Family Law Practitioners Association Family Law Retreat

Leadership in Family Law

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Peppers Noosa Resort and Villas

Initiating an Appeal: the Importance of Advocacy

Introduction: Conceiving the Teaching of Advocacy

1. Advocacy is almost a secret art. It is one of those skills about which a teacher can say many things. But none of those things that are said about advocacy tells you how to be an advocate.

2. Let me, in contrast, speak about something I know even less about, the art of learning to play the piano. The piano teacher sets a piece for the student to play. The student goes away and practises. The student comes back and plays the piece and the teacher tells the student what she is doing wrong. The fingers are not in the right place; the wrong notes are being struck; the dynamics are wrong; and the foot peddle is being worked wrongly.

3. With much agony, the student plays and the teacher corrects and, eventually, at some satisfactory standard, the piece is mastered and the teacher prescribes a new piece so the experience of agony can be renewed.

4. The theory is that, with the mastering of each piece, the student also collects some knowledge of the principles of music and some level of muscle memory and technique such that the student may, eventually, be said to be able to play the piano.

5. The equivalent in advocacy training is called a workshop. As advocacy students, we engage in a workshop every ten years or less frequently. The result is that many of us are experienced but poor advocates and we keep on making the same mistakes because we do not have any teacher who, each time we play, is able to correct our errors and impart her wisdom to us. Judges before whom we appear do their best, occasionally, but, contrary to appearances, they are much too restrained

and soft hearted to tell us what we really need to know. The most we can expect from judges is that occasional howl of frustration when we, again, turn up in maximum unhelpful mode.

6. So I thought I would do something which, from the piano teacher's point of view, will be really unhelpful. In a few easy paragraphs, I will tell you everything I know about advocacy. If that were to be effective, we would all be really brilliant advocates and really brilliant piano players. We know it is not true because all the agony of music lessons and music practice would, in that case, be unnecessary and pointless. And we know that's not true.

It's Just Communication

7. First, advocacy is simple and easy. Essentially, you have to communicate, in an accessible form, a set of information to the court before whom you appear. It will vary from task to task. Essentially, however, it involves communicating certain relevant legal principles and the evidence necessary to satisfy those principles.

8. So, advocacy involves working out the relevant law; assembling the applicable evidence; and communicating that to the court. Nothing could be simpler. Anything not directed towards achieving those tasks is probably not advocacy. And probably not helpful to the court or your client.

What's your authority, my daughter?

9. The second point follows from the first. In assembling your notes, think in terms of a mathematical proof (another thing about which I know very little).

10. The court wants to know what you are seeking; what power it has to grant that which you are seeking; and the reasons why you say it should be granted to you.

11. Everything you say must be appropriately supported (by something).

12. It is easier, in our modern day, because courts and tribunals rely on written submissions and outlines, a lot of the time.

13. So, the answers to the most basic questions appear in the outline supported by footnotes.

14. The wife is seeking an order preventing the husband's mother from entering the former matrimonial home. Footnote to paragraphs 1-3 of the second further amended initiating application in which the finely tuned detailed orders you are seeking are spelled out.

15. The court has power to grant injunctions for the personal protection of the parent of a child. Footnote to some obscure part of division 9 of the *Family Law Act*.

16. The power has been exercised against the grandmother of a child on many occasions. Footnote to paragraphs in one or two cases.

17. The respondent mother in law has threatened family members on more than one occasion (footnote to paragraphs in affidavits) and has used actual violence on the applicant (footnote to more paragraphs in affidavits).

18. The respondent has denied these incidents (footnote to the respondent's affidavit) but she is not to be believed as her evidence is inconsistent (footnote to pages and lines of the transcript in your brilliant cross-examination) and exaggerated (more brilliant cross-examination highlighted).

19. Even where you are asking the court to draw an inference, identify the facts from which the inference is to be drawn and provide clear references to the evidence which establishes each of those facts.

20. The Court should never have to ask you: "Why do say that, Ms. Smith". They will, of course. They always do but don't make it easy for them.

Prepare, Prepare …

21. Most experts on advocacy, judges and ex-judges, say that it is all about preparation. They are right, of course, but avoid madness.

22. Every time we appear in a court, it is likely that there will be at least one question to which we don't know the answer.

23. It is fine to say: "I'm sorry, your honour, I don't know the answer to that. Can I take it on notice?"

24. There are two lessons, here. The first is that, if you stay up to 4 am, three nights in a row, and neglect your children, you still won't know the answer to every question. That way, madness lies.

25. The second lesson is: don't waffle on and pretend that you are answering the question. Nothing makes a judge's life more unbearable than people who cannot say: "I don't know, your honour".

26. The point is a good one at a general level, as well. Some advocates, when they are asked a question, do not answer it even when they know the answer. They think that answering any judge's question involves some kind of terrible concession. Answer the judge's question, anyway. Even if the judge is trying to harry you into a corner, you will get a chance to explain why your answer to the first question does not necessarily lead to those conclusions adverse to your client which the judge thinks it might do.

27. By being able to say: "No, your honour, that doesn't follow for these reasons" and explaining those reasons, you get to engage in your most effective advocacy.

28. If you had not answered the judge's first question, you would still be trying to avoid it and, thereby, making the judge more frustrated. Instead, you get to deal with the one matter which is troubling the judge and might, otherwise, have prevented the judge from finding in favour of your client.

The Judge is your friend

29. This brings me to a related point.

30. We have an irresistible urge, when the court asks us a question, to think that they are doing that, purely, to spoil our day and make our life miserable.

31. Try to resist the irresistible. Think of one other possibility. The court may actually be interested in the answer to your question. The judge may not be trying to shoot you down in a burst of flame. Her Honour may not be trying to rub your nose in your inadequacies. She may actually be interested in your case and want to know a little more detail about it.

32. Absurd as that possibility is, it is nearly always true.

33. So, stifle your panic. And address the question. Don't try to avoid it. Don't burst into a never ending apology. Don't dodge and avoid and waffle and try to pretend that this is not really happening. Just answer the question about your client's case to the best of your ability and knowledge at the time.

34. If you can do that, and I admit it challenges the realms of possibility for all of us, you might actually get to enjoy this caper called advocacy. And you might actually be quite good at it.

The Let Out Clause: For the Days when the Judge really does hate you.

35. There is one further thing you need to know for the day when you are unprepared because you got home late because all the buses and taxis broke down and then you were up all night and did not get to prepare because your baby had colic.

36. This turns out to be the same day that the judge had a huge fight with her favourite daughter just before she came into the court room. She did not tell you or your opponent this but she made her general feelings known when you first got up to stutter through your almost wholly unprepared submissions.

37. On those days, the judge is not your friend.

38. But take comfort. Even on those days, the judge is not allowed to leave the bench. The judge is not allowed to come down and sock you in the ear.

39. There will be days when you need to remind yourself that. Never forget it.

Advocacy is All Around

40. It is a widely held belief that advocacy starts when the advocate rises to her feet before the court and finishes when the advocate sits down. That is a mistaken belief.

41. Advocacy, actually, begins when the client walks into the office and the graduate law clerk, hopefully, takes a full and accurate statement. By taking a useful and informative statement, the graduate helps ensure that the next steps in the litigation will be able to be taken in an informed way. By collecting the relevant documents, the graduate ensures that the strengths of the evidence can be tested early. It will be easy to ascertain what further documents will need to be pursued including from the opponent through disclosure.

42. A good statement assists the sensible and correct framing of the case. It assists in informing as to what legal research needs to be done.

43. Advocacy continues every step of the way. It is found in the clear and sensible letters you send to the solicitors on the other side of the case in response to their crazy rants which are based neither in evidence nor the law. When the court gets to read your letters (and theirs) as part of the affidavit evidence in some procedural skirmish in the case, you will not only win the application but will build up the court's faith in you as an objective advocate of sound judgment.

44. There is also advocacy involved in the conversations you have with your client. Brilliant advice is not very helpful if the client will not act on it. By being articulate, calm, reasoned, well-informed and cautious in your conversations with your client from the beginning, you can build up the client's trust in your ability to provide reliable advice. You can avoid building up unrealistic expectations in your client. In the midst of

negotiations, which may occur months or years later, you will be better able to assist your client to make the right decisions if your client trusts your advice. Your ability to assist will be enhanced if your client has a realistic attitude to what the litigation can achieve and the downside risks of the litigation. This ability to advise and have that advice trusted is likely to have beneficial results for both you and your client.

45. Filing a notice of appeal is the commencement of a new chapter in the litigation. It does not mean that you have been wholly unsuccessful in the earlier parts of the litigation. It does mean, however, that in at least some important respect, you hope that your achievements on behalf of your client can be improved on appeal.

Advocacy and Drawing the Grounds of Appeal

46. The proposition that advocacy starts well before counsel gets to her feet to argue the appeal is particularly cogent in the area of appeals.

47. The circumstance that you are drawing a notice of appeal is salient. It implies that your client lost on the last occasion. It means that you have to convince a new court that, notwithstanding that your case was found to be the less preferred by the court below, the tables should be turned and your client's case should be held to be more worthy.

48. Your grounds of appeal are your first opportunity to use advocacy to change this situation. Your grounds of appeal are likely to be the first thing that the members of the appeal court read when starting to prepare to hear the appeal. If your grounds are vague and unconvincing, the court will start with a feeling of weariness about your appeal. If they are interesting and convincing and raise a picture of possible error on the part of the court below, their interest will be piqued and they will be eager to hear what further things you have to say. This is your opportunity. Make the most of it.

49. I will let Judge Tilmouth tell you what not to do: "Far too many appeals are overloaded with innumerable grounds, apparently in no logical order

or sequence, often stated in the vaguest and most general of terms. These are commonly referred to as "shotgun grounds"."[1]

50. In advocacy, you must have confidence. If you are drawing the grounds, you need to regard yourself as capable, at both a general and a specific level, of doing the job. The type of vague and general grounds come, in my view, because the person drawing the grounds regards herself as just filling in until someone actually knowledgeable and capable comes along and draws the real grounds. It, often, seems that the drafter is afraid of telling the other side what the real grounds are lest they prepare a counter-argument. Sometimes, the truth is, rather, that the drafter is afraid, either, that she does not know what her argument is or that, if she states her ground out aloud (that is, clearly), she might be wrong.

51. When doing any task of advocacy, approach it as if you are the last word on the subject. If a senior partner or a silk, later, decides your work needs to be changed, they can do it just as easily (indeed, more so) if have tackled it with gusto and made your very best attempt.

52. What did the court below do wrong? Why did your client lose? What made you angry when you read the reasons for the first time and what made you angry when you read it again? When you, or someone else, gets to their feet to argue the appeal, what will they take the appeal court to to convince them that your client should have won?

53. If you can answer these questions with a little bit of passion,[2] you are well on the way to drawing good grounds of appeal. Then it is a process of burrowing in; gnawing at the words of the judgment; checking parts of the transcript; isolating the precise point at which the court below went wrong.

54. The third step is placing what you say is the error into words that are both precise and concise.

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[1] Judge Tilmouth, *Notices and Grounds of Appeal*, in Blank and Selby, *Appellate Practice*, The Federation Press, 2008, page 48

[2] Note my later remarks on the importance of objectivity and its being preferable to too much passion. Still, an occasional burst of anger is good for motivation.

55. Poor grounds of appeal are marked by generality and vagueness and say that every possible error that could ever be made was made in the court below. Good grounds are well thought out, specific and go to the heart of what is said to be an error, below.

56. So, the trial court made an error of law becomes: The trial court wrongly construed the phrase … in s. 96 of the statute to place an onus of proof on the defendant when s. 96 does not impose any such onus.

57. The trial court exercised its discretion wrongly becomes the trial court exercised its discretion wrongly in favour of the respondent by placing excessive weight on the following factors … in circumstances where the said factors were deserving of little weight.

58. Good grounds get to the heart of the error and express it clearly.

The Law is Not Irrelevant

59. I have an ambivalent relationship to the rules of law which govern every facet of our life and, as advocates, a great deal of our work.

60. It is true, of course, that, occasionally, the cases that we, as advocates argue, involve complex and abstruse points of law and that the case, on that occasion, is decided by the way in which one or more of those difficult points are decided.

61. I have colleagues who believe that every minute of their lives is decided by just such points of law. Some of them rarely get out of bed until they have read at least four or five judgments of the Full Federal Court and one or two of the High Court.

62. I am more cavalier about the law than my colleagues.

63. I do think, however, that an advocate has to have consulted and satisfied herself about the content of the section or rule on which the particular dispute on which she is working turns. And it would be of further assistance to have read the key one or two paragraphs in the leading case on the same section or rule.

64. And, if the cause of action is based on case law rather than a statutory provision, it is good to have read one old case that lays down the key principles and one recent case that shows how modern courts are applying and reflecting those principles.

65. This rule of good practice applies at the time of drafting a notice of appeal (or drawing an application to a court at first instance) as much as it does to the night before you walk into court to argue the matter.

The Appeal Provision (and a little case law)

66. It is important, in my opinion, to be aware of the provision which bestows the right of appeal on your client.

67. Part X of the Family Law Act 1975 ("the Family Law Act") has a complex array of provisions as to the appeals that are available under the Act. Section 93(2) provides that, for most appeals, the court will have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact. This is, effectively, an appeal by rehearing[3] (with the rare possibility of further evidence) as opposed to a hearing de novo.[4] Section 93(2) also provides that the appeal court has a (rarely exercised) discretion to receive further evidence upon questions of fact.

68. Because the appeal is in the nature of a rehearing, it is likely that courts hearing appeals under s. 93(2) will apply the quite restrictive principles developed by the courts relating to fresh evidence[5] and additional evidence. On the other hand, the subject matter dealt with by courts administering family law is such that the welfare of the child, for example, may require a different and more lenient approach to the receipt of further evidence.[6]

69. It is also useful when drafting a notice of appeal, particularly, the relief you are asking for, to be aware of the relief that may be granted by the

[3] See *Da Costa v Cockburn Salvage & Trading Pty. Ltd.* (1970) 124 CLR 192, 208-209 and *Fox v Percy* (2003) 214 CLR 118, 125 [22]-[23]
[4] See *Builder's Licensing Board v Sperway Constructions (Syd) Pty. Limited* (1976) 135 CLR 616, 621
[5] *Amiss v Western Australia* (2006) 165 A Crim R 387, 390
[6] *CDJ v VAJ* (1998) 197 CLR 172

appeal court. Section 94(2) Family Law Act bestows a broad set of options upon the Full Court of the Family Court on appeal including the ability to order a rehearing by the court at first instance on terms and conditions.

70. Another important aspect of the statutory provisions which you need to know when asked to draw a notice of appeal is whether leave to appeal is necessary. Section 94A Family Law Act provides for leave to appeal to be prescribed in certain circumstances. The notion of needing to obtain leave carries with it the need to convince the appeal court that there is some level of importance associated with the appeal: some reason even to contemplate hearing the appeal, at all. This normally may concern either public factors such as the general importance of a point of law arising in the case or factors associated with the level of injustice in the case which requires correction.

71. When you are drafting an application for leave to appeal, you should look for cases which identify the criteria for granting leave pursuant to this provision. Special leave to appeal to the High Court from Full Court of the Family Court will involve different criteria to leave to appeal to the Full Court of the Federal Court against an interlocutory order of the Federal Court at first instance. Both are likely to be different to the criteria applicable to granting leave to appeal against sentence to the Court of Appeal in Queensland from a judge of the Supreme or District Court. Having a case on the section will assist you in knowing what principles you need to address in drafting your application.

72. While appeal by rehearing is not as broad as a hearing de novo, sometimes, even more restrictively, the right of appeal is only available on a question of law.[7] If the appeal is available only on a question of law, it affects the ability of your client to appeal but also affects what the advocate must think about when drawing the grounds of appeal.

73. Whereas it is always important to clearly delineate the error of the court below in the grounds of appeal, it is important, when the appeal is only available on a question of law, to draft the grounds identifying both the

[7] See, for example, s. 44 *Administrative Appeals Tribunal Act 1975* (Cth) , s. 44(1)

question of law and the error of the court in determining that question of law. It is also important to identify how the error on the question of law has affected the result which your client wants to overturn.

74. As with any appeal, vague pleading of grounds of appeal on a question of law will suggest to the appeal court judges that the appellant's lawyers do not really know what a question of law is and indicate that, instead of a real question of law, the appeal is probably based on a vague argument about facts badly disguised as a question of law.

75. One of those matters which an advocate must face when contemplating the grounds of appeal is the trial court's findings of fact. If your client's appeal is premised upon challenging a finding of fact, that must be squarely addressed in the grounds. Why do you say that the finding is wrong? This should also be expressed with precision. Has the evidence been misstated and, by inference, been misunderstood? Has the error been not in the primary facts found but in the drawing of inferences from those primary facts?[8] If the criticism is of placing weight on one piece of evidence and too little weight on other evidence, why is it that the appeal court should accept that criticism? Whatever the answer to these self-asked questions, the answers need to find a precise form of expression in the grounds.

76. It is especially important to identify, with precision, the fault you are alleging when your appeal challenges the finding of facts below because you need to overcome the scepticism of the appeal court members when they read your appeal grounds and realise it is a facts appeal. You want them to say to themselves that your reason for saying the court below was wrong in its findings of fact makes sense and to look forward to you making good those precise and beautifully crafted criticisms in your written outline of argument and your oral submissions.

77. You may need to know the case law principles that apply to challenging the trial judge's findings on credibility. It is not easy, of course, but it is not impossible to overcome findings on credibility of particular witnesses. You need to know when it is possible so that you can frame

[8] A famous statement of principle is found in *Warren v Coombes* (1979) 142 CLR 531, 551

your appeal grounds by reference to the circumstances which have been said to be sufficient. “Incontrovertible facts” and “uncontested testimony” may form the basis for overturning the trial judge’s findings even when they are said to be based on credibility.[9] And incontrovertibility may not be required if an analysis shows that the trial judge’s decision is “glaringly improbable” or contrary to “compelling inferences”.[10]

78. If you use these buzz words in characterising the degree of the error in your grounds of appeal, the appeal court will start with the impression that you know your law. And, if you provide an articulate and precise basis for using those characterisations, the members of the appeal court may even think that you understand how evidence and reasoning and legal principle work together and they will be keen to hear what further things you have to say.

79. Starting with the court’s respect is always a good way to start any advocacy task.

What Kind of Decision: Discretionary Orders and Grounds of Appeal

80. Section 79(1) Family Law Act bestows on a court in proceedings with respect to property a power to make such order as it sees fit altering the property interests of the parties to a marriage. That sounds like the bestowal of a discretion.

81. Section 79(2) Family Law Act does restrict the discretion by the requirement that any such order is premised upon the court being satisfied that the making of the order is, in all the circumstances, just and equitable.

82. Section 79(4) Family Law Act prescribes a number of matters that must be taken into account in making a decision pursuant to ss. 79(1) and (2). The discretion is not completely at large.

[9] *Fox v Percy* (2003) 214 CLR 118, [25]
[10] *Fox v Percy* (2003) 214 CLR 118, [29]

83. Nonetheless, the precondition of satisfaction that the making of the order is just and equitable involves an evaluative process about which many members of a court might come to different conclusions without any of them being necessarily wrong.

84. Section 65D(1) of the Family Law Act provides that, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and Division 6 of the Act, a court may make such parenting order as it thinks proper.

85. Section 65 bestows a discretionary power upon courts exercising jurisdiction in respect of children under the Family Law Act.

86. Since so much of the work of the family lawyer involves being frustrated about the exercises of discretionary powers under the Family Law Act, knowing the principles governing appeals against exercises of discretion by courts and judges may be important.

87. For an exercise of a discretion to be set aside on appeal, it must appear to the appeal court that some error has been made in exercising the discretion. This may consist of acting upon a wrong principle; taking into account irrelevant or extraneous matters; making a mistake concerning the facts; or failing to take into account a material consideration.[11]

88. It may not be necessary to identify the particular error. If the order, against the facts of the case, is plainly unjust or unreasonable, the appeal court may infer that a failure to apply the correct principles has occurred.[12]

89. Okay, we can all recite that passage from *House v The King* by heart. What does it mean for your grounds of appeal?

90. Because property orders and parenting orders are discretionary, the continuum of correct decisions in any particular matter is extensive. An

[11] *House v The King* (1936) 55 CLR 499, 504-505
[12] *House v The King* (1936) 55 CLR 499, 505

order may be mean from your client's point of view or generous to your client and be correct in either case.

91. Where there is a large area within which reasonable judges can differ, there is a heightened need to identify with precision and clarity why you and your client say the trial judge went wrong.

92. This means that just running through each category of error in *House v The King* and ending with the phrase "plainly unjust or unreasonable" is likely to tell the appeal court that, when you drew the grounds of appeal, you had no idea what you wanted to argue.

93. This can be difficult in that the errors at first instance may have contributed to and reinforced one another. One factor may have been given far too much weight. This may have led to other factors being undervalued or given no weight. The result may be that the final award is massively unbalanced and unfair. As a result, you may actually need to plead more than one ground of error.

94. The answer is to be precise and clear in identifying each aspect of the error. Do not just say that the Court gave too much weight to the husband's contribution. Rather, identify that, in treating the contributions as broadly equal, the trial judge failed to take into account, or give any sufficient weight to the circumstance that the husband tripped off to Thailand for a number of years during the marriage and contributed no money to the wife's household during that time.

95. Then, in saying that the broadly equal assessment also undervalues the wife's contribution, identify the circumstance that the wife worked a 50 hour week as well as carrying out most domestic chores for the whole of the marriage including during the husband's sojourn overseas.

96. Particularising the error is clearly essential to convincing the members of the appeal court that you have a proper case of error on the part of the trial judge.

97. In challenging the trial court's findings of fact leading to a discretionary judgment, you need to follow the principles applying to appeals against findings of fact, generally. However, you should also link the factual error to the exercise of discretion. Why was the factual error important to the court's final assessment and why is the correct finding of fact important to a correct final exercise of discretion?

The Substantive Law Governing the Dispute (and the Evidence)

98. I have focussed on the principles that appeal courts are required to apply when hearing and deciding appeals.

99. A basic knowledge of the principles applicable to the questions which arose below is also important in framing your grounds of appeal.

100. The Family Law Act is 42 years old. It has been amended on several occasions. The statutory provisions have, through this process, acquired complexity. The High Court has elucidated the principles applying to property orders and orders relating to children on more than one occasion.

101. The rules of substantive law which apply to the dispute are important in beginning to understand whether the decision at first instance was wrong and in what particular aspect it was wrong.

102. By way of example, framing the grounds of appeal in a personal injuries dispute would be very difficult for an advocate who knew nothing about duties of care; nothing about the law of damages; or none of the content of the *Civil Liability Act* 2003 (Qld).

103. So, in working out why a decision of the Family Court at first instance is wrong, the drafter of the grounds of appeal may suddenly realise that she needs to know in a little more detail and with a little more precision what the Full Court of the Family Court recently said about property orders.

104. The substantive law of the dispute is also important.

105. In the next section I talk about reasons. The reasons for decision will often provide evidence of error. However, the complete picture may require resort to the evidence. I would seldom advise that the transcript of evidence be read from front to back before sitting down to draw grounds of appeal. However, just as the advocate may realise that an aspect of the case law related to the dispute needs to be better understood, she may also realise that framing a particular ground correctly may require a re-reading of the evidence of one or more witnesses on a particular point.

106. Grounds of appeal cannot be drawn in a vacuum.

The Reasons

107. The reasons of the court against which your client is lodging an appeal are crucially important. Appeal courts always say that a trial judge's reasons should not be placed under a microscope. That is exactly what an appeal advocate must do when framing a notice of appeal.

108. Unless you can point to some evidence of error in the reasons (or you can properly paint the reasons themselves as inadequate so as to justify an appeal), the likelihood of having a successful appeal is fairly low.

109. When you come to prepare your written outline of argument, you will seek to advance your appeal grounds by referring to evidence of error on the trial judge's part by referring to passages in the reasons. If, in preparing your notice of appeal, you analysed the reasons closely and drew on that analysis, your outline of argument will already be half written in your head. If you just went on gut feeling and the angst felt by your client, your written outline will be much harder to write.

Be Objective and Fair

110. Objectivity is a key virtue of the advocate. Having empathy with your client is also important but should always fall short of affecting your objectivity.

111. The advocate who loses objectivity is of less use and less able to assist the client. It follows that even disappointment on the part of the

advocate with a result from a court should not cause the advocate to recommend or institute an appeal without the proper amount of objective and informed analysis.

112. This objectivity needs to be brought to the analysis of the trial judge's reasons. Be aware that an appeal court will be assessing your treatment of the judge's reasons much later in time and in a different room and without yours or your client's angst and disappointment.

113. It is proper to look for error in the judge's reasons. That search will be informed by what you consider possible errors in the result of the trial and in the final orders made.

114. But be fair to the judge's reasons. Do not misconstrue them. Where they are a little obscure, make a real attempt to understand them. Make an attempt to read them in the best light. (The appeal court certainly will.) Then, if they still provide evidence of error, use them to identify that error in your grounds of appeal.

Conclusion

115. This has been a fairly superficial consideration of the art of advocacy in its application to formulating grounds of appeal, particularly, in the area of family law.

116. Each advocacy task is different. Each will raise different challenges and require different approaches and solutions. Advocacy cannot be approached using templates in the hope that there will always be one to fit every situation.

117. An advocate can, however, develop methodologies and analyses that suits her and can be adopted to whatever challenge comes along.

118. Some of the principles discussed herein may prove of assistance to the reader.

119. Be aware, at least in broad compass, the principles of law that apply to your task. Know, at least, the key statutory provisions.

120. Be brave. Do not delegate your present task to someone who will carry out the next step in the litigation. If the next person finds better grounds of appeal, she can seek to amend. She will not be assisted by you putting in grounds so vague that they cover everything and nothing at the same time.

121. Engage with the task. Let your brain do the work. Be precise. Identify the error. Express it with clarity.

122. Be objective and fair.

123. Hopefully, your grounds of appeal will be praised from the hill tops.

Stephen Keim SC
10 May 2018
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