FAMILY COURT OF AUSTRALIA

SEVGI & CHAFFEN ***[2019] FamCAFC 252***

FAMILY LAW – APPEAL – Where it is not possible to determine the merits of any new grounds of appeal – Where the appellant's oral application is dismissed – Where certain grounds of appeal seek to re-agitate the issues that were before the primary judge and do not assert error –Where despite some mistakes made by the primary judge, there is still evidence to support the finding that the father had been violent in the presence of within the hearing of the child – Where the primary judge did not demonstrate bias by determining that there was family violence – Where there is no error disclosed in the primary judge's statements of the law – Where the primary judge was statutorily obliged to give greater weight to protecting the child from a risk of harm and family violence than the financial circumstances of the parties – Where the appeal had little chance of succeeding because it was a discretionary decision made by the primary judge – Appeal dismissed – Where given the impecuniosity of the parties there is no order for costs.

FAMILY LAW – APPLICATION IN AN APPEAL – Where the appellant sought to dispense with the requirement that he provide a transcript because he could not afford it – Where requiring the appellant to provide the transcript would stay the appeal – Where in the interests of justice and the parties' interests the Application in an Appeal is allowed.

Family Law Act 1975 (Cth) s 60CC and s 61DA
Federal Circuit Court Rules 2001 (Cth) r 16.05

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22
Gludau & Gludau (No.2) (2013) FLC 93-562; [2013] FamCAFC 181
House v The King (1936) 55 CLR 499; [1936] HCA 40

APPELLANT:	Mr Sevgi
RESPONDENT:	Ms Chaffen
INDEPENDENT CHILDREN'S LAWYER:	Legal Aid Queensland
FILE NUMBER:	SYC 7423 of 2015
APPEAL NUMBER:	NOA 73 of 2019
DATE DELIVERED:	18 December 2019
PLACE DELIVERED:	Cairns

PLACE HEARD:	Cairns
JUDGMENT OF:	Tree J
HEARING DATE:	4 December 2019
LOWER COURT JURISDICTION:	Federal Circuit Court of Australia
LOWER COURT JUDGMENT DATE:	19 July 2019
LOWER COURT MNC:	[2019] FCCA 1983
REPRESENTATION	
THE APPELLANT:	In Person
COUNSEL FOR THE RESPONDENT:	Mr Raeburn
SOLICITOR FOR THE RESPONDENT:	Bevan & Griffin
COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:	Mr Williams
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER	Legal Aid Queensland

ORDERS

(1) The Appellant's oral Application in an Appeal made 4 December 2019 to adjourn the appeal is dismissed.

(2) The Appellant's Application in an Appeal filed 30 October 2019 is allowed.

(3) Appeal NOA 73 of 2019 is dismissed.

(4) The Respondent's application filed 27 November 2019 that the Appellant pay her costs is dismissed.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Sevgi & Chaffen* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE APPELLATE JURISDICTION OF THE FAMILY COURT OF AUSTRALIA AT CAIRNS

Appeal Number: NOA 73 of 2019
File Number: SYC 7423 of 2015

Mr Sevgi
Appellant

And

Ms Chaffen
Respondent

REASONS FOR JUDGMENT

Introduction

1. On 19 July 2019, the primary judge made final parenting orders in relation to the only child of the parties' relationship, being X, born in 2007 and therefore presently 12 years of age ("the child"). Pursuant to those orders, Ms Chaffen ("the mother") was afforded sole parental responsibility for the child, who would primarily live with her. Further, orders in favour of Mr Savgi ("the father") established a regime under which he could spend time and communicate with the child, albeit until the child turned 13 on 22 November 2020, such time was to be supervised at the B Town Contact Service. Then, upon the child turning 13 years of age, assuming that the father had spent time with the child at the Contact Service, he would have the child in his care for one half of term 1, 2 and 3 school holidays, albeit during day time only between 9.00 am and 5.00 pm, and for one week during the Christmas school holidays, although again, only during the day.

2. From those orders the father appeals. For the reasons which follow, that appeal must fail.

3. Also, on the morning of the hearing, the father made an oral application to adjourn the appeal so as he could seek legal representation. I dismissed that application for reasons to be published later.

4. Finally, by Application in an Appeal filed 30 October 2019, the father sought that the requirement to provide transcript of the proceedings before the primary

judge be dispensed with. At the hearing of the appeal I determined that application in the father's favour, for reasons to be published in due course.

5. It is convenient to include the reasons for those two decisions in this judgment.

Background

6. The father was born in Sydney to Country A parents in 1975, and hence is presently 44 years of age. He is a sales manager/project manager by occupation, albeit presently in receipt of a disability pension, as he was seriously injured at work in 2015. The mother was born in the United Kingdom in 1977, and hence is presently 42 years of age. When she was about four years of age, she and her family moved to Australia and settled in New South Wales. The mother is a health care professional by occupation, albeit not presently fully employed, and therefore also in receipt of Social Security Benefits.

7. The parties' relationship commenced in about July 2000, when they were respectively 24 and 22 years of age. They married in 2005, and divorced in 2011. They are not in agreement as to the actual date of separation, with the mother contending it was July 2007 (i.e. before the child's birth) and the father contending it was in 2010.

8. The mother re-partnered in 2010, to which relationship four children were born, they being presently seven, six, four and two years of age. Although the mother and her partner are now separated, it appears as though co-parenting arrangements in relation to their children are amicable.

9. Between separation and mid-2015, it appears as though the parties managed to achieve co-parenting of the child, with the father spending alternate weekend with her. However in mid-2015 a complaint was made that, some two years earlier, the father had, on a number of occasions, sexually assaulted and indecently dealt with a then seven year old girl. The New South Wales Department of Family and Community Services became involved, and advised the mother not to allow the child to spend further time with the father. The mother acted on that advice.

10. In fact not long afterwards, the mother moved from Sydney to B Town. It appears she did not disclose her, or the child's, whereabouts to the father, however he located them, and commenced these proceedings in the Federal Circuit Court in Sydney on 12 November 2015. In his Initiating Application he sought both final and interim orders that the child live with him, and that a recovery order issue in relation to the child, to effect her moving into his care. Although on a final basis he sought orders that the child spend alternate weekends and half of school holidays with the mother, no interim orders in that regard were sought. For her part, in her Response the mother sought final

orders that the child live with her, and neither spend time nor communicate with the father. Her interim orders were to like effect.

11. On 25 May 2016 Judge Henderson (as her Honour then was) made interim orders that the child live with the mother in B Town, and spend such supervised time at a Contact Service in B Town with the father as the parties might agree. There were also orders made facilitating a communication regime between the child and the father, and transferring the matter to Townsville.

12. It appears as though the father only exercised his rights to spend time with the child at the Contact Service in B Town infrequently, albeit such time as he did spend with the child proceeded well.

The trial and the primary judge's reasons

13. By the time of the trial before the primary judge, the father was no longer seeking an order that the child primarily live with him, but rather sought an order that the mother and child be required to relocate to the Sydney region. He also sought orders for equal shared parental responsibility, and that the child spend time with him on alternate weekends and for half of school holiday periods.

14. For her part, the mother sought orders for sole parental responsibility, and by the end of trial, had changed her position so that she conceded that, not only should the child spend time with the father, but that from the age of 13 years and onwards, the father's time with the child should no longer be required to be supervised.

15. The Independent Children's Lawyer supported the mother's position in relation to sole parental responsibility, but contended that there should only be interim orders pronounced, affording the father continued supervised time at the B Town Contact Service.

16. At [25] in the Reasons for Judgment ("the Reasons"), the primary judge identified the relevant issues requiring his determination, as follows:

> 25. Having regard to the orders sought by the parties and the evidence before the court, the following issues are to be determined:
>
> a) Whether a coercive order should be made;
>
> b) With whom the child should live;
>
> c) What time arrangements should be ordered with the non-resident parent;
>
> d) Whether there was any family violence;
>
> e) Whether there was any abuse or neglect of the child by the mother;

f) What orders should be made for parental responsibility and;

g) Whether final or interim orders should be made.

17. His Honour proceeded to address the primary considerations listed in s 60CC(2) of the *Family Law Act 1975* (Cth) ("the Act"), and was satisfied that, provided that it was safe to do so, the child would benefit from a meaningful relationship with both parents. His Honour then addressed the parties' respective allegations of violence, and concluded that the mother posed no risk of physical assaulting the child, nor neglect, and particularly that the mother had not failed to provide nutritious meals for the child.

18. His Honour next addressed the alleged risk of harm which the mother said the father posed to the child, reviewed the father's history of violence and controlling behaviour, and the extent to which he demonstrated insight as to the effects of family violence on a child. His Honour made findings (at [105]-[106]) as follows:

> 105. Having regard to all of those matters I am satisfied, on balance, that the father committed acts of family violence, both during the relationship and after the relationship had ceased. I am further satisfied that the father was involved in the act of family violence in the presence and/or hearing of the child on a number of occasions including on 1 January 2017.
>
> 106. I am further satisfied that the father has no difficulty in acting out with violence in circumstances where he believes there is either a right to do so or a perceived threat.

19. His Honour then determined that the father "could not regulate his emotions" in the courtroom, which "left me to wonder if the father could not regulate his emotions in court in front of a judge what chance would there be of him regulating emotions in a less formal environment" (at [108]).

20. At [114]-[115] his Honour concluded:

> 114. In my view there is a very real risk that this child would be exposed to ongoing conflict as a result of the father's dogged belief that he is right at all times and that the mother is not caring for the child appropriately.
>
> 115. Having regard to all of that evidence I am satisfied that there is a need to protect the child from physical or psychological harm from being exposed to family violence in the care of the father. I have to give greater weight to this consideration pursuant to section 60CC(2A).

21. His Honour then addressed the additional considerations enumerated in s 60CC(3), noting that the child wanted to spend time with her father, and would

prefer to live closer to him, which, given her age, were views deserving of some weight. His Honour was persuaded that the child had a close, secure and primary attachment with her mother, but was clearly attached to the father and had a meaningful relationship with him. His Honour was satisfied that the parties had difficulty in making joint decisions in relation to the child, although the father has fulfilled his obligations to maintain the child, and indeed has exceeded them on occasions. He further noted that to make orders consistent with the father's application would uproot the child from the B Town area, where she had then lived for three years and ten months. His Honour considered the consequences of moving the child to Sydney, and concluded that such an order was not in her best interests.

22. The primary judge then noted that there would be real practical difficulty and expense with the child spending time and communicating with the father whilst she lives in B Town, which "will substantially affect the child's right to maintain personal relationships and direct contact with both of her parents" (at [134]).

23. Whilst satisfied that the mother has the capacity to provide for the needs of the child, his Honour had concerns about the father's capacity, and particularly his lack of insight in relation to an assault between him and his brother in front of the child on 1 January 2017. His Honour was also concerned that the father might continue to undermine the mother's role as a parent, by continuing to engage in evidence gathering. He was further satisfied that both parents had a good attitude towards the child, but "due to his lack of insight [the father] at times fails to demonstrate that he can meet those responsibilities particularly have in regards to the child's emotional well-being" (As per the original).

24. His Honour then repeated his conclusions that there had been family violence in the presence and hearing of the child, but that the father does not understand what family violence is, nor understand that he can be intimidating and aggressive.

25. The primary judge was satisfied that the father's proposal would invariably lead to the institution of further proceedings.

26. His Honour was not attracted to the Independent Children's Lawyer's proposition of making only interim orders, because that would likely expose the child to ongoing conflict into the future, until the proceedings eventually concluded. In any event, he did not think that interim orders requiring supervised time "would serve any great purpose for this child." (at [147])

27. Turning to the mother's proposal, his Honour was concerned that the parties would be unable to meet the costs of travel between Sydney and North Queensland. Further, his Honour had "a real concern that if the child spent even day time with the father in Sydney there is a real risk that she would be exposed to aggression and/or violence whilst in his care" (at [149]).

28. At [155]-[157], his Honour set out the justification for the orders relating to the father's time with the child which he ultimately pronounced, as follows:

> 155. The child is coming up for 12 years of age and has a desire to spend time with her father. That time should occur in a safe environment and not expose the child to any further acts of violence or conflict.
>
> 156. In those circumstances, I am satisfied that, provided the father commits to spending time with the child at a supervised contact [service] until the child is 13 years of age then the child can spend day time with her father predominantly in B Town or indeed in Sydney if the mother is otherwise travelling to Sydney during holiday times.
>
> 157. In my view, this provides an appropriate balance between the safety needs and the needs of the child to maintain a meaningful relationship with her father moving forward.

29. His Honour then returned to the question of relocation, and noted that, although there was no evidence as to the availability or affordability of accommodation in the area in Sydney where the father proposes the mother be required to reside, nonetheless he thought that the mother would have difficulty affording accommodation. His Honour discounted the father's submissions that Sydney provided a better opportunity for the child, and ultimately determined that the child's best interests lay in remaining in B Town.

30. Because of his finding in relation to family violence, the presumption of equal shared parental responsibility in s 61DA of the Act did not apply, and his Honour was satisfied that "the parents have a very poor, almost non-existent, co-parenting relationship" (at [168]). His Honour then determined that an order for equal shared parental responsibility was not in the best interests of the child, and declined to make such an order, but rather was satisfied that it was in the best interests of the child for the mother to have sole parental responsibility.

Father's application for adjournment

31. As I have indicated, on the morning of the hearing of the appeal, the father made an oral application for an adjournment. In support of that, he read out an email he had received at 8:00 pm the previous evening from a solicitor who had, perhaps at the request of Legal Aid, apparently sought advice from counsel as to the prospects of success of an appeal from the primary judge's orders. Whilst counsel's view as to the merits of the father's present appeal was not disclosed, it appears counsel had identified a number of potentially successful additional grounds, although the father had not previously raised these with the opposing parties.

32. However it seems that the solicitors had no grant of aid to conduct the appeal, but rather, they would first need to persuade Legal Aid that the new proposed

grounds of appeal were sufficiently meritorious to warrant a grant of aid. The prospects of that being successful was unclear, and the time frames involved were not disclosed.

33. As has been seen, the proceedings from which this appeal relates have been on foot since 12 November 2015, i.e. more than four years ago. The appeal was commenced on 16 August 2019 and an Amended Notice of Appeal was filed on 1 November 2019. The appeal was listed for hearing for 4 December 2019 by order of a Registrar made 14 October 2019. At no time prior to the morning of the appeal had the father raised the possibility of an adjournment.

34. The father is impecunious, and the prospects of him meeting any costs order consequent upon an adjournment are low.

35. The orders under appeal do not deny the father any relationship with the child. Rather, the father seeks to increase the amount of time he spends with the child, and remove any period of supervision.

36. It is not possible to confidently determine the merits of any new grounds of appeal that remain largely unarticulated, but it may be that there is, as the solicitor's email suggested, some internal conflict, or lack of precision, in the orders. In that event, the father is not necessarily without a remedy short of appeal, in that an application under the so-called "slip rule" under r 16.05 of the Federal Circuit Court Rules 2001 (Cth) could be brought by him (see also *Gludau & Gludau (No.2)* (2013) FLC 93-562).

37. Unless the interests of justice requires otherwise, generally cases should proceed when they are listed. Weighing the above matters did not persuade me that it was in the interests of justice to adjourn the appeal, and I therefore dismissed the father's oral application.

Father's application to dispense with requirement of transcript

38. By Application in a Case filed 30 October 2019, the father sought to dispense with the requirement under order 5 of the Registrar's orders of 14 October 2019 that he provide a transcript of the trial before the primary judge by 30 October 2019.

39. To the extent that the father's appeal made reference to conduct or cross-examination during the trial (see, for instance, ground 4), the absence of a transcript would only disadvantage him, rather than any other party. The father asserts that he could not afford a transcript, and given that his only income is a disability pension, and the proceedings were conducted before the primary judge over four days, that is likely correct. In those circumstances, to require the father to procure transcript would effectively stay his appeal, and it is in the interests of justice, and in these parties' interests, that it be determined. For those reasons, on 4 December 2019 I allowed the father's Application in a

Case, and dispensed with the requirement that the father obtain transcript of the proceedings before the primary judge.

The appeal generally

40. As he did before the primary judge, the father self-represented in the appeal. His Amended Notice of Appeal contains 13 grounds of appeal, many of which are not proper grounds. In the orders he sought consequent upon any success of the appeal, he no longer pressed for the relocation of the mother to Sydney, but rather sought that there be equal decision making in relation to the child, who should live with the mother, but spend blocks of holiday time with him in Sydney, together with two occasions during each school term in B Town.

41. I should also note that the father structured his grounds of appeal by reference to the paragraph number of the Reasons which he attacks under that ground. He then recites the contents of the impugned paragraph and sets out a variety of matters which he contends shows the particular error he advances.

Ground 1

42. This ground is as follows:

1. Line 38

In mid 2015 a complaint was made by the mother of nine-year-old girl on 1 June 2015 that the father had committed sexual assault and acts of indecency on various occasions at a time when the child subject to the complaint was seven years old.

1. According to my previous solicitor [Mr C], this complaint was made by a Father of a child, not the Mother.

2. The investigation was closed a few months later.

3. Police have never asked me about the allegation.

4. This complaint was made 15 days after I asked the respondent to stop beating our child and that I am reporting it to police on 15th May 2015. ([the mother] had beaten the child with a broomstick during that occasion escalating the corporal punishment toward our child beyond a regular 'smack', [the child] was too frightened to go back to stay with her mother so I was had to intervene).

5. The broomstick assault on the child by the mother and the bruise caused by dragging the child were two separate incidents. The broomstick incident occurred in Sydney and the bruise occurred whilst [the child] was on holidays in B Town with her mother, stepfather and siblings a few weeks later.

(As per the original)

43. It is immaterial whether it was the mother or father of the alleged victim who made the complaint of sexual assault. In any event, this ground does not assert that there is a material error in [38], but rather, as counsel for the mother and Independent Children's Lawyer contend, simply seeks to re-agitate issues which were before the primary judge.

44. This ground of appeal is not made out.

Ground 2

45. Ground 2 provides as follows:

> 2. Line 40.
>
> Following on from that complaint the father then attended [Suburb E] police station and made an allegation that the mother had struck the child with a broom on or about 15 may 2015 and dragged the child by the arm, causing her to fall on or about 20 June 2015. He showed police a bruise the size of approximately a 20 cent piece.
>
> 1. I attended [Suburb D] Police station (near my home) and they sent a squad car from [Suburb E] Police station the suburb where the mother was residing.
>
> 2. I had no knowledge of that complaint until FACs accused me during an interview & my solicitor read my Police report later in 2015 before our first court proceedings. I was shocked.
>
> (As per the original)

46. Again, as with ground 1, this does not assert any error, but rather the father uses it to mount some species of argument in relation to the mother. This ground therefore also fails.

Ground 3

47. This ground provides:

> 3. Line 80.
>
> Exhibit 6 in the proceedings is a police report dated 7 August 2013. The report indicates that there was evidence of scratches to the mother, and that there had been evidence of threats to harm the mother and as a result, the father was charged, but not convicted of assaulting the mother.
>
> 1. This case was with an ex girlfriend Ms [H], not the mother.

2. The scratches/marks were caused by the dog leash whilst the dog was stuck behind the bedroom door and Elie was moving in the other direction.

3. The case was withdrawn by my ex girlfriend almost immediately however police insisted they wait until a further date before they were able to remove the ADVO.

4. The matter was unrelated to this one.

(As per the original)

48. It is conceded by the mother and the Independent Children's Lawyer that there is an error contained in [80] of the Reasons, in that, as the father asserts, it was not the mother upon whom there was evidence of scratches on 7 August 2013.

49. Whilst it is true that this is likely to have been part of the material that the primary judge had in mind when reaching his ultimate finding that the father had committed acts of family violence during and after the relationship, in the presence or within the hearing of the child, as I shall discuss when addressing ground 9, there was ample other material, upon which that finding could be supported.

50. Moreover, the identity of the woman in question in the events of 7 August 2013 is somewhat immaterial, in that, on any view, what exhibit 6 contains is an account of intimate partner family violence, worryingly, post-dating the parties' separation. It merits setting out some relevant parts of the exhibit as follows:

> TIME/DATE: 9:00am / 07/08/2013
>
> …
>
> The victim and the accused were in an intimate relationship for the past 1 and a half year.
>
> …
>
> The victim and the accused were renting this property and were paying rent from a joint account. Since the victim and the accused were living together, they were searching for the second hand house furniture. The victim obtained some contact numbers from the Gum-Tree website and started contacting numerous sellers over the phone for furniture. The victim also sent numerous text messages to numerous people in an attempt to but the furniture. In the early morning of 6th of August 2013, the accused checked the victim's mobile without the permission of the victim, he saw that the victim sent numerous text messages to many people. The accused spoke to the victim on the same day in the evening at the dinner table in relation to those messages. The accused was accusing the victim that she is flirting with other males over the phone. As the victim found that the accused checked her mobile without her permission went inside her

bedroom and started using the website called 1800respect. This website is for taking advice in domestic relationship. At this website the victim had an online chat with a counsellor who advised the victim that if she has any concerns about her domestic relationship, she can speak to them in person at [Suburb F] Domestic Community service office. After some time the victim came outside form her room and asked the accused about the AVO between him and his ex wife. To which the accused replied that he threatened his wife to stab her in the stomach and because of this threat, his ex-wife requested for an AVO to be in place. The victim then did not speak to the accused and went back inside her room. At that time the victim was scared as she was not aware of this incident. The victim closed the bedroom door and placed a desk, two chairs and a single bed in front of the door, so the accused could not open her bedroom door. However the accused still attempted to open the door. The victim then told him "dont come inside, just leave me alone". The victim then slept to till 9:00am in the morning, when she heard the accused was attempting to come inside her bedroom. The victim saw the accused forcibly opened the door and grabbed the BBQ lighter which was placed on the desk inside the bedroom. The accused took the lighter and walked towards the apartment's balcony. The victim then got up and followed him to the balcony. The victim saw the lighter was placed on the BBQ desk. The victim grabbed the lighter and walked back to her bedroom. The accused then followed her and entered her bedroom. Once the accused was inside her bedroom he asked the victim for the bank details of the joint account they have. The victim said that all the bank paper work is in her hand bag and she will give it to him. However the accused grabbed the victim's hand bag and held it upside down, causing all of the things from her hand bag to drop to the floor. The victim found this kind of behaviour very odd, as this was done by the victim previously on numerous occasions. The victim then decided to leave the premises. The victim took her laptop, her dog and some personal belongings and started walking towards the front entrance door. As she was walking the accused followed the victim and stood in front of the door and stopped the victim from leaving. The accused physically held the victim's left hand very forcibly, as a result the victim had scratches around her left arm and bruised on her left leg. Later on the victim noticed that a few marks on her left arm were bleeding. At that time the victim was screaming and shouting for help. The victim then forcibly pulled the door and got out from the apartment and went to the carpark of the premises. The accused followed her to the car park and told her that "If you call the Police. You will see the things which you never seen before". The victim then placed her items in the car and left the car park. After that the victim contacted the accused's ex-wife to confirm why there is an AVO between them the accused ex-wife Helena told the victim that the accused has a history of violence and he threatened her with the knife. She also advised the victim that she should not live with the accused and find a safe place to live. The victim then contacted the Domestic help services at [Suburb F] and attended their office. The domestic officers from the [Suburb F] advised the victim to report this incident to Police and request an AVO

against her boyfriend. The two female officers then attended the [Suburb G] Police Station with the victim to report this incident. Police obtained the details of the person involved in this incident and also signed statement from the victim, in which she outlined the above circumstances. Police offered the yellow card to the victim, which was accepted by her. Police observed the victim has three or four scratch marks on her left arm and bruises on her left arm and left leg.

51. It can therefore be seen that, at least on the father's then partner's version, the father had engaged in serious and controlling family violence. It speaks to the father's propensity for such behaviour, and hence, informs the risk of the child being exposed to it when in the father's care. It is therefore directly relevant to s 60CC(2)(b) of the Act, and the primary judge's mistake does not detract from that in any material way.

52. It follows that this ground therefore fails.

Grounds 4 and 5

53. It is convenient to deal with these grounds together:

4. Line 81.

Exhibit 7 is a police entry dated the 11th of February 2012 when the police took a complaint from the father's employer at "[J Company]" of a threatening phone call. The alleged threat was that the father had said to his employer "you're dead".

1. This threat was carried out to me after I dismissed an employee at [J Company].

2. I called the police after being threatened.

3. I have email communication that I was still employed there in May 2012.

4. The evidence has not been understood properly & Exhibit 7 has been recorded twice for two different matters. (Line 81 & 83).

5. This evidence was rushed by Barrister Mr [K] cross examination. As I was trying to read the police report Mr [K] insisted I pass the document to the Judges clerk. I was explaining that the threat was carried out to myself by an employee I asked to dismiss the evidence however it appears the judge took Mr [K] words as truth and not mine.

6. I thought the Judge had read the police report before marking it as an Exhibit however Mr [K] continued to the next question almost immediately.

(As per the original)

5. Line 82.

> The police spoke with the father in relation to this incident and he admitted to being irate at being unfairly dismissed and stated that he said to his employer before terminating the telephone call "you're a dick" and not "you're dead". As a result, the police advised the father to stay away from his employer and advised the employer to call police if the issue continued.
>
> 1. The Police spoke to me as a victim of the threat not a perpetrator.

54. As with ground 3, it is conceded by the mother and the Independent Children's Lawyer that there is an error contained within these paragraphs, namely that it was not the father who was the perpetrator in the incident, but rather he was the victim.

55. However, other than perhaps informing the view which the primary judge took of the father's capacity to emotionally regulate himself, this incident, even on the mistaken interpretation of the primary judge, was not an incident of family violence, and it was plainly that which was the focus of the risk assessment which the primary judge undertook in relation to the father. As I have already observed, and shall shortly elaborate upon, there was ample other material by reference to which the ultimate finding of the primary judge in relation to that issue could be supported. The error in [81] and [82] is not material, and this ground fails.

Ground 6

56. Ground 6 provides as follows:

6. Line 83.

> Exhibit 7 also contains a police report dated 7 April 2011 relating to an act of intimidation and threats of physical violence. The report notes a prior history of violence, including stalking and intimidation.
>
> 1. This was the date the mother had applied for her first AVO which was not granted on the day.
>
> 2. The mother initially alleged that I had 'threatened to kick her in the head'
>
> 3. The ADVO was issued the following day after the mother had added to her statement stating that I 'threatened her with a knife'

4. This is highlighted in Children's Lawyer report by [Ms L]'s Sequence of Events

5. This also somewhat proves the mother is a liar in my view

6. This was the only ADVO ever issued to the mother relating to me

7. Following this on 9th May 2011 the mother filed for a divorce

8. This Exhibit has been marked #7 (sharing same number as above (5. Line 82)

9. Between this day and mid 2015 (until the smacking increased) we were sharing custody of the child without any dramas.

(As per the original)

57. This is not a proper ground of appeal. As with grounds 1 and 2, it simply seeks to re-agitate issues that the father raised at trial, but no error by the primary judge is alleged.

Ground 7

58. Ground 7 provides:

7. Line 88

The mother ultimately obtained a domestic violence order in 2015. During submissions it was submitted by the father that the apprehended domestic violence orders are "handed out" and that the mother lied when giving evidence concerning the apprehended domestic violence order.

1. The mother attempted to obtain an AVO after she was interviewed by the FACs team following my complaint to FACs regarding the excessive abusive behaviour toward our child in 2015.

2. Together with the interviewer from FACs ([Ms M]) they went to the police station to obtain an AVO however the police had rejected the application and not granted one.

3. The mother was unable to obtain an ADVO in 2015, the only time an ADVO was granted to her was in April 2011, prior to our divorce.

4. My comment on AVO are handed out was geared to when the mother went to first obtain an ADVO in 2011 (she was unsuccessful on the first day, the following day she added fud (fud = fear uncertainty & doubt) to her statement that I

'threatened her with a knife') after that the police issued an ADVO the following day.

5. This is highlighted in Children's Lawyer report by [Ms L]'s Sequence of Events.

6. It is in my view that he Judge has come to the assumption that 3 ADVO's have been granted to the Mother when in fact only 1 was ever granted, in (2011).

(As per the original)

59. As with ground 6, there is no material error asserted in this ground. To the extent that it asserts that the primary judge mistakenly concluded that there had been three apprehended violence orders in the mother's favour against the father, a proper reading of his Honour's reasons would not support that inference.

60. There is an error in [88] as to the year in which the mother obtained a domestic violence order – it was 2011, and not 2015 as the reasons state – but nothing turns on that.

Ground 8

61. Ground 8 provides:

8. Line 100

The father was cross-examined about this incident and the answers he gave satisfied me that he had very little insight as to the effects the domestic violence may have had on the child, and furthermore very little insight into how to protect the child from similar acts of family violence.

1. I do understand the effect this incident has had on the child & it was definitely one of the lowest points of my life, it has changed the whole course of my life and hers pushing obstacles between us. I did however try to explain to the judge that it will never happen again & we will not be seeing my mother or brother again.

2. The incident was totally unexpected and unavoidable (detailed – 13 Line 112).

3. [The child] and I have overcome the situation, we constantly communicate as much as we can via phone & SMS and our relationship is strong even though we are distant.

(As per the original)

62. As with the two preceding grounds, no error is asserted, but rather the father is using it as a vehicle to re-agitate issues concerning the mother, upon which he focussed at trial. This ground fails.

Ground 9

63. This ground provides:

> 9. Line 105.
>
> > Having regard to all of those matters I am satisfied, on balance, that the father committed acts of family violence, both during the relationship and after the relationship had ceased. I am further satisfied that the father was involved in the act of family violence in the presence and/or hearing of the child on a number of occasions including on 1 January 2017.
> >
> > 1. His Honour has made significant errors understanding the evidence as noted in (Lines 3,4,5,6 & 7) & some less significant errors noted in (Lines 1 & 2).
> >
> > 2. Having regard to the significant errors (Lines 3 to 7) I believe 'in my view' His Honour may have formed a bias view which has created a substantial injustice for the child and I. Especially considering the severity of the orders & how impossible they are to maintain on a disability income.
>
> (As per the original)

64. In order for this ground to succeed, I would need to be satisfied that the findings made by his Honour in this paragraph were not reasonably open on the material, or contrary to incontrovertible or uncontested facts(*Fox v Percy* (2003) 214 CLR 118 at 125-8 and 146-7). However it is correct to say, as counsel for the mother and the Independent Children's Lawyer assert, that even if one were to wholly remove [80]-[82] from the reasons, (although on no view could one ignore exhibit 6, on which [80] is based) there was still ample evidence from which the conclusion made by the primary judge could be supported, and particularly:

(a) The events of 1 January 2017, when the father had a physical fight with his brother in front of the child in Sydney, and both he and his brother were arrested by police;

(b) The conclusion of the New South Wales Department of Family Services that the child had witnessed domestic violence between the parents (at [78]-[79]);

(c) The intimidation and threat of physical violence which was made by the father to the mother on 7 April 2011, seemingly in the presence of the child, referred to in exhibit 7, and at [83]-[87];

(d) The making of a domestic violence order against the father in favour of the mother in 2011 (at [88]);[1]

(e) The father's admission that he had called the mother names, and made threats against her (at [89]); and

(f) The father's controlling behaviour of the mother, even extending to his conduct during the course of cross-examination of her, despite warnings by the primary judge (at [102]-[104]).

65. Accordingly this ground is not established

66. To the extent that this ground asserts that there is a basis to reasonably apprehend that the primary judge was biased, no foundation for such a submission exists in this paragraph of the Reasons. His Honour was obliged to determine whether there was family violence, and in doing so, could not be said to be demonstrating bias, or giving some basis for a reasonable apprehension of it.

Ground 10 (twice occurring) and ground 11

67. It is convenient to deal with these ground cumulatively. They provide as follows:

> 10. The Laws
>
> Lines 26, 27 & 28 + reference to 34.
>
> 1. (26) Guided by the objects and principles set out in section 60B of the Family Law Act 1975 (Cth) ("the act"), and having regard to the best interests of the child as my paramount consideration pursuant to section 60CA of the act I must make orders that are in the best interests of the child.
>
> 2. (27) In determining what orders are in the best interests of the child, I must consider the matters set out in section 60CC.
>
> 3. (28) When considering the primary consideration set out in section 60CC(2) (a) and (b). I must give greater weight to the consideration set out in paragraph (2)(b).
>
> 4. (34) Importantly, the High Court held that section 65DAA(1) and (2) is concerned with the reality of the situation of the parents and the child and not whether it is desirable that there be an equal time arrangement or a substantial and significant time arrangement. That is, I must make orders having regard to the factual matrix that presents itself as a result of the assessment of the evidence.

[1] Noting that the year 2015 in [88] is incorrect.

1. Having misunderstood key evidence from (Lines 3 to 7) and applying the law based on factual matrix that represents itself as a result of the assessment of evidence I feel the results translated incorrectly by the judge has lead to an error in principle and caused a substantial injustice for the child and my future outcome.

10. Line 49.

In McCall & Clark(8) the full Court concluded that a prospective approach is the appropriate way to address the benefit to a child of a meaningful relationship with both parents.

1. I believe his honor has applied major part of his decision on what I have referred to as mistakes in understanding the evidence/exhibits pointed out in (Lines 3-7)

2. Given these important areas have been proved I believe this has caused a substantial injustice for the child and I.

3. Given the severity of the orders it makes it very hard for the child and I to have an ongoing & meaningful relationship.

11.

With regards to the parties proposals as the full Court made clear in Goods case, 12 if neither of the scenarios:

"Delivers an outcome that promotes the child's best interest, then the issue is at large and to be determined in accordance with the child's best interests"

1. I sincerely believe the orders set by the judge are not in line with the best interest of the child not only due to the errors about translation of exhibits but also from the child's point of view where she enjoys spending time with her father, had attempted to move back to Sydney every year from 2016-2019. [the child]'s best interests are my priority.

(As per the original)

68. His Honour's statements of the law are uncontroversial. There is no error disclosed in these paragraphs.

69. To the extent that the father complains in ground 11 that the orders were not in the child's best interests, it is important to remember that in the case of discretionary decision, the fact that the Full Court may have reached a different conclusion on the same evidence, does not establish error. As was said by the

High Court in *House v The King* (1936) 55 CLR 499 at 504-5 (*House v The King*) said:

> 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.

70. This ground therefore fails.

Ground 12

71. This ground appears under a heading "Severity of the Orders made" and recites particular orders and challenges them. It provides as follows:

> 12. The Orders
>
> (4) That until the child turns 13 years of age and commencing as soon as practicable after the date of this order the child spends time with the father as follows:
>
> (a) At the [B Town Contract Service] at such times as agreed between the parties and the contact [service] at least once every two months;
>
> (b) By telephone/Facetime or skype each Tuesday, Thursday and Sunday between the hours of 6:30pm and 7:00pm Queensland time.
>
> 1. I am on a disability pension, in these circumstances, the expense is impossible for me to afford to visit every two months.
>
> 2. Each trip would cost between $600 - $800 depending on the amount of days I stayed in B Town.
>
> 3. It is impossible to fulfil Order (4) visiting every 2 months on a disability pensioners income. (5) Provided that the child has spent

time with Father in accordance with Order 4, then upon the child having attained the age of 13 years as follows:

(a) For one half of the term 1, 2 and 3 Queensland gazetted school holidays during the daytime only between the hours of 9:00am and 5:00pm;

(b) During the Christmas holiday period for one week as agreed between the parents during daytime only between the hours of 9:00am and 5:00pm with such time to occur in B Town or otherwise in Sydney in the event the mother is otherwise travelling to Sydney;

(c) By telephone/Facetime or skype each Tuesday, Thursday and Sunday between the hours of 6:30pm and 7:00pm Queensland time.

1. As I wont be able to fulfil all the required visits in Order (4) the child and I will end up missing out on seeing one another in the near future.i, this would be a substantial injustice for [the child] and I.

(7) That Save for in accordance with these orders the father is restrained from contacting or coming into the presence of the child and/or the mother and from attending upon their home, school, place of employment and/or any other place where it is likely that the mother and the child will be in attendance.

1. Every parent wants to see their child perform at school functions such as sports carnivals, Rock Eisteddfod, music and theatre performances. Taking that privilege from a parent & child can have an impact on the future relationship between parent & child.

2. During supervised visits in 2016 [the child] had organised for me to watch her perform at the B Town theatre one night. This event made her extremely happy to perform in front of her father & she still constantly asks when I can attend events at her school.

(8) That the mother is authorised and permitted to travel internationally with the child.

1. The mother had once tried to plan a holiday to [Country N] which is where her husband is from & I had not accepted fearing they may never return.

2. [Country N] is not listed on the Hague convention & at the very least 'in my view' [the child] should be

> placed on a watch-list and only be able to visit countries listed in the Hague convention.
>
> (As per the original) (Emphasis altered)

72. His Honour was plainly aware of the straitened financial circumstances of both parties, who were both on Centrelink benefits (at [131]), and hence the difficulties in the child maintaining a relationship with both parents. His Honour was also well aware of the practical difficulties which stemmed from the distance between Sydney and North Queensland.

73. However, as both counsel for the mother and the Independent Children's Lawyer note, his Honour was statutorily obliged to give greater weight to protecting the child from a risk of harm from exposure to family violence (amongst other things) and his Honour was explicitly mindful of that at Reasons [115].

74. Further, as I noted at [69] of these reasons, it is not to the point that I may have, on the same material, fashioned orders differently to those which the primary judge was persuaded to make. Discretionary judgments can only be interfered with if there is error established of the kind discussed in *House v The King*.

75. There is no such error established here. This ground fails.

Outcome

76. No ground of appeal is made out, and therefore the appeal fails in its entirety. It must be dismissed.

Costs

77. The mother's costs were claimed in the sum of $5,264.09. In the event that she was successful in defending the appeal, she sought an order for costs in that sum.

78. The appeal has been wholly unsuccessful. It was structured in a way which necessitated unnecessary work, in the sense that improper grounds were included, and it raised matters which, given the discretionary judgment in question, had almost no chance of success. Nonetheless the mother was obliged to engage and respond to those matters.

79. The father is impecunious. The mother is in receipt of Legal Aid. The impact of any costs order would be to still further reduce the financial capacity of the father to travel to B Town to see the child, as the primary judge's orders require.

80. Weighing those matters in the balance tells strongly against an order for costs against the father.

81. The Independent Children's Lawyer did not seek any order for costs in the event that the appeal was unsuccessful.

I certify that the preceding eighty-one (81) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 18 December 2019.

Associate:

Date: 18 December 2019