The A-Z of Running Appeals

QLS & FLPA Family Law Residential 2013

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This paper examines the steps required to institute and (to a limited extent argue) an appeal and also touches on some alternatives to consider in lieu of appeal, matters to be considered when an appeal is contemplated, and some issues that may arise in the course of an appeal.

Appellate Jurisdiction

The jurisdiction relating to appeals is found in Part X of the *Family Law Act 1975.* Section 93A of the *Family Law Act 1975* invests the Family Court of Australia with jurisdiction to hear and determine appeals:

> *(1) The Family Court has jurisdiction with respect to matters arising under this Act or under any other law made by the Parliament in respect of which:*
>
> *(a) appeals referred to in section 94[1] are instituted; or*
>
> *(aa) appeals referred to in subsection 94AAA(1) [2]or (1A)[3] are instituted; or*
>
> *(b) appeals referred to in section 96[4] are instituted.*

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1 This section refers to appeals from a decree of the Family Court (other than a Full Court of the Family Court) and from a Family Court of a State or the Supreme Court of a State exercising original or appellate jurisdiction under the Family Law Act or proceedings set out in section 9 of the Family Law Act – which are the transitional provisions

2 Appeals from decrees of the Federal Circuit Court

3 Appeals from the Magistrates Court of Western Australia

(2) Subject to section 96 in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given:

(a) by affidavit; or

(b) by oral examination before the Family Court or a Judge; or

(c) as provided for in Division 2 of Part XI.

Section 93(2) makes it clear that the Court will primarily have regard to the material before the Court below but can receive further evidence. Section 96A makes it clear that there are separate considerations in appeals against international agreements about adoption etc[5].

Family Law Rules 2004 Chapter 22

The "nuts and bolts" of appeals are found in Chapter 22 of the Family Law Rules.

Rule 22.02 provides:

Starting an appeal

(1) A person may start an appeal by filing a Notice of Appeal:

(a) for an appeal from a court of summary jurisdiction other than a Family Law Magistrate of Western Australia -- in the registry of a Family Court that is closest to the court of summary jurisdiction that made the order appealed from; and

(b) in any other case -- in the Regional Appeal Registry.

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4 Appeals from Courts of Summary jurisdiction in its family law jurisdiction other than the Magistrates Court of Western Australia

5 See section 111C which refers to the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993

(2) If an appeal cannot be started without the leave of the court, leave must be sought in the Notice of Appeal.

Appeal as of right v. Leave to Appeal

Section 94 of the *Family Law Act 1975* sets out the decrees from which appeals lie as of right. In summary, an appeal lies as of right from:

- a decree of the Family Court, sitting other than as a Full Court, exercising original or appellate jurisdiction under the Family Law Act or under any other law
- a decree of a Family Court of a State or a Supreme Court of a State or Territory constituted by a single Judge exercising original or appellate jurisdiction under the *Family Law Act 1975* or in proceedings continued in accordance with any of the provisions of section 9 of the *Family Law Act*.
- a decree or decision of a Judge exercising original or appellate jurisdiction under the *Family Law Act* rejecting an application that he or she disqualify himself or herself from further hearing a matter.

Section 94AA coupled with Regulation 15A of the *Family Law Regulations* 1984 sets out the matters in which leave to appeal is required. The *Child Support (Assessment) Act 1989* specifically provides for appeals to the Full Court of the Family Court only with leave under sections 102, 102A or 105 and the *Child Support (Registration and Assessment) Act 1989*[6] similarly provides for appeals to the Full Court of the Family Court, and appeals with leave There may also be other specific matters which require leave to appeal for which the practitioner should be alert.

Apart from those matters for which leave is required prescribed by specific legislation, leave

[6] Applications for leave to appeal under ss 107, 107A and 110 and appeals under ss 107, 107A and 110

to appeal is required in relation to appeals against:

1. An interlocutory decree (except if it is a decree in relation to a child welfare matter[7])
2. An order under section 102PE of the *Family Law Act* 1975[8]

An interlocutory decree is distinguished from a final decree[9]. **The distinction arises from the legal effect of a decree not its practical consequence**. A decree is interlocutory if it leaves open the legal possibility of the application it deals with being renewed, even though, for all practical purposes, the application is not likely to succeed.

When is leave to appeal likely to be granted:

1. The Court will normally be reluctant to grant leave to appeal against an interlocutory decree concerning practice or procedure unless there is a serious injustice shown
2. It may be necessary to demonstrate an error or principle[10]
3. It may be that the applicant will be granted leave to appeal if he/she can show the issue is one of general importance[11].

In *Tamaneigo & Tamaneigo*, O'Ryan J discussed the distinction between final orders and interlocutory orders and said:

> *140. The question whether an order is interlocutory or final has been discussed in*

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7 Meaning an order in relation to (a) the person or persons with whom a child is to live; or (b) the person or persons with whom the child is to spend time or communicate; or (c) any other aspect of parental responsibility, within the meaning of Part VII of the *Family Law Act*, for a child.

8 A suppression or non-publication Order

9 *Tudor and Tudor* (1992) F.L.C. 92-273

10 *Adam P Brown Male Fashions Pty Ltd v. Philip Morris Inc* (1981) 148 CLR 170. In *Emamy and Marino* (1994) F.L.C. 92-487 the Full Court said there should be either serious injustice or an error of principle.

11 *Alfasi and The Alfasi Group* (2006) F.L.C. 93-271

many cases including in the High Court: see Re Luck [2003] HCA 70; (2003) 203 ALR 1; Bienstein v Bienstein [2003] HCA 7; (2003) 195 ALR 225 and 230, and Carr v Finance Corporation of Australia Limited (No.1) [1981] HCA 20; (1981) 147 CLR 246 at 248 and 256. The usual test is whether the order finally determines the rights of the parties in the principal cause pending between them.

141. In Thallon and Thallon (1992) FLC 92-322 the Full Court (per Fogarty, Baker and Maxwell JJ) concluded that orders under s 44(3) of the Act whether granting or refusing leave were final, that is, they finally determined that particular proceeding. If leave is granted and property or maintenance proceedings are instituted then that is a separate proceeding: see also Neocleous and Neocleous [1993] FamCA 44; (1993) FLC 92-377 (per Fogarty and Nygh JJ with Lindenmayer J dissenting).

142. In Emamy and Marino (1994) FLC 92-487 the majority of the Full Court (per Ellis and Baker JJ) concluded at 81,075 that an order dismissing an application pursuant to s 44(3) of the Act was final but was interlocutory if leave was granted because property proceedings would then be instituted and the "substantive property rights of the parties under s 79 remain to be determined". The majority found that Thallon and Thallon was wrongly decided insofar as it was authority for the proposition that an order granting leave was a final order.

143. The issue was briefly considered by the Full Court (per Finn, Warnick and Boland JJ) in Richardson & Richardson [2008] FamCAFC 107 (16 July 2008). In that case the appellant husband filed an application for leave to appeal (and if leave was granted) an appeal against orders dismissing an application for a review of orders made by a Judicial Registrar. The primary judge had, in effect, confirmed the orders of the Judicial Registrar which had granted the wife leave under s 44(3) of the Act to institute proceedings against the husband for property settlement, notwithstanding a delay of 13.5 years. The Full Court said at [6] that it was well established by authorities that an order granting leave pursuant to s 44(3) to institute proceedings is an interlocutory order and that therefore leave is needed to appeal such an order and referred to Emamy and Marino. It was also accepted that in order to obtain leave to appeal, the appellant husband had to establish that there had been an error of principle in the making of the order or that the order worked a substantial injustice towards him.

144. I have some doubt about the correctness of the view of the majority in Emamy and Marino. However, it is not necessary for me to resolve that issue because in the written submissions of the Wife, referring to Emamy and Marino, it was acknowledged that there is Full Court authority indicating that applications pursuant to s 44(3) of the Act are interlocutory proceedings. It was submitted that, in addition, the proceeding was conducted as an interlocutory proceeding and there was no

evidence given or cross-examination of witnesses during the hearing before the Federal Magistrate (Transcript, 11 September 2009, p 8). The Wife acknowledged that in those circumstances she required leave to appeal and that such leave can only be granted if her Honour made errors of principle and/or not to grant leave to appeal would cause a substantial injustice to the Wife: see Rutherford and Rutherford (1991) FLC 92-255. Accordingly, it was submitted that the errors made by her Honour in the hearing of the Wife's application either individually or cumulatively lead to that result such that leave ought be granted.[12]

More recently, in *Tadgell & Hahn and Anor*[13], Strickland J., said:

23. Pursuant to s 94AA of the Act "a prescribed decree of the Federal Magistrates Court" requires leave to appeal. Regulation 15A of the Family Law Regulations 1984 (Cth) provides that a "prescribed decree is an interlocutory decree".

24. Thus, the question is whether the order made here is "an interlocutory decree" rather than a final order.

25. This issue has been discussed in many cases including in the High Court of Australia: see Re Luck [2003] HCA 70; (2003) 203 ALR 1; Bienstein v Bienstein [2003] HCA 7; (2003) 195 ALR 225, at 230; and Carr v Finance Corporation of Australia Limited (No. 1) [1981] HCA 20; (1981) 147 CLR 246, at 248 and 256.

*26. **The usual test is whether the order finally determines the rights of the parties in the principal case pending between them. If it does then it is a final order, and if it does not it is an interlocutory order.***

*27. Importantly, those same authorities have determined that in applying the test the court is to have **regard to the legal rather than the practical effect of the judgment**.*

28. Here, in my view, the legal effect of the judgment is not to finally determine the rights of the parties. The principal parties are the husband and the wife, the proceedings comprise disputed applications for property settlement, and the order under consideration does not deal directly with the rights in contest in that action; the Federal Magistrate did not determine the substantive rights of the parties with respect to property.

12 [2010] FamCAFC 254
13 [2013] FamCAFC 1

29. Certainly, the legal effect of the decision is to preclude at this stage the husband's mother's property, or any interest in it, from inclusion in the pool of assets as between the husband and the wife, but it does not prevent a subsequent application being made or proceedings being commenced in the State courts. Undoubtedly there are practical difficulties in undertaking either of these two courses, but that is not the test.

30. Accordingly, leave to appeal is required.

31. I am comforted in the conclusion that I have reached by the fact that in Bergman & Bergman [2009] FamCAFC 27; (2009) FLC 93-395, where the husband sought leave to appeal against orders refusing to grant him leave to join third parties to the property proceedings, the Full Court made no suggestion that the order was a final order not requiring leave.

The requirements to be demonstrated for leave to appeal in relation to child support matters are not as restrictive as in applications for leave under section 94AA since, the Full Court has said, it is '*inevitable*' that the orders will affect the financial position of the parties and that may be a relevant factor for the Court to take into account[14]

Section 96 of the *Family Law Act 1975* provides for appeals from State Courts of summary jurisdiction. In those cases the appeal is a hearing *de novo* but the Court can receive the record of evidence from the Court below and can receive new evidence, determine new issues and the parties can raise matters that have arisen since the first hearing.

The necessity to appeal – consider the 'slip rule'.

Consideration should be given to both the necessity to appeal and the utility of an appeal. There will always be a section of litigants who are annoyed by and refuse to accept an adverse decision.

From a professional point of view, some mature consideration of the prospects of appeal is

[14] *Seymour & Seymour* [2011] FamCAFC 97 at [67] – [60] per Strickland J. and the cases his Honour cited therein

required before any encouragement is given to a client to appeal. That will require the legal representatives to look critically at potential grounds of appeal. That examination should be detached and objective.

There may be alternatives to appeal and those avenues should be considered first. By way of example, does the alleged "error" fall within those matters that can be corrected under 'the slip rule'?

Rule 17.02 enables an order to be corrected under limited circumstances. The rule provides:

> *(1) If a party claims that there is an error in an order issued by the court, the party must give written notice of the error to the Registry Manager and all parties.*
>
> *(2) A Registrar may rectify an error that appears obvious on reading the order. Example A kind of amendment that a Registrar may make under subrule (2) is the correction of a typographical error .*
>
> *(3) If the Registrar:*
>
> *(a) is in doubt about whether there is an error in an order; or*
>
> *(b) believes that an error in an order has, or may have, arisen from an accidental slip or omission;*
>
> *the Registrar may take action under subrule (4).*
>
> *(4) If subrule (1) or (3) applies, the party or Registrar may, after giving reasonable notice to each party, refer the order to the judicial officer who made it.*
>
> *Note If the judicial officer who made the order is unavailable, it may be referred to another judicial officer (see rule 1.13).*

(5) A judicial officer may, after giving each party a reasonable opportunity to be heard, rectify a suspected error referred to the judicial officer.

Note An amendment of an order may be made under this rule only if it is an error obvious when reading the order. Any other amendment must be remedied by appeal or consent

The omission or mistake will **not be treated as accidental if the amendment proposed requires the exercise of an independent discretion upon a matter in relation to which a real difference may arise**[15]. If an exercise of discretion is required then the correction is not a matter which can be corrected under the slip rule or under the inherent jurisdiction of the Court. Under those circumstances, any alleged error can only be corrected by consent or through an appeal.

An accidental error by counsel, a solicitor or a party can also be 'corrected' under the slip rule. In *Milham v. Stanford*[16] there was an agreement between counsel as to how chattels were to be divided. The trial Judge did not adopt the agreement in the orders. It was held he ought to have done so and that the matter could have been remedied under the slip rule.

The slip rule should be invoked carefully and **with clear notice to all parties**. That was emphasised by the Full Court in *Kettle & Baker & Green*

> *"..this case also demonstrates the importance of adherence to the procedure prescribed in rule 17.02 of the Family Law Rules 2004 (Cth) for the making of "slip rule amendments", particularly the need for notice to all parties so that they have the opportunity to be heard in relation to a proposed amendment"*[17]

You can't simply send in a letter to the court and ask for corrections. You will have to show that all interested parties have been given notice and establish what their attitudes are.

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15 *Milham v. Stanford* (2001) F.L.C. 93-073

16 *supra*

17 *Kettle & Baker & Green* [2009] FamCAFC 113 para 118

In practice, if a Judge has made the order, the Registry will send the matter to the Judge for consideration. The rules may permit a Registrar to make the order under limited circumstances. However, in either case the matter must be clear – you must truly be an error or omission, and the matter must not involve a fresh exercise of discretion. You will have to establish that all parties have been given notice.

An interesting example of an application for a Judge to use the 'slip rule' to correct a judgment is found in *Lovine & Connor and Anor (No 2)*[18] . Mushin J declined to use the slip rule in the following circumstances:

> *24. In this matter, I have mistakenly found that the parties had agreed on all aspects of child support and did not have regard to the dispute between them with regard to the wife's application for departure from administrative assessment as it related to the weekly amount to be paid by the husband. Regrettably, that was not an accidental error or omission. It can only be categorized as an incorrect finding.*
>
> *25. Accordingly, a determination of the outstanding issue of a departure from the administrative assessment of child support would constitute a further substantive hearing which would require the independent exercise of discretion in accordance with the relevant provisions of the Child Support Act (sic). Such a process takes the wife's application outside the ambit of the slip rule and must therefore be dismissed.*

Can a Judicial Officer alter his or her reasons?

It seems clear that a Judge can alter his or her decision (it would seem reasons and/or outcome) at any time up until the Order is perfected. It can only be done, though, provided procedural fairness is afforded to all interested parties. It is likely to be a power that is rarely used.

In England, the Supreme Court recently affirmed that a Judge **can** alter his or her decision at

[18] [2011] FamCA 535

any time up to the when the resulting order is perfected in *Re L and B (Children)*[19].

In that matter the Judge announced her decision in care proceedings about a girl named Susan. Susan came to the attention of the authorities when taken to the hospital by her mother and was found to have fractures of her ribs, clavicle and long bones as well as bruising to her face and head. She was placed in foster care. The Judge directed the matter be set down for a hearing to determine the nature and extent of Susan's injuries, their causation and, if non-accidental, the identity of the perpetrator or perpetrators. At the hearing it was common ground that the injuries were non-accidental and the only possible perpetrators were the father and/or the mother.

In her Judgment (headed "*Preliminary Outline Judgment approved by the Court*") the Judge found that the father was the major care giver for the child and that he found caring for Susan intolerable in the circumstances he found himself (which included financial problems, the mother's mental illness and caring for a young baby who cried often and was not easy to feed), had snapped, and was the perpetrator. The Judge added that if any party would be assisted by the provision of detail in relation to specific points then she would address them.

Counsel for the father, at the hearing and by email the next day, asked the Judge to address a number of matters in her judgment[20].

The Order was not formally sealed until approximately 3 months later.

Before sealing the perfected order the Judge delivered a written 'perfected judgment' in which she changed her opinion and said that it could have been either of the parents.

19 [2013] UKSC 8

20 A matter that is permissible under a practice note in that jurisdiction

At a directions hearing a few days later counsel for the mother asked the Judge to explain why she had changed her mind and not given the parties an opportunity to make further submissions before doing so. The Judge delivered short reasons in which she apologized to the parties, but said she did not view her change as a complete change of direction but something that was always a possibility. She said that when she considered the matter carefully on the balance of probabilities she could not exclude the mother as the perpetrator.

Leave to appeal was granted to the mother. The Court of Appeal upheld the mother's appeal and further ordered that the original reasons stand. The father appealed to the Supreme Court.

The Court held it had long been the law that a judge **is** entitled to reverse his (or her) decision at any time before his (or her) order is drawn up and perfected[21]. The Court concluded that the notwithstanding legislative changes through the Judicature Acts and the Civil Procedure Rules (in the United Kingdom) the position was that there is jurisdiction for a Judge to change his or her mind up until the order is drawn up and perfected. Once an order is perfected (by being sealed by the Court) there is no jurisdiction to change one's mind unless the court has an express power to vary its own previous order. Under those circumstances the proper challenge is by appeal.

Consideration of that issue then raises the application of the doctrine of *functus officio.*

Boland J considered the doctrine in *Sangara & Hamwood*[22] and discussed the interrelationship between the doctrine and the slip rule. Her Honour said that when a matter has been regularly determined and orders perfected then the judicial officer is *functus officio*. The Federal Magistrates Court (as it then was) and the Family Court of

21 Reasons para 16
22 [2007] FamCA 1353

Australia, as courts created by statue, do not have power to re-open orders regularly entered[23].

In *Sangara* the Federal Magistrate didn't deal with a costs application. Boland J said that if the costs applications had been drawn to the Federal Magistrate's attention prior to engrossed orders being taken out then "*she would at once have varied the order which clearly did not reflect her intention*'. Her Honour also cited Toohey J in *Raybos Australia Pty Ltd & Anor v. Tectran Corporation Pty Ltd*[24], in which Toohey J said that "*the power of correction also extends to cases where a matter, through inadvertence, was not dealt with at the hearing"*.

Barry J, in *Matheson & Matheson*[25] , said "*a trial Judge does not become functus officio until the orders flowing from his or her reasons for judgment have been issued formally by the Court. The Judge is entitled to change his or her reasons and amend his or her orders prior to that time (Swaney & Ward [1987] FamCA 24; (1988) F.L.C. 91-928)"*[26]

Machinery Orders

There is a further exception to the 'rule' that orders are final when regularly perfected – that is if a machinery order is required to give effect to the substantive orders[27]. "*Where the variation does not alter the substantive effect of the order but merely spells out its application in particular circumstances not covered by it express terms but consistent with*

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23 Her Honour referred to *DJL v. Central Authority* [2000] HCA 17; (2000) 201 CLR 226 at 248

24 [1988] HCA 2; (1988) 77 ALR 190

25 [2010] FamCA 772 at [58]

26 See too, Cronin J in *Bulleen & Bulleen* [2011] FamCA 253 at [10] – [11]; [17] – [20]; [25] – [26]

27 *Guinness & Guinness (No 2)* [2008] FamCAFC 100 at [17]

the original intent" [28]

When Judgement is handed down before the orders, with a request by the Judge for the parties to draft agreed orders:

Unfortunately this is a situation which has arisen more frequently recently. It is likely borne of pressure of work on judicial officers coupled with a lack of proper assistance from legal representatives. The pitfalls and the impracticabilities that may arise from such an order are obvious.

In the majority of matters, the parties have just concluded a trial or other litigation. Self evidently the parties had been unable to reach agreement. It is not likely that the parties will be able to cooperate and reach 'agreed' orders. I accept that there will be cases where after a determination of a critical issue, reason may prevail (particularly when parties are represented) and Orders can be crafted without difficulty. That assumes, though, that the lawyers continue to be retained in the matter and that they can obtain cogent and rational instructions from the client. Ultimately legal practitioners act on instructions and their hands are tied by the instructions they receive or don't receive as the case may be.

It cannot be assumed that clients will continue to retain the same lawyers once a decision is delivered – particularly when the decision is an adverse one.

In *Yorston & Yorston*[29], the Federal Magistrate gave reasons and concluded:

> *58. I am going to give the parties 21 days to send to the Court orders that they say reflect the Reasons for Judgment. I will settle the reasons first, including the pool and the other findings that I have made, and then the parties can forward the draft orders..*
>
> *59. I will issue an order from my chambers giving the parties a number of weeks to respond after I provide to the parties the Reasons for Judgment.*

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[28] Counsel's submissions approved by the Full Court in *Lenova & Lenova* [2011] FamCAFC 114 at [22] and citing *Kaljo & Kaljo* (1978) F.L.C. 90-445

[29] [2013] FamCAFC 49

> *Now that actually means, so far as the parenting is concerned, that the current parenting orders remain in place. …"*

The mother in the case was self represented. The Court received draft orders from each of the parties but the mother provided further written submissions. In fairness the Magistrate referred to the parties making submissions about the orders.

The mother's written submissions went beyond what was contemplated by the Federal Magistrate. They were not confined to matters dealt with in the reasons for Judgment and addressed not only issues not dealt with in the reasons, but the mother also sought orders that did not form part of her response or her case information document. The father's solicitors confined themselves to presenting their proposed orders.

No direction was made for the parties to provide the other with a copy of the draft order they proposed the Federal Magistrate should make (and so, as it transpired, the mother did not serve the other party). The Federal Magistrate did not relist the matter on receipt of the submissions as to the Orders that should be made and proceeded to make final orders which were quite different from those which the father could have reasonably expected by reference to the reasons.

The appeal was allowed and the matter remitted for rehearing on the basis that the father was not afforded procedural fairness, citing *Kioa v. West*[30]:

> *It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and will be given an opportunity of replying to it.*

And *R v Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam*[31]:

30 [1985] HCA 81; (1985) 159 CLR 550 at 582
31 (2003) 214 C.L.R. 1

> *Fairness is not an abstract concept. It is essentially practical,.. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid injustice.*

Murphy J., in a separate judgment also referred to *Russell v. Duke of Norfolk*[32]:

> *"..whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case"*.

Another scenario which might occur is that during any period of delay between the giving of the reasons and the making or perfecting of orders the parties (or one of them) take matters into their own hands and sell , transfer or encumber property.

When reasons are delivered, the parties then know how the decision will fall and impact them. There must be a high risk, at that time, that a dissatisfied party facing that adverse decision will take matters into his or her own hands unless prevented from doing so. If that happens then there is not much choice but to seek to reopen and to apply to set aside whatever transaction has taken place in the intervening period.

We are in dangerous territory when reasons have been given and the orders are delayed – even overnight. It provides an opportunity for the unscrupulous to act against the intent of orders yet to be made. It would be wise, in those circumstances, to at least seek injunctions restraining parties from taking any step which might frustrate the intent of orders proposed in reasons.

More fundamentally though, practitioners should ensure the Court is not in the position where it is not able to make orders. It is a fundamental step in a trial to know what orders are sought on behalf of a client. The orders sought should be in the case information document or at the very least in a draft in writing and handed up during submissions. Sometimes the 'tide swings' against the preferred position in a case. It is being realistic to

32 [1949] 1 All E.R. 109 at 118

bear in mind that the orders sought by your opponent may be made or that orders differing from either position may be made. It is not an admission of weakness to 'read' how a trial is progressing or to be realistic and to be prepared and put up an alternate set of orders in the event the Court does not accept a client's primary position.

The Notice of Appeal

It is important to take notice of Note 2 to Rule 22.02 which says:

> *Note 2 At the hearing of the appeal,* ***only the grounds stated in the Notice of Appeal may be argued*** *except with the court's permission. A Notice of Appeal may be amended only in accordance with rule 22.09*

From a practical point of view, you have to file the original Notice of Appeal, plus enough copies for every person who has to be served (each respondent[33]) AND if the appeal is to the Full Court, then enough so that there is an additional copy for each member of the bench[34].

It is important to try to frame proper grounds of appeal – not just "cobble something together" to beat the time limit. Occasionally it may be necessary because of time pressures and/or the legal representative not having had prior involvement in the matter under consideration to simply do the best you can and then look at amending later when the transcript, judgment and material relied upon is to hand.

Rule 22.09 permits amendment to the Notice of Appeal without permission at any time up to and including the date fixed for filing the summary of argument by the appellant. If there

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33 See rule 22.04

34 See rule 24.08

is an amendment under this rule then the grounds of appeal and orders sought in a cross appeal may also be amended without permission at any time within 7 days after service of the amended Notice of Appeal.

If the amendment is not made within the time limited above, then an application needs to be made for permission to amend[35]

Time limit for filing appeal and application for leave to appeal

It is important to bear in mind the time limit for an appeal. Rule 22.03 provides:

> *A Notice of Appeal, including a Notice of Appeal in which leave to appeal is sought, must be filed within **28 days** after the date the order appealed from was made.*

An order is made:

> *(a) in a hearing or trial -- when it is pronounced in court by the judicial officer; or*
>
> *(b) in any other case -- when the judicial officer signs the order (see paragraph 11.16 (3) (b)).* [36]

An application can be made for an extension of time within which to appeal under **rule 1.14**. There is a discretion to allow an extension of time within which to appeal. The discretion is governed largely by the need to ensure justice is done to all parties.

An extension of time will be granted only on proof that strict compliance with the rules will

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35 See rules 22.35 to 22.38 and rule 11.12

36 Rule 17.01 which relates to Orders made in Court (they are made when pronounced in Court), and Rule 11.16(3) which relates to Orders made in Chambers and provides that a judicial officer who determines a case in chambers must record the file number; the names of the parties; the date of the determination; and the orders made; and **sign the record**.

work an injustice upon the applicant. In order to determine whether compliance with the rules will work an injustice on the applicant, regard is had to the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequences of the grant or refusal of the extension of time. It is always necessary to consider the prospects of the applicant succeeding in the appeal. The Court also will take into account that upon the expiry of the time for appeal the proposed respondent has a vested right to retain the judgment unless the application is granted[37]. The applicant must show there are adequate reasons to explain the delay, that there is a substantial issue to be raised on the appeal and that no hardship or injustice is caused to the respondent which cannot be compensated for by costs or otherwise[38].

In *Seymour & Seymour*, Strickland J., summarised the foregoing and said at [56]:

> "*In summary, then, the factors that need to be addressed where relevant are:*
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> *the history of the proceedings;*
>
> *the conduct of the parties;*
>
> *the nature of the litigation;*
>
> *the extent of any delay;*
>
> *whether there are adequate reasons which explain the delay;*
>
> *the prospects of the applicant succeeding in an appeal;*
>
> *if there is any hardship or injustice to the respondent which cannot be compensated by orders for costs or otherwise; and*
>
> *the consequences for the parties of the grant or refusal of the application.*

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37 McHugh J in *Gallo v. Dawson* [1990] HCA 30; (1990) 93 ALR 479 at 480

38 See *McMahon and McMahon* (1976) F.L.C. 90-038;*Tormsen and Tormsen* (1993) F.L.C. 92-392 and *Seymour & Seymour* [2011] FamCAFC 97

However, to again emphasise as the Full Court in Tormsen observed, and as is apparent from what McHugh J said in Gallo v Dawson, these factors are to be considered in the context of determining what the justice of the case requires."

Service

A copy of a Notice of Appeal must be served on each party to the appeal within 14 days after it is filed. A party may apply for an extension of time to serve a copy of a Notice of Appeal

Rule 22.04 sets out who the parties to an appeal are as

Each person who is directly affected by the orders sought in the Notice of Appeal, or who is likely to be interested in maintaining the order under appeal, must be made a respondent to the appeal or the application for leave to appeal.
Note An application may be made to have a person added or removed as a party to an appeal (see paragraphs 94 (2B) (a) and 94AAA (8) (a) of the Act, paragraphs 102 (6) (a) and 102A (7) (a) of the Assessment Act and paragraphs 107 (5) (a) and 107A (7) (a) of the Registration Act). See Division 22.7.1 for how to make an application relating to an appeal.

Rule 22.06 provides that if the appeal is from an order of a court other than a Family Court, the appellant must give a copy of the Notice of Appeal to the Registrar of that court within 14 days after filing the Notice of Appeal and if the 'appeal' is an application for leave to appeal a copy of the notice of appeal in which leave is sought must be given to the Registrar of the other court; and for an appeal from a court exercising jurisdiction under the child support legislation - the Child Support Registrar.

Cross-appeal

A respondent to an appeal or an independent children's lawyer who intends to argue that

an order under appeal should be varied or set aside must cross-appeal by filing a Notice of Appeal endorsed as a cross-appeal[39]. A Notice of Appeal for a cross-appeal must be filed within the later of 14 days after the Notice of Appeal for the appeal is served on the cross-appellant; or 28 days after the date the order appealed from was made. Similarly a person may apply for an extension of time to cross-appeal.

Stay

> *"R 22.11 – Stay*
>
> *(1) The filing of a Notice of Appeal does not stay the operation or enforcement of the order appealed from, unless otherwise provided by a legislative provision.*
>
> *(2) If an appeal has been started, or a party has applied for leave to appeal against an order, any party may apply for an order staying the operation or enforcement of all, or part, of the order to which the appeal or application relates.*
>
> *..*

The principles applicable in stay applications have been set out clearly in many authorities. In *Aldridge v. Keaton (Stay Appeal)*[40], the Full Court said:

> *"The principles to be applied in determining an application for stay of orders, both in the general law and in respect of parenting applications are also well known. See The Commissioner of Taxation of the Commonwealth of Australia v. Myer Emporium Limited (No 1) (1986) HCA 13, Alexander v. Cambridge Credit Corporation (1985) 2 N.S.W.L.R. 685; Jennings Construction Limited v. Burgundy Royale Investments Pty ltd (1986) HCA 84, Clemett and Clemett (1981) F.L.C. 91=013; JRN and KEN v. IEG and BLG (1998) 72 ALJR 1329.*

The principles applied to be applied in stay applications are as follows:

> *"The authorities stressed the discretionary nature of the application which should be determined on its merits. The principles relevant to this matter include the following:*

39 Rule 22.07

40 (2009) FamCAFC 106

1. The onus to establish a proper basis for the stay is on the applicant for the stay. However, it is not necessary for the applicant to demonstrate any special or exceptional circumstances:
2. A person who has obtained a judgment is entitled to the benefit of that judgment;
3. A person who has obtained a judgment is entitled to presume the judgment is correct;
4. The mere filing of an appeal is insufficient to grant a stay;
5. The bona fides of the applicant
6. A stay may be granted on terms that are fair to all parties. This may involve a court weighing the balance of convenience and the competing rights of the parties
7. A weighing of the risk that an appeal may be rendered nugatory if a stay is not granted. This will be a substantial factor in determining whether it will be appropriate to grant a stay
8. Some preliminary assessment of the strength of the proposed appeal whether the appellant has an arguable case
9. The desirability of limiting the frequency of any change in the child's living circumstances
10. The period of time in which the appeal can be heard and whether existing satisfactory arrangements may support the granting of the stay for a short period of time
11. The best interest of the child, the subject of the proceedings are a significant consideration

(Cited by Foster FM in *Gaffney & Gaffney*[41] *)*

At para 32 (of *Aldridge v. Keaton (Stay Appeal)*), the Full Court said:

"The granting or refusal of a stay involves an exercise of discretion by a trial judge. While such discretion must be exercised judicially in cases involving children, we accept that from time to time circumstances in existence at the date of the orders or which may occur from the date of the orders until the hearing of a stay application, may be very relevant matters to be considered in the exercise of discretion in determining whether or not to grant a stay.

The interests of the children would not be promoted by an inflexible requirement of presumption in every case to maintain the status quo prior to the making of orders the subject of the stay application and to ignore unsatisfactory arrangements at the

41 [2012] FMCAfam 390

time of the orders or significant events which have occurred after the making of those orders"

In *JRN & KEN v. IEG & BLG*[42], Kirby J said:

In my opinion, some adaptation of the rules stated in the cases governing stays in this court must also occur in cases which affect significantly third parties who are not parties before the Court and, in particular, children whose welfare must always be in the mind of a court in making an order affecting their interests

An application for a stay must be filed in the Registry in which the order under appeal was made and be heard by the Judge, Federal Magistrate or Magistrate who made the order under appeal but it may be listed before another judicial officer if the judicial officer who made the order under appeal is unavailable.

Appeal Index

The next step in the process, assuming the appeal has been properly filed, is for the appellant to prepare a draft index to the appeal books[43]. The draft plus two copies have to be filed with the Regional Appeals Registrar within 28 days of filing the Notice of Appeal or 28 days from the date reasons for the decree appealed from are issued (whichever is later). – unless an extension of time is granted. The draft index must be served on all other parties to the appeal.

If the draft index is not filed within time, the appeal will be deemed abandoned[44]

The index has to comply with rules 22.19 and 22.20. Rules 22.19 and 22.20 set out the

42 (1998) 72 ALJR 1329 at 1332
43 Rule 22.13
44 Rule 22.13(3)

content and form of the appeal books and ensure that only ***relevant*** material is in the books and is in a logical order – paginated and indexed. Try to keep out material that is not going to assist the Court to determine the issues in the appeal and/or cross appeal.

If the appeal is to be heard by the Full Court (as opposed to a single Judge) then you need to produce not only an original and sufficient service copies but also three extra copies for the bench.

Once the draft has been filed, the Regional Appeals Registrar will fix a procedural hearing[45] at which the index will be settled, and directions will be made for the hearing of the appeal, dates fixed to file and serve summaries of argument and the like. The parties or lawyers representing them must attend the hearing although it is possible to request leave to attend by electronic means[46]. A party can apply to be excused from attendance.

Rule 22.17 sets out the Orders which may be made at the procedural hearing.

The appellant (or cross-appellant if ordered to do so) then must prepare the appeal books within the time limited by the orders made at the procedural hearing and file and serve them. There are provisions under rule 22.18(2) for the Court to order a respondent to prepare the books or for the Registrar to prepare the books in the event of 'exceptional hardship'.

Ensure the directions are complied with or the appeal will be deemed abandoned[47].

For an appeal against a court of summary jurisdiction, a date will be fixed for the hearing of

45 Rule 22.15
46 Rule 22.31
47 Rule 22.21

the appeal as near as practicable to 56 days after the Notice of Appeal was filed[48] and the appeal will be heard on that date. Remember it is a hearing *de novo*. If you don't appear then the appeal is likely to be dismissed. If the respondent does not appear then the appeal will proceed in that party's absence.

Ordinarily argument will be confined to the matters set out in the Notice of Appeal.

Summary of argument and list of authorities

As part of the directions made at the procedural hearing the parties will be ordered to file and serve a summary of argument and a list of authorities to be relied on. The rules provide for that step at least 28 days before the first day of the sittings in which the appeal is listed to be heard (on the part of the appellant) and at least 7 days before those sittings for the respondent and independent children's lawyer.

The summary of argument must set out each ground of appeal and, for each ground of appeal set out a statement of the arguments setting out the points of law or fact and the authorities relied on. The summary should set out the orders sought. The rules say it should not exceed 10 pages. All paragraphs should be consecutively numbered and be signed by the lawyer who prepared the summary or by the party and include the signatory's name, telephone number, facsimile number and email address (if any) or document exchange number (if any) at which the signatory may be contacted.

I would respectfully suggest this is your most important point of contact with the Full Court. The summary will be used by the Judges to inform them about the appeal and is the ***first impression*** they will have of the appeal. It is critical to try to be clear and concise. You are

48 Rule 22.29

trying to set out in a few sentences an unassailable argument as to why the appeal should be allowed. Don't persevere with points that have no merit. If you have a ground in the Notice of Appeal that you don't want to press then in the summary say it is abandoned (subject to instructions of course).

Applications in Appeals

If an application in an appeal is to be made then the application must be filed in the Registry in which the appeal was filed and supported by an affidavit stating the facts relied upon to support the application[49] . The Regional Appeals Registrar will fix a date for the hearing of the application or, if the matter can be determined by a Judge in Chambers without a hearing or the respondent(s) do not object to the matter being determined without a hearing, then refer it to a Judge in Chambers for determination.

Application to Adduce Further Evidence

Parties who wish to adduce further evidence on an appeal must file an application at least 14 days prior to the date of commencement of the sittings in which the appeal is listed for hearing[50]. The application must be supported by affidavit(s) describing the nature of the further evidence it is sought to adduce or include the further evidence sought to be adduced. The Court will list the application for the same day as the appeal or application for leave to appeal is listed. Any other party to the appeal will be permitted to file an affidavit in response prior to 7 days prior to the date on which the appeal is listed for hearing.

In *Jamine &* Jamine[51], O'Ryan J considered an application to adduce further evidence and said:

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49 Rule 22.36

50 Rule 22.39(1)

51 [2010] FamCAFC 105

General Principles

[85] The approach to be taken in relation to an application to adduce further evidence at the hearing of an appeal is well settled. Section 93A(2) of the Act provides:

> *Subject to section 96, in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given:*
>
> *(a) by affidavit; or*
>
> *(b) by oral examination before the Family Court or a Judge; or*
>
> *(c) as provided for in Division 2 of Part XI.*

[86] Rule 22.39 of the Family Law Rules 2004 ("the Rules") provides:

> *(1) A party to an appeal, other than an appeal that is a hearing de novo , who seeks to apply for an order that the court receive further evidence on the hearing of the appeal, must file the application at least 14 days before the date of commencement of the sittings in which the appeal is listed for hearing.*
>
> *(2) The affidavit filed with the application must either describe the nature of the further evidence or include the further evidence that the applicant wants the court to admit at the hearing of the appeal.*
>
> *(3) Any other party to the appeal may file an affidavit in response to the application at least 7 days before the date of commencement of the sittings in which the appeal is listed for hearing.*
>
> *(4) The hearing date for an application to adduce further evidence will be the same as the date fixed for hearing of the appeal or application for leave to appeal.*
>
> *Note 1 For the rules on how to make an application, the procedure and by whom the application will be heard, see Division 22.7.1.*
>
> *Note 2 Documents relating to further evidence should not be included in the*

appeal books.

[87] In CDJ v VAJ (No. 1) (1998) 197 CLR 172, McHugh, Gummow and Callinan JJ, who were in the majority, discussed at [104] to [116] the "scope of s 93A(2)" and in so doing explained the difference between admission of fresh evidence in an appeal at common law and appeals under statutes like the Act which contain provisions such as s 93A(2). Their Honours said:

> *In the exercise of the discretion conferred by a power such as s 93A(2), the critical factor is the subject matter of the proceedings with which the appeal is concerned. This is because* ***the purpose of the power to admit further evidence is to ensure that the proceedings do not miscarry.*** *Tests such as those stated in Wollongong Corporation based on the need for finality in litigation are therefore not necessarily applicable to cases in which the interests of third parties, such as children, are at stake, although* ***factors such as finality, discoverability of the evidence and its likely effect on the orders made are usually relevant to the exercise of the discretion****. In an application at common law to admit further evidence, the court applies principles, bordering on fixed rules. In an application under s 93A(2) and similar provisions, the Full Court or Court of Appeal weighs factors, although it may of course develop guidelines for weighing those factors and exercising the discretion. (endnotes omitted)*

[88] Their Honours said:

> *One consideration in construing s 93A(2) is its remedial nature.* ***Its principal purpose is to give to the Full Court a discretionary power to admit further evidence where that evidence, if accepted, would demonstrate that the order under appeal is erroneous.*** *The power exists to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures. A further, but in practice subsidiary, purpose is to give the Full Court a discretion to admit further evidence to buttress the findings already made.*
>
> *...*
>
> *... The power to admit the further evidence exists to serve the demands of justice. Ordinarily, where it is alleged that the admission of new evidence requires a new trial,* ***justice will not be served unless the Full Court is satisfied that the further evidence would have***

> ***produced a different result if it had been available at the trial.*** *Without that condition being satisfied, it could seldom, if ever, be in the interests of justice to deprive the respondent of the benefit of the orders made by the trial judge and put that person to the expense, inconvenience and worry of a new trial.*

[89] Their Honours said at [107] that:

> *"The discretion conferred by s 93A(2) to receive further evidence on appeal is not expressed to be limited in any way". However, they also said at [108] that* ***the discretion is not unfettered and at [113] that the discretion is not "so wide that the Full Court can admit further evidence merely because it is useful" (emphasis in original). Their Honours said at [115] that it "must be exercised judicially".***[52]

Determining an appeal

An appeal may be determined by abandonment, consent, discontinuance or judgment following the hearing of the appeal.

Abandonment

The earlier discussion of the rules shows the many instances where an appeal will be deemed abandoned if the appellant (or cross-appellant as the case may be) fails to take necessary procedural steps. See also rule 22.43. It provides a party abandoning an appeal may be ordered to pay the costs of the other parties. An application for costs can be filed within 28 days of the date on which the appeal is deemed to be abandoned.

Application can be made to reinstate an appeal if it is deemed abandoned. Application must be made under rule 22.44. May J recently dealt with such an application in the matter of *Lyons & Adder*[53]. Her Honour said at [6]:

> *It is not necessary to restate the principles applicable to such applications in any*

52 Also cited in *Stephens and Stephens and Anor (Enforcement)* [2009] FamCAFC 240

53 {2013] FamCAFC 62

detail other than to refer to Bemert & Swallow [2010] FamCAFC 100, commencing at paragraph 113, where the Full Court (Coleman, May & O'Ryan JJ) referred to the well known passages from Gallo & Dawson [1990] HCA 30; (1990) 93 ALR 479 at 480 and Aon Risk Services Australia Ltd v ANU [2009] HCA 27; (2009) 239 CLR 175.

Her Honour then proceeded to examine the explanation for the delay, the merits of the appeal and a consideration of the balance of justice and injustice to the respondent and appellant in the case.

Consent

If the parties wish to dispose of the appeal by consent then rule 22.41 provides they may file a draft consent order setting out the terms of the order they seek. If they agree about the orders to be made but disagree about costs then the Regional Appeals Registrar can fix a date for the hearing of argument about costs without requiring the appeal books to be prepared. Indeed, if the consent order is early enough, then the procedural hearing may be omitted altogether.

You need to be careful. If you are going to seek an order that the appeal succeeds and want a costs certificate under the *Federal Proceedings (Costs) Act* 1981, then there needs to be a 'hearing' for the Court to be able to grant the certificate.

Discontinuance

A party can discontinue an appeal by filing a notice of discontinuance. An application for costs can be filed within 28 days of the filing of the notice of discontinuance and the party may be ordered to pay the costs of all other parties [54]

Hearing

[54] Rule 22.42

At the hearing you are expected to argue the appeal based on the grounds set out in the Notice of Appeal. The summary of argument filed provides a start and you should be prepared to add or supplement that as required – particularly to take into account arguments raised in the respondent's outline. You are rarely permitted to argue matters not set out in the Notice of Appeal without an amendment and/or leave.

Appeals against the exercise of a discretion require the appellant to show that the judge:

- Acted upon some wrong principle
- Allowed extraneous or irrelevant matters to guide the decisions
- Mistook the facts
- Did not take into account some relevant consideration

What follows is quite possibly the most frequent phrase found in judgments of the Full Court and almost always appears in cases which deal with appeals from discretionary judgments:

> " *The law governing an appeal from a discretionary judgment is well settled. In House v The King [1936 HCA 40 (1936) 55 CLR 499, Dixon, Evatt and McTiernan JJ said at pages 504 to 505:*
>
> > *...The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred...*

It is not enough to argue that another judge or even this Full Court may have come to a different decision on the same facts. The appellant must show, as articulated per Stephen J in Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513 at page 519:

> *The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion..*

It is sometimes necessary, particularly as part of the jurisdictional consideration in child support appeals[55], (i.e., considering if the appeal is against a question of law) to demonstrate that an error of law was made. It is often necessary to distinguish matters of fact and questions of law.

In *Tasman & Tindall*[56], Brown FM said:

> *40. The first question to consider is what is the nature of an appeal on a "question of law"? The provisions of the Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006 has significantly reformed the review process in respect of administrative decisions of the Child Support Registrar. The legislation has inaugurated an independent process of review through the SSAT. This process is external of the Agency's processes and is administrative in nature.*
>
> *41. Pursuant to the provisions of section 110B, any further appeal from the SSAT is limited in nature**. It is limited only to an examination of how the SSAT applied or failed to apply the applicable principles of law**, which were relevant to the determination of the appeal issue which came before it. As such, an appeal to this court, pursuant to section 110B, does not constitute a rehearing on the merits of the case nor should this court, other than in exceptional circumstances, challenge findings of fact made by the SSAT.[3]*
>
> *42. Accordingly, **this court should not be concerned as to whether or not it would have come to the same conclusion as the SSAT did, but only whether the SSAT erred in law,[**4] as it is only in "exceptional circumstances" that the decision of the Tribunal should not be the final decision.[5]*
>
> *43. It is the function of this court to determine whether the decision of the*

55 *Child Support (Registration) Act 1989* s.110B

56 [2008] FMCA fam 126

SSAT was within its legal powers. That is what is meant by a question of law. It is not the function of this court to examine the merits of that decision. As such, I should be cautious to approach the decision of the SSAT with "an eye [which is] too keenly attuned to perception of error". [6] Rather I should take a commonsense approach to what the SSAT was saying in its decision and the reasons why it did said what it said.

44.An administrative tribunal exceeds its powers and thus commits a jurisdictional error, which is correctable on appeal in respect of a question of law, if it:

fails to construe properly the legislative provisions applicable;
identifies the wrong issues or asks itself the wrong questions;
ignores relevant material or relies on irrelevant material;
fails to accord procedural fairness to the party before it;
makes an erroneous finding of such a magnitude that it goes to the very jurisdiction which it purports to exercise rendering its decision perverse or unreasonable or otherwise offending logic.[7]

45. As Gleeson C.J. pointed out in Re Minister for Immigration & Multicultural Affairs: Ex Parte Applicant S20/2002[8]:

"To describe reasoning as illogical, or unreasonable or irrational, may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence, it may be necessary to be more precise as to the nature and quality of the error attributed to the decision maker, and to identify the legal principal or statutory provision that attracts the suggested consequence."

The cases relating to administrative law contain a wealth of argument about what is and what is not a question of law and what is and what is not a question of fact. [57]

In *The Australian Gas Light Co v The Valuer-General*[58], the Full Court of the Supreme Court of New South Wales had under consideration questions of law referred to that court by a

[57] For an interesting recent discussion in the United Kingdom see *Jones (by Caldwell) v First-tier Tribunal* [2013] UKSC 19

[58] (1940) 40 SR (NSW) 126

Judge. Jordan CJ set out a series of rules in cases where an appellate Tribunal has jurisdiction to determine only questions of law. His Honour said[59] the relevant rules are:

> *"(3) a finding of fact by a tribunal of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of supporting its finding, and there is evidence capable of supporting its inferences …*
>
> *(4) Such a finding can be disturbed only*
>
> *(a) if there is no evidence to support its inferences, or*
>
> *(b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences … or*
>
> *(c) if it has misdirected itself in law. …"*

Costs

Although section 117 applies to appeals and there is a presumption that each party will bear their own costs[60], it is common in an unsuccessful appeal for the Full Court to order an unsuccessful appellant to pay the costs of the respondent.

If the appeal is successful then the appellant should consider making an application to the Full Court for an order granting the appellant a costs certificate under section 9 of the *Federal Proceedings (Costs) Act 1981*[61]. Costs certificates can be granted on an appeal where

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59 Omitting (1) and (2)

60 Section 117(1)

61 "*The history of the legislation, and indeed its terms, make it plain that the purpose which must be kept in mind in its interpretation and application is the relief of litigants against the costs inevitably incurred when appeal review discloses an error of law requiring correction. The object is to ensure that litigants do not, as in the past, bear the costs thereby occasioned but that these costs are spread, by way of the fund, to mitigate the hardship to*

the appeal is allowed by consent[62] in limited circumstances – i.e , that there is a federal appeal, that it has succeeded on a question of law, and that the Court concerned has 'heard' the appeal.

The respondent in an unsuccessful appeal will need to make an application against the appellant based on section 117 of the *Family Law Act 1975.* However, in a successful appeal the respondent may apply for the grant of a certificate under section 6 of the *Federal Proceedings (Costs) Act 1981.*

Although the Full Court may defer submissions about the costs of an appeal until the reasons are delivered, litigants must be prepared to argue costs at the hearing of the appeal. Parties should be prepared to mount and/or oppose arguments based on section 117(2) and (2A) as well as arguments relating to the grant of certificates.

litigants that would otherwise flow.": *Mir Bros Developments Pty Limited v Atlantic Constructions Pty Limited* (1985) 1 NSWLR 491 at 494 per Dawson CJ

62 *B & B (Costs Certificates)* [2007] FamCAFC 1177