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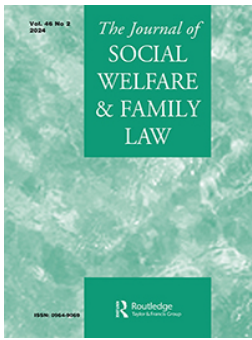
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Lessons from Australian family law appeals jurisdiction

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ABSTRACT

Much has been researched, written about, and subjected to public enquiry with respect to the content of Australian family law arrangements. This study adds to current understanding by the examination of the records of all successful appeals of parenting orders under the recently adopted regime of the Federal Circuit and Family Court of Australia Division 1 Appellate Jurisdiction. Drawing on transcripts from this Court to the date of writing, 35% of applications to appeal parenting orders were successful in being granted a rehearing or variation by the Appellate Jurisdiction. It is these cases which form the basis for this analysis. Employing an inductive thematic analysis, it has been possible to identify the pattern of circumstances most likely to lead to the compromise of the delivery of the declared principles of clear, predictable, and accessible law. Learning from the record of successful appeals, it becomes evident that the Appeals Court plays a relatively unappreciated critical role in identifying the context and nature of risks in the delivery of these core principles and what should be a central focus for attention.

KEYWORDS

Family law appeals; judicial error; risk; parental relocation; rule of law

Introduction

The rule of law requires that laws be applied equally to all, be understandable and predictable. The Australian Attorney General's Office (2024) states, 'We uphold the rule of law through our daily work to ensure laws are clear, predictable and accessible'.

Similarly, the American Bar Association (2024) states that 'The rule of law also requires that people can expect predictable results from the legal system'. Predictable results mean that people who act in the same way can expect the law to treat them in the same way. If similar actions do not produce similar legal outcomes, people cannot use the law to guide their actions, and a 'rule of law' does not exist. Likewise, the UK Attorney General stated (in a recent speech to the Institute of Government on the Rule of Law and Effective Government) 'Laws should be accessible, intelligible, clear, and predictable' (Attorney General's Office and the Rt Hon Victoria Prentis KC MP 2023). This means that those making the laws and those responsible for administering them should have a shared appreciation of their intended application. A primary learning from this research has been to highlight the extent to which these principles are and are not being achieved.

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The aim of this initiative has been to consider the nature of orders and decisions of Family Court judges involving contentious parenting arrangements which have been subject to successful appeal in the period 2021–2023. This time period covers the period for which cases were heard by the new Court Division and for which transcripts were available at the time of writing. Over the period studied here, 35% or 45 of the 124 applications to appeal parenting orders were successful in being granted a rehearing or variation in court orders by the Federal Circuit and Family Court of Australia Division 1 Appellate Jurisdiction (Appeals Court hereafter). It is these cases which form the basis for this analysis. Appeals involving property issues are not included.¹ Cases which were unsuccessful when seeking an appeal hearing will be subject to subsequent study and comparison with those which succeeded. This is a first step in gaining understandings offered by the findings of the Australian Appeals Court for family related matters.

Part 1 of this paper sets out the methodology which has been employed in this study. Part 2 focusses on the issues identified in Appeals Court decisions. Part 3 concerns the best interests of the child as the paramount concern and objective in setting of Family Court orders. Part 4 offers a reflection on the learnings and practical implications for going forward.

Part 1: methodology

In setting out how this study was implemented, it is relevant to articulate the foundation upon which it was developed. Family law, wherever it is practiced, should be understood in the social context in which it operates. It is essential then to be knowledgeable about the range of situations to which the law must respond effectively. This requires an appreciation of the conflicts over parenting arrangements which bring parents to court and how the court responds to the issues presented to it. By examining the context of cases, it is also possible to identify how changing social patterns and expectations bring challenges to the court as well as to the parents themselves. There are notable examples such as amendments to Australian legislation to better reflect the need to consider risk and family violence or the benefit of a child having strong relationships with both parents. For this reason, the qualitative research method and ultimately the narrative nature of reporting has been chosen as a best fit.

This study employed inductive thematic analysis (Braun and Clarke 1996). Using the Australasian Legal Information Institute (AustLII) database,² it was possible to identify all cases presented to and subsequently heard by the Appeals Court in which child custody, and parental rights and responsibility matters were the prime focus. All cases meeting this criterion and heard by the Appeals Court are included in this study.

The transcripts of each of the 45 cases included in this review were coded using the Nvivo software system. The list of codes is documented below. Consistent with the inductive method, the aim was to allow analysis of the transcripts themselves to detect recurrent themes which occur across the data. In this study, the details of the cases themselves form a foundational component (data) of the analysis. The coding was driven by the content of the trial transcripts and augmented by a limited number of administrative elements such as dates, legal representations, and presiding judicial officer(s). Several reads of each transcript enabled the development of subsets of codes to best reflect the issues raised in in

each case and addressed by the Appeals Court. However, to minimise the risk of missing the wood for the trees, it was essential to retain focus on those matters which the Appeals Court emphasised as being of importance. At the same time, it was found that matters raised by parents and those considered by the Appeals Court were often appropriately entered into multiple codes. For example, there was an overlap between such as categories as ‘error in law’ and ‘failure to consider evidence in reasons’ and ‘failure to give reasons’ and ‘procedural fairness’. This intersection between and across recorded factors was found to form patterns as discussed in this paper.

In addition to identifying the grounds of appeal, the legal basis for the decision to grant a rehearing or variation in orders was set out in the Appeals Court ruling. This includes references to a combination of statutory provisions including the Family Law Act 1975, the Federal Circuit and Family Court of Australia (Family Law) Rules 202, and case law. If cases involved jurisdictions outside Australia, international agreements could become relevant such as the Hague Convention (1980) and the Child Protection Convention (1996), although that was not identified in the cases of international relocation in this study. The coding process recorded each of the matters or issues raised in the application for appeal and the primary court’s judgements. This enabled the identification of recurring patterns associated with the context and contended grounds of appeal. A comparison could then be made with the factors identified by the Appeals Court as justifying a rehearing of the case or the issuing of new orders by the Court itself. It was then possible to document the intersection of contextual issues, legal principles, legal mechanisms and judicial performance as identified by the Appeals Court.

A frequent risk in reporting on a thematic analysis is turning a qualitative study into a quantitative reporting regime. Nonetheless a brief overview highlights some critical patterns which emerged as they became the focus of analysis. The Appeals Court provided specific reasons for ordering a rehearing. In over half of the cases, an error in law by the primary judge was identified (25/44 or 58%). The second most frequent error involved a failure to give adequate reasons for orders being made (13/44 or 30%). Failure to consider evidence in reasons was found in 10/23% of cases and lack of procedural fairness was identified in the same number of cases. In over a third of cases (77%) a rehearing was ordered and in the remaining cases the Appeals Court issued revised orders directly. A useful starting point is to consider the relationship between the nature of disputes that were heard by the primary judge and the problems identified by the Appeals Court.

Part 2: issues identified in appeals court decisions

In considering the issues identified in this review of the Appeals Court’s decisions, it is relevant to start with the key values underpinning Australian family law. These values include a primary concern with the best interests of the child, the minimisation of risk and the importance of both parents having opportunities to participate in the child’s life, which is described as shared care. As noted in the introduction, it is essential that the law and its application is clear, predictable and accessible for all those engaging with it through the courts. The extent to which these values are instrumental to the Appeals Court’s adjudications is reflected in these cases.

About parental relocation

Twenty-first century Australia is characterised by a generally mobile population, both internally and internationally. However, when proposed relocation involves disruption of the relationship between separated parents, especially when there is an existing shared parental arrangement, it becomes a challenge that may well end up in court. When determining the best interests of the child, there may be many factors to consider such as the effect of remarriage, potential employment opportunities and broader family relationships of the child with both parents and grandparents. It is not surprising then that just over a third (37%) of the cases reviewed in this study involved the mother wishing to or having relocated either domestically or internationally. None of the cases involved a father initiating or seeking to relocate. Where such relocation involves moving with children a considerable distance (whether inter-state or internationally) it can drastically impact on the ability of the other parent and extended family members to have a meaningful relationship with the children. Approximately half of the cases (9 out of 17 cases) involved relocation to international destinations. This included cases where previous orders had provided both parents with responsibility for care and decision-making. Reasons given for wanting to relocate often relate to seeking support from family living internationally, moving to be near a new relationship or employment opportunities. Ongoing conflict with the other parent was not raised as a justification in these cases. While the principle of freedom of movement is a relevant consideration, the court will consider not only the reason for the move, but also such factors as the impact on the ability of the non-relocating parent to maintain regular contact and have meaningful time with the child, the impact on the child's education, the distance of the move, and if relevant any history of abuse or violence. This, however, proved to be differentially interpreted by primary judges both historically and within the new court (Parkinson 2008).

A key component in the resolution of family court matters is that irrespective of the issues, the reasoning of the judge must be clearly understood, whether or not they are agreed to by the parties. The failure of the court to provide proper reasons increases the risk of repeated litigation, avoidance of which is a central goal in family law in line with the best interests of the child. The Appeals Court found that 7 out of 17 (41%) of cases involving applications for relocation that were referred for rehearing or amended order involved a failure to give adequate reasons and a failure to consider evidence in the primary judge's reasons. In addition, the Appeals Court found that in determining applications to relocate, 8 out of 17 (47% of) cases judicial statements of reasoning involved errors in law, 4 out of 17 (24%) had errors of fact and a similar number lacked procedural fairness. The following cases illustrate how inconsistencies in determination of applications for parental relocation undermine the potential predictability and clarity of decision making.

It is worth noting in providing the 'story' behind the cases described below, that none of them are exceptional. This is to say, they represent circumstances that are neither out of the ordinary nor unusual and that is why they are important. It is for this reason that the findings of the Appeals Court offer important learning opportunities.

Linking the matter of relocation and judicial reasoning, the case of *Stern & Colli [2022] FedCFamC1A 95* is illustrative of the application of the principle of *Rice v Asplund*

(1979). This principle requires an applicant wishing to vary an existing parental order to demonstrate that there has been a change in circumstances that justify the matter being reconsidered by the Court. In this case, following parental separation the mother and child had relocated approximately 280 kilometres from the father's residence. In the final orders, the primary judge had allocated equal parental responsibility for the child (known as shared care in Australia), allowing for the time being spent with the father to increase as the child passed certain age milestones, with the distance between residences being the primary determinant of these orders. The father subsequently relocated to within a 40-minute drive of the child to have more frequent time with them and wished to revisit prior orders which had been based on the greater distance between homes. Additionally, while the prior orders provided for Wednesday being a contact day with the father, his unchangeable work commitments on that specific day made it unworkable with respect to the intent to spend time together. In 2021 the Judicial Registrar refused to allow a rehearing based on these changed circumstances. This decision was then subject to review by the primary judge who concluded that the appellant had not demonstrated a material change in circumstances to warrant reconsideration of the parenting order. On appeal in 2022, the Appeals Court found that the primary judge had failed to consider the significance of the changed circumstances as a determinative matter and provided inadequate reasons underlying this conclusion. Similarly, in finding that the father was unable to facilitate time on Wednesday was not sufficient to warrant reconsideration, the primary judge failed to provide reasons for this conclusion. The case was again referred for rehearing. Some three months later, it was found that the case for material change had been met and it was in the best interests of the child that the application for new orders be allowed to progress.

In the case of *Cording & Cording [2022] FedCFamC1A 51* the Appeals Court found an error in law and failures in the provision of reasoning justified an order for rehearing of the case. Over three hearings, the nature of parenting orders changed dramatically. Initial orders provided for shared care by both parents, the second hearing involved the mother's application to relocate with the child, which was denied, to the final appeal in which the father was given sole parenting responsibility and allowing the mother to decide whether or not she preferred to relocate or remain in the locale and retain shared care. It is critical to recognise that two specific failures resulted in the rehearing order. The Appeals Court found an error of law associated with a 'finding of fact' for which there was no evidence supporting it. Secondly it was found that the lack of adequate reasons for decisions (such as financial practicability and matters of support) was sufficient for allowing the appeal to progress. The Appeals Court concluded that a rehearing was justified on the basis that such errors were critical to the outcomes as set out in the judicial reasoning.

When a parent is allowed to relocate internationally, this can significantly reduce the capacity of the other parent to maintain a regular and meaningful relationship with the child(ren). A rehearing was ordered in the case of *Edinger & Duy [2023] FedCFamC1A 194* as a consequence of judicial error. The primary ground upon which the appeal relied was a lack of procedural justice. In this case the final parenting orders allowed no time with the father and sole parenting rights to the mother, including the right to take the child outside of Australia. Having left Australia, the mother never returned with the child and did not participate in the appeal process. The Appeals Court found on reviewing the

transcript of the final hearing, that the primary judge was responsible for a miscarriage of justice. This determination was based upon the primary judge being held responsible for not only failing to allow evidence to be heard but also for unacceptably interrupting the cross-examination process as well as supporting the mother's case. Further error was made by the primary judge in making a finding of fact as to the presence of family violence perpetrated by the father. It was determined by the Appeals Court that this latter finding was both unfounded and unfair. Collectively these errors resulted in a lack of procedural justice.

The particular relevance of this case is its linkage with the way accusations of risk were assessed and potential barriers to being able to redress the harms resulting from both a false positive or a false negative determination on the relationship between a parent and child. As of writing, no rehearing has been convened and the child remains living abroad. The approval of relocation internationally creates the most significant risk when it comes to both long term outcomes and ability to address errors in primary decision making. As in the case of *Edinger and Duy* [2023] it is reminiscent of the phrase 'closing the barn door once the horse has bolted'.

Risk, amelioration of risk and judicial discretion

Austin J's dissenting judgment in *Fitzwater & Fitzwater* (2019) 60 Fam LR 212 [138] stated that,

The assessment of risk is a predictive exercise and while it is, naturally enough, liable to be influenced by factual findings about past events, the contemplation of risk entails the foresight of possible harm. It is an oddity to expect that the mere possibility of future harm can or should be proven as a probability, as has been implied before (Potter and Potter (2007) FLC 93326 at [110], [129]). Risks of harm must be heeded even if they are improbable eventualities.

Further, Deputy Chief Justice McClelland noted in the case of *Matthew & Hickson* [2022] FedCFamC2F 201 'such an unacceptable risk can include any or all matters that compromise the safety, welfare and well-being of a child, and is examined in light of an accumulation of factors proved' [39]. Assessment of risk and its potential amelioration constitutes a discretionary determination by the family court, but which is accountable through the statement of reasons provided by the presiding judge.

Critical to judicial decision making is the treatment, weight and inclusion or exclusion of expert evidence. Family report writers, family consultants and psychologists as single expert witnesses play a crucial role in the Australian family law system. Such witnesses report their assessment of potential risk – whether related to such accusations as domestic violence, child abuse, compromised mental health, or parenting competence. The ability of such expert witnesses to directly influence judicial decisions and orders is significant. As noted by Rathus (2021, p. 1) in a recent study documenting the experience reported by expert witnesses, Although an understanding of the legal context is essential for expert witnesses, the study suggests that the legal system, and their experience of it, may influence their assessment framework, affect their recommendations, and consequently impact parenting orders. Although this article investigates the situation in

Australia, the results raise questions for similar family law jurisdictions which rely on family assessment reports.

The single expert witness reports presented to court were not accessible in this study. As a consequence, there is no available documentation setting out the method of assessment employed by such witnesses nor evidence of the reliability of such methods. This review is, therefore, reliant on the observations made by the Appeals Court and records of expert testimony in relevant court transcripts.

However, taking on board the findings and recommendations of the single expert witness is only one element in the Court's response to alleged risk. Referral to parenting programmes that claim to reduce risk and enhance parenting abilities has also become part of the Court's arsenal and forms part of a preventative or risk management component of Court orders. It is relevant to acknowledge that such orders are generally associated with addressing specific types of parental behaviour rather than programmes relevant to a specific child's development, behaviour, mental health or related issues. This is important because many of the programmes identified in Australian evaluations have focussed on helping parents to respond to child related issues rather than risk related parenting issues (Parenting Research Centre 2017.) Two different but commonly occurring risks identified in family law cases are that of anger management and domestic violence. There are a number of service providers who offer users a certificate suitable for court on the completion of their anger management course.³ Reference to any independent evidence of the success of such programmes in mitigating risk is not found in any court transcripts. Such courses are separate from those which are specific to domestic violence problems in which power and control, coercion, financial and social control are present. As noted nearly a decade ago by the National Research Centre for Women's Safety, 'It is widely accepted in the literature that anger management is ineffective and unsuitable as a sole intervention for men who use family/domestic violence' (Mackay *et al.* 2015). It is relevant therefore that in making judicial orders there is an appreciation of these differences.

In 2023 the Appeals Court heard the case of *Darmadi & Binjori [2023] FedCFamC1A 29* in which historic family violence was at the core. In that case the primary judge made orders that the father complete a men's behaviour change programme (20 weeks), an anger management counselling programme (12 weeks) and that the Independent Child Lawyer provide the name of a psychologist who was able to provide to the father anger management counselling under a 12-week mental health plan. As attendance progressed, the orders permitted access to supervised and ultimately unsupervised time with the child. The maternal parent and the Independent Children's Lawyer (known as ICL)⁴ argued that the primary judge failed to provide reasons as to why the prescribed pre-conditions would sufficiently ameliorate risks to allow unsupervised access by the father. At the appeal hearing, the father denied the need for either the anger management or counselling programmes, acknowledged that he had failed to pursue them in the intervening year and agreed only as a requirement of the court. The mother and ICL argued that given the failure to recognise the need for change it was unlikely that participation in the prescribed courses would produce the awareness of or the necessary change. The Appeals Court found significant deficiencies that warranted a rehearing. This included a failure of the primary judge to provide the basis for concluding that the preconditions being set were sufficient to ameliorate risk to an acceptable standard or to sufficiently consider the father's lack of insight into the consequences of his behaviour. Collectively these concerns were found to

reflect a deficiency in assessment of the potential risk to the children. Based on these deficiencies, the Appeals Court ordered a rehearing.

The case of *Clanton & Lachman (No 2) [2022] FedCFamC1A 165* involved documented physical violence against the mother, a series of Apprehended Violence Orders being made by the NSW police and contested orders allowing unsupervised time with the children. It should be noted that the father had been previously ordered to attend and complete an anger management programme course by Judge Henderson as far back as May 2018 which he failed to do, nor did he display any insight into the impact on the children of witnessing the violence. In the context of such history, the mother appealed the primary judge's orders (as sequentially amended under the slip order) which would allow unsupervised access by the father (who was described by the Family Consultant as a reactive perpetrator). On ordering a rehearing by a different primary judge, Justice Aldridge concluded that I am satisfied that it cannot be discerned from the reasons how his Honour found that the F Service and subsequently the J Service anger management courses would ameliorate the otherwise unacceptable risk of harm that the father posed and how an obligation to complete the course was reconcilable with the children immediately spending unsupervised time with the father in a rapid reintroduction of the children to him [43].

As in the case of *Clanton & Lachman (No 2) [2022] FedCFamC1A 165*, the parenting orders involving *Bielen & Kozma [2022] FedCFamC1A 221* were subject to multiple hearings. In June 2022 final parenting orders placed two children of the relationship with the father and they spend no time with the mother unless agreed in writing between the parents. In August of the same year, the mother lodged a Notice of Appeal seeking to set aside those orders and for a rehearing to be held. In September, a further application was made by the mother seeking that the prior orders be stayed and supervised contact be allowed. In the June hearing of *Kozma & Bielen (No 2) [2022] FedCFamC2F 1250* the primary judge found that the mother presented an unacceptable risk of psychological harm to her two young children based on unjustified allegations and beliefs that they had been victims of sexual abuse by the father. Given the risk of harm that such beliefs present, and a view that a programme of therapy was unlikely to reduce the risk, the primary judge ordered that children reside with the father and have no contact or time with the mother.

Three months later the Appeals Court heard the case. The Appeals Court determined that a rehearing was justified as the primary judge had failed to consider *how risk might be ameliorated* prior to concluding a 'no time' outcome was appropriate. The Appeals Court argued that despite the explanation of reasons presented by the primary judge being clear, there remained a complementary duty to consider potential orders that might mitigate the total loss of relationship with the mother while recognising the risk she presented. It was not argued that the success of the proposed counselling would guarantee best outcomes, but rather whether there were unexplored options despite this. In making an order for rehearing to consider solely whether and how the mother might communicate or spend time with the children, the Court noted [68]:

That finding did not, however, relieve the primary judge from the obligation to consider a range of potential orders that could mitigate against the children being subjected to a risk of psychological harm, in being separated from their primary carer by ensuring these young

children retained a meaningful relationship with their mother ‘to the maximum extent possible’, having regard to the finding of unacceptable risk in living with their mother. Again, the prospect of supervision of the children’s time with the mother, pending completion of that therapy, stands out as a factor that should have been given proper consideration and, with the greatest of respect to the experienced primary judge, she failed to do so.

Staying with the problematic issue of risk, *Hickson & Matthew [2022] FedCFamC1A 161* is relevant. In this case, the Appeals Court found two substantive issues that justified a rehearing of the case. The first issue was the failure of the primary judge to provide adequate reasons for determining that risk was sufficient to order the child be placed in residence with the father, despite having resided with the mother since her birth four years prior. The second issue was the failure to provide adequate reasons for the decision to allow the child to spend regular, overnight, unsupervised time with the mother given the determination that there was sufficient risk to require a change in residence. In short, there was a fundamental non sequitur between the finding that the mother presented an ongoing risk to the child and yet providing for unsupervised time between the child and mother. Further to this, the Appeals Court found that while the primary judge found that spending equal and substantial time was impractical once the child was attending school (given the 90 km distance between the parents), no reasons were provided as to why this would be impractical prior to the child starting school [56]. The Appeals Court noted that The components which lead to a conclusion that an unacceptable risk exists need not each be established on the balance of probabilities. The Court may reach a conclusion of ‘unacceptable risk’ from the accumulation of factors, none or only some of which are proved to that standard [39]. This does not, however, remove the need to explain such reasoning.

In each of the preceding cases, the way in which alleged risk should be addressed is a critical component. Analysis of the Appeals Court determinations revealed two recurrent matters. The first of these is the failure of the primary judge to provide an adequate statement of reasons. Secondly, the Appeals Court expressed concern as to how it was concluded that the participation in the ordered parental behaviour programmes would or would not ameliorate the otherwise unacceptable risk. At the same time it is reasonable to question what responsibility lies with service providers to demonstrate efficacy of their programmes to better advise judicial decision making.

Providing reasons - accountability in the exercise of judicial decision-making

The relative weight ascribed to the evidence presented by parties to a case is generally reflected in a judicial statement of reasons and decision making. Who is allowed to give evidence and under what circumstances as well as what is excluded is then critical to the court process. In over a quarter of the cases reviewed (13 or 29%), the granting of an appeal involved either a failure to receive evidence or a failure to adequately consider evidence in reasons for a decision.

Denham & Newsham [2021] FamCAFC 141 is illustrative of both these considerations. In this case the primary judge allowed the mother and child to relocate to Belgium. In considering the challenge to this decision by the father, the Appeals Court focussed on two grounds. The first of these was the failure of the primary judge to provide reasons as to why the advice of the independent expert was not accepted or why other more

significant aspects of the best interests of the child would mitigate against adhering to such advice. Of particular importance was the independent expert's advice that allowing the international relocation at the child's young age would lead to a fracture in the relationship with the father and longer-term consequences for the child.

The second issue was the practicality of the father meeting the financial costs of the international travel three times a year as suggested by the mother. Again, it was found that both the timing and costs of such arrangements were not given adequate regard given the father's circumstances when determining that the mother's proposal was ultimately achievable. The Appeals Court concluded that:

The failure to address the full effect of the evidence given by the single expert as discussed above and to then explain why it was or was not accepted and, to then weigh it along with other significant matters is an error in fact finding, the process of reasoning and renders the ultimate conclusion unsustainable. The same must be said about the approach taken to the father's ability to afford the costs of spending time with the child provided for in the orders. That point is reinforced by the further evidence, which in and of itself requires that the appeal be allowed, and a rehearing ordered. The consequence of this is that the relocation order must be set aside, and the relocation issue be remitted for rehearing by another judge. [53]

The judicial statement of reasons is expected to allow all those involved, including the Appeals Court, to understand the facts and analysis upon which a decision is based. This is not to suggest that litigants must agree with the court's decisions, but that they are able at least to know how they were reached. In *Dorsey & Lamb [2021] FedCFamC1A 94* Aldridge J noted that 'The obligation to give adequate reasons is well known' (14) and cited the principles expounded by Grey, J in *Sun Alliance Insurance Ltd v Massoud [1989] VR 8 [18]*, namely that:

The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if: —

- (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
- (b) justice is not seen to have been done.

The two above stated criteria of inadequacy will frequently overlap. If the primary Judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the losing party is denied knowledge of why his or her case was rejected.

And further, the Appeals Court referred to *Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110*, in which the Court of Appeal said:

The extent and content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties. [58]

The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted . . . it is necessary

that the primary judge enter into the issues canvassed and explain why one case is preferred over another. [59]

The order by the Appeals Court for a rehearing was based on these principles in the case of *Dorsey & Lamb* [2021] FedCFamC1A 94. In that case the primary judge found that the child should live with the mother who would have sole parental responsibility. This was despite the child having lived with the father and grandparents for the previous three years and was found to have done well in this environment. In considering the application to appeal, it was found that the primary judge acknowledged that the testimony of the mother, the father and the grandparents was credible, and the views of the Family Consultant were mentioned in the decision of the primary judge. Notably, the Appeals Court reflected that it is essential that it is the judicial officer who determines the outcome of a case not the Family Consultant or other expert witness. A second element in the Appeals' Court critique was the failure of the primary judge's statement of reasons to address specific requirements of the Family Law Act including such elements as family violence, the impact of separation from the father, the practicality of arrangements and the capacity to meet the child's needs. Accordingly, the right to a rehearing was allowed as the Appeals Court concluded that:

In short, the reasons do not explain why the orders were made and why the mother's contentions were accepted and those of the paternal grandparents and the father were rejected. One may readily accept that the primary judge took many matters into account but, unless the matters to which significant weight was given are identified and the weight given to them explained, the recipient of the reasons and a court of appeal is entirely unable to say whether the evidence and the issue in the case were given proper consideration. [37]

While the judges of the Appeals Court may have considered that they would have pursued a different way of exercising discretion than a primary judge, it will allow an appeal only if there is an error law or in the exercise of discretion. This might include allowing extraneous or irrelevant matters to be considered, where there is an error in fact or a failure to consider relevant evidence. Examples of such errors are set out in the following section.

Errors of law – calling out judicial mistakes

Just as the giving of reasons is a critical component in the sustainability of judicial orders, the Appeals Court found cases involving fundamental errors in law by the primary judges were sufficient to require a rehearing. The application of social theory has arisen in recent hearings. The *Shell & Armel* [2022] FedCFamC1A 83 case is significant because it raises the contentious nature of the application of social theory in the court room (Hayes 2014, Rathus 2016). *Rubra & Potter* [2023] FedCFamC1A 159 is noteworthy because of the critical role that mandatory mediation now plays in the Australian family law system and its relationship to the trial setting.⁵ And the case of *Basford & Basford* [2021] FedCFamC1A 105 exemplifies error associated with a failure to consider relevant evidence in a statement of reasons.

In the case of *Shell & Armel* [2022] FedCFamC1A 83 the father argued that the mother had alienated the children and the mother argued that the children were simply responding to the father's abusive behaviour. The Family Consultant ultimately could not determine which

of these positions was an accurate description of the situation, but nonetheless concluded that unless the children were to live with the father, any relationship with him or extended family would not be possible. The critical reason for ordering a rehearing arose from the decision by the primary judge to refer to the 2001 article authored by Kelly & Robertson entitled *The Alienated Child: A Reformulation of Parental Alienation Syndrome*. The article was neither tendered in evidence nor would its content fall within the provision of 'common knowledge' as set out in s144 of the Evidence Act 1995 (Cth). Although the Independent Children's Lawyer (ICL) questioned the Family Consultant on the relevance of the article to the case, neither legal representative opted to do so. The application to appeal was successful because the Primary Judge's '*erroneous reference to and reliance upon the article, when it was not in evidence, is an error of law*' [41].

A similar reference was made in the case of *Berry & Andrews [2022] FedCFamC1A 120*. In this case the primary judge also cited the Kelly and Johnston (2001) article referenced in the *Shell & Arnell* appeal. Because the Appeals Court found matters of fact had determined the final orders, this was not a determining factor in this case. Nonetheless the way in which exogenous non legal 'learning' arising from social science research is treated in legal reasoning is directly linked to the broader question of how well prepared the Court is to address such challenges as reliance on and/or identification of unreliable or controversial social science (or indeed psychological assessments) when it underpins evidence provided by expert witnesses (Fidler and Bala 2020).

Other errors identified by the Appeals Court involve the exercise of powers which the primary judge did not have. For example, in the case of *Rubra & Potter [2023] FedCFamC1A 159* the primary judge relied upon information exchanged during mediation to make a determination. Appeals Court judges Aldridge, Baumann and Riethmuller JJ concluded that the use by the primary judge of information exchanged during mediation was an error and had been material to the court outcome. This is contrary to the fact that the judge is not entitled to have regard to such information.

Basford & Basford [2021] FedCFamC1A 105 exemplifies the intersection between risk assessment, the role of expert witnesses and judicial error. There the appellant challenged the primary judge's orders on the basis of the failure of the judge to consider the evidence of the treating psychologist and general practitioner. The written submissions of both practitioners were provided as part of the appellant's case and had effectively undermined the oral assertions of risk made by the respondent. The primary judge provided no reasons to justify the decision to accept the assertions of risk while not considering the evidence of these practitioners which directly contradicted assertions of unacceptable risk. In this context, the primary judge failed to receive relevant evidence nor explain why. The Appeals Court concluded that rehearing of the case was required. In reaching this conclusion, the Appeals Court stated *at* [6] 'a failure to give reasons will itself constitute an error of law'.

In the dispute between *Defrey & Radnor [2020] FCCA 713* the primary judge referred the parties to arbitration, a power not available to the primary judge. In the appeal of *Halloran & Keats [2023] FedCFamC1A 56* the Appeals Court found that the primary judge had made orders for which the source of power was undetermined and was in conflict with the principles of *Rice v Asplund 1979*. In the case of *Oberlin & Infeld [2021] FamCAFC 66* the primary judge made an order limiting the ability of a parent to bring a fresh hearing under conditions for which there was no statutory power. A similar example is found in the case of *Hedlund & Hedlund [2021] FedCFamC1A 84* in which the

primary judge's order for a Personal Protection Order of indefinite duration (including past when children reach adulthood) was an error in law.

Arguably 45 cases represent a small population upon which to rely. However, the ability to identify recurring patterns involving similar issues facing the court supports the importance of learning from the Appeals Court decisions. Importantly the three core patterns emerging are directly relevant to and should be accountable to the core values and principles underpinning family law.

The first pattern is the need for judgements to be clear and predictable. Despite the inherently discretionary decision-making power of judicial officers, there is a need for this to be implemented in a predictable or clear manner. In contrast cases involving parental relocation have often involved multiple hearings and re-hearings, as well as changing parental arrangements for children. It can be suggested that there is insufficient evidence of how such decision making is practiced in a predictable or clear manner. In short, the exercise of discretion is not unfettered and must be accountable and set out in judicial reasoning.

A second pattern which is visible is the need for participants to be able to understand how decisions are made (statement of reasons) and how the evidence and information provided in hearings is assessed and weighed in making such decisions. This emerges as a particularly significant concern in cases involving the assessment of risk and how such risk should be addressed, ameliorated or shape parenting orders. In cases in which risk is a core issue, the court is often reliant on the advice of external experts and how this is weighted or considered can be critical to outcomes. Similarly, when parenting arrangements are conditional on the meeting of requirements for parental participation in specific programmes, this requires consideration of the evidence which has been relied upon in setting such requirements. In short, reasoning must be accessible to stakeholders.

A third pattern which is visible is the extent to which judicial error may be responsible for the additional cost, time and delay in a case. This is not a small matter. The fact that the cases used for illustration here and ordered for rehearing had not been reheard to date, is not inconsequential. This can be critical when relocation is involved, where orders involve a denial of parental access to a child, or where allegations of risk are not appropriately addressed. Failure to provide adequate reasons, failure to consider evidence, errors of fact, errors in law and lack of procedural justice collectively account for such costs. Most importantly, such errors may have a significant impact on the best interests of the child.

Drawing together the issues and learnings arising from these decisions, it becomes evident that the Appeals Court plays a critical role in addressing the way in which the Federal Circuit and Family Court of Australia can be held to account with respect to adherence to law and case law intended to shape decision making.

Part 3: best interests of the child

Section 60CA of the Family Law Act 1975 states 'In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration'. This requires that irrespective of the nature of parental conflict over parenting arrangements, or claims made, or evidence tendered, the best interests of the child must be the primary objective of any orders. Further as set out in

s60D of the Act, the best interests include having a meaningful relationship with both parents and being protected from physical or psychological harm, abuse, neglect, or family violence.

It is worth noting that when determining the best interests of the child, the court is required to consider the views of the child, (s60 CC and s60CD of the Act). There was no discussion or evidence in any of the transcripts which indicated that this had occurred or, if it had, how it informed the court. Given the relatively young age of the children in these cases (being toddlers to 9 years of age), this would have been difficult. Nonetheless it will be relevant to see how this plays out in future cases involving older children.

There are no specific formulae, tests or criteria which ensure a predictable determination of cases involving parental relocation with a child, allegations of past and future risk, or reliability of expert witnesses. None of these are easy – how to balance a parental right to freedom of movement in context of the child’s best interests, how reliably do past behaviours predict future conduct, what assumptions and approaches to psychology or social science (for which there are conflicting opinions) must be revealed and weighed when presented by an expert witness? A combination of provisions of the Act and legal precedents (case law) are relied upon to establish a basis for consistent decision making which offers stability, dependability, and uniformity in the system (Endicott *et al.* 2023).

In an increasingly risk oriented society, the focus on the best interests of the child is proof of safety (Bergkamp 2017). This places the expert witness in a critical position in defining the nature, scope and basis of risks and surveillance of risk. Determining how risk is assessed is subject to conflicting assumptions underpinning social science and psychological claims. As with adequacy of reasons, the determination of what constitutes an unacceptable risk and how this is addressed has been subject to case law as well as the provisions of the Act itself. The determinations made in three recent cases expose a lack of clarity in addressing this critical concern. In determining unacceptable risk and how it should be addressed requires consideration of risk along a continuum with the level of risk and opportunity for its amelioration. In the case of *Hickson & Matthew [2022] FedCFamC1A 161* at [37], McClelland, DCJ cited Austin J’s dissenting judgement that risks of harm even if improbable need to be considered (Austin J’s dissenting judgement in *Fitzwater & Fitzwater (2019) 60 Fam LR 212*).

Further, drawing from the Full Court decision in the case of *Blinko & Blinko [2015] FamCAFC 146* at [27–28], McClelland J noted that, ‘A consideration of risk, and factors which impact upon or ameliorate the risk, will in most cases be inextricably linked. That is because [t]he object of safeguards is to convert an unacceptable situation to an acceptable one where that is feasible and is of ‘benefit to the child’. And McClelland, Henderson and Harper JJ relied on this same principle in the case of *Bielen & Kozma [2022] FedCFamC1A* when determining that the primary judge had failed by not considering how risk might be ameliorated when ordering no contact.

The extent to which options for amelioration of potential abuse can be confidently relied upon is no small issue given they form a decisive element in cases involving issues of potential abuse and ensuring a child’s safety. A failure to demonstrate reliability of the proffered programmes and interventions by proponents is a substantial concern. (This specifically relates to the range of services other than supervised visits, such as parenting training, anger management, counselling, and relationship services.) This includes the adoption by the Federal Circuit and Family Court of Australia of the Lighthouse Risk

Screening tool (including labelling a respondent as high risk) for which an independent evaluation would be beneficial given the status accorded to the approach.⁶

The assessment of the competing proposals requires the judge to focus on the evidence of the advantages and disadvantages for the child's best interests. The extent to which the legal framework promotes clear and predictable decision making is less obvious. Sections 60C, CC2, CC3 and 65 DA specifically address the factors that should be considered in determining the best interests of the child – which is the paramount consideration in all cases involving conflicting parental claims. However, appeals suggest that this is not always straightforward. In the case of *Mallows & Harrod (No 2) [2022] FedCFamC1A 102 at [36]*, the Full Court established that in addressing applications to relocate:

It is not simply a matter of comparing the relocating party's proposal against the status quo and allowing or denying relocation. Rather the court must consider each party's proposal on its merits, in accordance with the prescribed legislative pathway.

As noted in that decision, the proper focus is what is better for the child irrespective of the mother's good reasons for wanting to relocate. It is this same precedent which informed the successful appeal of *Tanev & Baumann [2023] FedCFamC1A 182 at [28]* against an order allowing relocation internationally in which the Appeals Court found 'we are satisfied that the appeal as to parenting must succeed because the parenting determination failed to follow the statutory requirements mandated by s 60CC and s 65DAA of the Act' [17]. Although the specific details of cases involving relocation may differ, the commonality lies in the implementation of the legislated requirements in which judicial error played a significant role.

A comparison of the provisions of the law, case law and its application in appeal cases reveals two separate considerations. The first of these is simply identification of cases in which the primary judge has been found to be in some form of error. The second is the way in which critical issues associated with assessing risk and best interests of the child have led to problematic Family Court orders. In each of these matters, the Appeals Court has been invaluable in responding to questions arising in individual cases and which collectively enliven recognition of the challenges in addressing such recurring issues facing judicial decision makers.

Part 4 – reflection on the practical implications going forward

The aim of this paper has been to contribute to the understanding of how the administration of the family law system currently performs in the resolution of contentious parenting order disputes. The cases adjudicated by the Appeals Court have provided the data for this study.

The rules specified in law and the interpretation cited as case law are designed to provide the basis for decision making. Because the administration of law remains contingent on the what and the way information is presented and processed by individuals and evaluated by decision makers, it is a profoundly subjective process. Because it is not always (and often is not) possible to achieve 'neat' outcomes, demonstration of the principles of transparency, accountability and predictability in decision making are essential. This analysis has revealed a pattern of situations and decision-making practices

that warrant further consideration to realise these agreed principles. The aim of this reflection is not to provide answers but rather to promote acknowledgement of the learning by that can be garnered from Appeals Court reporting and how this can help to inform Family Court decision making.

Family law operates in the intimate and personal lives of families. It reflects a blend of legal and social norms, neither of which are static, but rather are subject to change as attitudes, values and understandings evolve. It is for this reason that legislative rules and legal precedents must be viewed from the perspective of the current context, considering the extent to which the rules and interpretations of the past are relevant in the present. For example, the intersection of changing social norms, gender roles and relationships as well as notions of power have evolved since the first Family Law Act was passed in 1975, nearly a half century ago. This in turn colours the lens through which the law and precedents may be viewed. Such changes are reflected in sequential amendments to the primary legislation and creates questions around the relevance of case law which pre-dates such changes. In broad terms, it is useful to consider whether the intent and interpretation of intent expressed in precedents continues to reflect the aims and intentions of the evolving legislation and societal change.

Despite the specific criteria set out in the legislation and the application of case law, the experience from Appeals Court judgements suggests case outcomes are not consistently predictable. At times transcripts suggest that evidence presented, and judicial reasoning becomes weighed down more with respect to the benefit of the applicant parent with an implication that what is good for the parent is best for the child. This was well represented with legal precedent found in the High Court decision in *MRR v GR [2010] HCA 4* in which it was determined that improved conditions for the mother through relocation would by extension be in the best interests of the child. However, the Family Law Act 1975 now well recognises the importance of the role of fathers in children's lives and the value of a meaningful relationship with both parents. Despite the evolving understanding of the role of fathers, neither the Federal Circuit and Family Court of Australia (Family Law) Rules nor the judicial practice notes provide relevant guidance with respect to this now substantially outdated precedent. At the same time the complexity of matters set out in the legal framework which must be considered by the judicial officer, and how these are accorded weight, may contribute to a lack of predictability in practice. This effectively undermines the ability of potential applicants or respondents to make informed decisions. Cases involving disputes over parental relocation are a good example of this problem.

The Appeals Court rulings also reveal a recurring challenge associated with reliance on unproven means of ameliorating risk. While supervised access is now a well-established means for addressing perceived risks while enabling contact, there is also a pattern of relying on referrals to training, education, therapeutic and counselling services. These are often developed to respond to specific behavioural or risk factors that the Court views as needing amelioration. The challenge is the paucity of evidence of the long-term effectiveness of such programmes even where they are in receipt of public funding or promotion. This can be problematic given the risk of trust on the unproven to reduce perceived safety issues for children and as a prerequisite to allowing or denying a parental relationship with a child. As with all social, psychological, and behavioural practices there are central assumptions underpinning approaches to social and psychological services

which need to be made explicit. Without robust evidence and demonstration of long-term outcomes, this poses an additional risk when courts rely on such programmes. For this reason, there is a need to establish standards of proof of programme performance with respect to the long-term outcomes in risk reduction and the best interest of children.

There is also a link between the reliance on intervention programmes, the reliance on expert witnesses and the reliability of the social sciences employed. The controversy with respect to parental alienation theory is just one example. It raises the question as to how well equipped the judicial officer is to weigh the reliability of the social science being relied upon, the expert witness method and consequent findings which can ultimately shape parental orders. While there are legal standards applicable to physical science evidence, there is no practical equivalent for the social sciences. It is argued that given the inherently significant role of such practitioners, it is timely to consider this issue. It is relevant to consider what safeguards exist against the halo effect undermining expert witness testimony, particularly when participants are effectively professional expert witnesses in the family court.

Despite the apparent repetition of argument in this discussion, it arises because there is an inherent relationship between the types of issues which the court needs to address and the inter-related nature of the elements identified by the Appeals Court. Again the requirement to provide reasons, the nature of evidence and how it advises decision making, procedural justice and errors in law are not distinct but rather consistently overlap in practice. In the same way they collectively impact on how the core values underpinning family law are achieved. Once a pattern of judicial performance issues is identified by the Appeals Court, it provides a valuable platform for the professional bodies to best support practising judicial decision makers which in turn benefits those turning to the courts for resolution.

If there were easy solutions to these issues, they would have been found and implemented. However, this requires acknowledgement that that the issues exist. This preliminary study points to the merit of learning from the conclusions of the Appeals Court. Only one third of applications to appeal parenting orders were successful in being granted a rehearing or variation in Court orders by the Federal Circuit and Family Court of Australia Division 1. Nevertheless, the significant finding is that there is a consistent pattern of situations and causes that lead to successful appeals. While this is a relatively limited number of cases and considerably more investigation is needed (including how other jurisdictions address these issues), it provides a useful starting point for learning from the Appeals Court and opens up opportunities to engage with family law court stakeholders in delivery of the declared principles of accessibility, predictability, and clarity.

Notes

1. It is essential to acknowledge that the Family Law Act 1975 is a federal act and operates through federal courts in each state and territory.
2. <https://www.austlii.edu.au/>.
3. Some examples include Jasmin Newman (private sector) Claims that course on anger management ends with a certificate that is recognised by the Court and is designed for those in family law matters <https://parentingafterseparation.com.au/courses/anger->

management.; Transformation Ministries <https://www.anger.org.au/the-course.>; Tame Your Dragon's website states its anger management course is designed for those referred by Court and is able to certify <https://tameyourdragon.com.au/mens-behaviour-change-program/>. Men's Behaviour Change; and Open Path offers an online programme with certification <https://mentalhealth.openpathcollective.org>.

4. The Independent Children's Lawyer is appointed by the Court and is responsible for representing the best interest of a child within family law hearings. <https://www.fcfta.gov.au/fl/children/icl>.
5. Under the Australian Family Law Act 1975 separated parents are required to participate in family dispute mediation prior to seeking a court hearing for parenting orders.
6. <https://www.fcfta.gov.au/fl/pubs/lhp-info-parties>.

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Primary coding elements

Date, Judge, Legal Representation, Legal Principle, Ground of appeal, Basis for granting appeal, legal precedents, expert witness, outcome, evidence presented in first trial, exercise of discretionary judgement, relocation, issues identified, orders made, reference to time delays.

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