Big money and endless acrimony: Family Court reform to rein in 'dreadful' litigants, lawyers

By Harriet Alexander

The government's chief backer for its controversial Family Court merger says the bill would give judges the power to rein in litigants who waste court time and use unfair strategies.

Patrick Parkinson, the outgoing head of the University of Queensland's law school, said the legislation before the Senate will allow judges to manage cases and ensure they do not rack up massive costs, which will free up the over-burdened Family Court for other litigants.

"Sydney has a dreadful reputation among judges for the way in which so many cases are so hard-fought and there's so much less willingness to compromise than elsewhere," Professor Parkinson said.

"In the high wealth cases, we do see some very bad behaviour by lawyers or lawyers acting on behalf of clients. Particularly where the clients are a little bit better off, every legal point is argued over and there's a tendency to make fewer compromises early and negotiate settlements," Professor Parkinson said.

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The Family Court system is beset by long delays, drawn-out cases and high costs, which are partly the result of resourcing not having kept pace with demand. Since 2012-13, the backlog of applications has grown by 34 per cent to 6720 cases in the Family Court and by 63 per cent to 17,478 cases in the Federal Circuit Court. Over the same period of time, only two additional judges were assigned to each of the courts.

The government wants to merge the Family Court with the lower-level Federal Circuit Court, which also hears migration and industrial law matters, to simplify the system and make it more efficient. The proposal is opposed by more than 110 individuals and organisations who say it will downgrade the Family Court and put families at risk.

Against their arguments, the government has relied on the submissions made by Professor Parkinson, who advised the Howard government on its equal shared parental responsibility laws while chairman of the now-defunct Family Law Council. He also chairs the conservative think tank Freedom for Faith.

But Professor Parkinson said the merger alone would not solve the most intractable issues of the family law system. The strength of the new laws merging the Federal Circuit and Family Court of Australia was the power it gave judges. These included the ability to order lawyers to bear the costs personally if they hindered a case from running efficiently and inexpensively, and to dismiss applications without merit.

"The merger itself will not set the world on fire," he said. "It's a modest improvement. But the other part about the court powers is very important."

Professor Parkinson had previously caught the eye of the Prime Minister's office with research that found court resources were disproportionately used by people who had the money to fight protracted battles and came at the expense of other litigants.

It is a theme with which the family law courts are familiar.

In one egregious case, a couple's combined legal costs extended to $860,000 during an acrimonious dispute in which voluminous letters flowed between the parties' solicitors, airing grievances that the judge would later say served no forensic purpose. Their seven-day trial settled on the final day.

Justice Robert Benjamin, presiding over the case in the Sydney registry of the Family Court, was appalled.

“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,” he said, referring the solicitors to the Legal Services Commissioner of NSW for professional misconduct.

“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.”

But that was 2017, and the acrimonious culture described by Justice Benjamin did not stop.

"I wouldn't be surprised if he still holds that view," family law solicitor Deborah Searle said. "The adversarial culture goes on. There are firms that will run it for costs but in some cases where you have an enormous amount of work and the parties are intractable there's absolutely no way around it. I've had people arguing over who owns the debt."

Last month, a Sydney couple spent $60,000 - nearly 8 per cent of the total property pool - on an interim application that a judge of the Family Court said was devoid of merit, even though the final hearing was only three months away.

Last year, the Federal Circuit Court in Parramatta heard that one man had spent $80,000 on lawyers to quibble with his ex-wife over a sum of $4500. He wanted Judge Joe Harman to make an order for his ex-wife to pay his costs on an indemnity basis. "You're kidding," Judge Harman said, learning the size of the man's legal bill. The proceedings appeared to be a perpetuation of hatred between the parties, Judge Harman said. Taxpayers were already paying $20,000 for the matter to be heard.

"This is a busy trial court," Judge Harman said. "It is a trial court which has far more work than it can possibly deal with simpliciter on any given day. Matters of this nature take up time which is then ... not made available to other litigants. The cases displaced include cases where children are not seeing a parent, or a parent their child. Cases where children are seeing a parent, but are alleged to be at risk. Cases where children are at risk ... It is that business which this case displaces."

Other strategies well-known to the legal profession include "burning off", when litigants run every conceivable issue or contest applications that are bound to succeed to pressure the other party to settle, and "trial by ambush", where affidavits are served the night before trial.

Both strategies lend themselves favourably to the Family Court. In the case of burning off, the default rule that each party pays its own costs puts the person in a weaker financial position at a disadvantage. Trial by ambush leverages the delays in the system because people are unwilling to ask for an adjournment if they have been waiting months for a hearing.

Or it just derails them completely.

That is what happened to Angus, 43, when he turned up to a dispute resolution with his wife in 2018. The estranged couple sat with their legal representatives in two separate rooms in the Parramatta court complex. The mediator started by blindsiding Angus with the news that his wife intended to move interstate with their 18-month-old son.

"I just spent the first half of the day in tears," Angus said. "My lawyer was arguing against their lawyer, saying you can't just drop a bombshell like that and expect us to make decisions about property. It was the worst day of my life."

It is illegal to identify the parties in family law proceedings.

Jane Wangmann, a senior lecturer in law at the University of Technology, Sydney, interviewed 35 men and women who had represented themselves in Family Court proceedings for a study published by the Australian National Research Organisation for Women's Safety this month.

Around 22 per cent of litigants in the Family Court and a quarter of litigants in the Federal Circuit Court were self-represented at some stage in 2019-20, typically because they could not afford a lawyer, which significantly slows down proceedings because judges need to explain legal concepts to them.

Several of Dr Wangmann's subjects believed that their ex-partners had deliberately tried to deplete their finances.

"When I had a private lawyer the spam from [my ex-partner's lawyer] increased, drastically, and I quite honestly believe it was to deliberately burn through [my] money as fast as possible," one woman said, referring to the cost of her solicitor being required to read and respond to the other side's communications.

"And then when I became self-represented she entirely backed off. Instantly. Less than 10 per cent of the volume of communication from her once I was self-represented."

It is not clear to what extent those strategies are driven by clients and how much by their lawyers. Lawyers have also pointed out that court delays are endemic across the country and not just in the Sydney registry, where the culture is more adversarial.

Professor Parkinson said family law reform would require a combination of measures, including greater resourcing and restoring the practice of less adversarial trials, but the judicial powers to ensure lawyers resolved cases quickly was a good start. "On their own, these things may not seem like silver bullets but cumulatively they are," he said.