FAMILY LAW COSTS Wifes application for costs dismissed Family Law Act 1975 (Cth) Fitzgerald (as Child Representative for A(Legal Aid Commission of Tasmania)) v Fish and Another [2005] FamCA 158; (2005) 33 Fam LR123 Hitch & Hitch [2012] FamCAFC 124 Lenova & Lenova [2011] FamCAFC 141 Penfold v Penfold (1980) 144 CLR 311 APPLICANT: Ms Katic RESPONDENT: Mr Katic 2NDRESPONDENT: Mr B INDEPENDENT CHILDRENS LAWYER: FILENUMBER: MLC 7934 of 2010 DATE DELIVERED: 28 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: By Way Of Written Submissions SUBMISSIONS RECEIVED FROM SOLICITORFOR THE APPLICANT: Boon Legal SOLICITOR FOR THERESPONDENT: Allan McMonnies ORDERS (1) That thewifes application for costs is dismissed. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Katic & Katic and Anor has been approved by the ChiefJustice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER:MLC 7934 of 2010 Ms Katic Applicant And Mr Katic Respondent And Mr B 2nd Respondent Independent ChildrensLawyer REASONS FOR JUDGMENT On10 September 2014, I made final property orders as between the husband and thewife. Those orders are subject to an appeal. Thewife seeks that I determine her costs application now. That application is setout in the written submission filed on 9 October2014. Provision was made forthat process in the orders pronounced on 10 September 2014. On24 October 2014, the solicitor for the husband filed a submission in reply tothat of the wife but within it was a submission thatsaid: The respondent contends that this matter ought not be considered until afterdetermination of the appeal filed by the husband. Inmy view it is more sensible to determine the costs application now and obviouslybefore the appeal so that if any appeal was toarise out of such an order forcosts, it could be dealt with as part of the substantive appeal. To dootherwise would potentiallygive rise to the prospect of a second appeal. Accordingly, I propose to determine the costs application now. Theorder I made on 10 September 2014 provided that a response to any costsapplication was to be filed by 24 October 2011 (sic). That must clearly havebeen understood. Having begun writing these reasons, I was given a furthersubmission dated 27 October 2014. Accompanying it was an email from thehusbands solicitor saying a supplementary

submission hadbeen receivedthat day from the husbands counsel. No suggestion was madethat an indulgence was required or sought either from the Courtor the solicitorfor the wife. I have read the submission notwithstanding the discourtesy buteven though some of the things I willsay hereafter may appear very similar tothe supplementary submission, I had prepared these reasons beforereadingit. I do not intend to take the new matters into consideration becauseof rule 11.02(1). Theorders made on 10 September 2014, amounted to an alteration of propertyinterests. They included the sale of the former matrimonialhome and thedivision of the proceeds as well as the division of other real property betweenthe parties. These proceedings involvedthe parties adult son as anintervener. Thewifes submission seeks party/party costs as and from 3 January 2012primarily on the basis of an offer in writing madeto the husband on 3 January2012. It is submitted that the offer contained a settlement proposal underwhich the wife would be preparedto accept a global 55 per cent of thepool inclusive of any allocation of the settlement to capitalisespousal maintenance. Afterthe offer was made by the wife, the husband filed an amended response that boreno relationship to the settlement offer madeby the wife. It included a paymentby the wife of $417,000 plus interest to the husband from which money was to bepaid to the AustralianTax Office. It included that the wife pay to the husbanddamages representing the loss of rental income on the two properties thatwereultimately split. That particular position adopted by the husband was notamended any further and no alternate submission wasmade by counsel for thehusband at trial. Theoutcome of the proceedings as perceived by the wife was that the judgment of theCourt was that she receive 65 per cent of theglobal share of the netpool which she described as significantly better than theoffer made to the husbandand one which he ought reasonably have accepted. Thehusbands response as outlined in the submission filed on his behalfreferred to the fact that the offer was conditionalon the basis that thehusband indemnify the wife in relation to claims brought by the intervener. Forreasons that are not clearto me, the submission went on to say that thewifes offer was served on the husbands former solicitor. Whatthat clearlyindicates to me is that at least the husband had legal advice. Thewife submitted that not only did the husband refuse the offer, he pursuedproperty orders that might be characterised as beingwholly outside anypossible range. It

was submitted that the offer was highlycompetitive and it was certainly notone which was narrowly eclipsed by theresult. Thesubmission of the wife then said that the question of the offer was one thingbut the husbands conduct during the proceedingwas another in terms ofhis non-disclosure of assets and the movement of funds. Reference was made tofindings by the Court aboutthe husbands conduct in relation to thosematters. The submission noted that neither party was legally aided nor was itbasedupon a failure to comply with orders of the Court save as to thedisclosure just mentioned. Itwas observed and submitted that the offer of the wife was made some two yearsprior to the conclusion of the proceeding and thatsignificant weight ought tobe attached to the husbands failure to accept it. Thehusbands submission was that even if there was a failure on the part ofthe husband to accept the offer, that was not sufficientto depart from theusual rule that each party should be responsible for its own legal costs. Inthat context, I turn to the legal issues. Itis the usual rule, prescribed in s 117(1) of the Act, that each party shouldbear their own costs. Are there circumstances here to justify an order forcosts and, if so,what should it be? InPenfold v Penfold (1980) 144 CLR 311, the plurality said that it was anaccurate description of s 117 (1) to say that it expressed a general rule butthat it was not paramount to s 117 (2) which provides that the no costsrule had to yield if, in a particular case, there were circumstancesjustifyingthe making of an order for costs. Interestingly,on the question of how to approach the determination of whether there was ajustifying circumstance, in Hitch & Hitch [2012] FamCAFC 124,Thackray J said, at [116] [117]: Itis also essential to appreciate the breadth of the language employed ins 117(2), which provides that the Court may make such order as to costs asit considers just. There is arguably no more impreciseword inthe legal lexicon... Forbetter or for worse, the legislature has determined that decisions about costsin the family law jurisdiction are to be made onthe basis of the judicialofficers sense of what is just, albeit guided by referenceto prescribed factors.Regrettably this means that, having resolved thesubstantive issue, the trial judge is then often faced with a second disputeaboutwho should bear the costs. Ifthe Court finds a justifying circumstance, it still has to consider the factorsset out in s 117(2A) of the Act. It is relatively easy here to deal with thosematters because the only one of some significance relates to the offerearliermentioned. The financial

circumstances of the parties are not such that theycould be described as affluent. Having saidthat, they have money and were ableto defraud the Australian Taxation Office of significant cash in a business inwhich the husbandstill works. Their financial circumstances here should notaffect their capacity to pay costs. Thequestion of conduct in relation to compliance with orders is relevant and thewife complained about the husbands compliancewith the provision ofdocuments but she too was not forthcoming with information as I shall set outbelow. Itseems common ground that there are no legal aid issues in this case. The mainargument concerns the offer of settlement. Whilstmuch focus was placed by thewife on that issue, there is no specific requirement that any one factor in s117(2A) dominate. Indeed, neither s 117(2) nor s 117(2A) demand that any onefactor has more weight than any other factor nor is it necessary that more thanone factor must be present (Fitzgerald (as Child Representative for A (LegalAid Commission of Tasmania)) v Fish and Another [2005] FamCA 158; (2005) 33 Fam LR 123). Inrelation to the wifes focus on the offer she made, it is timely to recallwhat the Full Court said in Lenova & Lenova [2011] FamCAFC 141 thatcosts do not follow the event. On the subject of the offer, theirHonours said that a timely offer in writinggenuinely made might be an importantpart of a limited armory available to prospective litigants seeking to avoid thecosts of litigationas would be a comparison between an offer to settle and theultimate result. These are factors, albeit important ones, in the exerciseofdiscretion but they are not determinative. Inmy view, whilst the wife did make the offer, it would seem there is something tobe said for the husbands response thatit was made in a vacuum. Despitethat, the financial position was clear to the parties because they knew orshould have been ableto work out holistically what each other had done with thesignificant cash assets which were the parties focus in the proceedings.Accordingly, examining the offer and the outcome in percentage terms does notassist me much. Whatis of significance here is the question of the justification to depart from thes 117 principle. Although in the wifes submission, emphasis was placedon the behaviour of the husband in relation to the proceedings,the wife knewthere had been cash money involved that ironically, both were fighting about.Much of the proceeding was taken up withdisclosure on both sides. The wifefailed to disclose inheritance interests and was evasive about on what she hadspent money shetook from the parties joint

account. In addition, therewas clear tax fraud. The paucity of the husbands costs submissiondidhim (and his practitioners) little credit but I consider the just approach tothis determination must come from the observationsI made about the parties aslitigants. Isaid of the wife that she: was evasive as awitness; was (at trial)still evasive about what had happened to money she took at separation; Was deliberatelyevasive and unco-operative; conceded she hadsmall parcels of land overseas; was evasive andresponded to questions by simply saying that her answer was whatever was writtenon the paper; conceded she hadlent a sum of $8000 to a woman she described as a friend she met in a refuge.She conceded that that had occurredin November 2012 and she had not been repaidthat loan by that woman. That was not referred to in her financial statement atall. Isaid of the husband that he: asserted thatthe Asset pool included $417,679 that the wife took fromthe business during the marriagethat she had not declared for taxationpurposes. This was said to be the undeclared or omitted income ascalculatedby the parties accountant. The evidence did not support anassertion that the wife took that money. The husband called thatstealing. Therewas hypocrisy in his statement; knew that theprofit as disclosed to the accountant, was much less than his actualearnings. Ofthe wife, I said I could not get a sense of her true financial position. Idid not accept the husbands evidence about the taxation issue that thewife was solely responsible for this fraud on theAustralian public. Of theparties generally, I said (their) taxation dishonesty was a jointenterprise. Asto the parties, I said that I had an absence of confidence in (their)evidence. Imade a determination on the evidence as best I could taking into account what Ihave just said about both parties. In my view, thereis no basis for me to findit just here for a departure from the principle in s 117(1). The application forcosts must fail. I certify that the preceding Thirty (30)paragraphs are a true copy of the reasons for judgment of the Honourable JusticeCronin deliveredon 28 October 2014. Associate: Date: 28 October 2014