Family law litigation – some practical observations

"Getting off to the right start"

Overview:

[1] Good family lawyers should always conduct their litigation with the final hearing in mind.

[2] In many cases, the result at the final hearing – whether good or bad – can be traced back to what happened at the beginning. With hindsight, you can often see how a successful case got off to a good start, and an unsuccessful case didn't.

[3] The aim of this paper is to help you get your client off to a good start.

It begins with the orders you seek:

[4] Whether it is a parenting or a property case, the orders sought by your client need to be credible and achievable. Simple as this sounds, it is still quite common:

[a] in a property case - for a party to start by seeking orders that are, on any objective analysis, likely to fall outside the range of what is "just and equitable";

[b] in a parenting case - for a party to start by seeking orders that are draconian or unduly restrictive, or otherwise glaringly improbable.

Property cases:

[5] True it is that in property cases, there is a range and that a commonly accepted margin for discretionary difference of opinion is around 10%. So if you assess that your client's entitlement is around 50%, maybe you can justify seeking a division - but don't ask for 75%. Overly excessive claims are unwise on a number of levels:

[a] At some point, the Judge will inevitably challenge you to justify the claim. This will occur in front of your client, the opposing lawyer and their client. If the claim cannot be rationally justified, then you – and the client - risk losing credibility;

[b] As a lawyer, you don't want the Judge/s to think you have an unreasonable approach to cases or that you give unrealistic advice to clients. It is also unhelpful for your opponent to think the same;

[c] If the claim isn't discredited at an early date, your client may actually by the time of trial have come to believe that their entitlement is in fact the 75% originally claimed. They will cite the legal costs they have spent, the trouble they have incurred etc. Then you may well have a client management problem when you try to settle in the 50% range. In that event, expect your client to be unhappy with any settlement, no matter how reasonable. A clever opponent might make such an offer early on, thus setting your client up for a costs order later on.

[6] Ambit claims are to be discouraged. The pre-action procedures in Schedule 1 of the Family Court Rules ("FCR") expressly include this requirement:

> *6(1) Lawyers must, as early as practicable:*
>
> *…*
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> *(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable.*

[7] FCR 1.07 provides that the main purposes of the FCR are (amongst other things) to deal with cases fairly, proportionately in terms of costs, and to encourage the parties to negotiate a settlement if appropriate. FCR 1.08(a) provides that parties and their lawyers have a responsibility to promote the main purpose, including ensuring that any orders sought are reasonable in the circumstances of the case.

[8] The same standard would also be expected in the Federal Circuit Court – put simply, it is best practice.

[9] Both sets of rules (FCR and FCCR) expressly provide for the prospect of costs orders against lawyers in cases of default, improper or unreasonable conduct etc.[1]

[10] I would also add that the solicitor's paramount duty is to the Court and to the administration of justice – see rule 3.1 of the Australian Solicitors' Conduct Rules. If a solicitor is asking the Court to make orders that are not likely to ever fall within the range of what is "just and equitable", how does making an ambit claim comply with that rule?

[11] Having said all of the above, there will be cases from time to time in which it is entirely appropriate to make what might at first blush appear to be an ambit claim. The classic example is the case in which the lawyer reasonably believes that the other party is hiding assets or otherwise failing to make proper disclosure. If such a case is made out, then as the Full Court told us in Weir v Weir (1993) FLC 92-338 at page 79,593:

> *This court has pointed out in a line of cases leading up to the recent decision of the Full Court in Black v Kellner (1992) FLC 92-287 that it is the duty of a party involved in property proceedings in this jurisdiction to make a full disclosure of their financial affairs. See also Giunti v Giunti (1986) FLC 91-759, and Mezzacappa v Mezzacappa (1987) FamCA ; (1987) 11 Fam LR 957; (1987) FLC 91-853. It is clear enough from his Honour's findings in the present case that the husband had not done so and had in fact pocketed the proceeds of a substantial number of cash sales. It is obvious that in most cases of this nature it is difficult enough for the party to establish that fact let alone establish the quantum of what has been taken.*
>
> - *It seems to us that once it has been established that there has been a deliberate non-disclosure which follows from his Honour's findings in this case then the court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.*

[1] FCR 19.10; FCCR 21.07

[12] And of course there will always be cases where, because of the particular facts or legal issues involved, there happens to be an unusually large space for debate as to what is a "just and equitable" outcome. But in my experience these cases are the exception rather than the rule.

Parenting cases:

[13] In a parenting case:

[a] if you act for the "archetypal" homemaker mother of a young child, and the parties agree to equal shared parental responsibility, then absent risk factors you will likely need to "push" your client to give the father more time with the child (both on an interim and final basis) than she is perhaps comfortable to. This follows logically from the legislative structure of Part VII, as clarified in Goode & Goode (2006) FLC 93-286;

[b] conversely, if you act for the archetypal "breadwinner" father who had little to do with the parenting of a very young child, should he really be seeking week-about on an interim basis? Just because he "can" doesn't necessarily mean he "should" – such a claim might later be shown to have been lacking in child focus or otherwise insensitive to the child's emotional and developmental needs;

[c] unless you have extraordinarily good reasons, don't encourage your client to try to relocate on an interim basis. The case law is clearly against your client. As Warnick J said in *C and S [1998] Fam CA 66*:

"[I]t is clear that the interests of any child or children, including the children here, are very much connected with any questions directly affecting those children, such as a relocation, being determined by a Court without the impediment of a situation of recent development, which situation significantly alters the relationship of the child or circumstances of the child with regard to one of its parents from what it or they had been immediately beforehand."[2]

[14] See also the decision of Boland J sitting as the Full Court in Morgan & Miles (2007) FLC 93-343. At page 81,871, Her Honour said:

[2] This was a Full Court decision; the other members of the Court, Ellis and Lindenmayer JJ, agreed with Warnick J's observations

> *"88. It appears to me that the very difficult issues in cases involving a relocation, which difficulties are highlighted in the cases and referred to by the Family Law Council in its 2006 report 'Relocation: a report to the Attorney-General prepared by the Family Law Council', (Family Law Council of Australia, Barton, 2006) make it highly desirable that, except in cases of emergency, the arrangements which will be in the child's best interests should not be determined in an abridged interim hearing, and these are the type of cases in which the child's present stability may be extremely relevant on an interim basis. It further appears to me the comments of Warnick J in C and S remain apt and relevant to determination of these cases."*

(For a case example involving a successful interim relocation, see paragraphs [53] - [60] of this paper.)

[15] In terms of drafting orders, an interesting problem often arises (usually for mothers) who allege that they have been the victims of family violence. Do they seek equal shared parental responsibility ("ESPR") or sole parental responsibility ("SPR")?

[16] In the "high level" family violence cases it is probably easy enough to justify a claim for SPR. In "lower level" family violence cases (for instance, some purely situational "pushing and shoving" at separation) it is generally wiser to ask for ESPR - but with the other side placed clearly on notice in the affidavit material that such behaviour has occurred, is not appropriate, and will not be tolerated by your client in the future.

[17] But what about "mid-range" family violence cases in which there are no objective signs of family violence beyond what the client tells you and which the other party is certain to deny? Seeking ESPR creates the risk that the Court may not treat the allegations as serious. Seeking SPR risks the Court thinking that the client is being controlling or unreasonable?

[18] One option I have seen employed is for the client to propose interim orders for ESPR (with a specific notation that this is on a trial basis only) – with the final orders reserving the client's right to particularise the orders as to parental responsibility closer to hearing, perhaps after the Family Report. I am not suggesting this be a "standard" approach but it is certainly an option in those

awkward cases in which the Court will be more inclined to order ESPR in the interim. It tells the Court that the issues are serious and require proper consideration later on. It puts the other party on notice to be "on their best behaviour." It reserves the client's rights.

[19] Why are the initial orders sought so significant? Because at trial, those orders can be a powerful own goal – especially in a parenting case where "attitude to parenting" is a relevant consideration.

[20] Costs orders can also be made in an appropriate case if a party unreasonably presses orders that could never be achieved, or seeks other relief to which the other party has to respond. I would refer you specifically to section 117(2A)(c) of the *Family Law Act* and to the rules referred to earlier.

[21] But more fundamentally, good advocacy means starting out with orders that are credible, achievable and consistent with the client's case. This assists to make a good first impression on the Court.

The supporting affidavit material:

[22] In truth a whole paper can be devoted to this subject.

[23] For now I just want to emphasise the following key points.

[24] Firstly, that the affidavit is the client's evidence-in-chief. It is supposed to set out all evidence relevant to the orders they seek, preferably in an easy-to-follow, logical and persuasive way. A well-drafted affidavit is a powerful piece of advocacy on its own. It can set the foundation for the Judge deciding the case in favour of your client.

[25] Conversely a poorly drafted or hard-to-follow affidavit risks the Judge instinctively going to the other party's affidavit to clarify events in dispute. It hardly needs be said how unhelpful this is.

[26] And whatever you do, unless you are in an emergency situation, don't draw an affidavit drafted in a way that is entirely "responsive", ie.

"I refer to paragraph 20 of the Affidavit of the Applicant filed x/x/x and say that this is correct.

I refer to paragraph 21 of the affidavit of the Applicant filed x/x/x and say that this is not correct, What happened was…"

This is not putting the client's case. It is merely responding to the other party's case. It is poor advocacy – the Judge has to read the other party's version to understand yours. Don't do it. If you are for a Respondent, put their case as though they were the applicant. To the extent the competing affidavits pass like ships in the night, you can respond to any "loose ends" at the end.

[27] As a starting point for any affidavit, the evidence in it needs to be relevant. The test for "relevance" appears in s.55 of the *Evidence Act*:

> *(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*
>
> *(2) In particular, evidence is not taken to be irrelevant only because it relates only to:*
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> *(a) the credibility of a witness; or*
> *(b) the admissibility of other evidence; or*
> *(c) a failure to adduce evidence.*

[28] Further, while many of the rules of evidence are now relaxed in parenting matters, it is still best practice to plead facts and only facts in an affidavit. Avoid comments and opinions. They add nothing to an affidavit and can in fact diminish its force.

Example

[a] "During our relationship, the mother had a serious drinking problem." OR

[b] "During the relationship, I observed that the mother usually drank a bottle of wine each day. She would generally start drinking around 5pm while preparing dinner and by around 6.30pm she would usually have finished the whole bottle by herself. Her speech was usually slurred by dinnertime and on a few occasions I can recall the children at the dinner table telling her she "sounded funny" and asking her if she was 'sick'".

[29] Obviously [b] is much better - it pleads facts, whereas [a] pleads an opinion. Pleading [b] makes [a] unnecessary to include at all. Let the Judge draw their own conclusion.

[30] The affidavit needs to give the evidence necessary for the Judge to make the orders your client seeks in the Application/Response. The affidavit and the orders sought need to sit comfortably together. So if for instance your client seeks orders restraining use of illicit drugs when he/she has the child, then specify why that order is specifically sought in this case.

[31] Try to keep sentences short. Use language the client uses, or at least understands. Otherwise they are at risk of being embarrassed in the witness box when they can't actually explain what it is they swore was the truth!

[32] Avoid long affidavits wherever possible. Remember that the *Family Law Act* gives you the signposts. In a property case, look to s.79 and s.75(2) - or their *de facto* equivalents in s.90SM and s.90SF. In a parenting case, look to s.60CC(2) and s.60CC(3).

[33] Use headings. Headings can break up an otherwise "full" page of affidavit evidence. Headings also help define where an affidavit is going. Affidavits are easier to read when headings are used. It also assists the Court as it enables the Judge to go straight to the relevant evidence on a particular topic.

[34] <u>In a property case:</u>

[a] Follow the basic structure – property pool; contributions; section 75(2) factors; and any "just and equitable" considerations. If you have an arguable <u>Stanford</u> case for "no order" then obviously you have to plead that. In that type of case, it may be better to plead those matters at the start – and then as a "fallback" draw the rest of the affidavit in the usual format.

Drafting an affidavit this way assists the Court. It makes it easy for the Judge to follow your client's case.

[b] In "long marriage" cases in particular, make proper concessions. So if parties, adopting "traditional roles" lived together for twenty (20) years and had four (4) children together, as a general rule each could probably

fairly concede that the other made "substantial contributions" whether as homemaker or parent. You could even agree with the other side that contributions during the marriage are equal. This might save both parties costs.

[c] Don't get caught up in complaints about a party spending money on the "pokies" or "smokes" or "alcohol" etc - unless the amounts spent can reasonably be seen to be at a level that could constitute "waste" in the circumstances. This is not an easy bar to get over.

[35] <u>In a parenting case:</u>

[a] If your client wants to rebut the presumption of equal shared parental responsibility, on the basis of "abuse", "family violence" etc - then the relevant supporting evidence needs to be in there. If ESPR is otherwise unworkable, then this needs to be clearly deposed to.

[b] Make sure that the affidavit adequately addresses the relevant s.60CC factors. However, I do not recommend that you draft the affidavit using the headings in s.60CC *per se* – as frankly this risks the affidavit being unintelligible. Rather what you should do is proceed in a generally chronological way, but ensuring that you have addressed the relevant factors as you go. Some practitioners may think it wise to "wrap up" the s.60CC factors under the various headings – if so then do it at the end of the affidavit by way of summary.

[c] Make sure that if your client is going to argue that the other side's proposed orders are not "reasonably practicable", that the relevant s.65DAA(5) considerations are addressed. The High Court told us in <u>MRR & GR</u> that such matters go to the Court's jurisdiction to make parenting orders.

[d] Make proper concessions. An affidavit that is wholly negative about the other parent is rarely persuasive. Surely the other parent has <u>some</u> good quality or qualities?

[e] Think twice before filing "cheer squad" affidavits. Do they really add to the case? In particular, in the case of loving grandparents, do you really

need to call them as witnesses, especially where the other side didn't call theirs? Sometimes it is best for the children's sake to keep the grandparents at least notionally "neutral" – this may help later on when the dust settles and the parties have to get on with parenting.

[f] And in those rare cases where there is a "killer point" to be made, get to it quickly. For instance if the father is facing criminal charges for sexually assaulting the child, or for serious violence offences etc - tell the Judge early on. Don't leave it to page 15.

[36] As a general rule, affidavits should proceed chronologically as much as possible. It is distracting to read an affidavit that flits around in time from paragraph to paragraph – your client may understand what happened but you risk "losing" the Judge, who may then refer to the other party's affidavit for clarification.

[37] And swearing an affidavit is not a *pro forma* exercise – the deponent needs to swear/affirm that what they depose to is the truth. So as a rule, avoid phrases in affidavits like:

[a] "he never helped with the housework/looked after the child". Once the other party establishes that they did do so even <u>once</u>, your client's credibility is damaged.

[b] "I always did all the housework/looked after the child". Same applies.

Basically avoid "never" and "always"! Unless your client can genuinely depose to same on oath, don't put it in. Save it for the case where it is strictly correct – in which case it can be very powerful advocacy.

[38] Importantly, affidavits should not raise irrelevant issues, particularly where they inflammatory. For instance in a property case (with no parenting issues), don't depose to episodes of situational family violence unless your client actually wants to run a <u>Kennon</u> argument. The Judge will be left wondering – is this a <u>Kennon</u> case? If not, why is it there? The other side will probably object to it or threaten to call contrary evidence if it is pressed. This is not helpful to a Court, which would rather see the issues narrowing rather than expanding. It may also give rise to costs implications later on.

[39] Think carefully before annexing anything. Is the annexure essential? Particularly this is the case with long correspondence between solicitors – do you need to annexe every letter? Or can you simply assert, for example, that your solicitors wrote to the other party's solicitors six (6) times between 1 January and 10 March 2016 asking for an answer to a specific question – but without getting a response to the question. Such an assertion forces the other side to "fess up" because a denial will only result in the correspondence being tendered. Another option is to simply quote in the affidavit the relevant extract/s from the correspondence and state that there was no response. This is much better than, say, annexing the six (6) letters especially where those letters are lengthy or otherwise refer to other irrelevant matters.

[40] Try not to annexe voluminous social media posts – only annexe what is necessary to make the point your client is wanting to make. So if for instance a parent has been "slagging off" at the other's parenting on Facebook, annexe that page – not the 150 subsequent entries when every other person "chimes in". (In this event you could simply say – "I saw 150 Facebook responses to my former partner's post, most of whom from people I did not recognise. If necessary these can be produced to the Court.") The Court will thank you for not doing so; the other side then has to "fess up" or risk you producing them in cross-examination at trial.

Financial Statements:

[41] Like affidavits, these are sworn documents. So go through them carefully with the client before getting him/her to sign.

[42] Have the client be as accurate as possible about weekly income and expenditure. Remember that in a maintenance case, Part O refers to actual expenditure – not expenditure on items the client would like to be able to buy if they had the income. What the client would like to spend belongs in the affidavit, not the Financial Statement. If needs be, reproduce Part O in the affidavit with a "wish list" of what the client says would be reasonable expenditure.

[43] Be internally consistent in the document. If for instance parties own a real property as tenants-in-common in equal shares, and are each liable pursuant to a mortgage over the property - then either include both the property and the corresponding mortgage at full value, or at half value. My preference is to adopt

the 100% value of both in the document and to specify that your client has a half interest. I think this generally makes more sense.

[44] And whatever you do, don't adopt "replacement value" for furniture items. The figure will always be artificially high – and likely to be immediately seized upon by your opponent or the Judge. The law is clear that the only proper measure of value is the second hand value – what a willing but not anxious buyer would pay a willing but not anxious seller. The figure is usually a tiny fraction of the "replacement value". As a general statement I commonly see figures for household furniture in the range of $10,000 - $15,000.

Contravention Applications:

[45] By their nature, contravention applications are quasi-criminal. They are a "punitive expedition" – not an exercise in determining the best interests of a child. So expect the rules of evidence to be applied.

[46] The Application-Contravention needs to be precise, with a copy of the relevant orders attached and each individual "count" properly identified and particularised by reference to date, paragraph number of the order breached, and a short statement of what the respondent did/did not do in terms of breaching the order/s.

[47] The supporting affidavit should also annexe the orders, and refer to the counts in date order. Plead the critical facts. For instance, if paragraph 4 of the order provides for weekend handovers to occur at 5pm at McDonalds Gosford, and the party with the child did not turn up, it is essential to plead that the other party did themselves attend at that place and time and the respondent didn't attend. Merely deposing in a bald way that the weekend visit did not occur is insufficient. Give the Court the essential details that allow it to trace the parties' actions back to what it was they were supposed to do pursuant to the orders.

[48] Another example is when a parent doesn't bring the child for their "alternate weekend" visit. It must be deposed that the weekend in question was in fact that party's weekend pursuant to the orders. If handover occurred "late" during school holidays, make sure your client deposes to the handover time and place that was required under the orders. If the orders are vague about such matters

so that there is room for debate, then maybe the client is better off applying to vary the orders rather than bringing an Application-Contravention.

Interim hearings

[49] Interim hearings in my view can be extremely important. In a parenting case in particular, a set of interim orders can set the proceedings off on a trajectory which can later be difficult to change. Doing well at an interim hearing can give your client the edge at final hearing. In finely balanced cases this edge can potentially be critical.

[50] However, interim hearings are an abridged process. Parties do not (generally) get into the witness box, so the competing evidence cannot be properly tested. The Court's inability to make findings about what might be crucial facts in issue places real practical restrictions on what findings a Court can make and what relief it can grant.

[51] So what do you do when your client alleges serious family violence or some other risk factor – and the other party simply files an affidavit full of "denials"?

[52] In such cases it is best for the accusing party to file any relevant supporting affidavits and subpoena any relevant records, such as medical, Police or "Child Welfare Department" material. In a close case this independent material may persuade the Court of the need to act cautiously despite the other party's denials.

[53] I would specifically refer you to the somewhat lesser known unreported Full Court decision in Deiter & Deiter [2011] FamCAFC 82. In this case, the mother fled Sydney after separation, taking the parties' three (3) young children to live with her in Perth where she had family support. The father applied for her return with the children to Sydney. Her case was that the father was extremely domestically violent and that she was afraid of him and would have to live in a women's refuge if she and the children returned to live in Sydney. The father denied that he was violent. Relying upon Morgan & Miles (supra), he submitted that the children should be returned to Sydney on an interim basis – there was no "emergency" to adopt Boland J's expression from that case.

[54] The mother and the children had been in Perth for six (6) months when judgment was delivered by the Acting Magistrate - who ordered that the children live with the mother in Sydney. The mother appealed – one of her grounds

being that the Acting Magistrate failed to give adequate weight to her allegations of family violence.

[55] The Full Court allowed the mother's appeal and remitted the matter back to the Magistrates Court for re-hearing. It is instructive to quote some extracts from the judgment. I have used bold print for emphasis.

"Exposure of children to family violence

59. …His Honour decided that, because the allegations were "vehemently refuted", it was impossible to make any finding concerning their veracity. Given that the parties' accounts were in such stark contrast, and given there had been no cross-examination, ***we accept it was not possible to make a conclusive finding****.*

…

61. The assessment of risk is one of the many burdens placed on family law decision makers. Risk assessment comprises two elements – the first requires prediction of the likelihood of the occurrence of harmful events, and the second requires consideration of the severity of the impact caused by those events. ***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.*

62. We are aware that in Goode and Goode [2006] FamCA 1346; (2006) FLC 93-286 the Full Court referred with some approval to the following statement made in Cowling v Cowling [1998] FamCA 19; (1998) FLC 92-801 (our emphasis added):

*'18. …**Ordinarily,** at interim hearings, the Court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties. Accordingly, in determining what orders should be made, the Court traditionally looks to the less contentious matters, such as the agreed facts, the care arrangements prior to separation, the current circumstances of the parties and their children and*

the parties' respective proposals for the future. ***In some cases, it may also be necessary to consider child protection issues.****'*

63. *In our view, the proposition contained in the final sentence of the quotation is* ***most important****...*

64. *We accept that the Acting Magistrate could make no definitive prediction of the likelihood of the father behaving violently toward the mother or others in the future. That would be hard enough in circumstances where findings could be made about what had occurred in the past. However, his Honour should have been alert to the* ***potential consequences for the mother and children*** *in the event the father was to behave violently pending a final hearing – including by carrying out the threats to kill which the mother claimed he had made in the past.*

65. *One of these alleged threats was recent. The mother claimed that the father had told her during their visit to Perth shortly before the separation that if she ever left him, he would kill her. These alleged threats stood to be assessed in the context of the mother's allegations about the father, for example, having:*

    - *kicked her, including in the ribs whilst she was pregnant;*
    - *punched her in the jaw;*
    - *slapped her in the face at a wedding; and*
    - *abused her, both in public and private, calling her names such as "fat cow", "fat bitch", "ganger"* and "cunt". (*the mother said "ganger" is "Sydney slang" for "slut" – Appeal Book 110)*

66. *In considering the risk, his Honour ought to have had regard to a combination of factors emerging from the evidence, which we consider should have led him to conclude there was a* ***need to act cautiously****.*

67. *Whilst the father claims the mother instigated the violence, it is not in dispute that the parties were involved in a physical altercation on the day they separated. It is also not in dispute that the mother immediately reported the matter to the police; sought an AVO; left the family home and took up residence elsewhere.*

> *68. …[T]he present case was not one where there were "no documents available to the court, such as domestic violence orders; police reports; or medical reports detailing injuries received". There **was** a domestic violence order (albeit interim and obtained ex parte). There **was** a report to the police, which had been acted upon (albeit the father was pleading "not guilty").*"

[56] The Full Court noted the Acting Magistrate's finding that the father had sent a vast number of text messages to the mother after separation – ranging from innocuous to strange to threatening. The Full Court noted that the father had a conviction for a violence-related offence involving a neighbour.

[57] Significantly, the Full Court noted that the mother had filed an affidavit by a witness which strongly corroborated the family violence allegations. The witness had lived in the parties' home for a period and the father had himself approached her to give an affidavit. The Full Court was critical of the Acting Magistrate's failure to refer to the witness' affidavit at all in the reasons for judgment. The Full Court said that the affidavit should have been given some weight having regard to the father's own approach to the witness – by implication he saw her as credible.

[58] Critically the Full Court said:

> *"87. In our view, given the uncontested evidence, unless and until the mother's evidence had been tested and discounted, it would not have been appropriate to consider any arrangement for the children which would involve the mother coming into contact with the father. On the contrary, it was most important that any interim orders be crafted to **preserve the mother's safety**, not only for her protection, but also to ensure the children were not exposed to family violence."*

[59] The Full Court was also critical of how the Acting Magistrate treated the mother's concession that the father could have unsupervised time. He took this to be a concession that the children did not need to be protected from family violence. The Full Court disagreed, noting that on the mother's case the handovers would be happening in Perth where she was safe and could have others facilitate the handovers. It was a very different situation in Sydney.

[60] As to the Acting Magistrate's "positive" findings about the benefits of maintaining the father/child relationships, the Full Court said:

> *"99. His Honour made a number of findings favourable to the father's case in determining that the benefits associated with the children remaining in Perth pending the trial were outweighed by the adverse effect on them of further separation from their father. These included findings that:*
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> - *there was "no doubt that these children would benefit from having a meaningful relationship with both of their parents";*
> - *he had "no concerns" about the capacity of the father to provide for the children's needs, including their emotional needs;*
> - *as far as could be determined, the father had "generally adopted an appropriate approach to parenting"; and*
> - *he had "no concerns" about the willingness and ability of the father to foster a relationship between the children and the mother.*
>
> *100. Whilst it was conceded on behalf of the mother that it would be desirable in principle for the children to have a "meaningful relationship" with their father, we are unable to discern in any of the material any concession by the mother concerning these favourable findings. On the contrary, the evidence she had provided, especially that concerning the way the father routinely abused and humiliated her in the presence of the children, would suggest that none of these favourable findings could be made, assuming her evidence was accepted.*
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> *102. The approach his Honour adopted in relation to these matters is in contrast with the approach he adopted to the allegations of violence. Because the allegations of violence were denied, he was not prepared to make any findings. Yet, the findings favourable to the father were made in the face of the mother's evidence which pointed firmly in a different direction…*
>
> *103. We therefore found merit in the mother's complaints about the priority afforded to the father having a meaningful relationship with the children pending a final hearing. It was **possible** the father had a good relationship with the children, and it is **possible** that there would be an adverse impact on the children of being further separated from him. However, these could not be taken as given, in the way his Honour clearly did."*

[61] The bottom line is that even at interim hearings where it is impossible to make positive findings, the Court is still required to carefully weigh the competing cases and pay close attention to any risk factors. The inability to make a positive finding is not necessarily the end of the matter. This is where good preparation and advocacy at an interim hearing can make the difference – setting the future agenda in a way that greatly advantages your client.

[62] Written submissions are a powerful advocacy tool. They continue to work for you after the Court has concluded - when that piece of paper finds its way to the Judge's chambers on the Court file. This is very helpful if judgment is reserved. The written submissions may well be the first thing the Judge looks at later on the refresh his/her memory - a well-drafted and persuasive submission can form a template for the judgment that later ensues. Not only have you "won" the case for your client, but on a professional level you have impressed/persuaded the Judge that your view of the case is the correct one.

Conclusion:

[63] Good advocacy begins long before the first return date.

[64] Well-drafted and credible material lays the foundation for a judgment in your client's favour. If you want a case to go well, it helps if it begins well. As lawyers this is your professional obligation and as advocates it is absolutely essential.