HOW TO GET THE BEST OUT OF YOUR DAY IN COURT – A GUIDE TO AVOIDING TROUBLE

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A PAPER PRESENTED TO
THE NORTH QUEENSLAND LAW ASSOCIATION
CONFERENCE
27 MAY 2011

This paper like so many came about initially as a result of a passing request months ago to the effect, "Would you mind doing a paper for the conference?" Of course, it was easy at the time to say yes and immediately slotted into a basket to be dealt with a considerable time later. However, as is so often the case, and in fact it's the case often in preparation for court, the attention to the matter came about late and with that there was a rush and with the rush there are sometimes mistakes that can be made. This paper hopes to address some of those types of issues and in what might almost be considered a "scatter-gun" approach, to deal with ways in which you can make your life easier, achieve the results that you want and perhaps also ensure that there is a friendlier response from the Bench.

I should start however by indicating that it's not necessarily even the first port of call at the Bench that might get you a negative reaction. The first working title that I thought of in relation to this paper was one that was suggested by my Associates. It was something along the lines of "Getting your Act together – what gets up the Judge's nose". I suggested when discussing this with them that it might have been more appropriate to suggest that it was more proper to call it "Getting your Act together – what gets up the Associate's nose". An alternative might have been "Don't upset the Associates – they can make your life so much easier". It's perhaps trite to say that that is not an unreasonable expectation.

The first port of call that all practitioners and, of course, the litigants also have with the court is with the Court Officers, the Associates and Deputy Associates. I'm mindful that over a considerable number of years now I've come to appreciate that what might be brought before me has had some history beforehand. Anecdotally, I can certainly indicate that there have been a number of comments over the years made to me by both Court Officers and Associates. I have always had Associates who have had a family background and on more than one occasion have received comments from the Associates to the effect of:

- He/she is a little bit hopeless and unprepared but be nice to him, your Honour, he looks like my son/daughter.
- It doesn't really matter what he says – he has such an impressive voice.

- He/she is really quite attractive and they should be given the opportunity to be heard. I must say that on this particular occasion it was troubling that the Associate who made the comment to me was speaking about a young practitioner perhaps 20 years younger than her but that is obviously a topic for another time.

Alternatively there are also circumstances that can lead to difficulties for the practitioner or the litigant. In particular I recall vividly an occasion more than 20 years ago where a solicitor who was very senior sought to have a matter brought on before the Court and became quite rude with the Court Officer. The exchange between them was something to the effect, "I'm a senior practitioner – I should go first – it doesn't matter what might be the length of my application – there are protocols to be followed." Of course, the Judge at the time had in fact indicated that his preference was to deal with consents and adjournments and it would not be surprising to any of you to know that that particular practitioner, from then on, and I literally mean for years, found himself considerably down the list even if only appearing on an adjournment of one particular matter because of the exchange that had occurred a considerable time before between he and the Court Officer.

Clearly, they are the first port of call. Clearly, a good relationship with the Associate or Court Officer is a very sensible and appropriate relationship to foster and develop. That's not to say that it should be one that oversteps the boundaries, but my experience both as a practitioner and subsequently on the Bench has been that personalities do affect the decision-maker but they also affect the person's assisting the decision-maker and it is quite clear that on many occasions that first port of call and that first impression is extremely important. It's simply a sensible move to ensure that there is a smooth transition between the external walls of the court room and the interior of the court room. Insofar as what occurs before the judicial officer is concerned, there is obviously one clear and appropriate starting point. That is to know your case and to be in a position to explain why you're there, what you want and dependent upon the type of matter, the information that is required to be provided.

In particular, it is essential that you be full and frank in your exchanges with the court. It would be unnecessary to say that every legal practitioner appearing before the Court is an

officer of the court and that there are therefore the obvious ethical and appropriate bases upon which there should be any exchanges between the practitioner and the court. The obvious needs include of course:

- To be scrupulously honest in what is to be said but more than that perhaps, is to ensure that there has been that earlier consideration of how the matter is to be dealt with. It is obviously helpful if the judicial officer knows that there may be an opportunity for negotiation and for talk to be had. There is also obviously a benefit in knowing that there have been prior discussions or that discussions are no longer going to achieve any resolution of the matter.
- Having done some pre-preparation can be of assistance particularly if there is to be a smooth transition between the exterior of the court and the interior of the court. Advising the Court or the Associate as to the other party, if self-represented or the other party's solicitor if they have only recently become involved in the proceedings, expedites the obtaining of information to ensure that the matter is able to smoothly and quickly move from one place to the other. Enquiries could be made of Associates as to whether they know the other party or the other party's legal representatives and whether information has been received from them as to how the matter is to be dealt with. In particular if there are to be appearances, for example, of a courteous nature such as to appear as an unpaid agent because one party or the other or their legal representatives are a considerable distance apart and it is to simply be the case that there will be an adjournment or the tendering of consent orders, then that again assists in that smooth transition.

Consent Orders

Speaking of consent orders, there is a personal issue for me in relation to any matter that comes before the court in which there is an indication that there is a consent order to be sought. First and foremost, if there is a consent then it should be in writing and it should be signed by the parties, or at the very least signed by the legal representatives for the parties following them having been instructed to sign such orders. There is a personal bug-bear for me in coming before the court advising that there are consent orders and then adding the proviso, "But of course we haven't agreed on everything" or "we require your Honour to just determine one small issue." That throws the whole flow out and my

personal practice is to immediately indicate that the matter will be stood down and placed upon the callover that I would normally do, following dealing with consents, adjournments and directions. Unfortunately, of course, for the practitioners and parties involved in such matters, we are all human and there is certainly a possibility that the matter may find itself more significantly down the list than would be the case if there was that full and frank indication of the fact that whilst most matters are resolved there may need to be a short argument or submissions made in relation to a point and therefore 10 or 15 minutes might be required. That earlier consideration of how to deal with the matter is essential in relation to the efficient management of what invariably is a busy list.

In that respect also it is essential that practitioners are able to speak to the orders sought. It is clearly well understood that for 20 years or thereabouts it has been essential to be able to satisfy the court in relation to property matters that the orders that are asked to be made, whether in chambers or in court, are just and equitable and of course, in more recent times, since amendments which have included an opportunity for splitting of superannuation, that there has been the appropriate notification given to superannuation trustees, for example, so as to ensure that they have been afforded procedural fairness. In that regard, I note particularly the commentary contained within the CCH Australia Service "Australian Family Law & Practice" in volume 2 at page 31,482, there is a commentary in relation to the making of orders and the need obviously to comply with the decision in *Harris v Caladine* (1991) FLC 92-217. I include herewith parts 43-200 and 43-205 of the CCH Service.

> **[43-200] Introduction**
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> The burden on the court to satisfy itself that the orders sought by consent are "appropriate" and "just and equitable" within s 79(1) and (20 or s 90SM(10 and (3) is not as great as in a contested hearing. However, the court cannot just rubber stamp the orders. The leading case is the judgment of the High Court in *Harris v Caladine* (1991) FLC 92-217.
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> **[43-205] Complying with Harris v Caladine**
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> The proper approach to be taken by the court in making consent orders under s 79 has been considered by the High Court. The High Court's pronouncements are equally applicable to orders made under s 90SM.

In *Harris v Caladine* (1991) FLC 91-217 a deputy registrar for the Family Court made consent orders under s 79. The wife subsequently sought to withdraw her consent. She filed an application for a review of the exercise of the registrar's powers under O36A r7 [now Pt 18.2]. Eventually the matter came before the High Court. The wife challenges both the constitutional validity of the delegation of power to a registrar of the Family Court to make a property order by consent under O36Ar2 [now r18.05] and the nature of a hearing de novo as described by the Full Court.

In dealing with these issues the High Court took the opportunity to examine the process which should be undertaken when making property orders by consent.

Mason CJ, Brennan, Deane, Dawson and Toohey JJ held that the considerations set out in s79(4) must be taken into account when making consent orders as well as orders not by consent. The court must also be satisfied that the orders are "just and equitable" under s79(2). However, in the case of consent orders, the court more readily finds that requirements are less demanding because the parties consent to the orders.

Dawson J said (at pp 78,485-78,486):

> "In considering what order, if any, should be made under s79, a court is required under sub-s (4) of that section to take a number of matters into account, including the various financial contributions made by the parties to the marriage. And sub-s (2) provides that a court shall not make an order under the section unless it is satisfied that, in all the circumstances, it is just and equitable to do so. The fact that an order is sought by consent does not relieve a court, or a Registrar, from compliance with the requirements of the section, but it may render compliance much less demanding. Provided that a court, or a Registrar, is adequately informed, where the parties are at arm's length and are properly represented little more than consent may be needed to establish that the requirements of the section have been met: see *Jenkins v Livesey* [1995] AC 424, at pp 437,444.
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> …And in the case of an application under s 79, even if there is consent amounting to a contract, that is not enough of itself to entitle the parties to an order. The requirements of the section must be satisfied."

The Full Court has considered the effect of *Harris v Caladine* on several occasions. In *Prowse and Prowse* (1995) FLC 92-557 the wife sought orders under s 79A setting aside the consent orders and making fresh s 79 orders. The application for consent orders did not contain particulars of the parties' property, contributions and other relevant matters. The Full Court rejected the argument that because there were procedural defects in the obtaining of the consent orders and because the trial judge found that the wife received considerably less than if

the court had determined the matter exercising its discretion it necessarily followed that there was an "injustice" under s 79A(1). All the circumstances needed to be looked at. The wife's appeal was dismissed.

The effect of legal representation was discussed in *Heuston and Heuston* (1993) FLC 92-382. Mullane J said in relation to consent orders (at p 79,957) that:

> "… it is reasonable for the court to assume in the absence of evidence to the contrary:
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> (a) that because the husband is legally represented, he has ensured full and frank disclosure by the other party; and
> (b) that because the husband has had legal representation, he has had competent legal advice regarding the proposed orders based on the information available to him."

In summary, it appears that based on *Harris v Caladine* and the Family Court's consideration of that case:

1. consent orders do not need to be investigated by the court as fully as orders not made by consent;
2. the investigation required is less when both parties are represented; and
3. if the orders on the face appear not to be just and equitable, extra information and/or documentation may be required (see 43-210).

It is surprising and, I must say on many occasions, disappointing the number of times that requests are made for orders to be made in chambers with no explanation, whatsoever, of the appropriateness of the orders and, just as unfortunate is the situation where the matter is before the court and, for example, a solicitor who is attending for other matters has been asked to "just obtain the orders that we've agreed in relation to this" without being able to provide any explanation as to the appropriateness of the orders. In that regard, reference to the appropriateness of the orders specifically is referred to in Part 43-210 of the CCH and makes reference to the various particulars that should be noted as follows:

> **[43-210] Explanation of appropriateness of orders**
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> Where orders are made by consent in court, the court will require an oral summary from the bar table of the background to the orders.
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> Where orders are to be made in chambers, a written explanation may need to be provided to enable the conclusion to be drawn that the orders are "appropriate" and "just and equitable". This is less likely since the changes to Application for Consent Orders. The form is discussed at 43-110. Explanations may still be required where one of the parties is receiving credit for a substantial financial contribution at the commencement of the marriage or

made during the marriage. The Application for Final Orders only asks whether the financial contributions are principal, equal or minor. The application also does not differentiate between large financial contributions made at the beginning of a long marriage, those made later in a marriage and those made post-separation. Further explanation may be required as to why the adjustment for the contribution is significant or not significant. The application also requests details of the financial position of the parties presumably at the date of completion of the application. There may be circumstances where a substantial post-separation contribution is retained solely or almost solely by one party.

Any additional explanation can be provided in one or more of the following ways:

- filing a separate document, a statement of agreed facts, signed by both parties
- including recitals in the orders
- including notations in the orders, and
- the parties each filing a financial statement.

A financial statement will only help in limited situations. Usually it will be preferable to use one of the other approaches. A statement of agreed facts is preferable where the explanation is lengthy and/or complicated. Recitals and notations are more appropriate for short simple explanations.

Recitals give the basic facts to enable the orders to be understood and to clarify the operation of the orders. They are an aid to interpretation of the orders. Recitals are used slightly differently in maintenance agreements (see 32-110 and following in the "Maintenance Agreements" tab in Vol 1 of the Reporter).

Notations are usually used to give a brief explanation of the parties' understanding of an issue or details of a complementary agreement. The two most common notations are that the parties intend the orders to be final in accordance with s 81 or s 90ST and a non-binding record of arrangements for the payment of child support.

A statement of agreed facts usually sets out more than the minimum information required to understand the orders. Some of the information in the Statement of Agreed facts may also be contained in the Application for Final Orders and other documents on the court file. The information should be set out fully and comprehensively albeit without unnecessary detail. The aim is to make it easy for the registrar (or magistrate, judicial registrar or judge) to understand the basis on which the parties have reached agreement. In *PAJ and GMJ* [2003] FamCA 751, Young J said (at para 43):

> "Notations re not orders made by the court but a statement of the then wishes and intentions of the parties and an aid to the court, if required, to properly interpret the orders pronounced."

The matters normally included in a statement of agreed facts are:

- *The marriage:* the fact that the parties were married at a particular place on a specified date.
- *Parties:* the dates of birth of the parties and their occupations are relevant to the assessment of s 75(2) and s 90SF(3) factors.
- *Children of the marriage:* the full names and dates of birth of any children of the marriage who are under 18 or the fact that there are no children of the marriage who are under 18.
- *Separation and divorce:* whether or not the parties have separated and when they separated. The date of separation is relevant to assess the values of assets and the contributions of the parties. If a divorce has already occurred, and if an application for one is pending before the court, it is usual to include the date of the decree or hearing.
- *Property:* a summary of the major items of property.
- *Value of property and financial resources:* agreed values of property and financial resources including real estate, businesses, superannuation entitlements, vehicle and chattels. If values are not agreed the values attributed by each party should be included.
- *Mortgage:* the full name of the mortgagee, the amount outstanding and any terms of the mortgage important for understanding the orders should be included.
- *Companies:* the details of any companies in which the parties have offices and/or shareholdings including the companies' names, the names of the companies' directors, and the companies' shareholdings.
- *Initial and special contributions:* the details of any initial or special contributions made by the parties or others on their behalf such as gifts, inheritances or personal injury claims, including approximate dates, sources and how they were used during the marriage.

Special clauses may be required where there is some special factor which leads the parties to enter into orders which otherwise appear on their face not to be "appropriate" and "just and equitable". Examples of clauses which, depending on the complexity of the matter could be used in a Statement of Agreed Factors or as recitals or notations, are:

- "The wife has an earning capacity which she wants to exercise. She does not seek any maintenance and wants to be relieved of any further financial ties to the husband."
- "The wife has remarried. Her current husband is in fulltime employment as an electrical engineer."
- "The husband is in a de facto relationship. He and his de facto wife have two children aged one and three."
- "At the commencement of the marriage the husband was the sole registered proprietor of the former matrimonial home which was unencumbered. Its approximate value at that time was $120,000."

- "In 1995 the parents of the wife gave to the parties because of their relationship with the wife the sum of $30,000 which sum was used to reduce the mortgage on the former matrimonial home."
- "After separation, by way of an advance of settlement of property the wife received the sum of $30,000 from the husband which she used to pay the deposit on her current home."
- "These orders make no provision for the maintenance of either the husband or the wife, each being capable of supporting themselves without assistance from the other."

In more recent times, and unfortunately I was perhaps the catalyst for such a situation occurring, there has been a similar need for a court to satisfy itself in relation to consent orders relating to the appropriateness of orders in respect of parenting. In the High Court's decision in *MRR v GR* (2010) FLC 93-424 the court commented specifically upon the need for the court to be satisfied, even in relation to consent orders, as to the arrangements to be put in place. At paragraph 19 of the decision, the Court said the following:

> The evidence before his Honour did not permit an affirmative answer to the question in s 65DAA(1)(b). It follows that there was no power to make the orders for equal time parenting. It was necessary for his Honour to proceed to consider whether substantial and significant time spent by the child with each parent was in the child's best interests (given that equal time was not possible) and whether that was reasonably practicable. That would require consideration of the mother being resident in Sydney. But without a finding as to practicability no conclusion could be reached. At the rehearing of this matter afresh, the necessary determinations will be made on the evidence as to the practicability of such orders, given the circumstances pertaining to the parties as they then stand.

Obviously, the development in that respect was to require that there should be a clear understanding of what is to occur in relation to arrangements with regard to parenting of children and, in particular, in a similar vein to the comments contained within Australian Family Law & Practice with regard to property the CCH Service refers at page 13,160 to the effect of an order for equal shared parental responsibility and the concepts of "equal time" and "substantial and significant time" and "reasonable practicality". Following a recitation of what is set out specifically in section 65DAA(1) through (5), section 65DAA(6) is in these terms:

> (6) If:
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> (a) the court is considering whether to make a parenting order with the consent of all the parties to the proceedings; and
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> (b) the order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child;

the court may, but is not required to, consider the matters referred to in paragraphs (1)(a) to (c) or (if applicable) the matters referred to in paragraphs (2)(c) to (e).

It is clear that there is therefore a need for there to be at least some consideration of the arrangements to be put in place with regard to parenting, even if the orders are made by consent. Whilst I accept that the section specifically makes references to the court "may", and therefore there is no obvious requirement that the court **must** consider the matters referred to earlier in the section, there is in my assessment a need for the court to be satisfied that it is in the best interests of the children. To that end, the learned authors of the Australian Family Law & Practice specifically say at page 13,104 the following:

"In other words if the presumption of equal shared responsibility applies (as will be the case in the vast majority of cases where allegations of child abuse or violence are not made) the court **must** consider whether the child spending equal time with his/her parents is both in their best interests and **reasonably practicable** (as defined in section 65DAA(5)) and if so the court **must** then consider making an order for the child to spend equal time with their parents. If the court forms the view that equal time with each parent is not both in the child's best interests and reasonably practicable the court must consider whether an order that the child spend substantial and significant time (defined in s 65DAA(3)) with the other parent is in the child's interests and reasonably practicable."

Flowing on, if you like from the issue of parenting, is the vexed concerns and questions that arise in relation to relocation cases but that is, of course, only one particular type of parenting case. It is obvious that there must be evidence provided which will enable such a case to be determined. I don't intend here to provide any lengthy commentaries in relation to relocation, there being many papers specifically designed and directed toward that topic. But what I would particularly comment upon in relation to a matter proceeding to trial, for example, is the need for there to be the evidence, sufficient to enable the court to be satisfied of the various matters that are set out in section 65DAA and to address the matters that were clearly touched upon by the High Court in *MRR & GR*.

Just in relation to that issue of relocation I am mindful of the comments recently made by my learned brother, Riethmuller, in a paper entitled Family Law Update : A Cook's tour of

recent family law tid bits". Federal Magistrate Riethmuller there at pages 16 through 18 commented about the potential impact upon parenting or mental health of a refusal to allow a relocation. FM Riethmuller noted that it was significant and in specific terms, made reference to the decision of the Full Court of the Family Court in *McCall v Clark* [2009] FamCAFC 92, where the Full Court overturning orders allowing a relocation was critical that the FM who had heard the matter at first instance had acted without evidence. The Full Court said at paragraphs 131 to 135 as follows:

> 131. In his written submissions in support of ground 4 the father's senior counsel noted that the mother "did not adduce any kind of expert evidence in her case". He further submitted "that there is a fundamental difference between a particular state of being in a parent and a state of being which compromises parenting capacity or results in an impact upon a child of the parents' capacity to provide appropriate parenting" (father's submissions, para 5.2, p 10). He further submitted that "absent some cogent evidence the finding referred to was entirely speculative and amounted to appealable error" (father's submissions, para 5.3, p10).
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> 132. The mother's counsel relied on the judgment of Kirby J in *AMS v AIF* at paragraph 145 where his Honour said:
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> > One of the objects of modern family law statues (including FLA 1975 and FCA 1975) is to enable parties to a broken relationship to start a new life for themselves, to control their own future destinies and, where desired, to form new relationships, free from unnecessary interference from a former spouse or partner or from a court. Courts recognise that unwarranted interference in the life of a custodial parent may itself occasion bitterness towards the former spouse or partner which may be transmitted to the child or otherwise impinge on the happiness of the custodial (or residence) parent in a way likely to affect the welfare of best interests of the child. This said, the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents. To the extent that earlier authority may have suggested the contrary, it has now, properly, been rejected. [footnotes omitted]
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> 133. We do not consider that the passage from Kirby J's judgement goes as far as supporting a proposition that the Federal Magistrate was entitled on the mother's evidence, and absent any expert evidence, to find that the mother's quality of parenting would be so compromised or adversely impacted because she may be required to live in Australia, that it would impact on the child.

> 134. We accept the Federal Magistrate was entitled to take into account the mother's statements that she suffered embarrassment about the father's rejection of their marriage plans, although it was not clear whether that embarrassment would impact on her if the father moved to, or visited, Dubai. He was also entitled to take into account that the mother lacked family support in Brisbane (although we note she would also lack family support in Dubai with her brother's departure to the U.S.A. and her parents' residence in Sri Lanka). We note that the Federal Magistrate made no reference to the mother's brother who lives in Sydney.
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> 135. We accept that the availability of family support including such things as reliable quality child care, financial assistance, and emotional support for a parent and a child, can be very important considerations in any parenting case particularly one involving relocation, and are all matters to be balances and weighted when considering competing proposals. But those factors, or a lack of them, do not automatically support a finding that a party's parenting capacity will be compromised particularly when they may be counterbalanced, at least in party, by other benefits, including the sharing of day to day care of a child. Again, we find merit in this ground.

FM Riethmuller then went on however to comment upon the different approaches that do seem to be taken by differently-constituted courts or, in fact, different judicial officers in first instance when FM Riethmuller made the following comments in relation to *Sigley & Evor* [2011] FamCAFC 22.

> However, in *Sigley & Evor* [2011] FamCAFC 22 the Full Court (overturning a relocation refusal) considered the briefest evidence of this type sufficient as a foundation for such a proposition, saying:
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> > 174. The Mother contends that the Federal Magistrate erred in finding that there was no evidence to support a finding of a likely mental health impact upon the Mother of being required to stay in the X district (Ground 5). During cross-examination of the court expert by counsel for the Mother there was the following exchange (Transcript, 24 August 1009, p 70):
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> > > Can I ask you this, now, if – if his Honour exercised the discretion in such a way that [the Mother] was obliged to stay in the [X] area, do you have any concerns about how that might impact upon her parenting? --- There's – there's certainly an argument that it could impact – it could impact negatively upon her parenting, in that it could impact negatively to some degree on her mental health. She may feel isolated. She may feel thwarted and frustrated. She may feel as though she's not being able to provide her son with – the full range of options that she'd like to provide him with. I understand she lives in a pretty isolated area at the moment. It is a fair way from [X] where she is living with her parents.

> She would have the option, of course, of moving into [X], but I gather that's quite expensive in terms of rent. She's in a better financial position where she is with her parents, and I believe she is able to – to get a much more reduced rent in [north Queensland]. It – it could affect her mental health some degree and that could affect her parenting. That's as much as I can say.
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> …
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> 186. The Federal Magistrate erred in finding that there was no evidence to support a finding of a likely mental health impact upon the Mother of being required to stay in the X district (Ground 5) His Honour erred in relation to his finding about the employment opportunities available to the Mother at the X hospital.

In *Cales & Cales* [2010] FamCAFC 237 the argument was put that the effect of *MRR v GR*, was that *Sampson & Hartnett (No 10)* was no longer good law. The Full Court said:

> 89. While we agreed the type of order envisaged by the majority in *Sampson & Hartnett (No 10)* is one which will be rarely and sparingly made, we are not persuaded, as presently advised, that as a rules of *MRR* the decision of the majority is no longer correct law (see *Nguyen v Nguyen* [1990] HCA9; (1990) 169 CLR 245).

In *Cales* the refusal of a relocation application (from Sydney to the Hunter Valley – some 166km) was overturned.

In *Partington & Cade (No 2)* [2009] FamCAFC 230 the Full Court made clear that findings about risk to the child must be factored into any consideration about relocation, saying:

> 104. In our view, his Honour's finding of unacceptable risk [of sexual abuse] and the findings underpinning that conclusion, were relevant' not just to the question of whether orders could be made to counter that risk, as to which question his Honour had regard, but also to the parenting capacity of the father, the benefit of time spend by the father with the children, the likelihood of various scenarios for time between father and children in the future and thus, ultimately, the question of whether the mother should be ordered to move from New South Wales to Tasmania. In the determination of those questions his Honour gave no regard to his findings of unacceptable risk. Thus, we are of the view that, notwithstanding his Honour's attention to and careful weighing of the many other relevant factors, the appeal has merit.

It is therefore not surprising that the Full Court overturned orders requiring the mother to remain in Tasmania, however, the Full Court said in its reasons:

> 93. The orders in question in *Sampson & Hartnett (No 10*) [2007] FamCA 1365; (2007) FLC 93-350 effectively required a parent to move residence from Geelong to Sydney. That was the "extreme measure constituted by the orders".
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> 94. We are not satisfied that this case could not have been one in which orders of the nature of those described in *Sampson & Hartnett (No 10)* as being at "83…the extreme and of the discretionary range", were open to be made, but again, where we have concluded that the trial judge failed to give proper weight to a relevant factor, we think it unnecessary and indeed unwise to say more.

I turn now obviously to those various issues that in my view can make the day in court so much easier and, in fact, the preliminary steps that can ensure that smooth path to the court. In no particular order, I note the following:

Urgent applications

When they are filed there is a process that obviously needs to be addressed. The application and accompanying material must be complete. It's obvious that there needs to be compliance with the rules of this Court and included there is the need to be in a position to file an application and accompanying affidavit or affidavits (only one please). It should be accompanied by a letter explaining the urgency and that doesn't need to be terribly lengthy but does need to address the issues that give rise to what the applicant says means that the matter should be given priority over so many others, that are awaiting hearing. The types of matters, obviously, are matters of serious domestic violence, matters which involve concerns as to mental health and therefore a risk to a child or children or the possibility of there being imminent departure overseas or a significant distance.

The correspondence doesn't need to repeat the contents of the affidavit but it is helpful if rather than requiring the entire reading of the affidavit to determine the issue of urgency if the correspondence were to direct the decision-maker, in that instance generally the Registrar, to where in the affidavit the concerns are outlined and provide a synopsis. It's also important in the correspondence accompanying any urgent application to indicate whether it is sought to proceed on an ex parte basis, which will generally expedite the listing of the matter at least, because there's not an obligation for service to be effected or whether short service is suggested so that there can be some arrangements put in place

with regard to the requirements in relation to service being effected by a certain time, so as to enable the matter to proceed on the date fixed for its return.

If there has not been compliance, because of the various reasons set out in the exceptions to s 60I then they also should be detailed in the correspondence as that again assists the registrar in the decision to be made with regard to the urgent listing. The fact is that a little pre-preparation or thought as to how the matter can be brought on can facilitate that smooth move from that first filing to the hearing of the application and in particular the urgent consideration of the application.

Directions

Also it's important that there be some real understanding of your obligations as officers of the court. You are not simply mouthpieces for your clients but clearly have professional obligations and ethical duties which need to be addressed. One of my personal bugbears is when directions are not complied with. When a legal representative attends before the court and directions are made with regard to the filing of material, if as is obviously necessary, you are recorded as the legal representative for a party then an obligation falls upon you as well as your client to comply with those directions. If as one would be the case, you would be endeavouring to comply with those directions, knowing there are time limits and obviously possible consequences for failure to comply, then if a client refuses to provide information or fails to provide instructions, then there are a number of possible avenues to be followed.

The first, and perhaps most radical, is simply to seek to withdraw as you are unable to receive proper instructions. It may however be more often than not the case that the client simply does not realise the urgency and the importance of compliance with directions and the possible consequences and what needs to be addressed there, is at the very least, an approach to the other side and of course when there are solicitors on the other side, there are the professional courtesies that should be extended in any event, indicating that more time is required and there must also be notification to the court of a request for more time and an indication as to whether there is agreement in relation to that.

It is unnecessary I'm sure for me to say that if orders are made or directions are given, it is not simply open to the legal representatives or the parties to ignore the necessity for compliance in that regard. Failure to comply, without at least appropriate steps being taken can have significant and serious consequences. Obviously the most radical of those can involve the dismissal of proceedings and costs but the other just as confronting and disturbing consequences can be that proceedings are removed from whatever priority they may have received in relation to moving through the busy lists that the court has and that they can then be placed at the end of the list and significant advantage in time can be lost. That obviously has consequences for the client and I might add, still remembering life as a practitioner, has consequences for you in relation to both client satisfaction and receipt of payment at the end of the day.

Readiness

Similarly, as an officer of the court, there is a need for readiness. It's unnecessary again but probably worthwhile to say but if you have commitments in another court, advice should be provided to the Court or Associates and to the other party or practitioner involved. I have no doubt that every person on the Bench still has recollections of the time when they have been a busy practitioner and I have no doubt that judicial officers will provide as much cooperation and assistance as they can to facilitate a busy practitioner ensuring that they are able to provide representation for their clients but it is difficult for that to be effected and it is certainly annoying when there is simply no appearance by one or on occasion, both practitioners or clients, but it is also no doubt embarrassing for a practitioner when their client is present, a matter is called on and as sometimes happens a rather dazed client appears before the court saying that they are waiting for Mr or Ms X to appear, they don't know where they are, they don't know why there's a delay and they're concerned as to their case being properly presented.

In relation to counsel, though of course it would never happen nowadays, there is always a concern as to the effects of double or even more frustrating multiple briefing before more than one judicial officer. In smaller registries, and I come from one, it's sometimes an unfortunate consequences of the small number of practitioners and barristers in a locality and again, simple courteous steps to ensure that the court and the other members of the

profession are advised of your circumstances ensures that there are not those difficulties that arise.

Flowing from those concerns that I've already referred to also is the difficulty that arises when there are late arrivals by one practitioner or the other without notice being given to the court. More often than not, that causes embarrassment to the practitioner, perhaps gives rise to an unsatisfied or unhappy client and, of course, can also mean as I've commented before, that you can find yourself and the other side at the end of the list which gives rise to those professional concerns to which I have already referred.

Telephone attendances

Requests for attendance by telephone or for arrangements to be made for witnesses in trials to attend by telephone need to be addressed early. The first step is always to enquire as to the other side's position in relation to the matter and if there is agreement it would generally be the case, that certainly I would cooperate with a telephone appearance, particularly, if for example, there was significant distance between the registry or place in which the court was sitting and the business address of the practitioner seeking to appear. However, it's also obvious that a suburban office is not sufficient explanation for a failure to attend in court particularly when in the locality that I am based there are often very great distances that are traversed by the practitioners and the litigants simply for the purposes of ensuring that the courtesy of an appearance is effected. It's important that that be recognised.

Conciliation Conferences

Conciliation Conferences have been a particular irritant to me for a very considerable time. It's not because they're not beneficial – they obviously are, and when run appropriately and efficiently can lead to a very early resolution of issues between the parties and can lead to very considerable cost savings for the parties as well as a quick turnaround in files and therefore a much better cash flow for practitioners but unfortunately it requires everyone to comply and there is a need to ensure that directions, as I previously indicated, are followed. That includes ensuring that at the time that a conference is arranged, the parties have given significant consideration to what evidence is necessary to enable the conference to proceed

so that it can be utilised effectively. Exchange of documentation in accordance with the rules needs to occur and a failure to comply will normally result in the adjournment of the conference or its discharge, that being the more likely outcome now and into the future. It's unlikely that there will be any real prospects of a second conference being granted.

The fact is that thereafter the matter will be required to come back before the Court and an explanation provided in relation to such proceedings. It has certainly been my practice in recent times to require that the matter come back before the court on a date shortly after the conference has been scheduled to occur. If agreement has been effected and consent orders been made, then that date is vacated, but otherwise it is essential in my view that the proceedings be kept moving. There are obviously difficulties that arise but they need to be addressed and addressed early. As is already a mantra throughout this paper, the need for preparation and thought is essential. The reasons that additional conferences are not likely to be ordered are the common ones of budgetary constraints and statistical considerations.

Quite simply, a conference that has been adjourned two or three times before it might necessarily be able to be heard or properly proceed, leads to a real difficulty for the practitioners but also for the court staff and especially the registrars of the court. They are employed, obviously, to assist the judicial officers of the court in relation to the conduct of the business of the court. They need to justify their positions. It's simply a financial reality nowadays and if the matter of Smith & Smith is the subject of four conferences, three of which are adjourned or only partially able to be dealt with because of lack of preparation, then the success rate that reflects upon that registrar is 25 percent. It's not a consideration of the fact that it's been prevented from going to trial and therefore the far greater expense of trial preparation has been avoided but rather simply a statistical analysis and that is not at all beneficial to the registrars of the court.

More particularly, there is regard that needs to be held specifically to the effect that the court, like virtually all of the jurisdictions throughout the country, State and Federal, are experiencing financial constraints. Insofar as the FMC is concerned, in the financial year about to end, the best estimates are that the court will be approximately 2 million dollars over budget. Such matters need to be dealt with and one of the obvious considerations that

are being looked at, along with many others, is the possible reduction in the number of registrars, and accordingly the number of conferences that are available. I must say that that is from my own perspective unnecessary and I think an over-reaction to the very great benefits that are available to the public generally and the practitioners through the involvement of registrars and in relation to mediation and family consultations through the family consultants.

However, one of the factors that are seriously being considered are the likelihood of out-sourcing the arrangements for future conferences. As practitioners have no doubt been aware that has been regularly occurring in the state courts, particularly with regard to mediation or conferencing in relation to de facto property issues. It's not been a consideration there of the financial circumstances of the parties or the size of the pool but whether a conference has been held or not was a factor to be considered in relation to the listing of a matter for determination. In fact, as I understand, the attitude of the state courts, were that if mediation had not occurred and that could not be attested to by the legal practitioners, then the matter was not listed for hearing, and if there was a direction for mediation and it was not complied with, then the proceedings would be dismissed. It was that simple and that straight-forward.

In any event, from the perspective of practitioners I see this as a real opportunity for the further development of an area of practice which no doubt can be highly remunerative. Many practitioners already will have been utilising mediation facilities through private members of the Bar or the profession. I would think that those who can get out there and can promote themselves as accredited mediators or arbitrators are going to find a very significant source of further work.

In the Brisbane registry of the court, it is clear that the vast majority now of conciliation conferences are conducted externally. There are generalised forms of orders that are being used and the anecdotal evidence which is being provided is to the effect that practitioners are now advising their clients that it is simply one of the financial obligations that arise in relation to the conduct of a matter and proceeding to hearing, if unable to be resolved. Generally, parties are attending with their legal representatives, advising of when a

conference is able to be conducted and when the matter should come back before the court. Whilst there is not generally a rule of thumb in relation to the directions with regard to the listing of the matter for an external conference, it would seem to me that it would be an almost unanswerable argument to suggest that the public purse, which is strained to the extreme, should be bearing the costs of conduct of a conference for parties, particularly when they are not generally being appropriately utilised and when the assets of the parties exceed $500,000. There needs to be a real change of mindset in that regard and it will occur, however it might be brought about.

Mediation and Family Reports

Mediation is throughout the country utilised extensively. The external arrangement is increasing significantly and as I have already made mention, the Brisbane registry of the FMC seems to be to the forefront of such arrangements. Budgetary considerations are again a driving factor in relation to ordering external mediations and external report preparation, though it will have become obvious from many of the registries and when appearing before many of the judicial officers now, that orders are being made for reports to be prepared externally and such reports in the FMC are often made and ordered pursuant to the provisions of 15.09 of the FMC Rules. The general form of the order that I would make in that respect is quite simple but some of the other forms of orders that are utilised, particularly in the south, can be more complex. They address very many issues and annexed hereto is a copy of the general form of orders that are made.

Again it is a situation where practitioners are now more often than not appearing with agreed terms to such orders and in fact, arrangements have generally been made with regard to the conduct of a mediation well before the matter might even have come before the court. Certain considerations are to the fore, certainly in relation to any judicial officer's determination and if the parties are both employed or are in fact, however it might be funded, in a position to pay for their own lawyers, then it almost seems unanswerable when a suggestion is made that external mediation or report preparation should occur. Again, it is a question of the parties and the practitioners being prepared to explain why such an arrangement would not be appropriate in all the circumstances.

Family reports and reports pursuant to the provisions of section 11F of the Family Law Act are also more and more often being utilised. The internal reporting system, with the assistance of family consultants, is an over-worked and under-resourced area of the court's services. The utilisation of reports or memoranda pursuant to the provisions of section 11F are obviously beneficial, however they are not a family report. They do not for example give a wide consideration to many of the matters that would normally be considered in a family report. They are a snapshot, if you like, addressing issues perhaps most specifically in Child Inclusive Conferences as to the wishes of children and, of course, children perhaps in the range of 10 to 14 years are able to provide such information. Those older than that will, as many practitioners are well aware, decide arrangements with regard their care by the use of their feet, rather than any other means of communication.

Those reports also are able to provide a snapshot of what issues might need to be more fully addressed if the matter is to proceed further and provide some guidance or assistance in relation to what might be the short-term arrangements put in place, pending the more comprehensive preparation and enquiry that would be involved in report preparation and trial readiness. Again, it is a financial consideration and it is one that needs to be addressed by the parties and considered early in the proceedings.

Adjournments

Adjournments are always a concern because of the delays that occur and the failure to fully utilise the limited time that is available to the courts. In that regard there needs to be preparation and again there can be a reduction in time and expense of the parties if there is thought before the day of mention of matters about what should occur. If, for example, an adjournment is sought because of short service or non-service or other special circumstances, then relief is available under the provisions of rule 10.03 of the FMC rules, but it is essential that one's mind be turned to such matters.

It is clear that adjournments can "clog up the system" and for that reason there needs to be a realisation on the part of practitioners that they will be less likely to be made available over time and only one adjournment is likely to be considered without their being clear explanations as to the reasons for delays. Such issues do obviously cause difficulties in

relation to proceedings and, as I referred to previously, it is one of the statistical factors that are analysed in relation to the efficient operation of the court.

In that regard the national average in relation to what are referred to as "court events" is 5, which is each occasion that the matter comes before the judicial officer who is handling the matter. In some proceedings of course it can only be 1 or even no appearances that are required because of agreement reached between the parties but for every one of those there obviously has to be an antithesis and clearly the situation of some matters having appearances of double digits and over years are not beneficial to the parties or, as I've commented before, to the practitioners.

Trial Readiness

It is obviously also necessary to ensure in readying a matter for trial that professional witnesses are given appropriate notification. I must say that it amazes me that over nearly 30 years now of practice, parties have still not become aware of the fact that whilst they don't wish to be inconvenienced in relation to their own life and business, there is little consideration of the inconvenience caused, particularly to private practitioners providing services to the court. The family reports that have been prepared over decades have constantly had as a front sheet addendum a requirement that either 7 or 14 days notice be given to the report writer to be available for the hearing. It's my practice and I'm sure the practice of many other judicial officers at the pre-trial compliance check to enquire whether the report writer is required, whether notice has been given, and what arrangements are to be made in that regard. Notwithstanding that, it is an unfortunately common practice for legal practitioners in particular, to attend and to enquire when the family reporter might be available. When rather quizzically I ask what is meant by that enquiry, they indicate that they thought because the report was being ordered by the court, that if they wanted the report writer it was simply a matter of the report writer being available.

That is not the case nor has it ever been and there are obviously consequences in relation to that, not the least of which is cost consequences or simply the inability to challenge the evidence of the report writer. Unfortunately I can say that as recently as the first week of

May 2011 I had a trial in which neither party had given notice to the report writer and the matter simply proceeded in the absence, with both parties commenting upon the report, positives being relied upon from them and negatives being challenged but of course there not being any real basis upon which there could be consideration of what the report writer had said or at least to consider alternatives that might not have been considered simply because this has not been considered.

Practitioners should not assume that as the court commissioned and paid for report, the court will arrange for the report writer to give evidence. What will occur in that type of situation is that the evidence contained within the written report will be accepted by the court, unless the parties or practitioners take the appropriate steps. There is, understandably, an opportunity within the rules and sections of the Federal Magistrates Act to utilise technology and it is generally accepted that with professional witnesses at a hearing, they will be facilitated and given the opportunity of attending by electronic means. Otherwise, it is generally expected that witnesses who are to be relied upon in proceedings will be required to be in personal attendance. Again, it is my practice to enquire of the witnesses to be called at the compliance check that is conducted by me and if there is any request then for a witness to attend by electronic means, then it is expected that that will have been raised previously with the legal representatives for the other side.

A response is necessary in relation to that and of course if there is objection then there needs to be argument. It cannot generally occur on that particular day because compliance checks are, at least in my list, listed to proceed for 15 or 20 minutes before the commencement of what is normally a busy court calendar. The consequences of a failure to make arrangements of that very basic nature are obvious again. There are costs that can flow in relation to adjournments or simply the costs of having a witness attend when a little earlier thought could have made alternative arrangements or significantly the consequences of that witness being unable to be relied upon.

General trial preparation

I turn now to some of those issues which need to be considered by practitioners in relation to preparation generally. In children's matters, there needs to be thought of what is to be

relied upon and, as I commented earlier in this paper, particularly consideration of what evidence is needed by your client and what evidence is to be challenged on behalf of your client. Preparation is always an essential element in relation to such matters.

I also am mindful of the essential nature of drafting and of actually expressing your client accurately and in terms that are able to be understood by them. All of us have at different times experienced situations where a client has been asked why they said such and such or so and so in an affidavit and have been unable to explain it other than to say "their lawyer must have put it in", or in relation to the contents of financial statements, that they had no idea of why it was there. This of course reflects poorly on the client, who is expected to have read, understood and affirmed the contents of their affidavits and financial statements but it also causes clearly an embarrassment to a practitioner who has prepared documentation because it gives rise to real concerns as to the preparation and therefore the accuracy of much that is contained within documentation.

Two obvious anecdotal examples that I can give very quickly relate to the following. In an affidavit recently a grandmother spoke of the close association that she had observed between the mother of the children and the children and she was quick also to criticise the father's relationship with the children. When questioned as to that, she was able to indicate that she had not seen the father for some years and had not spoken with the children about their interaction with the father for a similar period of time. She was asked whether she had perhaps embellished her evidence in that regard and her response was telling in that she said in court that the lawyer had told her it would be appropriate to put that in and that it simply reinforced the mother's position in relation to the matter. All it did was diminish any effectiveness or balance in relation to the statements that she made within her affidavit and in fact of course caused a deal of embarrassment to the solicitor.

Similarly in financial statements there is often the inclusion of particulars with regard to taxation liabilities or on a far more micro-managed level, details in relation to daily expenses. All of us will have experienced the situation of a client being cross-examined in relation to exorbitant expenses for clothing, entertainment or the like, and then being

unable entirely to explain what the figures were, or why they were there, other than to suggest that the solicitor had placed them there.

It's essential that that be dealt with so that there is not that degree of embarrassment for the practitioner and more particularly to ensure that the evidence that is sought to be relied upon is actually able to be relied upon because of the witness being able to speak to that evidence.

It would be unnecessary I would hope to suggest that the client's own language should be used, with restraint, in proceedings. There's no point in talking about the children and their relationship with the parents or lack of relationship with the parents if, when questioned as to what they might mean by such statements, they as a witness are unable to even understand what is being asked. It requires a little more time and a little more thought on the part of the practitioner to prepare such documentation, but the benefits are obvious when one sees the difference that it can have on its effect in court.

Advocacy

Finally I wish to speak a little about advocacy in the court. I was going to give a more generalised discussion of such matters when I recently read an article in the Law Society Journal of New South Wales, headed "Good morning, your Honour" - Is courtesy misplaced in the Children's Court?" by Dr Bao-Er. It related to comments that were made by Justice Palmer in the Supreme Court decision of *Wilson v Department of Human Services – Re Anna* [2010] NSWSC 1489 at para. 113. There, the case related to the arrangements to be made with regard to the care and protection of the child Anna. The child had been, pursuant to orders made in the Children's Court, appointed a Ward of the State and it was the situation that parental responsibility for the child had been provided to the Minister of Human Services. The mother applied to the Supreme Court in its parens patriae jurisdiction to have the child returned to her care. The mother was unrepresented and was successful in the application. Justice Palmer in making orders in relation to the matter, indicated that whilst she was successful it was "at the cost of immense anguish within her own family and within the Department". He went on to describe the case as:

> *"a tragic history of misunderstanding and distrust: on one side, officers of the Department who were acting in good faith but on limited information, in that they believed in what they believed to be the best interests of Anna and, on the other side, an intelligent and resourceful mother who believed that the Department had acted maliciously in taking her child without cause".*

What interested me in relation to this matter were the comments that were made by Justice Palmer in relation to the exchanges between the self-represented mother and the legal representative on behalf of the Department of Human Services. Justice Palmer ordered that it should be a situation where there should "not be compromise in any way by the intrusion of civilities since something as simple as a salutation between the Bar table and the Bench may give rise to a suspicion of unfair advantage". In order to emphasise the point, Justice Palmer referred to conduct he observed during the case. He said:

> *"Lest it be thought that this view is the relic of a stilted and now-outdated judicial self-esteem, let me illustrate, by reference to what occurred in this case, how the practice can cause substantial misperceptions prejudicial to the conduct of a fair trial.*
>
> *Mr Chapman, who is obviously a highly experienced and capable solicitor frequently conducting cases in the Children's Court, routinely greeted me with the salutation of 'Good morning, your Honour' or 'Good afternoon, your Honour' each time he announced his appearance at directions hearings and on each day of the trial. In accordance with the usual etiquette of this Court, Mr Moore of Counsel did not. Mr Chapman's apparent familiarity with the Judge could have caused a mis-apprehension in the mind of Ms Wilson, already distrustful of the judicial system, that Mr Chapman enjoyed a relationship with the Judge which was something more than merely professional. Such a suspicion should never be allowed to arise. A Judge should not feel compelled to allay such a suspicion by rebuking an advocate for misplaced courtesy.*
>
> *More importantly, Mr Chapman routinely began his cross examination with the salutation 'Good morning, Ms Wilson (or Mrs Wilson)'. He was met with a stony silence. How could Ms Wilson or Mrs Wilson greet politely the man who was avowedly intent on taking Anna away from them by destroying their evidence? A witness in their position would inevitably feel it to be the most odious hypocrisy to be compelled to return the salutation with a police 'Good morning, Mr Chapman'.*
>
> *Mr Chapman, of course, noted the rebuff and, on occasion, directed a meaningful look at the Bench. I do not think he intended it, but the impression which could well have been conveyed to Ms Wilson and Mrs Wilson was that, even before Mr Chapman had begun his cross examination, he had already unfairly scored a point against them because he had put them in the position in which he could say –*

> *eloquently, by a look, not even a word – 'You see what rude and unpleasant people we are dealing with here, your Honour'."*

I had not considered that to be a matter of real consequence in relation to proceedings until it was so eloquently outlined by Justice Palmer in the case. The commentary in relation to such matters is relevant and again comes back to that over-riding consideration that needs to be looked at well before a hearing of preparation and it seems to be that in instances where there is representation for one party and not the other, the type of communication between the Bar table and the Bench and between the Bar table and the unrepresented client or that client's witnesses, needs to be of a far more formalised and less friendly nature. That's an unfortunate situation but in light of the essential need for a level playing field and for there to be no perception of bias, it is again an essential consideration in your preparation.

Excerpt from **ADVOCACY IN THE FEDERAL MAGISTRATES COURT OF AUSTRALIA by Federal Magistrate Keith Slack**

Establish a reputation for honesty and integrity and value that reputation above all else.

Ultimately, the most significant asset that you have as a Family lawyer is your reputation. You must maintain honesty and integrity at all times, even in the face of a difficult and disrespectful client and/or opponent.

Your reputation for honesty, courtesy, diligence and courage must be protected and enhanced at all costs. You will be appearing in the Federal Magistrates Court on a regular basis. A reputation for honesty, courtesy and diligence will not always be rewarded by results but you will have the respect and appreciation of the Court.

In this area of the law, it is important that you read widely. You will need to have sound knowledge of the developmental stages of children. Try to keep up with the emerging research.

Avoid doing the work by "numbers". Strategic planning at every level of the case is essential for the outcome that you want to achieve.

You will build your reputation and clients will come to you because of your capacity to know and understand the law; to know and understand people who are in crisis; to know and understand the system in which you operate and through which your clients must traverse; and ultimately, to know and understand the way that individual Judicial Officers operate.

You are the gatekeepers for those who are about to enter the Family Law system. People will rely upon your advice and will make decisions based on that advice about whether they accept offers; whether they institute legal proceedings; whether they take an alternate dispute resolution path etc.

As Family lawyers, you will be dealing with people in crisis. They are people who are often unable to see beyond their own interests and often are not beyond sharp practice in dealing with their former spouse. Maintaining the highest standards of the profession and objectivity are crucial in the work that you do. The most valued asset that you will have is your name and integrity. To tarnish either in the interests of commercial pursuit will damage you irreparably.

Advocacy is the art of persuasion. As with any art, advocacy does require natural talent but more importantly effective advocacy requires uncompromising, unrelenting and often unrewarding preparation and work.

There are very few gifted advocates. There are very many bad ones. It is difficult to teach someone how to be a good advocate. Hopefully, I can help you not to be a bad one. Advocacy in the Federal Magistrates Court has to be conducted in the context of a busy list. Whilst that may be a frustrating process for an advocate, nevertheless as an advocate you need to be able to adapt to being persuasive in that dynamic.

Advocacy does not begin with the final address to the Court. The persuasion begins from the moment of the first interview with your client.

Treat your Profession with the respect that it deserves.

Duty to the Court and Rules of Conduct

In these times of pressure from commercialism and competition, always remember that you are part of an Honourable profession with a long tradition and history of service to the interests of justice, Chief Justice Spigelman during his speech after being sworn in as Chief Justice of New South Wales said:

> "There are parts of our society in which the ideology of free market simply has nothing useful or interesting to say. The requirements of justice is one of them. Some have advocated applying the doctrine of 'user pays' to the Court system. That would fundamentally diminish its capacity to deliver justice.
> The work of this Court cannot be assessed as if it were merely a publicly funded dispute resolution centre. There are some specific points of contrast between markets and the profession worthy of note.

The first and, in my view, foremost, is the significance of historical continuity. This is at the heart of the legitimacy of our legal system. A profession values such traditions. Markets are different. A market wakes up every morning with a complete blank mind, like Noddy.

Secondly, a profession has an ethical dimension and values justice, truth and fairness. The market recognises self-interest and self-interest alone.

Thirdly, the operation of a market gives absolute priority to a client's interests. A profession gives those interests substantial weight, but it is not an absolute weight. In many circumstances, the lawyers' duty to the Court prevails over the client's interests, let alone a client's enthusiasm. This Court knows that it can generally rely on the professionalism of those who appear before it. If that were to change the resources needed to administer the law would explode, perhaps to American dimensions.

I do not intend to suggest that venality is unknown in the legal profession, but it is not its central organising principle.

The duties of a lawyer to a Court include:

- A duty of full disclosure of the relevant law.
- A duty of candour not to mislead the Court as to fact, nor to knowingly permit a client to do so. In this greater regard recognition is now given to the many cases in which mere silence constitutes misleading conduct.
- There is a duty to prepare the case properly and to know the relevant law.
- A duty to refuse to permit the commencement or continuance of baseless proceedings or proceedings brought for ulterior purpose, such as malice, or to exploit the advantage of Court delay.
- There is a duty to exercise care by testing any instruction, before making any allegations of misconduct against anyone.
- There is a duty not to assist improper conduct, whether illegal or dishonest or otherwise improper.

All these duties will override the perceived interests of the client. There is another significant duty that may coincide with the interest of the client. Contemporary pressures on the administration of justice require the recognition of a professional duty owed to the Court, as well as to the profession, to conduct cases efficiently and expeditiously. Pursuant to this duty, practitioners must identify the earliest possible stage the real issues in dispute.

Practitioners have a duty to ensure that legal costs and Court time are not unnecessarily spent. It is no longer permissible, if it ever was permissible, for a lawyer to take every point, and this also applies in criminal trials. It may now be appropriate for the Court and the profession to review the means of enforcement of the duty to conduct cases efficiently and expeditiously. We simply must recognise the inability to make concessions is often a cloak for incompetence. So is prolixity."

In your dealings with all that you encounter in the jurisdiction, pay heed to the advice of James Glissan in his book "Cross Examination Practice and Procedure" published in 1985:

> "The rules of etiquette are few in number and indeed they can commonly be brought down to one simple statement: always be courteous. I would venture to say there is no rule of Court etiquette which would not immediately be apparent to a lay man with neither the training nor experience with the law who applied common sense and good manners to the problem at hand.
>
> It matters not that the Judge is being rude or boorish, that your opponent displays a complete lack of manners and commonsense, that your witnesses are intractable and fractious – none of these things, irritating though they may be, lessens one with the duty that you owe to the Court to maintain cool, calm courtesy – courtesy to the Judge; to other Counsel; to the witnesses; to the Court staff. The rules of etiquette are not merely old fashioned rules of behaviour out of step with modern reality which old fogies insist on to assert their superiority – far from it, they are in fact a system of rules which experienced Counsel rely on and frequently use to get themselves out of trouble."

Maintain a calm and courteous manner at all times (even in the face of abusive and unreasonable behaviour from a litigant (or sadly, their legal representatives) will always stand you in better stead than engaging in the conflict.

Being courteous though does not mean that you have to bow to the wishes and demands of a fractious Judge, a difficult opponent or another litigant. It means that you should steadfastly and forcefully represent the interests of your client in a way that maintains the highest standards of the Profession.

There are simple rules of etiquette and behaviour in a Court that bear repeating and reminding:

- stay behind the Bar table and stand when you address the Court;
- remain seated while the other side are addressing;
- remain still and do not wander about gesticulating and demonstrating;
- do not approach a witness in the witness box;
- do not leave the Judge in an empty Court;
- show courtesy to the other Counsel – do not interrupt, do not object unnecessarily;

- do not make *sotto voce* remarks at the Bar table while your opponent is on his/her feet – pay him/her the courtesy you would wish him to accord you;
- be careful in your submissions. Do not misstate the evidence.

Do not communicate with a Federal Magistrate without your opponent being present or without obtaining the consent of your opponent and only then, within the terms of the consent. It is not appropriate (and in my view, highly improper) for lawyers for parties to communicate with a Federal Magistrate in writing without the consent or knowledge of the other party.

Remind yourself often that your client needs neither your sympathy nor your friendship – they need your scrupulous objective analysis and advice about their prospects.

Decisions will be taken with your guidance and advice about what is to most people the most important things in their lives – their children and their property. Ultimately, your duty to your client is to assist them achieve the best possible outcome in their circumstances in the most cost efficient way. That does not necessarily mean attempting to achieve the outcome having regard to a consideration of all relevant factors and the law including the monetary, emotional and psychological costs of litigated outcomes.

Obligations of the practitioner

As a practitioner representing a party in a Family law dispute, you have a continuing obligation to:

- Advise the client about dispute resolution processes available to the client outside of the Court system.
- Focus the attention of the client to an agreed outcome at an early stage.
- Ensure that you are in a position to advise and assist the client in achieving an outcome. If you are uncertain about an outcome, then it may be in your client's interests to obtain Counsel's opinion at an early stage in the proceedings to assist you with advising the client about outcomes. The Rules provide various sanctions to parties who do not participate in meaningful settlement negotiations and

ultimately costs orders can be made against the client for breaching these obligations.

- To ensure, as you are best able, that the client meets their obligation to provide full and complete disclosure.

Obligations of the client.

Any party to a Family law proceedings has a duty to make a full and frank disclosure. The duty is continuing and immutable.

In financial proceedings, the duty includes disclosure of all of their property and financial resources: see *In Marriage of Black* (1982) 106 FLR 154; 15 Fam LR 343; [1992] FLC 92-287.

A failure to make full and frank disclosure can result in property orders being set aside and there are other consequences, including costs orders if the other party is put to the expense of establishing the existence of the property that has not been disclosed.

It is extremely important, therefore, that at the first interview the client be informed of this duty.

The client is also obliged to participate, save in some exceptional circumstances, in meaningful settlement negotiations.

The Rules are designed to assist the parties to resolve their property dispute in a just and timely manner. To that end, the Rules have focused on assisting the parties in the proceedings to have ongoing and meaningful settlement negotiations.

The Family Law Rules provide a mandated pre-action procedure that requires the parties, save for some specific exceptions, to embark on a course of negotiation or some primary dispute resolution programme prior to the institution of proceedings; Sch 1 of the Rules. Indeed a failure to do so may result in some penalty by way of costs orders if a party refuses or fails to participate in settlement negotiations without good reason. The Federal

Magistrates Court Rules do not have similar provisions but it is expected that parties will engage in pre-action negotiations in a meaningful way.

Throughout the Court process there are a number of steps in the resolution process that are designed to assist the parties to achieve an agreed outcome.

Hence, the parties and the practitioners acting for the parties have an obligation to not only participate in settlement negotiations, but also to use their best endeavours to try to achieve an agreed outcome at each stage of the proceedings.

Litigation should always be the last resort.

John Coker
17 May 2011

PRECEDENT ORDERS

EXTERNAL COUNSELLING

1. Pursuant to section 13C(1)(a) of the *Family Law Act* 1975 the parties attend family counselling and that:

    (a) The family counselling occur at an organisation as nominated by the Dispute Resolution Coordinator of the Federal Magistrates Court of Australia; and

    (b) The parties attend at the organisation at such time as requested by the organisation.

2. Thereafter and pursuant to section 13C(1)(a) of the *Family Law Act* 1975 the parties attend family dispute resolution to attempt to resolve their disputes with each other relating to the care of the Child/Children xx born and that:

    (a) The family dispute resolution occur at an organisation as nominated by the Dispute Resolution Coordinator of the Federal Magistrates Court of Australia; and

    (b) The parties attend at the organisation at such time as requested by the organisation.

PRIVATE MEDIATION

1. The parties are directed to attend, participate in and act reasonably and genuinely in mediation in respect of issues regarding property adjustment and for that reason the Court has excused their attendance at a conciliation conference pursuant to section 79(9) of the *Family Law Act* 1975.

2. Any mediation shall be completed no later than (Date or Set month period).

3. The mediator shall be agreed between the parties. The parties shall notify the Associate to Federal Magistrates Jarrett of the identity of the agreed mediator within fourteen (14) days of the date of these Orders. If no such notification is received the mediator shall be appointed by the Court in Chambers and notified to the parties.

4. Each party provide to the mediator copies of all documents filed by each party no less than seven (7) days prior to the mediation.

5. The parties shall contribute equally to the fees of the mediator in the first instance but that the ultimate incidence of those fees be reserved to trial.

6. The parties shall agree with the mediator the fees for the mediation and the terms of payment thereof.

7. At least twenty eight (28) days prior to the mediation both parties must comply with the provisions set out in Part VIIIB of the *Family Law Act* 1975 and the *Family Law (Superannuation)Regulations*, in particular:

    (a) File and serve a Superannuation Information Form (SIF);

    (b) Specify any orders sought in relation to any superannuation interest;

    (c) Afford procedural fairness to any superannuation fund trustee (by serving the relevant application/response).

8. Each party shall provide to the other a copy of the following documents no less than twenty one (21) days prior to the mediation:

   (a) The documents detailed in Attachment A hereto.

   (b) The documents upon which they intend to rely in the proceedings;

   (c) Documents in their possession (subject to a claim of privilege) adverse to their claim in these proceedings.

9. The applicant prepare and provide a schedule to the mediator and a copy thereof to the respondent no less than seven (7) days prior to the mediation that:

   (a) Identifies the agreed property and superannuation interests of the parties;

   (b) Identifies the alleged property that is not agreed including any alleged "add backs;"

   (c) Identifies the liabilities that are agreed should be taken into account and those that are not agreed;

   (d) Identifies the valuations that are agreed and those that are not agreed.

10. The matter be adjourned to 2011 at 9.30 a.m. for mention/directions in the Federal Magistrates Court of Australia sitting at Townsville.

ANNEXURE A

Documents to be produced prior to Conciliation Conference:

- List of all bank accounts, details of account numbers, passbooks and bank statements for the previous 12 months.
- Details of credit union/building society or other like deposit passbooks and statements for the previous 12 months.
- Details and records of any investments including stocks and shares.
- Income Tax Returns and assessments for the previous 3 financial years.
- Social security pension or payment details.
- Details/records of long service leave accrued.
- Details/records of overtime worked in the previous 12 months.
- Superannuation documentation including a completed “Superannuation: Information required for family law matters” form or a form which substantially complies with that form.
- Valuation of real estate.
- Valuation of chattels including car(s).
- Records/details of any life assurance or disability insurance.
- Details/records of any of the above Children.
- School reports.
- Medical or psychiatric reports.
- Medical certificates.