceedings. I am mindful that the husbands appeals against CroninJs orders in the property proceedingsand his appeal against the costsorder for those proceedings were heard separately and that this added to theexpense and inconvenienceof both parties. Presumably, the appeal against mydecision on 17 July 2014[9], filed on12 August 2014, will be heard in the same sittings as the husbands noticeof appeal filed 15 August 2014. Variouscomplaints by the husband are not relevant to costs but may go to alleged bias.That is, that I am pre-disposed to favouringthe wife and/or pre-disposedagainst him and, in any event, that an objective observer would doubt that Iwill bring an impartialmind to my determination of the case. Examples are:- Inhis submissions the husband reiterates his allegation that the transcript of thehearing on 27 May 2013 had been altered and refersto the United NationsConvention on the Rights of the Child. I dealt with this at paragraphs 30 33 of my reasons for judgment. Thehusband includes in his submissions allegations about a conversation between thewife and her solicitor which, he says, his childrentold him about when they ranaway to him on 17 July 2014: The Husbands daughtertold the Husband when the children ran away back to him on the 17thJuly 2014 that the Wife made a telephone call to her lawyer Mr. Lampe and hadhim on hands-free in her fathers backyard soher father could listen tothe conversation. Mr Lampe was heard telling the wife that he knew that thisJudge is on the Wifesside as he felt as if something the judge said wasa hidden message to him and the Wife that the Judge is on their side and willmake a good decision for the Wife. Mr. Lampe said that he feels that theWife has the Judge. Mr. Lampe told the Wifethat when they gotthis Judge he knew it was good for the Wife because the Judge would rule againstthe Husband and has a GreatReputation. Iwill hear the husbands application for me to recuse myself after I havedelivered this decision. I take the view, however,that having heard thesubstantive matter and determined it on 23 July 2014, I am best placed to hearthe consequential costs application.In any event, both decisions can bescrutinised by the Full Court subsequently. Ido not consider that there are any other matters which are relevant on the issueof whether there ought to be an order for costs.I am satisfied that thereshould be an order in favour of

the wife that the husband pay the wifescosts of and incidentalto the proceedings, with the exception of theproceedings on 17 July 2014 and the costs of Dr NZ to attend court to becross-examined,both which costs are the subject of earlier orders by me. Thisleads me to consider the basis on which the costs ought to be calculatedand thesource from which the costs should be paid. Indemnity costs Whenconsidering an application for costs to be assessed on an indemnity basis, I amguided by principles emanating from the followingrelevant authorities, whichwere conveniently summarised in Muldoon & Carlyle (2012) FLC 93-513,where the Full Court said; Itis beyond doubt that in order to justify an award of indemnity costs, it must bedemonstrated that there are exceptional circumstances,such that the usual orderfor party-party costs should be departed from (Colgate-Palmolive Company vCussons Pty Limited [1993] FCA 536; (1993) 46 FCR 225; Kohan and Kohan (1993) FLC 92-340; Munday v Bowman (1997) FLC 92-784; Yunghanns &Ors v Yunghanns & Ors and Yunghanns [2000] FamCA 681; (2000) FLC 93-029; Limousin& Limousin (Costs) [2007] FamCA 1178; (2007) 38 Fam LR 478; Fennessy & Gregorian[2009] FamCAFC 44; (2009) FLC 93-399; D & D (Costs) (No 2) (2010) FLC 93-435, Stephens v Stephens and Anor [2010] FamCAFC 172; (2010) 44 Fam LR 117). As wassaid by the Full Court in Stephens (at [67]): Anorder for costs is made to compensate a party against expense incurred inlitigation and is not punitive in nature. Costs arenot a penalty or damages... Insupport of the application for indemnity costs, counsel pointed only to the factthat it was always apparent there was no meritin the appeal. This is in ourview not an exceptional circumstance as would justify an order for indemnitycosts. Similarsentiments were echoed by the Full Court when it allowed an appeal against theindemnity costs order made by Cronin J in earlierproceedings between thehusband and the wife in this case. That decision is reported, in anonymisedform, as Prantage & Prantage [2013] FamCAFC 105; (2013) FLC 93-544. There the Full Courtemphasised that an indemnity costs order is an exception rather than the norm.However, the Full Courtsreasoning in Prantage does not precludethe possibility of an order being made on an indemnity basis, in an appropriatecase. InKohan and Kohan (1993) FLC 92-340 the Full Court emphasised the need forthe Court to be aware of the terms of any costs agreement in order to be able toassess thedifference between party-party and indemnity costs. That

requirementhas now found its way into the Rules, at Rule 19.08. Incompliance with Rule 19.08 the wife has provided the relevant costs agreementdated 20 July 2009. I note that the rates of chargesmay be reviewed in Juneeach year. However, as it stands, the charges under the costs agreement aresignificantly higher than thefees provides for in Schedule 3 to the Rules. Forinstance, the costs agreement provides for time reasonably spent by a legalpractitionerto be charged at $350 per hour as opposed to the $224.50 providedfor in Schedule 3. Theauthorities set the bar at a fairly high level before indemnity costs will beordered. However, the authorities do not prescribethat indemnity costs cannever be ordered, and ultimately, it is a matter of an exercise of discretion ineach case. Indeed, theRules recognise the possibility of an order being made onan indemnity basis because of the requirements of Rule 19.08(3) and theprovision of Rule 19.18(1)(b). InPrantage & Prantage [2013] FamCAFC 105; (2013) FLC 93-544, Thackray and Ryan JJ observedas follows; HisHonour's statement, at [50], that Sheppard J's emphasis inColgate-Palmolive was on parties who must have or should haveknown their approach was simply imprudent does not, in our view,accuratelyreflect the law as explained in Colgate-Palmolive and othercases dealing with indemnity costs. Itis true, as the trial Judge noted, that Sheppard J included in the list ofsituations that might give rise to an order for indemnitycosts theimprudent refusal of an offer to compromise. However, in our view,imprudence by a party in theirapproach is not sufficient toenliven the power to award indemnity costs. Itis important in this context to recognise, as Lindgren J did in NMFM PropertyPty Ltd v Citibank Ltd (No 2) [2001] FCA 480; (2001) 109 FCR 77 at [56], that there is norule that indemnity costs will be ordered where the losing party wasguilty of ethical or moral delinquencyin the antecedent facts which have givenrise to the litigation. Lindgren J went on to point out (original emphasis): Even in a proved case of fraud, for example, in myopinion the presumption is that a costs order against the fraudulent party willbe on the party and party basis. The conduct of a party that is relevant to theissue of indemnity costs is the party's conduct aslitigant. But, as notedbelow, the knowledge that a party has, including knowledge of his or her pastconduct, may be relevant toan assessment of his or her conduct as litigant. Theprinciple there enunciated has been picked up by s 117(2A)(c). It is the degreeof the husbands conduct which informs the

exercise of discretion to orderindemnity costs. Theoutstanding feature which could justify an indemnity costs order in this case isthat the husbands application was, forall intents and purposes, a wasteof time. The husband filed and served voluminous evidence in support of his casebut then abandonedthat evidence. The evidence upon which he did rely, did notsupport his contention that parenting arrangements should be re-litigated.It isone thing to prosecute a case based on probative evidence but fall short ofpersuading the court to grant the relief sought.It is another thing to make anapplication, require the other party to peruse hundreds of pages of affidavitsand annexures (twice)and prepare evidence in response but then abandon thatevidence and fail to adduce probative evidence on which the court could maketheorder. Theconclusion that there was no evidence to support the husbands case is aconclusion which I could draw only after listeningto the husbandslengthy submissions and speeches and his cross-examination of Dr NZ. Iam satisfied that the husbands conduct in these proceedings comes veryclose to justifying an indemnity costs order for allof the proceedings.However, very close is not close enough so I will not impose an assessment on anindemnity basis for all of theproceeding. Iam satisfied that a just and appropriate contribution by the husband to thewifes costs will be effected if:- Thewifes costs of and incidental to the two voluminous affidavits filed andserved by the husband are assessed on an indemnitybasis. In this regard, I amsatisfied that wifes lawyers were required to read the second affidavitnotwithstanding that itwas, in large part, repetitive of the firstaffidavit; MsSmallwood of counsel appeared for the wife. Her fees to appear are significantlygreater than the scale of fees for work done bycounsel. Ms Smallwood is asenior member of the family law bar. Her fees for work done should be assessedusing the upper end ofthe range of fees provided for in Schedule 3;and Thebalance of the wifes costs are assessed in accordance with the itemisedscale of costs in Schedule 3 to the Rules. Thewife seeks that the costs be paid, initially, from the funds held in trust. Thatappears to me to be perfectly sound providingthat it is understood that anymoneys released for that purpose are released to satisfy a liability of thehusband (and not the wife)notwithstanding that the funds will end up in thehands of the wifes lawyers and will reduce her liability to that firm.Thepayment of the funds from trust, initially, is merely a machinery provision.However, the

opportunity for the wife to take the moniesfrom the funds held intrust is, I am satisfied, an order as to costs which isjust within the meaning of s 117(2) and entirely appropriate onthe facts of this case. Inreaching my conclusion that the wife should be able to access funds in trust topay some legal costs, I am mindful that the husbandis already indebted to thewife for $170,000 or thereabouts for costs in earlier proceedings. Thatliability has not been cleared.My understanding is that it is agreed that thehusband will pay those earlier costs at or on the final alteration of propertyinterests.Accordingly, even if I am subsequently found at an appellate level tohave erred in my order as to costs, including that the wifecan take money fromtrust, no harm is done providing that the trust funds so accessed are less thanthe costs for which the husbandis already indebted to the wife albeit thatthose costs are subject to an agreement that payment ispostponed. I certify that the preceding fifty-five (55)paragraphs are a true copy of the reasons for judgment of the Honourable JusticeBennettdelivered on 9 September 2014. Associate: Date: 9 September 2014. [1] Wifes submissions dated6 August 2014 [1]. [2]Husbands submissions dated 12 August2014[1]. [3] Prantage &Prantage [2013] FamCAFC 105; (2013) 49 Fam LR 197[1]. [4] See paragraphs 25 to 28(inclusive) of my reasons for decision in the substantive proceeding. [5] Report of Dr NZ dated 10 May2013 Appendix F (ExhibitH2). [6] Annexure Bof the wifes affidavit sworn 30 January 2013. This was thehusbands response to the correspondence fromthe wifes solicitorsreferred to in paragraph 9(f) of thesereasons. [7] (A)SOA49/2014. [8] (A)SOA50/2014. [9] (A)SOA 49/2014.