GETTING A BETTER OUTCOME FROM YOUR ADVOCACY IN FAMILY CASES IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA

By

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PURPOSE

1. This paper is for junior to intermediate barristers practising in the family jurisdiction of the Federal Circuit Court of Australia ("FCCA").

2. It is not intended as a single treatise on top-quality advocacy in the FCCA. Instead, it has been prepared in the hope that from its comprehension and use, the quality of performances of barristers practising in the FCCA in the family jurisdiction will improve (something to the obvious benefit of the court) and in the process the barrister is more likely therefore to get a better outcome in his or her case (something to the obvious benefit of the barrister as well as to his or her client).

3. Barristers who believe that old dogs can in fact be taught new tricks may find this paper useful, even if only as a refresher or as an injection of new thought to a long practised style of court craft.

4. Your reputation as an officer of the court and as an advocate transcends the wishes or instructions of your clients. Clients will come and they will go but your reputation, good and bad, will endure. Make sure your reputation is always favourable. If that means you need to persuade a client out of adopting a ridiculous approach in a case, then so be it.

THE THREE "P"s – PREPARATION, PREPARATION, PREPARATION

5. Barristers practising in every single court across the Commonwealth of Australia will know that a successful outcome in court can only be achieved if you, as the barrister, have a complete mastery of –

   a) the facts of the case;

   b) matters favourable and unfavourable to your client;

   c) all relevant legal principles, favourable and unfavourable to your client; and

   d) all evidentiary issues likely to arise and the likely way those evidentiary issues will be dealt with by the court.

6. That mastery can only be achieved by the three 'P's – preparation (cubed). In the family jurisdiction, clients are often reluctant to earmark large amounts of fees for counsel for preparation. But funded or not, detailed preparation is utterly critical.

7. About your client, you must have precise information in relation to –

   a) names, date of birth, age, cultural or religious issues;

   b) date of commencement of relationship, date of marriage (if relevant), date of final separation and date of divorce (if relevant).

8. About the children, you must have precise information in relation to –

   a) ages, dates of birth, names and gender of each;

   b) with whom each child presently lives;

   c) school being attended;

   d) the involvement of one or more parents and the frequency of their involvement in the lives of the children;

   e) the involvement of any grandparents, aunts, uncles or extended family members in the lives of the children; and

   f) special behavioural issues, medical conditions, health or other lasting circumstances likely to have a bearing on s.60CC issues.

9. About your opponent's client, you must have a working knowledge of –

   a) why the couple separated;

   b) the attitude of each towards parenting; and

   c) whether each has formed a new relationship such that effective parenting is now problematic.

10. For financial issues, you must have detailed information about –

   a) the assets that make up the pool (real property, personal property, choses-in-action and entitlements under trusts);

b) the gross and nett value of each item of property that makes up the pool, preferably valued professionally or supported by bank information such as bank statements or certificates of currency, insurance valuations, payout figures from lenders etc;

c) proof of registration of ownership such as a certificate of title in relation to real estate, PPSI registration, bill of exchange etc;

d) any relevant trust and how it arises;

e) trust deeds if applicable;

f) tax returns;

g) company returns; and

h) audited balance sheets or accounts (if available).

11. Except for the purposes of a full trial on property issues, clients may attempt to delay the trouble, costs and inconvenience of sourcing and producing those formal proofs. Clients may demand that proofs of lesser probative value be used, in the process saving that client the trouble, cost and inconvenience of searching for and formally adducing better evidence.

12. They do that at their peril.

13. If proofs are deficient, the client may not overcome the evidentiary threshold. In property matters, the sufficiency of the evidentiary proof goes to the threshold issue, not merely to the weight to be accorded to the evidence. If the relevant issue is not proved, the party bearing the evidentiary burden is at risk of failure on that issue.

KNOW WHAT RESULT YOUR CLIENT WANTS TO ACHIEVE

14. Every barrister needs to know (and often fails to appreciate) that judges want instant, responsive answers to fundamental questions concerning the case. Among the more basic are these –

a) “what’s this application about?”;

b) “how long will this application take?”;

c) “how many witnesses are you actually calling?”;

d) “what is the value of the pool?”;

e) “what is your attitude towards a private mediation being ordered?”;

f) “what are the issues which I as the judge must determine in this litigation”?

15. Discursive or long-winded, unresponsive, poorly articulated, poorly structured answers to any of those questions from the judge will lead to the judge’s exasperation, the likely conclusion formed being that the barrister does not know his or her brief adequately. Worse, the judge may form an adverse view about the barrister’s ability or that the case is without merit.

16. That is a very bad way to start your client’s case.

17. Knowing your client’s objectives is one thing. Knowing the likelihood of the judge making orders that correspond with your client’s objectives is something else. Ideally, the two should coincide. They do not always.

18. Judges expect counsel to press as forcefully as good professional conduct and responsible advocacy permits when a barrister is advancing his or her client’s case. The fact that a particular judge may have a well-known attitude towards a particular application ought not deter the barrister from pressing such an application. It is not bad advocacy to run such a point. However, before running such a point the barrister should know how far the judge will go when entertaining the particular application.

PREPARING A MINUTE OF ORDERS

19. Little concentrates the mind more acutely than formulating, word perfectly, the orders that you seek. You should always prepare a minute of proposed orders before coming to court, irrespective of whether the application is interim or final, by consent or contested.

20. Know precisely what you want and how to get it.

21. If you can negotiate at court thereby converting certain paragraphs of the minutes into consent orders, so much the better.

22. If the application is contested, it is utterly critical that you give an accurate estimate of duration for the hearing of the contested application, especially trials.

23. If the application involves *viva voce* evidence from witnesses know –

a) each important proposition for which each witness is being called;

b) how long the evidence of each witness will take; and

c) what are the areas of likely cross-examination of each witness.

LIST OF ISSUES TO BE DECIDED

24. This point only relates to disputed issues on which the judge must rule.

25. Tell the judge about the issues that are agreed. It assists if an agreed statement of facts can be signed. It helps enormously to prepare a bundle (better still, a folder) of agreed documents that can be admitted into evidence by consent.

26. Hone the list of issues stating in précis form the respective attitudes of the parties. This might provide a guide -

Issue – parenting

Father – equal shared

Mother – sole

Witnesses – family consultant, recommendation: equal shared.

Next issue – property

Father – 50/50

Mother - 70/30 in her favour.

INJUNCTIONS

27. Orders seeking to restrain one party to the marriage from doing something (example, transferring sums out of a joint account) are regularly sought yet those restraints rarely enliven principles of equity

or of practice and procedure requiring the giving of an undertaking as to damages as the price of the injunction.

28. Conversely, if a party seeks orders in the nature of an injunction restraining a stranger to the litigation from doing some act (or even if a mandatory injunction is sought) then the applicant should be required to provide an undertaking as to damages.

29. The usual form is as follows –

a) [Name of person] hereby gives an undertaking to -

i) submit to such order (if any) as the Court may consider to be just for the payment of compensation, (to be assessed by the Court or as it may direct), to any person, (whether or not that person is a party), affected by the operation of the order or undertaking or any continuation (with or without variation) of the order or undertaking; and

ii) pay the compensation referred to in (a) to the person affected by the operation of the order or undertaking.

CHRONOLOGIES

30. A stand-alone document covering key events is always useful to the judge in an application in a case as much as at trial. Care is required to confine the entries on it to key events only. It ceases to be a useful document if it is dense, containing not only relevant information and dates but everything else.

WRITTEN SUBMISSIONS

31. Most judges read court files outside of court hours. It is always helpful for a judge to have a very brief outline of the attitude of a party to the particular application in the form of written submissions. Those can be as little as a single page. An applicant's submissions should address –

a) the orders being sought;

b) the evidence on which the applicant relies;

c) the specific sections of relevant legislation; and

d) key authorities directly on point.

32. For a respondent, the submissions should address –

a) a brief, pithy single key proposition why the court should refuse the relief sought by the applicant;

b) orders sought in lieu of the orders sought by the applicant;

c) if more relevant sections of legislation bear upon the point to hand, then those other sections; and

d) better authorities than those upon which the applicant relies.

AUTHORITIES

33. Be strict in relying only on authorities that provide a doctrinal point of principle, derived from an intermediate or ultimate appellate court, wherever possible. The High Court of Australia or an intermediate appellate court is obviously most desirable. Single judge decisions are useful only if they state a point not addressed by the High Court of Australia or the Full Court of the Family Court of Australia. Decisions of single judges of the FCCA are not binding on other single judges of the FCCA so they carry no precedent value according to concepts of *stare decisis*. Only use authorities that bind the judge. Authorities that the judge may find persuasive are of lesser value and invariably invite comment about the discretionary nature of the decision.

34. Ensure that you have a hard copy of the authorities on which you seek to rely ready to hand to the judge.

DUTY LIST ADVOCACY

35. Excellence in advocacy calls for flexibility of approach, especially in the duty list.

36. Whatever may be the advocate's style on an interim application, or at trial, for many reasons a very different style of advocacy is called for in a duty list.

37. A duty list is invariably overburdened by cases, parties and legal representatives, usually crammed into a court where the ventilation is

poor and the acoustics are challenging to all. The judge simply does not have time to devote the same care and attention to each case as the judge would do with only one case before that judge. The advocate must therefore modify his or her technique by shedding all verbiage except the absolute essential.

38. The judge wants to know, in the briefest of terms –

a) what the impasse between the parties is on the application because absent impasse, a consent position should be the rule of thumb;

b) how long the debate will take that day;

c) why the impasse cannot be resolved by consent;

d) whether all affidavit material in support of and in opposition to the application has been filed; and

e) whether circumstances of urgency exist calling for an immediate hearing of the interim application.

39. First return hearings should be addressed by consent making provision for interlocutory steps to the stage of providing a family report in parenting cases or to the stage of a conciliation conference or private mediation in the case of property cases.

40. In all cases, but especially in parenting cases, counsel must be practical, recognising that the judge is unlikely to look favourably upon a party who is behaving in an implacable, obdurate manner. Counsel should not expect the court to devote much hearing time in any skirmishes about the small-detail mechanics of change overs, overnight stays, weekend time with one parent etc. Those details must be negotiated prior to the case being called on for hearing. Counsel should tell their clients that the duty list is not the venue for the ventilation of those small details and that the judge is unlikely to indulge litigants by permitting those litigants to expend large chunks of valuable court time debating those tiny details, irrespective of how seemingly important those tiny details apparently are to one litigant or the other.

41. Client expectations must be carefully managed in the duty list.

42. Quite properly, urgent cases should be dealt with in the duty list. Injunctions to restrain international travelling, for example, are typical duty list cases as is an injunction application to restrain the depletion of assets.

43. It is commonly misunderstood that a duty list hearing is a rebadged interim application. The two are very different. They should not be confused.

44. In the duty list, counsel must, in a single sentence, tell the judge the nature of the case, what the impasse is and why it is necessary to require the judge to determine some particular point that day. Counsel must have a single sentence, fully responsive answers to the judge's questioning. As with all advocacy, long-winded and unresponsive answers to the judge's questions will irritate the judge and may lead to the case being stood over until some later duty list, possibly months away.

45. If the judge permits you to embark on some form of contested debate, keep the debate very narrow. Well understood taglines will assist such as –

a) "the mother has refused the father any time with the children for the last 12 months";

b) "the only remaining issue is the identity of the person who will supervise the time the mother spends with the child. My client says it should be the maternal grandfather";

c) "an airport watch list is sought. On the material, the risk of flight is extreme and the place of the mother's travel destination is not a Hague Convention country".

46. Always keep a typed minute of the proposed order to hand up.

SECTION 11F MEMORANDA

47. In a duty list, after the family consultant confers with family members, the family consultant usually gives *viva voce* evidence from the witness box expressing his or her preliminary recommendations. After addressing questions from the bench, counsel is usually permitted

to ask a few open questions to the family consultant in a non-tendentious manner designed to elicit information not already given on a point that the judge or a party will find useful. Under no circumstances should counsel cross-examine the family consultant or even put questions in a hostile or aggressive manner.

48. Counsel are ordinarily expected (dare we say required) to formulate minutes that give effect to the recommendations of the family consultant. Occasionally, the judge may be requested to provide some form of interpretation of the observations of the family consultant. When that occurs, counsel should accept that interpretation and formulate minutes accordingly.

LOCATION ORDERS

49. A location order is sought when a party is unable to ascertain the whereabouts of another party and the child or children. The best interests of the child are the paramount consideration for the court when deciding whether to make such an order. Usually, a location order takes the form of a Commonwealth Information Order directed to a government department or instrumentality such as Centrelink or DHHS for the provision of information about the child's location.

50. The judge cannot make a Commonwealth Information Order unless a copy of the application has been served in accordance with the relevant rules (for example, at least 7 days prior in the case of a prescribed department) or there are special circumstances warranting the truncation of time for service. You should ensure that you have evidence of service when making such an application otherwise you risk having your application adjourned. In the case of a location order sought against an individual, for example a relation of the missing party, service does not need to be effected prior to the application being made in court lest the person alert the missing party.

51. In order to satisfy the Court that a location order should be made, you must convince the Court that the individual or department against whom the order is sought is believed to hold the relevant information and why the making of such an order is in the best interest of the child.

RECOVERY ORDERS

52. This application may be made without notice to the other party. In the event that there are no current parenting orders in place, an application for recovery is sought together with parenting orders. The affidavit in support should provide details about the relationship between the parties, the child, how and when the child was taken or not returned, details of the last known whereabouts of the child, any steps taken to recover the child and why it is in the best interests of the child to be returned as well as any welfare concerns for the child if the recovery order is not made. As with a location order, the best interests of the child are the paramount consideration for the court.

53. The issuing of a recovery order is a serious matter and often a traumatic experience for the child. In the event the other party appears in court at the hearing, you may wish to reconsider whether a formal recovery order needs to be made. Preferably the matter should be resolved between the parties or by the making of an order delivering the child to the court or to another location on a particular date and by a particular time. Such a course is always to be preferred to the issuing of a formal recovery order. You may also consider asking for a self-executing order to be made in Chambers for the issue of a recovery order in default of compliance in the absence of a formal recovery order made on the day of the hearing.

AIRPORT WATCH LIST ORDERS

54. You must prove both risk and means in order to satisfy the Court that it is appropriate to make an order placing a child on the Airport Watch List (AWL). For example, the Court is unlikely to entertain an application to place a child on the AWL if the child does not have a passport and therefore has no means of leaving the Commonwealth of Australia. You should also know whether or not the country to which you are alleging the child will be taken is a party to the Hague Convention. This will not be determinative but may assist your application if the country is not a signatory to the Convention.

55. An order placing a child on the AWL is always an order of the Court. The judge must be satisfied it is appropriate to make the order after hearing submissions from the parties, even if both parties consent to

the child being placed on the AWL. An order agreed to by the parties and included in a Minute of Consent Orders must be brought to the attention of the judge. If it is not, the judge may refuse to make the order when it is later discovered in the Minute.

56. The Court is unlikely to make an order that lasts for an indefinite duration. The order is usually made for two years unless you can convince the judge that special circumstances apply.

57. It is also important that the information relating to the child's name and date of birth is correct. Double check spelling and dates with your client before the making of the order. If the information is incorrect, the child may still be removed even though an order has formally been made.

PROPERTY MATTERS

58. Strict proof must be given in property matters, unlike in parenting matters that relax some of the usual adversarial formalities by reason of the operation of s.69ZT.

59. Do not mistake admissibility with weight. A particular matter can only become evidence in the case if the particular fact, document or thing becomes evidence upon admission into evidence. Unless the fact document or thing is admissible, weight is irrelevant.

60. Unless with the agreement of your opponent, documents and facts in issue should be formally and properly proved. Normally –

    a) the maker of the document or statement proves that he or she created a document or said the relevant words;

    b) business records involve a consideration of the provisions of the Commonwealth *Evidence Act*;

    c) before the fact, document or thing is admissible, if hearsay, compliance with different provisions of the Commonwealth *Evidence Act* are involved.

61. It is always good advocacy to proceed on the basis that the best evidence rule applies.

62. Conversely, it is poor advocacy to attempt to tender a document (say, an invoice) created by a person not being the witness through whom the tender is sought. The witness may not even recognise the document. At best, the witness may be able to say he or she received the invoice but can otherwise say nothing about its contents. That document will probably not be admitted into evidence. If the document somehow becomes part of the evidence in the case, its probative value will be near zero.

63. Evidence of ownership of real estate is best given by producing a certified copy of the relevant certificate of title. That will show the date of registration of the interest claimed, the nature of the interest claimed, and if relevant, the proportion of interest claimed.

64. Where a litigant asserts a beneficial interest pursuant to a trust, and the trust is express, the most recent version of the trust instrument should be tendered along with all amendments to it.

65. Evidence of the application of funds needs careful attention. Matters that must be covered include –

    a) the source of funds from named, identified and numbered accounts, especially whether that account is in joint names and therefore the funds in it are taken to be jointly owned funds; and

    b) how the funds were applied, especially the date and amount involved, usually evidenced by a bank statement about which the witness can give direct evidence.

66. It is poor advocacy for a witness to be shown a bundle of invoices from an array of service providers and for the witness to be asked whether those invoices are correct.

67. Where parties reach agreement that one party is to retain occupation in or sole ownership of the former matrimonial home, *viva voce* evidence should be led addressing the date of that conversation, the participants in it and, as near as word perfectly, who said what to whom.

68. In property matters the strict application of rules of evidence is legitimate. Opposing counsel are entitled to put their opponents to strict proofs.

SPOUSAL MAINTENANCE APPLICATIONS

69. Capacity and need must be addressed.

70. A judge will be less inclined to make such an order if the expenses sought are wasteful, indulgent, wholly discretionary and reflective of a lavish lifestyle. Good advocacy, undertaken in private conference with counsel's client, will ensure that only justifiable, necessary expenses are sought from the respondent and that the respondent has the capacity to pay for those expenses.

71. Except in cases where you seek urgent spousal maintenance, ensure that your financial statements are not deficient. If they are, the judge will be unable to assess your client's need or the other party's capacity to pay and your application may fail.

THE IMPACT OF s.69ZT OF THE FAMILY LAW ACT

72. In parenting matters, the strict application of rules of evidence are usually relaxed. Of course, the trial judge is permitted to apply the strict rules of evidence in circumstances mentioned in the section. It must be remembered that s.69ZT says nothing about other principles of the law of evidence such as rules relating to the drawing of adverse inferences, for example. Counsel must be prepared to debate broader evidentiary principles, even if the case also involves a parenting matter.

INTERNATIONAL RELOCATION ORDERS

73. Applications for international relocation orders are becoming more common and a considerable body of learning applies to those applications. Counsel must be familiar with the legislation and the case law. A minute of proposed orders should not over-reach the bounds to which the authorities will permit an applicant to go.

EFFICIENT USE OF COURT TIME

74. Managing court time is essential. The time allocated for a hearing or trial can be rapidly and purposelessly consumed by debates that were better held behind the scenes between counsel, such as the time exhausted in arguing over line-by-line objections to affidavits. Counsel

should debate those privately and only bring to the attention of the judge those that cannot be agreed.

KEEPING THE JUDGE IN THE LOOP

75. Always provide the judge with a copy of whatever the witness is being shown. If you do not, the judge will not follow the question and answer with the result that the impact of any worthwhile evidence may be lost.

DON'T BE A PARROT

76. Knowing when and how forcefully to press a point is a real skill in any court in any matter. But counsel should never permit himself or herself to become a mere parrot for a client, mimicking no more than the client's ill-considered wishes. At all times counsel should only advance a point that has a statutory basis, an evidentiary foundation and some prospects of success. To that end, judges – just like most human beings – are quick to spot when they are being had. If you have made your submission and debated the point only to find that the submission has not found favour with the bench, by all means approach the matter in a different way if you consider you have a better chance of success by doing that. But it is unwise to merely advocate a ridiculous or unsupportable point merely because your client tells you those are his or her wishes. Judges are quick to pick up on the fact that an unsupportable point is being urged when counsel uses the expression "I am instructed to ask your Honour for orders as follows".

77. On a related point, sometimes counsel becomes locked in a debate with the judge over issues that are truly trivial in the overall. It is one thing to be fiercely independent in your advocacy but it is an altogether different thing to adopt an attitude of obdurate pigheadedness. The former may get a good result but the latter definitely will not.

78. To that end, some little effort is often required, when counsel is not on his or her feet, managing client expectations. If the client's instructions are unrealistic (possibly even because that particular judge's attitude to some particular issue is well known), tell the client before you announce your appearance.

DEALING WITH EXPERTS

79. Cross-examining experts is its own field of study. Time does not allow a detailed examination of it except to make the following brief general observations –

a) cross-examination of an expert must never appear as if you are learning about the expert's field of expertise for the first time when that expert is responding to your cross examination;

b) judges are normally unimpressed with head-to-head bickering between counsel and an expert;

c) invariably, in his or her field the expert is more adept than is counsel so it is unwise for counsel to engage in a debate about the precise specifics of the expert's field of expertise unless counsel has an equal or superior command of that expertise as well;

d) it is better to challenge assumptions on which the expert opinion is based, or to challenge the information provided to the expert or to assert the likelihood that if other, different facts and assumptions were made then the expert's opinion would or might change in accordance with those different facts and assumptions.

80. A judge asks questions because a particular matter is of interest or relevance to the judge. It is essential for counsel to squarely address the judge's point immediately the judge asks about it and preferably with a yes or no answer. If asked for it, the reasons for the yes/no answer can be later given. Little infuriates the judge more than a non-responsive, turgid, rambling response to a simple question. A short pithy response must be given.

ETHICAL PROPRIETY AT ALL TIMES

81. It goes without saying that counsel are bound by exacting ethical rules. Those rules require counsel to behave with utmost ethical propriety to the court, to one another and to their clients. No matter how stressful the case may be, nor how implacable may be the client, or the witness or opposite counsel, the advocate must always exhibit utmost ethical propriety. It is no excuse for the advocate to say he or she is too junior to know the rules on point or for counsel to say that by reason of the

fact that the advocate does not habitually appear in court, he or she is relieved of the obligation to behave with utmost propriety. A lesser standard will never do.

READ THE BENCH

82. Each judge has their own personal bugbears with respect to the advocacy style of practitioners who appear before that judge. Given this and the fact that you may not know what these bugbears are, it will always serve you well to read the bench or "sniff the breeze". The following are examples of things that are bound to raise the ire of the judge you appear before –

a) undue familiarity with the bench – do not greet the judge with 'good morning your Honour';

b) talking over the judge;

c) not handing a document to the judge;

d) stating "we submit" – unless you are being led by senior counsel, the correct phrase is "I submit";

e) not answering a question directly and succinctly;

f) failing to state your application succinctly;

g) inaccurate estimates of time;

h) inaccurate paraphrasing of cases or legislation;

i) undue obsequious behaviour;

j) sledging;

k) denigrating fellow counsel;

l) unless you are part-heard, telling the judge you will need to check your diary to see if you are available for the date your matter has just been allocated;

m) not being punctual; and

n) relying on authority that does not bind the judge.

A PARTING WORD

83. We hope the foregoing will assist in achieving better outcomes in your advocacy in family matter in the FCCA.

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