INTERIM HEARINGS IN THE FAMILY LAW COURTS

PREPARATION AND ADVOCACY FOR SUCCESS

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Introduction

It is unusual for any case in the Family Court ("FCA") or Federal Circuit Court ("FCCA") [1] to commence with a prayer for relief limited to final orders. An Application for interim orders is to be expected; and the caseload of our judges has a heavy emphasis on interim hearings. It will vary between places and the practises of individual judges but in Townsville, for example, about one week in four is devoted to the conduct of interim hearings.

Moreover, success at an interim hearing may and sometimes will set the agenda for the ongoing conduct of the case; especially in cases involving children. The outcome of an interim hearing can preclude the necessity for a final trial to be conducted.

Increasingly, in response to difficult economic times, advocacy at interim hearings is undertaken by solicitors rather than by counsel. And sometimes litigants in person confront us.

Advocacy is a separate and different skill than any other work we undertake as lawyers. It requires constant practice, deep thought and strategic vision.

This paper is aimed at our less experienced colleagues; we intend no criticism by the use of that description. We trust that our more experienced colleagues may derive some benefit as well.

For most clients the interim hearing is their first experience of a family court, indeed of any court. What memory will they have of it? What opinion will they have of you?

[1] For ease of reference "FCR" refers to the Family Court Rules; "FCCR" refers to the Federal Circuit Court Rules

We must always be mindful that family law has been the largest source of complaint to the Legal Services Commission over several years. For example in the year 2014/2015, 23.45% of all complaints received by the LSC were in family law. It was the highest source of complaint and double the number of complaints of the second-place getter. [2]

In this context we should also draw to your attention the very recent decision of the High Court in *Attwells & Anor v Jackson Lalic Lawyers P/L* [3] where the majority affirmed that the advocates (solicitor or barrister) immunity from suit in connection with litigation does not extend to advice given to settle during the course of that litigation. The exact working through of this decision has yet to occur, but for present purposes it might be said that there is now an exposure to claims for negligence in respect of the compromises and settlements made on a busy duty day – even the more so if the need to negotiate is a result of a poorly prepared case.

Success is a relative concept

For the purposes of this paper we define "success" as a favourable, even if a limited outcome, for either the applicant or respondent:

[a] The Applicant obtains the orders or most of the orders sought in the Application;

[b] The Respondent defeats or limits the success of the orders sought by the Application or succeeds (in whole or part) with a cross-application; and / or

[c] In the course of his/her decision, the Judge makes comments helpful to the ongoing progress of your client's case. For example, a Judge may not agree to an interim relocation order, but may comment that a parent has real prospects of obtaining a relocation order at a final trial.

A practical observation concerning use of documentary evidence

Broadly speaking there tend to be more seriously contested interim applications concerning children than there are concerning property disputes.

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[2] See the Annual Report 2014/2015 of the LSC at page 31. In previous years the figures were 19.3%, 21.16%, 22.37%, 21.12% and 20.06%.
[3] [2016] HCA 16

The conduct of an interim property argument is usually assisted because one or both parties have access to financial documentation. Payslips, bank and credit card statements, profit and loss statements of the family company and so on significantly reduce the range of disputed facts. In contentious areas judges are readily assisted by such documentation.

By contrast in the typical child case the debate can sometimes be no more scientific than "he said/she said". The point we wish to make is that, in a child case, you should search for supportive documentation.

Sometimes you can do no more than issue a subpoena to a school, a hospital, the police or Child Safety (see the section below entitled "issuing Subpoenas"). In these more technological times you can, however, be assisted by what a party has posted on Facebook, messaged or emailed.

The trap, however, is that clients sometimes censor what they give you. If a client produces a screen print of a Facebook post, the father's most recent SMS, or some abusive email then insist on seeing the complete documentary trail. There is nothing more embarrassing than having the opponent produce similar examples of poor behaviour that your client has conveniently not given to you.

The topics we shall canvas are:

1. Identify the issue(s) requiring interim resolution.

2. Identify the law and the rules relevant to the issue(s).

3. Managing your client's expectations.

4. Preparing the application or response

5. Affidavits.

6. Issuing subpoenas.

7. Interim interim hearings.

8. Know your judge/know their caseload.

9. The hearing.

Identify the issue(s)

One of the disciplines that civil lawyers experience is the necessity to draft a properly particularised Statement of Claim (or Defence and Counter-claim). Putting in words a precise description of the case to be advanced can be hard; and doing it by the mechanism of the client's first affidavit creates the risk of imprecision and inefficiency. As well, since the affidavit is a sworn/affirmed document it exposes the client to credibility or other criticisms if a subsequent affidavit significantly departs from the first affidavit.

Before drafting your Application/Response and the affidavit(s) in support it is useful to list in dot points all of the <u>outcomes</u> your client is seeking. You will then need to list the <u>issues</u> to be addressed to support these outcomes. These lists should be frequently referenced during the drafting process to ensure all of these matters are covered by appropriate factual material.

For example, your client may wish an order for Sole Parental Responsibility. This is the outcome she or he wishes. The issues to support this may include domestic violence, high conflict, or drug and alcohol abuse by the other party.

As well, the issues at an interim hearing will usually be <u>different</u> from the issues at a final hearing. There may be matters of particular urgency or of a short term nature - for example, if a recovery order is sought or where the parties cannot agree as to a school the child will attend in the coming months. These matters might be resolved from an interim hearing, or at least take less priority at the final trial.

In embarking upon this process bear in mind the obligations that may be imposed by the Rules. For example FCR 1.04 provides that the main purpose of the rule is

> *To ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.*

And so each party (and lawyer) has an obligation to promote and achieve this purpose by, amongst other things:

> *... ensuring that any orders sought are <u>reasonable in the circumstances</u>*
>
> *... assisting the just, timely and cost-effective disposal of cases*
>
> *... identifying the issues <u>genuinely</u> in dispute*

> *... being satisfied that there is a reasonable basis for alleging denying or not admitting a fact.* [4]

In similar fashion FCCR 1.03 provides that to assist its object of just, efficient and economical resolution of proceedings the parties must avoid undue delay, expense and technicality. For a child proceeding see also FLA s. 69ZN.

Who would not want the following compliment placed on the record?

> *Whilst it should not be remarkable nor the cause of comment, it must be observed that both attorneys and Counsel for these parties have conducted the case to the highest standards of the profession. The material prepared on behalf of the parties has been concise, erudite and confined to issues of relevance. There have been few objections taken and those taken have been consensually resolved.*
>
> *The conduct of the hearing invoked a nostalgia for days all too often considered passed when the presiding Judge can listen and take notes with minimal intervention leaving the conduct of the case to competent Counsel who deal with all witnesses and each other with grace, good humour and courtesy. Indeed, the only significant interaction between bench and Counsel has been, as it should be, during closing submissions when considerable assistance was provided by Counsel for each party through interaction with the bench, discourse and dialogue regarding the case and, ultimately, in placing the case of each parent clearly before the court with appropriate force.*
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> *The above not only fulfils the most proud tradition of the Bar, that upon which the trial process has been constructed and dependent for some centuries (albeit a foundation oft eroded in the present day through the absence of legal representation or inadequate representation), but meets and fulfils the principles for the conduct of parenting proceedings as set out in s 69ZN of the Family Law Act 1975.* [5]

Identify the law

The family law jurisdiction is frequently criticised by non-family lawyers as not being robust enough in applying established legal principle. This is not a view

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[4] *FCR 1.08*

[5] the underlining is ours from *Meredith v Meredith* [2015] FCCA 2152 per Judge Harman

with which those of us who practise in this area of law would agree. Having said that, we must always guard against complacency. And to be fair to our critics, sometimes the discretionary nature of decision-making leads to a less than robust approach to relevant principles.

A thorough analysis of the law is required prior to any drafting of Court material.

Take spouse maintenance for example. Before drafting an application seeking spouse maintenance even on an interim basis, it is imperative to look at section 72 of the *Family Law Act*. You need to ensure you address both limbs of this section – the applicant's need and the respondent's capacity to pay – the menu of items in s. 75(2) and, overall, the statutory requirement in s. 74 that the order you seek is "proper".

It is not an uncommon circumstance that spouse maintenance arguments are advanced without a proper analysis of the evidence required to convince the Court both that a party has need <u>and</u> that the other party has a capacity to pay.

There is also no substitute for looking at the Rules - in some cases these usually provide a template for the matters that will influence or govern the judicial decision. Some examples include

- For an application for spousal maintenance in FCA see FCR 4.14 "Evidence to be provided" and FCCR 24.05.
- For an interim order in FCA see FCR 5.08 "Matters to be considered".
- To transfer between registries of the same court see FCR 11.18 or FCCR 8.01.
- To transfer from the FCCA to FCA see FCCR 8.02.
- To justify the appointment of an adversarial expert witness, see FCR 15.49.

You need to ensure the matters identified in the Act or Rules are relevantly addressed in your client's material.

The more controversy you introduce in your material, the more of a discretion you require the judge to exercise without having the benefit of a full trial.

So to conclude this section of our paper we turn to the critical importance *Goode v Goode.* [6] It is a decision that bears repetitive reading. The crucial passages are at paragraphs 68 to 74 which we repeat following:

> 68. *... the procedure for making interim parenting orders will continue to be an abridged process where the scope of the enquiry is "significantly curtailed". Where the Court cannot make findings of fact it should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. The Court also looks to the less contentious matters, such as the agreed facts and issues not in dispute and would have regard to the care arrangements prior to separation, the current circumstances of the parties and their children, and the parties' respective proposals for the future.*
>
> 69. *It remains the case that the Court must regard the best interests of the child as paramount in deciding what interim parenting order to make. However, there are passages in Cowling that do not sit comfortably with the Act as amended. It is the following passage in particular which calls into question the applicability of Cowling to the Act as presently drafted:*
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> > 22. *Thirdly, where the evidence clearly establishes that, at the date of hearing, the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's welfare would be really endangered by his/her remaining in that environment.*
>
> 70. *There are many elements in the Act as amended that would militate against the continued application of the principles in Cowling, and in particular the passage cited above. While the ultimate goal in the legislation is to provide for an outcome in*

[6] (2006) FLC 93-286

the best interests of the child, if the presumption in s 61DA applies, then the Court is obliged by s 65DAA to consider the outcomes previously discussed. First, whether the child spending equal time would be in the best interests of the child and whether that is reasonably practicable. Second, if an order to that effect is not made, there is an obligation to consider whether an order that the child spend substantial and significant time would be in the best interests of the child and whether that is reasonably practicable. Section 61DA must be applied in any case, including interim proceedings, where a court is considering making a parenting order.

71. *The reasoning in Cowling, particularly in paragraph 22 of the reasons for decision to the effect that the best interests of the child are met by stability when the child is considered to be living in well-settled circumstances, must now be reconsidered in light of the changes to the Act, particularly changes to the objects (s 60B), the inclusion of the presumption of equal shared parental responsibility (s 61DA), and the necessity if the presumption is not rebutted to consider the outcomes of equal time and substantial and significant time.*

72. *In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, <u>unless there are protective or other significant best interests concerns for the child</u>, the Court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child.*

73. *That is not to say that stability derived from a well-settled arrangement may not ultimately be what the Court finds to be in the child's best interests, particularly where there is no ability to test controversial evidence, but that decision would be arrived at after a consideration of the matters contained in s 60CC, particularly s 60CC(3)(d) and s 60CC(3)(m) and, if appropriate, s 60CC(4) and s 60CC(4A).*

> 74. *We also acknowledge that, because of the circumscribed nature of the proceedings, the reasons given at an interim hearing may be brief. <u>So too, the filing of lengthy affidavits is unlikely to be helpful where the Court is unable to make findings about disputed facts.</u>*

The various emphases are ours. Note the underlined passage above concerning "protective or other significant best interest concerns". This lead the Full Court in *Dieter v Dieter* in an interim relocation case involving domestic violence allegations to state the following:

> *In our view, the assessment of risk in cases involving the welfare of children cannot be postponed until the last piece of evidence is given and tested, and the last submission is made. We accept, however, that it is always a question of degree depending on the evidence that is before the Court.* [7]

Managing your client's expectations

There is no point standing up to advocate for an impossible outcome; and there is no point allowing your client to believe that you can achieve the impossible.

The hurts, disappointment, sexual infidelities and the like that have occurred during the relationship or which caused its end have no relevance except in the most special of circumstances. Yet they can frequently drive a thirst for revenge, for counter-allegation and so on.

It is first important to remind each other that, as officers of the court, advocates cannot act as the "mere mouthpiece of the client ... and must exercise the forensic judgments called for during the case independently". [8] Advocates are obliged to take care to ensure that we responsibly use the privilege attached to court processes so that the material then available reasonably justifies allegations we make. [9]

Sometimes you must have the self-discipline to say "No" - "I will not make that allegation; I cannot make that submission".

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[7] *Deiter v Deiter* [2011] FamCAFC 82 at [61]

[8] *Barristers Conduct Rules* 2011 at Rule 41; *Solicitors Conduct Rules* 2012 at Rule 17.1

[9] *Barristers Conduct Rules* 2011 commencing at Rule 58; *Solicitors Conduct Rules* 2012 at Rule 21.

If the husband's net taxable income is $1000.00 per week and he is paying the mortgage for the house the wife and children are living in, as well as child support for those children whilst also renting premises for to live in, there are significant if not insurmountable mathematical limits to the spouse maintenance order that can be achieved. In difficult economic times such examples abound – with a net taxable income of $1000.00 per week, there is NO point asking for spouse maintenance of, say, $700 per week – but we see such examples not infrequently.

If you seek an interim property settlement you need to identify cash or other property/resources from which it can be paid. If you cannot, why create false hope if there is no identifiable cash or property from which it can be paid? In those circumstances re-frame your Application to seek a dollar-for-dollar order.

We must always be mindful that the attitudes exampled on an interim hearing may have a bearing at the final trial. Generally speaking the interim relocation of children requires special facts to be established. If your client has just taken off to another place with the children there is a very good chance that she/he will find that the children are returned. So where are the special facts that can be proved to the satisfaction of a judge on an interim hearing? If there are none, you need to provide your client with firm advice as to the likely prospects of being ordered back. The judge may well remember the attitude demonstrated at the interim hearing, which will not help the argument at the final trial.

Ambit claims can cause problems at an interim hearing. In a property case, there is no assumption of equality of result. Broadly speaking, the further you move way from a 50/50 division of the pool the more likely it is that you will need special facts. Seeking a 60/40 division is not likely to raise the judicial eyebrow but a request for an 80/20 division will. More interventionist judges may tackle you about that, even though it may not be a relevant matter at the interim hearing. So if you ask for an 80/20 division of the pool, be ready to give a concise and skilled description why that is so. There is nothing more deflating for you (and the client) to hear a judge say "that's unlikely to happen".

A similar comment applies to the use to which Child Inclusive Conference Memoranda or Family Reports may be used.

Save where you have convinced the presiding judge to make an "interim interim" order pending the receipt of such reports (or she/he has adopted that course of their own motion) the mere fact of a favourable report is not likely to be enough to justify an interim application. These reports are but one part of the evidentiary bundle to be considered at trial, and are untested. Clients need to appreciate that these reports are not some magical solution that can or may be

imposed by the waving of the judicial wand. As recently reinforced in Kapicic *v Bakal* [10]

> *It must be remembered that there is "no magic" in a family report. "Family Reports are meant to be, and almost invariably are, valuable and relevant material to assist a judge in forming his ultimate conclusion": see the comments of Evatt CJ, Fogarty and Yuill JJ in the Full Court decision of Hall & Hall(1979) 29 ALR 545 ; 5 Fam LR 609 ; (1979) FLC 90-713. It is not a matter where a court is obliged to accept the recommendations of a report writer or place unquestioning faith in the factual foundation as asserted by the author.*

Note the reference in that quotation to "ultimate conclusion" – so where are the important facts that enable a court to implement a family report on an <u>interim</u> basis; *a fortiori* where the report is merely that from the shortened process of a child inclusive conference?

Finally the "2 hour rule" requires mention at this point (and later under the heading below - "The Hearing"). Though the Rule is that of the FCA [11] it is very much applied as a rule of thumb by our circuit judges. In a busy court period you must warn the client that an immediate hearing may not be possible and the hearing is at risk of adjournment to a later date.

Preparing the application or response

As stated earlier, the drafting of Orders should be referenced to the outcomes sought by your client as well as the evidence you can provide to substantiate the Orders.

Frequently judges are confronted with the precedent orders of the firm, which may or may not adequately detail the precise Orders sought by the client. As Counsel, it is not unusual for us to have to redraft and hand up the Orders to be sought at the hearing.

An Order for Equal Shared Parental Responsibility obliges a judge to positively consider making an order for equal time or substantial and significant time. Yet far too often we see a "template driven" approach to the drafting of an application or response that automatically seeks or concedes equal shared parental responsibility.

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[10] (2014) 52 Fam LR 308
[11] FCR 5.10

As with any order sought you must identity the reason for it; and if your client wants to argue that the children should only be with the other side for 2 nights a fortnight but concedes equal shared parental responsibility you must be able to explain and justify factually such a result.

Affidavits

It is trite to say that your advocacy commences with the first affidavit. For those seeking a more comprehensive discussion see a previous paper by Fellows. [12] Let us briefly remind you, however, that affidavits must be confined to the relevant facts and that the style and layout of your affidavit is important. The use of headings, summaries, indexes and compliance with FCR Rule 15.12 or FCCR Rule 15.28 is essential.

On a more practical level, the absence of or late approval of Legal Aid funding may not lead to an excuse for poor preparation of affidavit material.

Not all the history/chronology can be relevant.

Not all the history/chronology will be uncontested.

When under pressure, it is tempting to think "this is a just an affidavit for an interim hearing" and assume the trial affidavit will address any inadequacies. Danger waits down this path! In preparing an interim affidavit, you need to properly question and challenge your client so as to ensure that the affidavit does not end up undermining their case at trial. How many times have we seen clients sit "alone and palely loitering" in the witness box and blame a lawyer for some uncomfortable error appearing in an earlier affidavit?

Interim interim hearings

The Courts are, unsurprisingly, unwilling to provide litigants with numerous opportunities to agitate their cases prior to a trial. Judges simply do not have the time. However there are circumstances where "interim interim" orders are required.

For example, judges are placed in an invidious position in children's matters in making an interim decision where there are numerous contested facts and without the benefit of a Child Inclusive Conference or a Family Report.

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[12] "Affidavit Preparation: a Primer for Beginners; a Refresher for Veterans" NQLA conference May 2015

In such circumstances, consideration should be given to negotiating a very short term interim Order, and asking for directions for a proper interim hearing to be held after the Child Inclusive Conference or Family Report is provided.

If you proceed with an interim hearing, rather than a Consent Order, under these circumstances you will need to address with the judge that your client seeks an "interim interim" order, and that it will be possible for a further interim hearing at a later date. Do not just assume that this will occur!

Issuing subpoenas

Where facts are disputed judges invariably turn to documentary evidence from third parties as a means of determining disputed facts.

Wherever possible, issue subpoenas with a return date prior to the date of the interim hearing.

It is best to read the returned subpoenas prior to the interim hearing to avoid the pressure of having to do this whilst managing your client at Court. Also if the subpoenas include information detrimental to your client's case, it is preferable they know about this prior to the hearing so as to enable strategic action to be taken prior to the hearing day.

Strategic use of subpoenaed material is critical for your advocacy. Do not hand up or tag material just for the sake of it. If the parent's criminal history has only juvenile offences and they are 45 years of age, it is most likely not relevant. The sign in records from Relationships Australia may not be important, but a record of an altercation with staff may well bolster your case that the parent has an anger management problem.

Know your judge/know their caseload

Each of our judges exercises an individual discretion by reference to the menu of considerations and the statutory pathway applicable to the case – children or property. Each of our judges is different and it is not uncommon to experience different approaches to the conduct of interim hearings. Judge Coker for example allocates all cases in the duty list to commence at 9.30 or 10am and conducts a callover once the consents and adjournments are dealt with. Judge Willis usually apportions cases between two or three sittings over the course of the day – say at 10am, 11.30am and 2.15.

Each of the judges is more or less busy or stressed at particular times of the year. And, it must be said, some are more pleasant to appear before than others. Do

not be misled by the usual experiences we have in front of the central and northern judiciary – some of their southern colleagues can be somewhat more cranky or aggressive.

Managing a client's expectations, as well as a thoughtful approach to advocacy, will take into account what you know of the judge. If you know the judge is more interventionist, or more aggressive, or not likely to approve an interim relocation or merely likely to be tired and grumpy by the end of a long duty day then:

[a] Warn your client about that so that he/she is not surprised; and

[b] Tailor your advocacy for that situation.

The same comments apply to the caseload of the judge in question. The court list can be misleading - sometimes it's not as bad it looks – but if there are more than say 25 matters listed it is almost inevitable that there will be time-pressures upon judge and advocate alike.

The hearing

The hearing commences, in our view, even before the time or day of your arrival at court.

Pre-hearing

Have you read the subpoenaed material, obtained permission to copy relevant extracts and prepared a tender bundle (or at least tagged and made a list of the documents you wish to tender)? That will not always be achievable but wherever possible ought to be undertaken. It disadvantages (and sometimes frightens) the unprepared opponent; it curries favour with the judge.

Have you negotiated in advance of the hearing day? Have you narrowed the issues? Turning up on the duty list with six issues in dispute may simply mean you are adjourned to another day.

Negotiating under the pressure of a duty list is sometimes inevitable but ought to be avoided where possible. Standing down a hearing whilst negotiations occur is unwise unless you can be confident that a settlement will occur. What do you do if its 3 o'clock in the afternoon and a settlement has not occurred? Make unnecessary concessions? Pressure the client to settle?

Is it necessary to hand up the print-out of a case to the judge? Usually that will only be necessary if there is a more unique or difficult issue to be determined but it is poor advocacy to be citing from a decision which you have highlighted or scrawled over and not have a clean copy for the judge and your opponent.

Have you downloaded the orders you seek to a lap-top or a USB stick so that, on the day of hearing, you can make changes as negotiations progress and print out the negotiated result? Or print out what has been agreed so that the judge can see what has to be decided? Some of us do not have neat and tidy hand-writing!

The day of hearing

Step one – take a copy of the Act and Rules to court. Sounds trite – but if you have not packed them in your briefcase you are storing up trouble for yourself.

On the day of hearing your advocacy starts with your first interaction with court officers and the judge's staff. Courteous, timely and informative exchanges with them are a priority; because they may or will report upon those exchanges to the judge.

Some judges conduct a call-over in order to allocate priorities for the day. A call-over is not an opportunity to rehearse your speech or to make inflammatory statements. A judge needs a short exchange, preferably without controversy *viz*

> *This is an application concerning two children aged 10 and 7. The father seeks shared care; the mother opposes that and seeks an order limited to weekend and holiday time. The family lives in Ingham. We have not been able to settle the matter. I've spoken to my colleague Ms Smith and we are in agreement that, with reading time, it will take approximately one hour.*

If it is essential that the case be given priority to be heard that day then state concisely those reasons *viz*

> *This is an application concerning two children aged 5 and 3. The mother seeks a recovery order as the father has failed to return the child from his scheduled weekend. The mother says this is a risk case involving drug and alcohol abuse by the father. The subpoenaed material will be relevant in addressing that issue. The matter is unable to be settled. It should take approximately two hours with reading time. I would ask that this matter be given priority today,*

given the age of the children and the extent of risk alleged by the mother.

Accurate time estimates are essential. Unless the judge tells you that he/she has already read the material, the time estimate must include reading time. Gaining a reputation (either with the judge or your colleagues) for under-estimating time will make you most unpopular.

In making your submissions, do not refer to contested allegations as facts. At an interim hearing, they are only allegations and the Court is unable to make findings as to their accuracy or otherwise. You can refer to your client alleging that the mother is a daily cannabis user, but if she denies this, you cannot state that the mother actually does smoke cannabis every day.

This means you need to build your case to persuade the Court to give these allegations real weight, notwithstanding actual findings may not be able to be made.

This is very important in submissions regarding domestic violence at an interim hearing. Increasingly this is an allegation raised in most family law matters. Simply stating that the father is domestically violent based on what the mother says in her affidavit may not be sufficient for the Court to give this significant weight if denied by him. You may need to identify and refer to other evidence in either subpoenaed material or annexed to an affidavit, such as:

- Police reports of domestic violence incidents;
- Protection Orders and Applications (particularly where made by a police officer);
- Consultations with counsellors, doctors or hospital emergency records;
- School records, if the children have commented to teachers;
- Affidavits by neighbours or other people who have witnessed incidents. Family members and friends can sometimes be viewed as being too partial, so it is preferable to find evidence from people more remote from the parties.

If such evidence exists, you can submit, for example, that whilst Your Honour cannot make a finding as to the specific allegations, the independent evidence suggests that the mother's allegations cannot be ignored and should be given real weight. This brings back into play decisions such as *Deiter.* [13]

Some comments about the art of advocacy

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[13] see footnote 5

Advocacy, like any other skill requires practice. There are two aspects, content and delivery. Both involve the use of words.

> *To succeed in the profession of the law, you must seek to cultivate command of language. Words are the lawyer's tools of trade ... on the words you use, your client's future may depend ... The reasons why words are so important is because words are the vehicle of thought ... you must use words. There are no other means available. To do it convincingly, do it simply and clearly. If others find it difficult to understand you, it will often be because you have not cleared your mind upon it.*
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> *Obscurity in thought inexorably leads to obscurity in language.* [14]
>
> *The good lawyer will be altogether in command of the English language and the art of communication. Communication, persuasion and ready use of written and spoken language are at the heart of our profession, which is concerned to avoid and if need be adjust with skill the conflicts which arise from the social nature of humanity ... a document produced by a lawyer ought to evince a full participation in the culture of literacy. It is not usually the place for slang, colourful idiom or technical language which is not in general use ...* [15]

To adopt the observations of Gleeson CJ in *Ali v R*, [16] it would be the hallmark of incompetent advocacy to pursue every line of argument that can be imagined regardless of its impact upon other arguments and regardless of its prospect of success.

Turning to content -

> *These are the three things—volume of sound, modulation of pitch, and rhythm—that a speaker bears in mind. It is those who do bear them in mind who usually win prizes in the dramatic contests.* [17]

Think about those three concepts:

Volume of sound

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[14] 'The Discipline of Law' Lord Denning MR, Butterworths, 1979 at page 5
[15] 'Affidavits' Justice John Bryson (1999) 18 Aust. Bar Review 166
[16] (2005) 214 1 at 4
[17] Aristotle, "the Rhetoric & the Poetics of Aristotle"

Modulation of pitch
Rhythm

Each matters. Note that Aristotle says nothing about content. It may not matter how good your argument is if you cannot attract the interest of the listener. Conscientious judges take written notes. Are you speaking too fast for him/her to take it down? Are you speaking in such a dull tone that boredom sets in?

In these modern times we increasingly use written submissions as an adjunct to the oral presentation. A 15-page repetition or summary of what can otherwise be read in the affidavits is not a submission. You need to equally develop a written style that is attractive – which is easy to read.

It is not for nothing that the Queensland Civil Procedure Rules provide that a pleading must:

> *... be divided into consecutively numbered paragraphs and, if necessary, subparagraphs, each containing, as far as practicable, a separate allegation.* [18]

and

> *... [be] as brief as the nature of the case permits.* [19]

Rivers of ink are not good advocacy.

Finally, do not overlook the impact that stress may play on your advocacy. We can give no better summary than that of Mukhtar ASJ in *Foster James Pty Ltd v Dalton* [20] which, with some amendment applies equally to the conduct of a contested interim application as it does to a lengthy trial

> *Here, I am bound to say that litigation, civil and criminal, particularly but not exclusively in higher courts, is notoriously stressful for advocates, solicitors, witnesses and judges. Trial is hard. Long cases in particular are exhausting, sometimes oppressive. They have their ebbs and flows. Anxiety and nervousness are normal; indeed they can increase motivation. This is especially so for those "on their feet" and*

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[18] UCPR 146(1)(f)
[19] UCPR 149(1)(a)
[20] [2010] VSC 133

dealing with the heat in the crucible of trial. The heat of the battle sometimes brings out impatience and aggression.

Performances in court fluctuate depending on the shifting fortunes of a case, the dynamics of trial, professional interactions, client expectations, the quality of instructions, and the diligence and competence of instructing solicitors.

Conclusion

One of the unintended consequences of poor advocacy is that the other side can win too well. This can cause real difficulties for both parties after interim hearings and, in particular, can undermine your client's negotiating position for a final settlement.

When our clients receives a Court outcome better than that deserved, they can become complacent and even cocky about their prospects. One of the best arguments we have to settle matters is the risk of a trial. Clients are often motivated to settle because of their fear of the unknown and of facing cross-examination. However if they receive a "too good" outcome at an interim hearing, their natural fear or anxiety of a trial can be greatly reduced. They can then refuse to settle or become unreasonable in their demands.

If you are representing the "losing" client, your position may become untenable, particularly if the judge is critical of your preparation or advocacy. Your capacity to manage the client on an ongoing basis will be compromised.

You may also be ethically challenged, especially if your client feels forced to accept a disadvantageous settlement. This may lead to unwanted consequences in another forum!

All of us who practise in the family law jurisdiction are required to do some kind of advocacy. Those of us who are the most successful understand and practise a high level of preparation, planning and strategic thinking. The consequences of not doing these things can be painful.

Janice Mayes
Michael Fellows

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