Legal principles relating to and Running Family Law Appeals

by Richard Maurice Barrister B.Ec LL.B NMAS Accredited Mediator

There are two preliminary points to make about a Family Law Appeal.

Firstly, an appeal against a discretionary decision lies from an order (decree) of the Court, not from findings.

Secondly, the words of Kitto J. in *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627, are apposite namely:-

> *"... the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that the decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong."*

When considering the prospects of any appeal those two factors, namely that an appeal is against orders, not findings and that there is a strong presumption in favour of the correctness of the decision appealed, must be kept in mind at all times.

Summary of the grounds for an Appeal

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles which are set out in *House v The King* (1936) 55 CLR 499 at 504.

These principles have been referred to in many well known authorities, including *Mallet v Mallet* (1984) 156 CLR 605 at 614 and 621, *Edwards v Noble* (1971) 125 CLR 296, *Lovell v Lovell* (1950) 81 CLR 513 at 519, , *De Winter and De Winter* (1979) FLC 90-605, *Gronow v Gronow* (1979) 144 CLR 513 and Norbis v Norbis (1986) 161 CLR 513 at 518 and Rodgers and Rodgers (2016) FLC ¶93-712.

Other grounds of appeal commonly relied upon relate to the denial of natural justice and procedural unfairness and the inadequacy of reasons and bias.

As to the applicable principles in relation to procedural unfairness involving litigants in person, see *Re F: Litigants in Person Guidelines* (2001) FLC 93-072.
As to the principles with regard to the inadequacy of reasons, see *Bennett and Bennett* (1991) FLC 92-191 and *Merriman and Merriman* (1993) FLC 92-422 and the

cases referred to therein. As to the applicable principles in relation to bias, see *Kennedy and Cahill* (1995) FLC 92-605 and the cases therein referred to.

Errors of fact

To succeed when complaining about errors in findings of fact the Appellant must establish that the trial judge's finding of facts was both very important to the overall result and clearly were wrong, not simply that another judge looking at the same facts might have come to a different conclusion.

It does not matter that a different judge or even the appeal judges might have conclude differently if the finding was open to the trial judge on the evidence then before the Court.

The next step is to decide if the error was so fundamental that it made the judge's whole decision on a point of appeal completely invalid. However where a judge exercises such a discretion as given in a Family Law property or parenting case, there is a lot a latitude offered to him and a wide range of possible results may be accepted by an Appeal court.

Principally there would be three areas of complaint against a decision under the Family Law Act at first instance:

1. Overlooking relevant matters which are vital to the decision;

2. Making a particular finding which was obviously inconsistent with the evidence (therefore said to be "not open" to the Court); and/or;

3. Giving undue or too little weight in deciding the inference to be drawn.

There are many examples of this in cases like: Edwards v. Noble (1970) 125 CLR 296; approved in the following Full Family Court decisions: Raby (1976) FLC 90-104; Barker (1976) FLC 90-068; Dyer (1979) FLC 90-614; Graham (1979) FLC 90-618 and Williams (1988) 91-980;

Point (3) above refers to subtle and subjective opinions and generally is very hard to establish. For example it includes a judge's assessment of the truthfulness or demeanour of a witness.

Credibility

The issue of a judge's findings about the credibility of witnesses was discussed by the Full Court in C and D (1998) FLC ¶ 92-815 . In that case the Fogarty J. commented that the trial Judge's orders in that case should not be disturbed given his advantage in the course of the lengthy trial in assessing the character and credibility of the parties. The advantage available to a judge sitting at first instance has been discussed in many authorities. The end result is that appeal courts recognise the unique advantage a judge has at first instance because he is in a position to see and hear the witnesses.

For instance in NK and LR (1997) FLC ¶ 92-745 Barblett DCJ, Baker and Coleman JJ held that:

> "A finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge has palpably misused his or her advantage. No appellable error has been demonstrated in the manner in which her Honour approached these issues. Devries v Australian National Railways Commission (1992-1993) 177 CLR 472."

Failure to give adequate reasons

The failure of a judge to give reasons for a conclusion which makes it impossible for an appellate court to determine whether or not the conclusion was based on an error of law itself constitutes an error of law (*Brazel and Brazel* (1984) FLC ¶91-568; *Maday and Maday* (1985) FLC ¶91-636).

In *Pettitt* v *Dunkley* (1971) NSWLR 376 the New South Wales Court of Appeal held that the failure of a trial judge to give reasons for his decision constituted an error of law as such failure made it impossible for an appellate court to determine whether or not the verdict was based on an error of law and so to give effect to the statutory right of appeal. This decision was the subject of extensive comment and explanation in *Housing Commission of NSW* v *Tatmar Pastoral Co Pty Ltd and Penrith Pastoral Co Ltd* (1983) 3 NSWLR 378, a decision which was extensively quoted with approval by the Full Court of the Family Court in *Christie and Christie* (unreported, 10 March 1988; Simpson, Joske and Yuill JJ) (also approved in *Power and Power* (1988) FLC ¶91-911).

In *Bennett and Bennett* (1991) FLC ¶92-191, the Full Court held that, in the absence of adequate reasons, the Full Court is not obliged to uphold a judgment merely because the result may be said to fall within the wide ambit of the judge's discretion. In general, the appellate court should be able to discern either expressly or by implication the path by which the result has been reached. However, reasons need not be extensive. The Full Court held that their adequacy must frequently be judged by reference to the issue raised by the parties at trial. *Bennett's* case was cited with approval in *Peters (aka Eustace)* v *Castuera* (1994) FLC ¶92-500, *Townsend and Townsend* (1995) FLC ¶92-569, *Whitely and Whitely* (1996) FLC ¶92-684 and *A* v *J* (1995) FLC ¶92-619.

In *Douglas* and *Douglas* (2006) FLC ¶93-300, Warnick J agreed with counsel for the husband that, "the functions of reasons are to provide a discernable path to the result and to demonstrate that justice has been done". In that case, the importation by Carmody J of passages from his judgment in another case "militated against his Honour's reasons performing the second function".

Further, Warnick J found, "the 'inadequacy' gains particular significance in view of the presence within his Honour's reasons of a number of principles or propositions extraneous to the proper

application of s 79".

Other examples of cases where the Full Court has had to consider the adequacy of the reasons of a trial judge are:

• *Brazel and Brazel* (1984) FLC ¶91-568 (the trial judge did not specify how the amount of lump sum maintenance was arrived at)

• *Maday and Maday* (1985) FLC ¶91-636 (the trial judge did not give adequate reasons for conclusions as to various competing factors arising in custody proceedings)

• *McLean and McLean* (1991) FLC ¶92-196 (the trial judge failed to address the significant issues which were raised, particularly the serious maltreatment of the children by the wife, in his decision to dismiss the husband's application for custody)

• *Towns and Towns* (1991) FLC ¶92-199 (it was impossible for the Full Court to determine why the trial judge had decided to change the custody status quo)

• *Horsley and Horsley* (1991) FLC ¶92-205 (the Full Court was unable to ascertain the reasoning upon which the trial judge's decision, that the wife should receive 42% of the parties' joint assets and the husband 58%, was based)

• *Neale and Neale* (1991) FLC ¶92-242 (the Full Court could not ascertain why the wife's application for property adjustment was dismissed, when there was considerable disparity between her and the husband's assets and incomes)

• *Merriman and Merriman* (1993) FLC ¶92-422 (the Full Court could not determine why the trial judge had reached the conclusion that the wife should receive 25% of the parties' assets)

• *White and White* (1995) FLC ¶92-648 (the trial judge failed to provide adequate reasons as to why he decided that it was in the interests of two children to be in the custody of their father and it was not possible to discern from the judgment what, if any, attention he had paid to the factors in former s 64 concerning each of the children)

• *Re W (Sex abuse: standard of proof)* (2004) FLC ¶93-192 (the trial judge failed to identify with precision the abuse which he positively found had taken place)

• *VC & GC and Ors* (2010) FLC ¶93-434 (the trial judge erred in failing to provide adequate reasons for her determinations in respect of transactions)

• *Lovine & Connor and Anor* (2012) FLC ¶93-515 (the Full Court held that it was not incumbent on the trial judge to give singular attention to one of many aspects of contributions (the trust assets) in the assessment of the wife's contribution-based entitlements and found no merit in the ground of appeal).

Options available to the Full Court if Appeal upheld

Finally it should be noted that the Appeal Court has several options even if an appeal is upheld and they include:

- Sending the whole or part of the case back to another judge to be heard again; or
- Substituting all or part of the original judge's decision.

In parenting cases more often than not the matter is remitted for hearing before another judge for another hearing.

Statistics

Given all of the limitations referred to above it is not surprising that over the last decade or so only between 5% and 15% of Appeals lodged have been upheld generally with more property than parenting appeals being successful.

Richard Maurice
Barrister and Mediator, Sydney
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About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University. He works as a Barrister & Mediator in Family Law financial and parenting matters.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179 and Vega and Riggs [2015] FamCA 797.

He completed the LEADR mediation course on 2006 (taught by Sir Lawrence Street) and a refresher course at the Resolution Institute in 2024. He is a member of the Family Law Section of the Law Council of Australia, is registered with the Civil Mediation Council (UK) and member of the International Society of Family Law. He is an Australian NMAS Accredited Mediator.

www.richardmauricelaw.com