AUSTRALIAN FAMILY LAWYER

Volume 34/1 May 2025

Family Law Section

Law Council OF AUSTRALIA

ISSN 2205-1147

EDITORS

Kate Alroe
QLD Solicitor Representative
Lander & Rogers
E kalroe@landers.com.au

Alison James
SA Representative
Mitchell Chambers
E ajames@mitchellchambers.com.au

NOTICE TO CONTRIBUTORS

Members of the Family Law Section, subscribers and other interested persons are invited to submit articles for consideration for publication in Australian Family Lawyer. The emphasis should preferably be on the practical aspects of family law, family relations and associated areas, although appropriate articles of a broader academic, theoretical or philosophical nature are also encouraged.

Contributions should be submitted to:
Kate Alroe and Alison James, Editors
Australian Family Lawyer
E mail@familylawsection.org.au

SUBSCRIPTIONS

Organisations may subscribe at the Section's discretion. Enquiries about subscriptions should be directed to Family Law Section, Law Council of Australia, PO Box 5350 Braddon ACT 2612, or by email mail@familylawsection.org.au

Family Law Section | Law Council OF AUSTRALIA

DISCLAIMER

CONTENTS

03 **From the Keyboard of the Editors**
Kate Alroe and Alison James

05 **From the Chair**
Jason Walker

07 **Speech – Ceremonial Sitting of the Federal Circuit and Family Court of Australia (Division 1) to Welcome Her Honour Justice Dianne Simpson**
The Honourable Mark Dreyfus KC MP

11 **From the Courts: Federal Circuit and Family Court of Australia**
The Honourable William Alstergren AO

15 **From the Courts: Family Court of Western Australia**
The Honourable Chief Judge Gail Sutherland

16 **The Case for Tightly Controlling Cross-Examination of Lay Witnesses in Parenting Trials**
The Honourable Peter Tree KC

24 **'You can't be neutral on a moving train' – Doctrinal Predictions for Post-Amendment Relocation Disputes**
Méabh Loughnane

32 ***Radecki & Radecki* [2024]: Reconciling Section 65DAAA with the Rule in *Rice & Asplund***
Vicki Geraghty

35 **The Voice of the Child in the English Family Court**
Forum Shah

39 **Australia Can Stop Living the Failed Surrogacy Experiment**
Stephen Page

54 **Neurodivergence in Family Law: A Discussion Between a Judge and an Expert**
The Honourable Justice Tom Altobelli AM and Stephanie Lau

64 **4 Reasons Why Family Lawyers Should be Trauma-Informed**
Claudia Maclean

69 **The Implication of a Term Preventing Family Violence into a Binding Financial Agreement**
Joshua Thomson SC

77 **Binding Financial Agreements: Is the Equitable Remedy of Rectification Available?**
Samuel Fallows

81 **Who should get the Pet? A Dog Day Afternoon in the Federal Circuit and Family Court of Australia**
Nicholas Kanarev

90 **Vale – Austin Asche AC KSTJ KC**
Ian Kennedy AM

92 **Vale – Barbara Mary Phelan**
Cath Devine

93 **Vale – The Honourable John Gerald Barlow**
The Honourable Rodney Burr AM

FROM THE KEYBOARD OF THE EDITORS

KATE ALROE

Kate works exclusively in Family Law at Lander & Rogers. She has been in practice for over a decade, working across Queensland in Brisbane, Gold Coast, Toowoomba and Townsville, and has a deep understanding of the challenges and opportunities facing family law practices in both major cities and regional areas.

Kate has an interest in legal reform and community. She volunteers for the WLSQ, LGBTI Legal Service and Pyjama Foundation. She has previous board experience as a committee member of Althea Projects, was shortlisted for Lawyers Weekly Senior Associate of the Year, and was named a Rising Star by Australasian Lawyer.

ALISON JAMES

Alison's family law experience spans 30 years now. She is a barrister, Advanced Family Law Arbitrator, Accredited Family Law Specialist, Family Dispute Resolution Practitioner, and Accredited mediator.

Alison appears regularly as counsel in the Federal Circuit and Family Court of Australia (FCFCOA) and handles briefs in property and parenting trials and appeals as well as interim defended hearings. She has a particular interest in a diverse range of property settlement cases involving trusts and equity, as well as family businesses. In parenting matters, Alison works with families affected by violence, mental ill health, addiction and substance abuse to final resolution.

Alison is Chair of the Member Services Committee of the SA Bar Association, and is a member of the Resolution Institute and the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM).

Welcome to the May 2025 edition of *Australian Family Lawyer* (AFL) and, excitingly, our first edition as the new Co-Editors. Like past issues, we delve into a range of compelling topics, sure to engage and inform our readers.

> Looking at the front cover, you might ask, "What do any of these articles have to do with Scrabble?". Much like a Scrabble board, where each tile represents a letter that contributes to the formation of a meaningful word, this edition of AFL brings together the varied perspectives and experiences of our contributors, providing diverse insights on topical issues.

In the first half of this edition, we have a thought-provoking piece by The Honourable Peter Tree KC, who gives us the perspective of a long-serving, distinguished Judge who has returned to the bar. There are contributions from several practicing solicitors, including Méabh Loughnane and Stephen Page, who provide intricate and thoroughly researched articles on topical issues, such as relocation and surrogacy.

Barrister Vicki Geraghty provides insight into the reconciliation of Section 65DAAA with the rule in *Rice & Asplund* in her analysis of *Radecki & Radecki*. We also have the international perspective of Forum Shah, examining the child's voice and their participation in Hague proceedings in the UK.

> In the second half of the edition, you will find an in-depth discussion between the Honourable Justice Altobelli AM and Educational and Developmental Psychologist Stephanie Lau about the importance of taking a *neuroaffirming* approach in appropriate matters. There is also clear insight into the trauma-informed approach from Director of Yellow Legal, Claudia Maclean, who explains why all family law practitioners should be trauma-informed.

We are grateful for the opinions of learned counsel, Joshua Thomson SC, and erudite solicitor, Samuel Fallows who have both looked to contract law and equity when considering and advising on Binding Financial Agreements after separation. To close the substantive component of the issue, we have a thought-provoking article from barrister Nicholas Kanarev regarding the companion animal clauses in the *Family Law Amendment Act 2024*.

> There are also tributes to the late Honourable Austin Asche AC KC, the Honourable Sally Brown AM, the late Barbara Phelan, and the late Honourable John Gerald Barlow whose contributions to the field of family law have left a lasting legacy.

Like scrabble, this edition is a mosaic of ideas, and when you step back from the board after reading it, you will see a broader picture where each article contributes to a greater framework which shows the innovative direction family law is headed across Australia.

We hope you find this issue as informative as we have, and we welcome and encourage your feedback, as well as your contributions. Whether you are an experienced solicitor or counsel, a budding new lawyer, an international practitioner, or from an area adjunct to Family Law, we encourage you to send in your submissions.

FROM THE CHAIR

JASON WALKER

Jason Walker joined the Section Executive as the Victorian Solicitor representative in December 2018 and was elected as Treasurer in December 2020, Deputy Chair in June 2021 and Chair in 2024.

Jason is a Partner at Forté Family Lawyers and is an Accredited Specialist in Family Law (2005). His practice involves complex property and complex parenting disputes. Jason has previously served as the Chair of the Family Law Section of the Law Institute of Victoria (LIV) and is a current member of the Executive of the LIV Family Law Section. He has also served on a number of LIV committees and was a founding member of the LIV Children's Law Specialisation Advisory Committee, which is responsible for assessing and examining candidates for specialisation in Children's Law.

Jason was the Deputy Chair of the Family Law Section's National Family Law Conference held in Melbourne 2016. Jason is a Fellow of the International Academy of Family Lawyers and a member of Pacifica Congress. Jason is regularly named in the Doyle's Guide list of Leading Family and Divorce Lawyers (Melbourne). Jason has also been ranked in the Doyle's Guide list of Leading High-Value & Complex Property Matters Family Lawyers (Melbourne) and list of Preeminent Parenting & Children's Matters Lawyers (Victoria).

Welcome to the first issue of Australian Family Lawyer for 2025, and my first formally as Chair of the Family Law Section.

We have started 2025 preparing for the practical commencement of the *Family Law Amendment Act 2024* (Cth) (the Amendment Act) which makes significant changes to the *Family Law Act 1975* (Family Law Act). While some of the measures came into effect in December 2024, the majority are effective from 10 June 2025. The changes will apply to new and existing proceedings, except where a final hearing has commenced.

> Importantly, the Amendment Act recognises economic or financial abuse as family violence for the purposes of section 4AB of the Family Law Act, inserting it into the list that the court can consider when assessing contributions in property proceedings.

In addition to family violence, the Amendment Act also inserts other new factors to be considered by the court. Another significant change is the introduction of a framework for dealing with family pets in property cases, separate from other property. The court can order that one party have sole ownership of a companion animal (as defined), that it be transferred to another person with their consent, or that it be sold. The court cannot make orders for shared ownership or shared care.

In an attempt to actively manage all family law proceedings through a less adversarial approach, aiming to reduce intimidation and stress of court processes for families, the Amendment Act

expressly sets out the court's powers. This may include facilitation of remote attendance and allowing otherwise inadmissible evidence in relation to family violence.

In other changes, the Amendment Act elevates the duty of disclosure in financial or property matters and includes significant consequences for non-compliance. It also specifies matters that can be arbitrated, and in support of a parenting application, requires parties to file a certificate from an accredited family dispute resolution practitioner.

> The implementation of the Amendment Act will require new rules, forms and practice directions.

The demands on our profession to understand the amendments, and their impact will be significant. The Section provided a free webinar for members to assist with the practical implications of these far-reaching amendments. Over 1700 registered. It can be viewed on the website.

But wait, there is more! The list of matters on the agenda for family law and policy reform is long. To mention a few:

- The Australian Law Reform Commission (ALRC) has been asked to inquire into surrogacy laws. The Terms of Reference ask the ALRC to conduct a review of Australian surrogacy laws, policies and practices to identify legal and policy reforms, particularly proposals for uniform or complementary state, territory and Commonwealth laws, that:
  - are consistent with Australia's obligations under international law and conventions; and
  - protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount.
- The then Attorney-General, the Hon Mark Dreyfus KC MP announced new appointments to the Family Law Council, to be chaired by the Hon Justice Brasch, Federal Circuit and Family Court of Australia (Division 1). The Terms of Reference can be found here.
- A review of the *Federal Circuit and Family Court of Australia Act 2021* (the Act) commenced on 2 September 2024 as required by the Act. The Attorney-General appointed the Hon Linda Dessau AC CVO and Professor Helen Rhoades OAM to conduct the review. A report of the review has been provided to the Attorney-General. The report is required to be tabled in Parliament within 15 sitting days of receipt. As at the date of writing, the report has not yet been tabled, delayed by the federal election.
- The Standing Committee on Social Policy and Legal Affairs adopted an inquiry into family violence orders on 4 June 2024, following a referral from the Attorney-General. The Committee tabled its report on Thursday, 13 February 2025. The Section had lodged a detailed submission to the Inquiry and appeared at a public hearing in August 2024. The report made 11 recommendations, nine of which were suggested to be progressed in the next Parliament.

> The government is expected to provide a formal response within six months, which will hopefully identify the key priorities in this area.

- The Section is assisting the Commonwealth Attorney-General's Department in a review process designed to "improve the competency and accountability of family report writers" following recommendations from the Australian Law Reform Commission and the Joint Select Committee's review into the family law system.

To conclude, there will no doubt be opportunities over the coming months for us to add our voices to these reform processes. The Family Law Section will continue its advocacy and focus on ensuring our members are up to date with change as and when it happens.

SPEECH – CEREMONIAL SITTING OF THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1) TO WELCOME HER HONOUR JUSTICE DIANNE SIMPSON

THE HONOURABLE
MARK DREYFUS KC MP

Member for Isaacs
Former Commonwealth Attorney-General

May it please the Court.

I acknowledge the traditional owners of the land on which we meet and pay my respects to their Elders, past and present. I also extend that respect to all Aboriginal and Torres Strait Islander people here today.

It is a great privilege to be here today to congratulate your Honour on your appointment as a Justice of the Federal Circuit and Family Court of Australia (Division 1).

> I thank you on behalf of the Australian Government for your Honour's willingness to serve as a judge of this Court and extend our best wishes for your career on the Bench.

Acknowledgements

Your Honour's appointment to this Court is another success in a diverse and eminent career.

That so many of your colleagues in the judiciary and the legal profession are here today is testament to the high regard in which your colleagues hold your Honour.

May I particularly acknowledge:

The Honourable Judge Kate Hughes of the Federal Circuit and Family Court of Australia (Division 2).

Other current and former members of the judiciary, and members of the legal profession.

May I also acknowledge the presence of your Honour's family who proudly share this occasion with you.

Your husband, Nick, is here today with your children, Charlotte, and Lachlan. We are also joined by your brothers, sisters, mother-in-law, and brothers- and sisters-in-law.

Time does not permit a full exposition of your Honour's achievements and the contributions you have made to the law. Therefore, today, I will focus on some key achievements that mark your distinguished career.

Formative Years and Early Education

Your Honour grew up on a dairy farm in Docker—twenty kilometres from Wangaratta, Victoria. I'm told that the farm, in the King Valley with sweeping views of the Victorian Alpine Ranges, has been in the Simpson family since settlement, as one of the four founding families of the Wangaratta region.

Losing your mother before your fourth birthday, your Honour was raised as one of five children by your father, Lindsay.

> I understand that he was a gentle, principled man, who worked hard to keep his young family together, and although life on the farm was sometimes hard, it was still happy.

Your Honour started early at the local Byrne Primary School—a small timber school with only eighteen pupils, and later attended St Joseph's College and Galen College for secondary schooling. You received the top mark for the HSC in the region and your disciplined approach to study during this time highlighted a capacity for focus and hard work which has been evident in your Honour's professional life.

The idea of becoming a lawyer was quite removed from life in country Victoria, where the traditional pathways were teaching and nursing. I understand you delighted in creating, and often directing, little skits with your sisters to perform for captive audiences during the school holidays at your aunts and uncles' homes. I hear you went as far as donning a sheet and performing some Lady Macbeth, and as such, thought of becoming an English and Drama teacher.

All great lawyers are actors at heart, and an attentive English teacher, Ms Gillard, was the first person to suggest a different pathway might be possible for you and encouraged your Honour to consider studying law. Your sister remarked that your Honour left Docker as a quiet, diligent, hardworking country girl, the first in the family to go off to Melbourne for university.

Legal Studies and Career

Your Honour graduated from the University of Melbourne with a Bachelor of Laws and a Bachelor of Arts in 1992. After graduating, you worked as a solicitor with Heinz and Partners in Ballarat until 1995.

The Honourable Justice Dianne Simpson and the Honourable Mark Dreyfus KC MP

The Honourable Justice Dianne Simpson

You moved to Melbourne and worked as a solicitor at Clancy and Triado until 1998, in part to be near your then boyfriend, now husband, Nick. After a long-distance relationship with Nick, who had then moved to Canberra to take a graduate position with the Treasury, you made the move to Canberra.

Your Honour worked as a solicitor at Clayton Utz until 2000, and at Crowley Clifford Simpson, formerly Chris Crowley and Associates, until 2007.

> With your partners, you set up your own firm, Dobinson Davey Clifford Simpson Lawyers, which went on to become a highly regarded family law firm. I understand you became managing partner in recent years.

A persuasive, eloquent, and principled solicitor advocate with a passion for law reform, your Honour has repeatedly ranked as market leader in the ACT, has been recommended nationally as a family lawyer in Doyle's Guide, and received the 2023 Law Council of Australia's President's Award for your contribution to the profession.

> As a member and chair of the Family Law Section of the Law Council of Australia and the ACT Law Society Family Law Committee, your Honour has contributed to substantial legislative reforms to the *Family Law Act 1975* (Cth), and advocated for better responses to family violence, continuing legal education, and increasing funding for legal aid and the wider legal assistance sector.

Personal Qualities

It is a great pleasure to recognise a few of your Honour's personal qualities that have culminated in your appointment to this Court.

Your Honour is known for being a champion of the vulnerable, a powerhouse lawyer, and a brilliant human with heart and empathy to match. As your family, friends, and colleagues have remarked, you are selfless, generous, resilient, witty, hardworking, compassionate, and quietly confident. I'm told that you always put others first and it is not uncommon for your Honour to spend an evening helping a friend or person in need.

> Evidently, this extends to the profession. You go out of your way to nurture and encourage young practitioners, have volunteered at the Women's Legal Centre throughout your career, and were the Director of the National Foundation for Women from 2015 to 2018.

Your colleagues fondly recall that you would debrief in the office after a long day in court, accurately recounting events and lessons, but not before you had opened a packet of chips. Often returning to your office with the leftover chips, your Honour would continue working into the evening in preparation for the next day.

Other Interests and Hobbies

Outside of the law, I understand you have a love of cooking, which stemmed from the necessities of childhood. With your share of jobs at home from an early age, I'm told that you began cooking for your family after school with your sister Judy using a wood-fuelled oven. Your Honour spent time reading old cookbooks that belonged to your mother, and would seek to improve family meals. This was your way of showing love and nurture and to take special care of your father and siblings, which later extended to your husband, children, and friends.

I'm told that you enjoy reading, walking outside in nature, architecture, design, travel, and have recently rediscovered tennis.

> However, above all, your family and friends have emphasised the importance your Honour places on family, friendship, and connection.

I understand that you are restored by spending time with your family, which includes your pets Milou and Kipling, and that you are immensely proud of your children. I'm also told that you have a number of long-standing and inter-connected friends, many of whom are present here today.

Conclusion

Your Honour's appointment to this Court acknowledges your dedication to the law and accomplishments in the legal profession.

Your Honour takes on this judicial office with the best wishes of the Australian legal profession and it is trusted that you will approach this role with exceptional dedication to the law as you have shown throughout your career.

> On behalf of the Australian Government and the Australian people, I extend to you my sincere congratulations and welcome you to the Federal Circuit and Family Court of Australia.

May it please the Court.

FROM THE COURTS
FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

THE HONOURABLE WILLIAM ALSTERGREN AO

Chief Justice of the Federal Circuit and Family Court of Australia (Division 1) and Chief Judge of the Federal Circuit and Family Court of Australia (Division 2)

The first two and a half months of the legal year have been busy and productive for the Courts in their family law jurisdiction. The Judges, Registrars, Court Child Experts, Indigenous Family Liaison Officers and staff have been working diligently to address the current caseload, as well as looking to the future to upcoming changes to the *Family Law Act*, a number of sets of relevant regulations, and then the associated practice and procedure changes. More about those changes is set out below.

Whilst the Courts have successfully harmonised their operations in family law, particularly with the implementation of a single front end case management pathway, each court retains its distinct identity and areas of expertise. The benefit now is that it is a seamless experience for our key primary stakeholders, who we must never lose sight of—the litigants and families that rely on our court system. Working harmoniously means eliminating duplication, confusion, cost and delay as much as we are able to, to deliver a safe and responsive family law system. This ideal is a constant work in progress and one that can always be improved. We will continue to strive to achieve it every day, of every year.

Below are some general updates from the Courts that may be of interest to the family law profession.

New appointments

In the FCFCOA (Division 1), we are delighted at the announcement from the Attorney-General that her Honour Judge Joanne Stewart and her Honour Judge Anna Parker have been appointed to the FCFCOA (Division 1) in the Adelaide Registry, commencing 1 June 2025.

> Their Honours' exceptional skill, work ethic, temperament and collegiality will be welcomed, and I have no doubt that they will continue to serve the Australian people to the highest standard in the next stage of their judicial careers.

The FCFCOA (Division 2) has also recently welcomed four new general federal law and migration Judges, Mr Peter Fary SC, Commissioner Leigh Johns OAM, Mr Mark Cleary and Ms Jane Marquard.

This takes the total number of Judges across both Courts to 125 Judges. I greatly look forward to seeing all of these Judges together for the Courts' Annual Plenary in June, the Judges' intensive judicial education and training opportunity, which takes place each year. At that time, the Courts will

celebrate the special milestone that is the 25th Anniversary of the Federal Circuit and Family Court of Australia (Division 2), which I will say more about at that time.

Implementation of the *Family Law Amendment Act 2024*

Many Judges and staff of both Courts are currently working diligently to consider the consequential amendments required to court practice and procedure to implement the *Family Law Amendment Act 2024*, much of which commences on 10 June 2025. Also commencing soon on 1 April 2025 are the following regulation instruments, which practitioners should familiarise themselves with:

- *Family Law Regulations 2024;*
- *Family Law (Superannuation) Regulations 2025*; and
- *Family Law (Family Dispute Resolution Practitioners) Regulations 2025.*

A practice and procedure update was published on the Courts' website on 27 March 2025 setting out the 12 court forms that have had minor updates due to changes to regulation numbering or other references.

> With respect to the *Family Law Amendment Act 2024* implementation, amendments to the rules of court are required, as well as to a number of practice directions, forms and other procedural content. Drafting of all of this material is currently underway. Proposed rule amendments will be considered and voted upon by all Judges in the usual course.

Similar to the approach taken in the lead up to the 6 May 2024 amendments, the Courts will release regular practice and procedure updates detailing the changes to different elements of practice and procedure to assist the profession and the public. Practitioners can subscribe to updates from the Courts or view them published on the Courts' website throughout May.

Co-location and information sharing

It has almost been 12 months since the *Family Law Amendment (Information Sharing) Act 2024* commenced, and the Courts continue to experience significant benefits from information sharing with police and child welfare agencies. The early and timely receipt of documents under the information sharing provisions is critical for judicial officers to assess and manage risk appropriately. Practitioners are likely to see references to restrictions on subpoenas to information sharing agencies in the standard section 67ZBD order. This is to ensure that information sharing agencies are able to respond to targeted requests for information in the timeliest way.

> Practitioners should also be aware of the impact of section 67ZBK of the *Family Law Act*, which restricts the issue of a subpoena to an agency if a section 67ZBE order has already been made for that agency to provide documents or information, unless the court gives permission.

In relation to a national approach to co-location, I am pleased to report that Victoria Police have informed the Courts that they will be formally joining the Co-Location Program, joining the Department of Families, Fairness and Housing (DFFH), who are co-located in the Melbourne and Dandenong registries. Many of the benefits of the information sharing and co-location program stem from the relationships of goodwill and collaboration between information sharing agencies and the Courts, and we are looking forward to extending this productive working relationship with Victoria Police. The Courts are pleased that the co-location program is now operational with both child welfare agencies and police in all states and territories within the Courts' jurisdiction except the Northern Territory.

Delegation of section 51 transfer power to all Judges of the FCFCOA (Division 1)

There has been some discussion by the Full Court about section 50 of the *Federal Circuit and Family Court of Australia Act 2021* and the power of Judges of the FCFCOA (Division 1) to deal with additional causes of action commenced, for example, by the filing of an Amended Initiating Application or Response, noting that Section 50 of the *FCFCOA Act* prohibits proceedings being initiated in the FCFCOA (Division 1). These cases include: *Gilford & Cavaco* [2024] FedCFamC1A 55 and *Vang & Chung (No 3)* [2024] FedCFamC1A 199.

> To alleviate the uncertainty surrounding this issue, all Judges of the FCFCOA (Division 1) have been delegated the power to transfer a proceeding from the FCFCOA (Division 2) to the FCFCOA (Division 1). This means that if the Judge considers it necessary to transfer the new cause of action or matrimonial cause to the court because of the prohibition in section 50, they have the power to do so. This delegation means that matters can be transferred administratively and seamlessly, reducing any delay or expense for parties.

Expanding the Court Dog Program

The Courts are very pleased to be expanding the Court Dog Program to a further five registries. Preparations are well underway to expand the Program to the Newcastle, Parramatta and Sydney registries, with Brisbane and Adelaide also to commence this year. Practitioners in the Melbourne and Hobart registries will be able to attest to their northern colleagues the magic of seeing a Court Dog dispel stress, fear or tension for a party, help them to regulate their emotions, feel calm, supported and actively participate in their proceedings. Court Dog Poppy and Court Dog Zoey are beloved members of their registries, and further examples of the way that modern courts can be trauma-informed.

Pleasingly, the Australian Law Reform Commission recently recommended in Report 143 *Justice Responses to Sexual Violence* that the presence of canine companions is one of the flexible evidence measures that should be adopted to support vulnerable parties (see recommendation 46). I look forward to swearing in our new Court Dogs very soon.

Vale the Honourable Austin Asche AC KC and the Honourable Sally Brown AM

Whilst it is fitting to mark the appointment of new Judges to the Courts, it is also appropriate to mark the passing of Judges who have contributed so much to family law and the Australian judiciary.

In December I received the sad news that the Hon Austin Asche AC KC had passed away.

The Hon Austin Asche had a remarkable career, starting when he served in the Royal Australian Air Force during the final years of WWII and then began studying law at The University of Melbourne. After WWII, Austin attended the University of Melbourne where he obtained a Bachelor of Laws and a Master of Laws. He was admitted to practice in 1950 and practised as a barrister in Queensland and Melbourne. He was appointed Queen's Counsel in 1972.

> In 1976, he became the first Victorian based Judge of the newly formed Family Court of Australia, and was Acting Chief Judge from 1985 to 1986.

In 1986, the Hon Austin Asche returned to Darwin as a Judge of the Supreme Court of the Northern Territory and in 1987 was appointed Chief Justice. During this time, he also served as Chairman of the Northern Territory Parole Board.

In 1987, he was awarded the honorary degree of Doctor of Literature by Deakin University, where he was also Chancellor. In 1994 he received an honorary degree of Doctor of Laws from the Northern Territory University (now Charles Darwin University), and was Chancellor of that

university for four years. In 2010, he was made an Emeritus Chancellor of Charles Darwin University, and a Fellow of Trinity College, the University of Melbourne.

The Hon Austin Asche was appointed as the 15th Administrator of the Northern Territory in 1993, a position he held until 1997.

He was appointed a Knight of Grace of the order of St John in 1993. In 1994 he was appointed a Companion of the Order of Australia (AC) for service to the law, to tertiary education and to the community, particularly the people of the Northern Territory.

> The Senior Judicial Registrars' Chambers on Level 11 in the Melbourne registry were last year named the Austin Asche AC KC Chambers. It was a great honour to share this occasion with Austin, who was able to beam in electronically from Darwin at the age of 98 years of age.

In March, former Judge of the Family Court of Australia the Hon Sally Brown AM passed away.

The Hon Sally Brown attended the University of Melbourne, studying a Bachelor of Laws/Bachelor of Arts, and worked as a solicitor and lecturer before being called to the Victorian Bar in 1978.

In 1985 the Hon Sally Brown was appointed a Magistrate in Victoria, then Deputy Chief Magistrate in 1987 before becoming Chief Magistrate in 1990. She was the first woman to head a Victorian Court. She was subsequently appointed as a Judge of the Family Court of Australia in 1993, serving the Court with distinction.

> The Hon Sally Brown played a significant role in the development and delivery of judicial education in Australia, particularly education relating to gender and culture, and the incidence and impact of family violence.

In recognition of her contributions to judicial education, the Hon Sally Brown was made an Honorary Life Member of the Australian Institute of Judicial Administration.

In 2003 the Hon Sally Brown was appointed to the Victorian Honour Roll of Women and in 2006 was made a member of the Order of Australia.

> Her contributions to family law, family violence, inclusivity and equality before the law, and judicial education, will be remembered as a lasting legacy, and foundational steps in the great progress made in these areas over the last few decades.

The Courts extend their deepest condolences to their Honours families.

FROM THE COURTS
FAMILY COURT OF WESTERN AUSTRALIA

THE HONOURABLE CHIEF JUDGE GAIL SUTHERLAND

Chief Judge of the Family Court of Western Australia

Left to right: Magistrate Stacey Wellings, Registrar Victor Tham, Magistrate Samantha Craig

Changes in judicial personnel

Magistrate Samantha Craig and **Magistrate Stacey Wellings** were appointed as Family Law Magistrates, with effect from 6 January 2025. Both are very experienced family law practitioners. Magistrate Craig was formerly a Registrar of this Court, having been appointed to that role in 2023. Prior to joining the Court, Magistrate Craig worked as a solicitor in private practice and then as a Solicitor / Team Leader with Legal Aid Western Australia. Magistrate Wellings was, for many years, a partner in a Perth based family law firm. Until her appointment, Magistrate Wellings was also a member of the Executive Council of the Family Law Practitioners' Association of Western Australia, including serving as President in 2023 and 2024. The appointments bring to 14, the number of permanent magistrates of the Court.

In January 2025, **Registrar Victor Tham** was appointed as a Registrar of the Court. Registrar Tham is also an experienced family law practitioner and, most recently, has worked as a Family Violence Conciliation Registrar at the Magistrates Court of Western Australia.

PPP500 program update

The PPP500 program started operation in Western Australia in October 2023. As of February 2025:

- 582 "financial only" Form 1 initiating applications filed in the Court have been initially included in the program (being 37% of all financial only Form 1 applications filed).
- 86% of PPP500 applicants and 68% of PPP500 respondents were legally represented.
    - 448 have exited the program, including:
    - 115 matters were removed, due to parenting issues being introduced, the estimated hearing time for trial being greater than 2 days, or for other complexities.
    - 319 settled by consent.
    - Eight were discontinued and/or were otherwise dismissed.
    - Six proceeded to trial.
- The remainder are still progressing through the program.

THE CASE FOR TIGHTLY CONTROLLING CROSS-EXAMINATION OF LAY WITNESSES IN PARENTING TRIALS

THE HON
PETER TREE KC

Peter was appointed as a Judge of the Family Court of Australia in January 2013. In April 2019, he was assigned to the Appeal Division of that court. Notwithstanding the abolition of the Division on 1 September 2021, Peter continued to primarily sit on appeals, albeit undertaking some first instance work as well. In 2024 he was appointed an acting judge of the Family Court of Western Australia until the end of the year, at which time Peter also resigned from the Federal Circuit and Family Court of Australia (Division 1).

Prior to his appointment as a Judge, Peter conducted a broad practice as a silk, maintaining chambers in Hobart, Melbourne and Cairns. Peter has now returned to the bar.

This paper was presented at the 20th National Family Law Conference in Perth

Introduction

Unlike most other Australian civil courts, in parenting matters our family courts do not determine the occurrence of, and compensate for, historic wrongs or misconduct; rather, and perhaps uniquely, the court's task is to craft orders capable of effective and optimal operation in a dynamic future.

We should not therefore assume that the processes adopted in the other civil courts—much less the criminal courts—ought just be uncritically adopted in our context. Moreover, we should be willing to always critically evaluate what we do, to see whether it can be done better, cheaper, faster or more efficiently.

> Just because other courts do something, or because we have always done something, does not mean that it is appropriate. We should not be scared to look in the mirror, nor should self-interest disincline us to.

This paper, which is only the author's reflections, invites scrutiny of one aspect of the family courts' invariable practice, namely the cross-examination of lay witnesses in parenting trials. It is not, nor intended to be, a piece of scholarly writing; rather it is more along the lines of a fireside chat, designed to stimulate thought and discussion.

What is cross-examination?

Wigmore famously said:

> Cross-examination is the greatest legal engine ever invented for the discovery of truth.

Indeed, it probably is, at least in theory. That is to say it can answer that description when competently undertaken by a well prepared and ethical cross-examiner; sadly, it rarely looks anything like it when undertaken by a poorly prepared and incompetent cross-examiner, either not bound by, or advertent to, ethical standards.

What "truth" needs to be discovered in parenting proceedings?

Surprisingly little historical "truth" is required in parenting cases, being only that which is necessary to fashion orders capable of creating a parenting regime which works effectively in the child's best interests in the future.

> Thus, by and large, in parenting proceedings the only value of historical truth is to assist in accurately forecasting the future, so the orders ultimately made have the greatest chance of success.

Of course, no one can give much useful evidence about the future; promises, even if well intentioned, are notoriously unreliable, predictions even less so. Therefore, the family courts tend to ground their future forecasts by reference to what has already transpired.

The means of proof of historical fact

At one end of the spectrum of evidence capable of proving past events are contemporaneous, independently created and authentic documents will always command the greatest weight in determining whether it is more probable than not that something occurred. Any challenge to that weight will necessarily focus on the extent to which they are truly contemporaneous, independently created and authentic.

Such material may be in conflict with other kinds of evidence, but rarely will there be a significant reduction in the weight it deserves, precisely because the documents are contemporaneous, independently created and authentic.

Examples of such documents include:

a) records of medical examination; e.g. visible injury;

b) school attendance records;

c) CCTV footage;

d) criminal histories; and

e) telephone call records.

At the other end of the spectrum is partisan, lay witnesses' recollection of past events. That is not necessarily deserving of little weight because of deliberate dishonesty—although often it may have that character—but because of the many inherent weaknesses in such evidence, including:

a) incomplete or poor observation (etc) of what occurred;

b) subjective experience and recall of the event, including potential unconscious bias (e.g. if the witness believes a person to be a violent perpetrator, they may more readily interpret or recall what they see as violence);

c) subsequent contamination of the memory, or at least change in recalled content over time;

d) increasingly degraded recollection due to the passage of time; and

e) confused delivery of information (e.g. nervousness or fatigue).

Of course, if the alleged recollection is entirely confected, or at least to the extent it is confected, it is undeserving of weight, although the confection might itself be a relevant fact.

Inevitably then, where an independently created, contemporaneous and authentic record conflicts with partisan lay witnesses' recollection of past events, the former is likely to prevail.

The context of cross-examination

Given the above, logically a party's case ought to largely, or at least to the greatest extent possible, be based upon and emphasise the best independently

created, contemporaneous and authentic documents, and the preparation of their case ought to be largely the sourcing of such material, normally by subpoena, and its inclusion in either a tender bundle or a court book.

> In other words, their case ought to be document focused, with that material introduced no later than the outset of the trial (and ideally far earlier).

Unfortunately, experience suggests that often:

a) the Independent Children's Lawyer (if there is one) is mainly responsible for subpoenaing such material, and importantly, renewing subpoenas close to trial;

b) parties often leave inspection of subpoenaed material until just before trial, or worse, during it;

c) the process of producing tender bundles or court books is rarely complete by the first day of trial, and often they do not get tendered until the last day, and even then are a disorganised mess;

d) alternatively, documents are first produced (piecemeal, and then tendered as exhibits) during cross-examination.

In my experience, both at the Bar and in the Court, a chronologically ordered set of documents, amalgamated from all sources (rather than organised under tabs by reference to their source) is often the essential key to getting to the truth.

> And yet over 12 years on the bench, having done innumerable parenting trials, I could count on one hand—indeed perhaps one finger—the number of times I have seen that done.

What is there instead?

Almost invariably:

a) a cradle-to-grave affidavit of each parent, (which is then traversed by the other party, paragraph by paragraph), rarely, if ever, organised other than chronologically, so the important bits are buried and often expressed argumentatively ("thank goodness the rules of evidence don't apply!"); and

b) a suite of affidavits from plainly partisan lay witnesses, who are keen to help, and the relevant parent thinks will assist their case; and then

c) achingly long cross-examination of the parties and their witnesses, without any attempt to sift the wheat from the chaff; before

d) eventually, at the last gasp, a bundle of documents is produced to the court, almost as an afterthought, only some of which are able to be understood, or if they can, appear relevant.

Why is that so? I suspect it is cultural – we've always done it, and it has become an accepted, comfortable and predictable process.

I think it likely goes like this:

a) to save time and hence costs, the solicitor askes the client to provide a statement in writing (rather than the solicitor compiling the statement themselves in conference with the client). The client has no idea of what is relevant, so puts everything in, especially nasty stuff about their ex;

b) the statement then forms the basis of the client's draft affidavit, often prepared and edited under serious time pressure, and with a (safe) philosophy that more is better, so keep it all in;

c) that initial affidavit then forms the basis for the ultimate trial affidavit, which again is likely being produced against a tight deadline, and hence in a busy practice, under real time pressure;

d) the affidavits have all been sworn and filed by the time the trial brief goes to counsel;

e) counsel is also under pressure, and simply runs with what is in their brief, with only the occasional advice to the solicitor to do something more;

f) given that most matters settle, experience has demonstrated that the above is generally sufficient to get it over the line; and

g) if it doesn't settle, then, and only then, do all the inadequacies of preparation come home to roost, but by that time, it's the fault of no one in particular (because it is the fault of everyone) so we just muddle through as best we can.

The courts must bear some responsibility for this too, as they are mercilessly settlement focused as well, albeit so focused by necessity, as the system would simply crash if anything more than a small percentage of matters ran the full distance. But that means that, by and large, the courts cannot force a better standard of preparation, and more, having grown up in it themselves, it might be that some judges are quite comfortable with the status quo, so long as most matters continue to settle.

> The point I want to emphasise here is that in large part, the role of cross-examination in parenting trials is shaped by the process which precedes the trial itself, which has largely been to get it to (economically) settle. The matter has not been prepared to facilitate good, efficient cross-examination; it has been prepared on the (reasonable in most cases) expectation that it will settle, and cross-examination will never be required.

Ironically however, I suspect that the better prepared a parenting matter is, the more likely it is to settle, albeit not necessarily as economically for the client. That is because a case which is focused upon the determinative issues in the litigation, and provides the best evidence in relation to those issues, will likely reveal the true strengths and weaknesses of each party's case, thereby enhancing the prospects of settlement.

The benefits and detriments of (a good) cross-examination

I do not deny there are benefits to be had from a well prepared and competently executed cross-examination of lay witnesses in parenting cases, however, those cross-examinations are not common. Unfortunately, there are many poor—sometimes horribly incompetent—cross-examinations, which are rarely of any benefit.

However, the benefits of a good cross-examination include, at least, the following:

a) it can force concessions from a witness, and hence assist in determining the truth;

b) the prospect, and actuality, of it can assist in achieving settlement;

c) it can achieve a degree of vindication for a spouse if the relationship was violent (etc) and hence assist in the delivery of therapeutic justice; and

d) it can let a judge see what sort of a person the witness truly is, which otherwise might not be possible.

But even a good cross-examination in parenting proceedings can be problematic:

a) it can re-traumatise victims;

b) in any event it will almost inevitably effect an emotional toll on witnesses, before, during and after their questioning;

c) it rarely assists, and more likely will impair, effective future co-parenting, given each party's resentment of being cross-examined in a public court by a former partner or their lawyer, where the cross-examiner has full power and control;

d) it can be used to humiliate and "beat" the witness, or at least runs the real risk that such will be the witnesses' perception and experience, which in turn runs real risks of perpetuating any history of violence, coercion or control;

e) it is very expensive, with the attendant risk that the party being cross-examined will be forced to pay for the privilege; and

f) it is extremely time consuming.

Of course, a poor cross-examination does all of that too, only much worse.

And what does it achieve?

Although this is only my experience (albeit also reflected in the experience of judicial peers I have spoken with) I would venture to suggest that in the average trial:

a) 90 per cent of time spent on cross-examination is directed to disputed lay testimony about past events;

b) 5 per cent of the time is spent on cross-examination of lay witnesses about the future (although as I have already noted, lay witnesses' evidence about the future is rarely much help, so I am not being critical here); and

c) 5 per cent of the time is spent in cross-examining expert witnesses.

Likewise, I would suggest that on average, in parenting trials:

a) cross-examination of lay witnesses is decisive (in the sense that an opposite outcome would have otherwise ensued) in less than 5 per cent of cases; and

b) cross-examination of lay witnesses is materially influential (in the sense that substantially different orders would have otherwise ensued) in about another 10 per cent of cases; and therefore

c) cross-examination of lay witnesses has little to no bearing on at least 85 per cent of cases.

From the appellate view point:

a) cross-examination of lay witnesses is rarely referred to—certainly in no more than 20 per cent of cases;

b) even then, only small extracts of transcript are referred to; and hence

c) most parenting appeals are determined without any reference at all to the evidence of lay witnesses given under cross-examination.

Why then is it so prevalent?

I think the answer again lies in an entrenched legal culture. The lawyers expect cross-examination of lay witnesses, as does the client and even the judge.

Moreover, I think timidity has a role; counsel think if they don't cross-examine, they will lose. (And it pays the mortgage.)

So what?

What does weighing those considerations against each other suggest? Significantly, I do not ask what it suggests in "normal" civil litigation, which is almost invariably wholly focused on past events, but rather what it suggests in the context of parenting litigation, when the focus is on the future?

> To my mind, it suggests that the family courts subject the vast majority of parties and their lay witnesses to cross-examinations, which (even if not poorly prepared and poorly executed) will likely have little to no bearing on the case, but rather will very likely make the prospect of a workable outcome worse.

It also suggests that there will be a small number of cases where cross-examination does win the day for a client, (and hence the child or children) who would otherwise have lost. But the price of that minority's victory is to subject huge numbers of parties and their lay witnesses to ultimately irrelevant cross-examinations, wasting eons of court time, and at vast cost. That is not justifiable.

Thus, at least to my mind, it suggests that we should try and identify the cases which are in that minority. To achieve that screening, I suggest that cross-examination of lay witnesses should be the exception rather than the rule, and probably should be required to be the subject of explicit leave, and by that process deliberately limited to critical witnesses, and their cross-examinations restricted as to topic and duration.

The current legal context

Within Division 13 of the *Family Law Act 1975* (Cth) is s69ZX(2) which provides:

> (2) Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:
>
> …
>
> (d) limiting the time for the giving of evidence; or
>
> …
>
> (i) limiting, or not allowing, cross - examination of a particular witness; or
>
> (j) limiting the number of witnesses who are to give evidence in the proceedings.

Those powers can be exercised on the court's own initiative (s 69ZP).

To like effect are the *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 69(2) (limit to number of witnesses) and s 197 (limit to time for testimony).

Thus, in parenting proceedings—and, indeed, generally—there is no "right" to cross-examination; rather, the authorities say there is only a right to a fair trial: *Naparus & Frankham* [2020] FamCAFC 32 at [17]-[20]. Therefore, a judge has a discretion as to whether to permit cross-examination, the exercise of which will only miscarry if procedural unfairness results.

One example of such unfairness is of a judge warning that the cross-examiner only had 5 minutes left, which was a procedurally unfair exercise of the power under s 69ZX(2)(d):

> when a significant part of the evidence regarding family violence had not yet been put to the witness (*Edinger & Duy* [2023] FedCFamC1A 194 at [50]).

Further,

> … it would be a rare case in which the refusal of a party's request to cross-examine a material witness at final trial would not manifest the deprivation of procedural fairness… (*Morgan & Valverde* [2022] FedCFamC1A 133 at [35]).

Also relevant is FLA s 102NA which positively prohibits personal cross-examination of a spouse in proceedings in certain circumstances involving family violence.

There are also lesser known, and earlier prohibitions, for instance FLA s 101, which provides:

> (1) The court **shall forbid** the asking of, or excuse a witness from answering, a question that it regards as **offensive, scandalous, insulting, abusive or humiliating**, unless the court is satisfied that it is essential in the interests of justice that the question be answered.
>
> (2) The court **must forbid** an examination of a witness that it regards as **oppressive, repetitive or hectoring**, or excuse a witness from answering questions asked during such an examination, unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the questions to be answered.

(Emphasis added)

And ss 11 and 26 of the *Evidence Act 1995* (Cth) are also relevant, albeit limited.

A way forward

I would suggest that the start of restricting the cross-examination of lay witnesses to the small minority of cases where it makes any difference, and hence the solution to excessive, or wholly unnecessary cross-examination in parenting proceedings, is to move to issues-based parenting trials. That is now far easier since the ghastly shopping list of matters that FLA s60CC used to mandate consideration of has been dramatically reduced.

For many years now, when a first instance parenting matter came into my docket, I would immediately convene a Trial Management Hearing(TMH), and

in doing so, circulate a draft list of issues, the determination of which would inform the ultimate orders. Wherever possible, I would cast those issues prospectively, and discuss them to the point of agreement at the TMH, eventually incorporating them into the trial directions.

Two examples are:

1. What is the nature of the relationship between the children and each parent.
2. What risk, if any, does the father pose to the children, and what means, if any, are available to mitigate such risks.
3. What risk, if any, does the mother (and her household) pose to the children, and what means, if any, are available to mitigate such risks.
4. Would the children benefit from a meaningful relationship with the father, and if so, how might it be facilitated.
5. What are the respective parenting capacities of each parent, and what is their ability to meet the needs of the children.
6. What is the likely impact on the children of each parties' proposal.
7. Would each parent facilitate a meaningful relationship between the children and the other parent.
8. Would the parties' communication be sufficient to support equal shared parental responsibility, or sole parental responsibility with an obligation to consult the other parent.

And:

1. What is the nature of the relationship between the child and each parent.
2. What risk, if any, does the father pose to the child in relation to:
   - Family violence;
   - Allegations of sexual abuse; and
   - Substance use

   and what means, if any, are available to mitigate such risks.
3. What risk, if any, does the mother pose to the child, and what means, if any, are available to mitigate such risks.
4. Would the child benefit from a meaningful relationship with the father, and if so, how might it be facilitated.
5. What is the likely impact on the child of each parties' proposal.
6. What is the likely impact on the mother if the child were to recommence spending time with the father, and what effect would it have upon her parenting capacity.
7. Would the mother facilitate a meaningful relationship between the father and the child.
8. Would the parties' communication be sufficient to support equal shared parental responsibility, or sole parental responsibility with an obligation to consult the other parent.

The purpose of so framing the issues is to try and move beyond a trial focused on the past (except to the extent it informs those issues) to one focused on the future.

> Now of course those issues can be revised during the trial, but their ultimate formulation then became headings in my reasons, under which I traverse the relevant evidence and reach conclusions (which were, of course, mostly predictions).

I had always hoped that the parties would structure their material using those headings, but never once did that occur. If they had done so, then except for a brief introductory background, the cradle-to-grave approach of drawing affidavits would have disappeared. And, indeed, cross-examination, if required at all, would have been directed to the issues, rather than bashing away at irrelevant events which happened many years distant.

Plainly, even under the current legislative provisions, cross-examination of witnesses whose evidence does not inform an issue could be prohibited, and in relation to others, could legitimately be restricted to the identified issues (save that cross-examination as to credit might by an exception). Indeed, skilled counsel will realise that the mind-numbing "puttage" of contrary material in their client's or witnesses' affidavits is not required (*re LC & TC* (1998) FLC 92-803).

> Likewise, under the current framework, sensible time limits can—and should—be imposed in the trial plan agreed at the TMH, although most counsel will claim they were not there, and did not agree to it. (Tough; get on with it).

A trial judge could robustly do all of that now, and with appellate impunity.

Do we need statutory reform?

Whilst in my view most, if not all, the necessary tools are already in the legislation, what is needed are judges and practitioners courageous enough to robustly apply them, and appeal benches prepared to support that courage. That said, the plain fact is that notwithstanding the tools being available, vast amounts of ultimately useless cross-examination of lay witnesses still continues. Why that is so is not clear, but perhaps again it's cultural; we've always done it this way.

> As I have noted, albeit in a different context, since the past is one of the best predictors of the future, I am not sanguine that, absent significant impetus, any such culture, or at least the status quo, will change.

So a degree of practical compulsion will likely be required.

To **ensure** consideration of which witnesses should be permitted to be cross-examined at all, and on what topics and for how long they should be questioned, I would advocate for the cross-examination of lay witnesses to be the subject of a grant of leave, which if granted, would have explicit conditions attached, and enforced. In other words, instead of the starting point being that cross-examination of lay witnesses will be permitted unless it specifically isn't, it would be prohibited unless specifically allowed, and more, the onus placed on the putative cross-examiner to show why it should occur at all, and if so, as to what, and for how long, the proposed ordeal should pertain.

The niggling worry is procedural fairness—not because we should not strive for it, but because it is not always clear cut, and armchair critics reading transcript from the comfort of their chambers can always think up things not apparent or argued on the day,

> however, trial judges have the solace that natural justice only requires a reasonable opportunity to put one's case, whether by evidence or submissions, not an unlimited opportunity to explore every allegation, however remote or speculative, chase every rabbit, or venture up every dry gully.

If that still does not effect a significant curtailment of cross-examination of lay witnesses, then some further reform might be warranted, perhaps the simplest being to require leave to appeal from any curtailment of cross-examination, hence requiring a would-be appellant to prove substantial injustice would flow from a refusal of leave. However far cleverer lawyers than I might be able to think of other ways to solve the problem.

Conclusion

Whilst cross-examination of lay witnesses in parenting proceedings should not be altogether banned, its frequency, duration and scope needs to be substantially curtailed. Its current prevalence is simply an unproductive and unjustifiable waste of resources.

"YOU CAN'T BE NEUTRAL ON A MOVING TRAIN": DOCTRINAL PREDICTIONS & CURRENT TRENDS IN POST-AMENDMENT RELOCATION DISPUTES

MÉABH LOUGHNANE

Méabh Loughnane is a lawyer in the Family and Relationships Law group at Lander & Rogers.

Prior to her admission to practice in 2021, Méabh was a research assistant to the Honourable Diana Bryant AO KC and then a Judge's Associate to now Justice Riethmuller AO of the Federal Circuit and Family Court of Australia. Following that, she worked at a specialist family law firm in Melbourne.

She is a member of the Executive and Courts Practice Committee of the Family Law Section of the Law Institute of Victoria, Co-Chair of the Junior Family Lawyers Working Group and a member of the Family Law Section of the Law Council of Australia and of the Law Institute of Victoria.

Since the introduction of the *Family Law Act 1975* (Cth) ('the Act') various doctrinal principles have emerged across relocation matters, yet jurisprudence has remained relatively settled since the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). This doctrinal coherence may undergo a slight recalibration following the recent *Family Law Amendment Act 2023* (Cth) ('amendments'), which have been operative since 6 May 2024 and revised the legislative pathway for parenting matters.

> The amendments may have a more conspicuous impact on relocation matters than general parenting issues. Although it is well established that there is no discrete regime for relocation disputes,[1] the issue engenders unique strategic challenges and competing considerations due to the mutually exclusive nature of the dispute and available outcomes.

Whilst the paramount consideration remains the "best interests of the child",[2] prior to the amendments, the Act's emphasis was to preserve a "meaningful relationship"[3] between a child and both parents, which frequently collided with a party's freedom of movement.[4] Relocation applications were anchored by the presumptions of "equal shared parental responsibility" and "equal" or "significant and substantial"[5] spend

1 *B and B: Family Law Reform Act 1995* [1997] FamCA 33; *Sayer & Radcliffe and Anor* [2012] FamCAFC 2009 209 [47].
2 *Family Law Act* (Cth) s 60CA (*'the Act'*).
3 *The Act* ss 60CC(2)(a), 60B(1)(a)-(2)(b), as at 5 May 2024.
4 *AMS v AIF* [1999] HCA 26; *Morgan & Miles* [2007] FamCA 1230; *MRR v GR* [2010] HCA 4.
5 *The Act* ss 61DA, 65DAA, as at 5 May 2024.

time arrangements,[6] unless they did not apply, were rebutted,[7] or where it was practicable to facilitate time, notwithstanding relocation.[8] Now that those provisions are repealed, the question arises, what can practitioners expect in developing relocation case law? Some doctrinal predictions are contemplated based on the Act and published decisions to date, to inform future advice, negotiations and applications in the Federal Circuit and Family Court of Australia ('the Court').

> It is anticipated, as the early case law pattern suggests, that application success rates may increase, particularly when safety considerations are substantiated and relevant.

New Pathway

Jurisdiction

Relocation falls within the broad scope of children's matters in Part VII of the Act. The object of which is now twofold: (1) ensure the child's best interests are met, including their safety; and (2) give effect to the *Convention on the Rights of the Child, New York, 20 November 1989*.[9]

Best interests

The list of factors to determine a child's best interests has undergone significant synthesisation. The previous legislative pathway, guided by *Goode & Goode*[10] and summarised in the ironically described "42 easy steps",[11] notoriously featured an onerous 15 "primary" and "additional" considerations.[12] Following the Explanatory Memorandum's ('the EM') intent to make the pathway "safer and simpler",[13] the current legislation provides only six "general" factors in section 60CC(2), including a 'catch-all' discretionary clause.[14] The Act is silent on whether factors should be addressed hierarchically, however, the EM indicates the weight attached should turn on the relevant facts of each matter.[15]

The first factor considers arrangements that "promote the safety [including from family violence or harm] of the child" and importantly, in relation to "each person who has care for the child."[16] This echoes the principle that a child's best interests is the paramount, but not the sole, consideration.[17] That prospective exercise (similar to the family violence risk assessment required by section 60CG), is to be assessed in combination with the retrospective considerations in sections 60CC(2A), 60CF and 60CH of the Act, including any history of family violence, abuse, neglect, welfare care and family violence orders. Relevantly, new information sharing and evidence directions are set out in sections 67Z, 67ZBD(1) and 69ZX(4) of the Act.

There is no definition of "safe" or "promote" in the Act. These terms probably require statutory interpretation, although a focus on mitigating future risk is likely to apply. The Parliamentary intent to "encourage or support a removal, reduction or avoidance of harm,"[18] may import a higher burden for protective measures than the previous object to "protect from harm".[19]

> Arrangements that "promote safety" imply a positive duty which will presumably relate to a higher standard of protection than the negative duty to not expose a child to "unacceptable risk," of harm (if established on the evidence),[20] given that terminology from section 60CG(2) has not been adopted. Nonetheless, both historic allegations and future risk will be relevant and should be addressed in material.

6 *Taylor and Barker* [2007] FamCA 1246.
7 *H & H* [2007] FMCAfam 27.
8 *Edgar & Strofield* [2016] FamCAFC 93.
9 *The Act* s 60B.
10 [2006] FamCA 1346.
11 Grant Riethmuller, "*Deciding Parenting cases under Part VII: 42 Easy Steps*", (2015) Vol 24(3) Australian Family Lawyer 1.
12 Former sections 60CC(2) and (3).
13 Explanatory Memorandum, *Family Law Amendment Bill 2023*, page 2, [1] ('Explanatory Memorandum').
14 *The Act* s 60CC(2)(f).
15 Explanatory Memorandum (n. 13) 19, [25], [27].
16 *The Act* s 60CC(2)(a).
17 *A & A: Relocation Approach* [2000] FamCA 751 ('*A & A*').
18 Explanatory Memorandum (n. 13) 20.
19 *The Act* s 60B(1)(b), as at 5 May 2024.
20 *Isles and Nelissen* [2022] FedcFamC1A 97.

Section 60CC(2)(c) considers a child's "developmental, psychological, emotional and cultural needs" and 60CC(2)(d) addresses the capacity of each party to facilitate such. Family report observations may carry increased weight for this assessment. The principles derived from *Re Andrews*,[21] where one party's conduct detrimentally impacts the other's capacity to care for a child, may also be relevant. Whilst these provisions do not expressly refer to physical needs (e.g. housing and food security), they may be relevant where a parent seeks to relocate due to financial hardship.

> Section 60CC(2)(e) refers to the benefit of a child having a relationship with people significant to them, if safe to do so. Importantly, any reference to a "meaningful relationship" has been revoked, but recent decisions continue to refer to that phrase.

Further to the child's views, which cannot be compelled,[22] other relevant considerations can be captured by section 60CC(2)(f), for example, practical issues of distance and cost of travel. A single "additional" consideration now applies if a child is Aboriginal or Torres Strait Islander.[23]

Parental responsibility

Sections 61B and 61D define "parental responsibility", and provide for allocation of decision-making responsibilities about major long-term issues to parties, either jointly or solely,[24] for all or particularised issues about a child's care, welfare and development.[25] While each parent will have parental responsibility by default (subject to Court order),[26] section 61CA provides that, "parents are encouraged to consult each other about major long-term issues", only if safe. Therefore, parents are not required to agree on long-term decisions, but rather, "consult" (also undefined). If a party unilaterally determines it unsafe, it seems they may make such decisions absent agreement. This may incite disputes about the proper basis of a party's safety assessment and increase the volume of interim orders sought for decision-making responsibility on discrete issues, which if made, require consultation and a genuine effort to reach joint decisions.[27]

> It is anticipated this issue will largely be reserved for final hearing, consistent with current practice. Final orders for sole decision-making ('SPR') (generally or on specific issues) may increase, particularly where positive findings regarding safety issues are made.

Trends

Between 2006 and 2023 studies found on average approximately 50% of relocation applications were allowed.[28] To date, such statistics make it challenging to advise clients on the prospect of success, seeking or opposing applications, with so many variables receiving varying weight in all the surrounding facts and circumstances of each case. That is compounded by the inevitable uncertainty that arises during a new regime 'test case' such as the current period, pending the proliferation and development of subsequent published decisions.

The principles in existing guideline judgments will likely continue to apply.[29] The first published judgment considering the new pathway was a relocation matter. *Shams & Alkaios (No 2)*[30] ('Shams') structurally affirms a simplified pathway:

21 [1996] FamCA 43.
22 *The Act* ss 60CC(2)(b), 60CE.
23 *The Act* s 60CC(3).
24 *The Act* s 61D.
25 *The Act* s 4.
26 *The Act* s 61C.
27 *The Act* s 61DAA.
28 Patrick Parkinson, 'Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *Australian Journal of Family Law* 35; Adam Cooper, 'Negotiating Relocation Arrangements', 7th Annual Family Law Conference, 10 March 2022, 3.
29 For example, above n 1, 4, 8 and 17.
30 [2024] FedCFamC2F 620.

Steps		Reflections
1	Identify the competing proposals of each party.[31]	The Court may formulate its own alternative (subject to procedural fairness).[32]
2	Identify the agreed facts.	Parties should consider annexing to Outline a list by consent to expedite findings process.
3	Identify the issues in dispute and make findings of fact (preferably addressing evidence through prism of statutory considerations).[33]	At the interim stage, assess risk on evidence available and likelihood of final outcome,[34] including for injunctions (noting coercive orders and interim relocations are exceptional).[35]
4	Assess what is in the child's best interests.[36]	Consider section 60CG, parties' freedom of movement and decision-making responsibilities, if sought.[37]
5	Make orders in the child's best interests.	Address why arrangements are preferred.[38]

Ultimately, in *Shams* there was an absence of safety concerns to clearly demonstrate the impact of the amendments, however, there have since been a total of 11 relocation judgments for final hearings listed following the introduction of the amendments. Those decisions are summarised as follows:

Citation		Outcome	Observations
1	*Schuchard & Liang* [2024] FedCFamC1F 438 delivered *ex tempore* by Justice Baumann on 17 June 2024.	✓ Mother's relocation application allowed.	The new pathway was referred to but not considered or assessed in detail.
2	*Eastling & Pariser* [2024] FedCFamC2F 815 delivered by Judge Burt 27 June 2024. Appeal in *Eastling & Pariser* [2024] FedCFamC1A 239 dismissed by Christie J on 12 December 2024.	✓ Mother's relocation application allowed.	The new pathway as summarised in Shams was applied (although that case was not cited) and the EM considered. Allegations of family violence were made against the father and a history of child protection intervention and IVOs was raised by the mother, who was diagnosed with PTSD. Her evidence was preferred in assessing safety considerations. Orders were made for the Mother to relocate from Melbourne to Queensland with the children and to have SPR for medical decisions, with all other major long-term decisions to be joint. This decision was appealed in *Eastling & Pariser* [2024] FedCFamC1A 239 on the ground the wrong test was applied to the relocation application, but no error was demonstrated and the appeal was dismissed.

31 *Sayer & Radcliffe* [2012] FamCAFC 209.
32 *U v U* [2002] HCA 36.
33 *Koen & Biondi* [2023] FedCFamC1A 89 at [26].
34 Riethmulle (n 11), step 9.
35 *The Act* ss 68B, 114(3); *Oswald & Karrington* [2016] FamCAFC 152; *Browne & Keith* [2015] FamCAFC 143.
36 *The Act* 65D(1).
37 *The Act s* 61D(3); Riethmuller (n 11) [28], [29].
38 *A & A* (n 17).

Table cont.

3	*Manion & Danner* [2024] FedCFamC2F 896 delivered by Judge Jenkins on 15 July 2024.	✗ Mother's relocation application refused.	This decision did not follow the pathway as summarised above, it addressed each step but in a different order. No risk issues were raised. Both parties were found to have a loving relationship with the young child. Orders were made for the child to remain living in Sydney in a shared care arrangement. The parties were granted joint parental responsibility for the child.
4	*Grainger & Grainger (No 3)* [2024] FedCFamC1F 470 delivered by Justice Schonell on 1 August 2024.	✓ Mother's relocation application allowed.	The new pathway as summarised above was applied. The mother sought to relocate to the United Kingdom with the parties' 15-year old child. The matter had a long, complex history of litigation, including *Hague Convention on the Civil Aspects of International Child Abduction* proceedings and previous final parenting orders in place, therefore s 65DAAA and the new codification of *Rice & Asplund* provisions were considered. In relation to safety, it was found the father did not pose a risk of harm or abuse to the child, and it was accepted the mother exposes the child to a risk of emotional and psychological harm, having consciously sabotaged any possibility of the child's relationship with the father. However, it was found that living with the father would be devastating and destabilising for the child, who has an ASD diagnosis. Neither proposal was found to promote the safety of the child, therefore, an arrangement removing the child from ongoing parental conflict and risk of further systems abuse via litigation was found to be in the child's best interests. Importantly, this decision (at paragraph [128]) found the word "safety" should be given its ordinary meaning, that is > the others should provide a degree of protection from the matters identified in the subsection [60CC(2)(a)] to the extent necessary, relative to the evidence and the risk of harm. Orders were made for the child to live with the mother and that she have SPR, save for notice to be afforded in the event the mother sought to change the child's name or schooling arrangements.

Table cont.

	Citation	Outcome	Observations
5	*Werner & Manz* [2024] FedCFamC2F 1079 delivered by Judge Humphreys on 8 August 2024.	✓ Mother's relocation application allowed.	The new pathway as summarised above was applied. The mother sought to relocate with the 5-year old child overseas to her home country, and for the child to spend time with the father in Australia twice each year and in the new location twice a year. The mother found to be the more reliable historian. The issue of safety was not in issue and no allegations of family violence or abuse were raised. The Court was satisfied the mother would promote the child's relationship with the father. The mother was granted SPR (and to consider the father's views) for the child in relation to education and health and the parties were granted joint decision making for all other major long-term issues.
6	*Mizushima & Crocetti (No 3)* [2024] FedCFamC1F 542 delivered by Justice Curran on 15 August 2024.	× Mother's relocation application refused.	This decision only roughly followed the pathway as summarised above. The Mother, the primary caregiver to the twin children, sought to relocate with them to the United Kingdom. After a long history of IVF, the children were donor conceived by donor eggs and donor sperm, so neither party was biologically related to the children, however the mother carried them to term and was the birth Mother. A question of parentage was determined, and the father was declared a parent of the children. As a result, this is a long judgment, over half of which relates to that issue. Safety was not considered an issue, other than protecting the children from exposure to conflict. The parties' history of a high level of conflict and poor communication was relevant to ss 61D and 61DAA considerations. Orders were made for the children to live with the mother, however, in Australia and for graduating time with the father. The mother was granted SPR (although to take into consideration the father's views), except in relation to the children's names.

Table cont.

7	*Kroeger & Kroeger* [2024] FEdCFamC2F 1452 delivered *ex tempore* by Judge O'Shannessy on 20 September 2024.	✓ Interim decision, mother's relocation upheld (allowed).	Interim hearing on issue of interstate relocation. Father alleged mother unilaterally relocated with children from Queensland to Town B but mother asserted father was aware of her intention. *Goode & Goode* pathway applied with modified s 60CC considerations (so Shams pathway not followed). Family violence allegations made but no findings applied to competing allegations as they were "no longer critical to this interim decision" (at paragraph [29]). Upheaval caused to children who had then spent 10 months in new school was given significant weight: see paragraph [33]. Orders were made for the children to continue living with the mother, but arrangements for increased time depending if father moved closer.
8	*Samuel & Walton* [2024] FedCFamC2F 1525 delivered by Judge Newbrun on 30 October 2024.	✗ Mother's relocation application refused.	Pathway followed. Mother alleged family violence by the father who denied that allegation, Judge found on balance of probabilities family violence occurred but that the father poses no physical or psychological risk of harm to the child in his care. Judge found safety considerations and the child's views to be neutral as to relocation. Orders for equal shared parental responsibility (by consent) and child to live with mother, but she not relocate.
9	*Nemcova & McLeod* [2024] FedCFamC1F 752 delivered by Justice Jarrett on 8 November 2024	✓ Mother's relocation allowed.	Mother sought to relocate to United Kingdom, where children had good relationship with father. ICL supported children remaining in Australia. Decision followed the pathway, although not expressly after step 1. Both parties had a history of alcohol related issues but the decision did not expressly relate this to s 60CC(2)(a). Found that violence was not a factor in the overall decision. Joint parental decision making (by consent) but children to live with mother, permitted to relocate overseas.
10	*Gronchi & Toyoda* [2024] FedCFamC1F 774 delivered by Justice Wilson on 21 November 2024.	✓ Mother's relocation allowed.	The pathway was followed, albeit in a slightly different order. Mother sought to relocate overseas, opposed by the father. Safety considerations were relevant, the mother made allegations of family violence perpetrated by the father, which were established on balance of probabilities. Mother had protection order and father had previously been incarcerated, during which time the parties separated and the mother relocated with the child from Brisbane to Melbourne. The mother received interim sole parental responsibility orders and the father had supervised time. The father was further charged and plead guilty. Mother was granted sole decision making responsibility and permitted to relocate.

Table cont.

	Citation	Outcome	Observations
11	Appeal in *Sujatha & Gutierrez* [2024] FedCFamC1A 223 considered by Full Court who delivered decision dated 2 December 2024 remitting the matter for rehearing.	Appeal allowed, matter remitted for hearing on relocation issue.	Mother sought to relocate to the USA and submitted it would be a temporary arrangement, but father opposed it, believe she intended it to be permanent. In the primary decision orders made for children to remain in Australia until 2026 after which relocation be permitted, subject to the children's wishes. The pathway was loosely followed by the trial judge, however referred to the pre-amendment legislation, including 'meaningful relationships' and the presumption of equal shared parental responsibility: see paragraph [184]. The appeal court found the order provided an inherent possibility (at paragraph [15]) and fell outside both parties' proposals and they were not afforded the opportunity to make submissions on that alternative arrangement.

Notably, all 11 decisions relate to a mother's application to relocate. Applications were allowed in all but three matters (being a significantly increased 73% approval rate of published decisions post-amendments), noting one matter where relocation was allowed but to be delayed (and subject to the children's wishes), was to be remitted. Of all the successful relocation matters, only two actively made family violence and safety findings. Of all the refused applications only one had safety considerations, the other two did not have family violence allegations raised. In all decisions that allowed relocation, SPR of some variation was ordered, save for where the parties agreed to joint parental responsibility.

> Whilst the judgments adopted the same general approach as set out in *Shams*, generally each step was addressed in a slightly different order. Interestingly, none of these judgments refer to one another or any other post-amendment pathway decisions. A Full Court decision on the issue of relocation post-amendments is yet to be delivered to affirm any particular pathway or order of steps or considerations to be adopted.

Conclusion

As always, each case will turn on its facts, circumstances and the best interests of the child, however overall, successful applications may continue to increase. A divergent trend may materialise, resulting in two broad types of relocation cases: (1) where safety concerns are substantiated, applications may be allowed slightly more frequently (as the early trends suggest) and correspondingly, orders for sole decision-making may rise. By contrast, (2) applications without safety issues may have comparatively lower success rates (unless the parties' financial position mitigates the tyranny of distance), albeit become more attainable relative to the previous pathway. The adage "you can't be neutral on a moving train"[39] applies to both parents and the Court in this vexed, evolving and binary issue in family law. During these 'unprecedented' times, the need for published reasons is pertinent to navigate the new legislative pathway and properly advise clients on their prospects of success.

39 Howard Zinn, *A personal History of our Times* (Beacon Press, 1994).

RADECKI & RADECKI [2024]: RECONCILING SECTION 65DAAA WITH THE RULE IN *RICE & ASPLUND*

VICKI GERAGHTY

Vicki Geraghty is a barrister at Blackburn Chambers, accepting briefs across all areas of family law, including parenting and property disputes, as well as care and protection matters in the children's jurisdiction. She draws on a strong background in policy and executive leadership to deliver clear, strategic advice, and persuasive advocacy.

Vicki is known for her meticulous preparation, client-focused approach, and practical understanding of the complex dynamics in parenting litigation.

Introduction

The judgment in *Radecki & Radecki*,[1] delivered by Austin, Carew, and Williams JJ on 19 December 2024, provides significant clarification on the application of section 65DAAA of the *Family Law Act 1975* (Cth) and its relationship with the established rule in *Rice and Asplund*.[2] The Full Court upheld the principle that a significant change in circumstances is required to vary parenting orders, rejecting the alternative interpretations suggested in recent cases such as *Rasheem*[3] and *Whitehill & Talaska*.[4] This paper examines the judgment's reasoning and its implications for family law practice.

Case Background

The appellant in *Radecki* sought to appeal against orders issued by the Federal Circuit and Family Court of Australia (Division 2) on 27 June 2024. The central issue was the primary judge's refusal to vary parenting orders made in 2015, which had originally limited the appellant's interaction with the child.

The appellant argued that between 2015 and September 2022, the child had spent more time with him than stipulated by the orders, evidencing an informal agreement.

> However, the respondent curtailed contact in September 2022, citing the appellant's intoxication, drug use, and criminal activities. The appellant's subsequent application sought to significantly increase his time with the child.

1 [2024] FedCFamC1A 246.
2 (1979) FLC 90-725.
3 *Rasheem & Rasheem* [2024] FedCFamC1F 595.
4 [2024] FedCFamC2F 768.

The primary judge dismissed the application, finding no substantial change in circumstances to justify a variation under the rule in *Rice and Asplund* or section 65DAAA.

The Rule in *Rice and Asplund*

The rule in *Rice and Asplund* requires a two-stage test before the court will reconsider settled parenting orders. First, there must be a prima facie case of a significant change in circumstances. Only once this threshold is met, does the court proceed to the second stage, where it considers whether the change is sufficient to justify a hearing to vary the orders. This principle is grounded in the importance of finality in litigation and the need for stability in custodial arrangements, which serve the best interests of the child.

> As noted in *Marsden & Winch*,[5] the two-stage test ensures that parties do not repeatedly litigate parenting disputes without compelling reasons, thereby protecting the welfare of children and reducing the emotional and financial toll on families.

The Full Court in *Marsden & Winch*[6] at [58] explained the two-stage approach as follows:

1) A prima facie case of changed circumstances must first be established; and

2) The court must then consider whether the case presents a sufficient change of circumstances to justify embarking on a hearing.

Section 65DAAA of the *Family Law Act 1975*

Section 65DAAA of the *Family Law Act 1975* (Cth) provides a statutory framework for varying parenting orders, codifying the *Rice and Asplund* rule. Subsection (1) requires the court to consider whether there has been a significant change in circumstances and whether varying the orders is in the child's best interests. Subsection (2) permits reconsideration with the parties' consent, even without changed circumstances. Non-compliance with subsection (1) does not invalidate the orders.

Recent case law has diverged in interpreting section 65DAAA. Some decisions, like *Rasheem* and *Whitehill & Talaska*, have suggested that the statutory requirement to "consider" changed circumstances does not necessitate a finding of significant change, allowing courts to prioritise the child's best interests over the threshold test.

Full Court's Decision in Radecki

In *Radecki*, the Full Court reaffirmed that section 65DAAA codifies the principles established in *Rice and Asplund*. The Court rejected the appellant's argument that the 2015 orders could be reconsidered based solely on the child's best interests without a substantial change in circumstances.

> The Court emphasised that a literal reading of the word "consider" in section 65DAAA, as suggested in *Rasheem* and *Whitehill & Talaska*, would undermine the legislative purpose. The Full Court held that section 65DAAA aligns with the principles of finality and stability in custodial arrangements, requiring a factual finding of significant change before revisiting parenting orders.

The Full Court's reasoning was supported by:

1) **Statutory Purpose and Context**: Section 15AA of the *Acts Interpretation Act 1901* (Cth) directs that statutory interpretation should prioritise the purpose and intent of the legislation. The purpose of section 65DAAA is to codify the common law rule established in *Rice and Asplund*, ensuring a significant change in circumstances is necessary before parenting orders are reconsidered.

2) **Explanatory Memorandum and Second Reading Speech**: These extrinsic materials confirm that section 65DAAA was intended to codify, not

5 (2009) 42 Fam LR 1.
6 Ibid.

alter, the principles in *Rice and Asplund*. They explicitly state that a significant change in circumstances must occur before reconsidering parenting orders.

Avoiding Literal Interpretation Issues: A purely literal reading of "consider" as requiring only contemplation without a factual finding would undermine the legislative purpose, lead to absurd outcomes, and fail to address the mischief of continuous litigation over parenting orders.

3) **Rejection of Broader Interpretations**: Interpretations in cases like *Rasheem* and *Whitehill & Talaska,* suggesting that the statute does not mandate a finding of significant change, were rejected. The Full Court deemed these views inconsistent with the legislative purpose and policy objectives.

Implications for Family Law Practice

The judgment in *Radecki* resolves ambiguity surrounding the relationship between section 65DAAA and the rule in *Rice and Asplund*. The Full Court's interpretation ensures consistency and reinforces the importance of finality and stability in parenting matters. Key implications include:

1) **Threshold Requirement**: Practitioners must demonstrate a prima facie case of significant change in circumstances when seeking to vary parenting orders. This aligns statutory and common law principles, providing clarity and predictability.

2) **Best Interests of the Child**: While the child's best interests remain paramount, these cannot be considered in isolation without meeting the threshold test.

3) **Legislative Purpose**: The judgment underscores the need to interpret section 65DAAA in a manner consistent with its purpose, avoiding literal readings that could lead to absurd or unintended outcomes.

Conclusion

The decision in *Radecki & Radecki* affirms that section 65DAAA does not deviate from the rule in *Rice and Asplund*. The requirement for a significant change in circumstances remains a foundational principle for varying parenting orders. By codifying and clarifying this threshold, the judgment reinforces the importance of stability and finality in parenting disputes, ensuring that the welfare of children is prioritised while protecting families from unnecessary litigation.

THE VOICE OF THE CHILD IN THE ENGLISH FAMILY COURT

FORUM SHAH

Forum is a Partner in the Children Department at Dawson Cornwell LLP, a leading specialist family law firm based in London.

Forum specialises in private and public children law, with particular expertise in international child abduction, international child relocation and issues concerning child protection.

Forum has acted in a large number of reported cases in the field of international family law before the High Court and Court of Appeal.

Forum is an elected member of the Executive Committee of both the Child Abduction Lawyers Association (CALA) and the Association of Lawyers for Children (ALC). She is a member of Resolution, AIJA (The International Association of Young Lawyers) and the Family Law Panel.

Forum was awarded 'Associate of the Year' in the prestigious Lexis Nexis Family Law Awards in 2023. Forum is consistently ranked by Chambers & Partners and the Legal 500 being described as 'a Hague Convention specialist and preeminent in this field'.

There are many different types of disputes relating to children that come before the English Family Court on a daily basis. These can range from disputes involving the State, where a Local Authority may have applied to seek a protective order removing a child from their parents' care, or private family disputes, where the arrangements for a child need to be determined following a breakdown in parental relations. There are then those applications which involve the international movement of children and an application for a child to return to a particular jurisdiction.

> Whatever the issues in the case, it is a focal point of proceedings that the subject child's voice is not lost or forgotten, and their wishes and feelings are ascertained, without the suggestion of undue influence of any of the other parties involved in the case.

This synchronises with what can be considered as a basic principle of Article 12 of the *United Nations Convention on the Rights of the Child* that a child shall be given the opportunity to express their views freely, in accordance with their age and maturity.[1] There are 196 countries that have signed up to the Convention, which demonstrates the strength of the feeling globally to the necessary protection of children. As a part of this, the child's voice is integral and considered a basic human right.

There are various ways in which the voice of the child is heard in the English Family Court. This article will focus on international child abduction

1 The United Nations Convention on the Rights of the Child, <https://www.unicef.org/child-rights-convention/convention-text>.

proceedings but, before we proceed, below is a short summary of how the child's voice is heard in the other types of court proceedings mentioned above:

Type of court proceedings	How is the child's voice heard?
Public law – for example, an application for an Interim Care/ Supervision Order.	The child is always made a party to the court proceedings and represented by a Guardian (from CAFCASS - the Children and Family Court Advisory and Support Service[2]) and a solicitor.
Private law – an application to determine the living arrangements for a child or more specific issues relating to a child.	The child will not automatically be made a party to proceedings. Consideration will be given as to the child being heard by: • An Interview with an officer of CAFCASS; • Face to face or written communication with the Judge; • Child becoming a party to the proceedings.
Proceedings concerning the inherent jurisdiction of the High Court, for example, a child seeking their return to England and Wales from a non-Hague state.	In my experience, this is not very common, but in one of my present cases, it is an issue, and this is why I am highlighting this here. That case has attracted media attention in the UK[3] and concerns a teenager himself seeking a return from an African country. Although uncommon, this is permitted under the Family Procedure Rules by virtue of Rule 16.6(3)(b)[4] which provides that a child may conduct proceedings relating to the exercise of the court's inherent jurisdiction without a Children's Guardian or litigation friend where a solicitor considers that the child is able to give instructions. Interestingly, this provision does not apply to proceedings under the 1980 Hague Convention.

Turning to *1980 Hague Convention* proceedings, it remains the case that children are at the heart of these proceedings and any exceptions to a return are child focused. This was observed by Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51:

> The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed.[5]

In *1980 Hague Convention* cases, the exceptions all (to varying degrees) consider the child as the focus. For example, when it is raised by a respondent that a child objects to a return (Article 13 of the Convention) or that the child is settled in its new environment (Article 12 of the Convention) a CAFCASS report will be directed by the court. As part of this, the CAFCASS officer will consider the child's involvement in the proceedings. There is often a letter from the child to the Judge (which is incorporated into the CAFCASS report), it may be that the child wishes to meet with the trial Judge or it may be that the matter is sufficiently complex (for

2 Children and Family Court Advisory and Support Service, (Web Page) <https://www.cafcass.gov.uk/>.
3 Brooke Davies, 'Boy, 13, 'abandoned' at African boarding school after parents thought he joined London gang', Metro, (30 November 2024) <https://metro.co.uk/2024/11/30/boy-13-abandoned-african-school-mum-thought-joined-london-gang-22096003/>.
4 Family Procedure Rules, Part 16 – Representation of Children and Reports in Proceedings Involving Children, r 16.6(3)(b) <https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_16>.
5 *Re D (A Child)* [2006] UKHL 51.

example there is Local Authority involvement) and this warrants the child being joined as a party to the proceedings.

In terms of the child being joined as a party, it should be mentioned that this should be the exception and not the norm, as per the Practice Guidance relating to International Child Abduction proceedings.[6] In recent times, it has somewhat become the norm that a child in *1980 Hague Convention* proceedings has approached a solicitor directly and they have been instructed to represent the child in the ongoing proceedings. That solicitor has then been known as the child's 'solicitor guardian.'

> The issue of a child instructing their own solicitor has been very topical recently and, in the summer of 2023, the Court of Appeal heard a conjoined appeal regarding separate representation of children in *1980 Hague Convention* proceedings.

The cases were *Re D*[7] and *C v M*.[8] In *Re D*, a return order to Singapore was made at first instance, D having been joined as a party previously through a solicitor guardian. The return order was made, despite it being found that D objected. An appeal followed and the Court of Appeal considered whether there are any constraints on the scope of evidence a solicitor guardian can give. This includes the assessment of a solicitor of the strength or source of a child's views, either legally, or as a matter of practice. The Court of Appeal subsequently upheld the child's appeal and it was held that a solicitor guardian's evidence is admissible. The Court of Appeal reinforced that a child's views are but one element during the discretionary exercise.

> In *Re D*, Lord Justice Moylan also referred to the lacuna in the Family Procedure Rules because as it stands, a child can instruct a solicitor directly in summary return proceedings under the inherent jurisdiction but not summary return proceedings under the *1980 Hague Convention*. It was suggested that a committee be set up to make recommendations as to whether the scope of the rules should be extended to apply to proceedings under the 1980 Convention and the appropriate role of a solicitor guardian in such proceedings.

In *C v M*, a return order to Mauritius was made in respect of two children, despite it having been found by the trial Judge that the elder child objected to a return. In this case, following the making of a return order, the elder child applied (through a solicitor guardian) to be joined as a party and to set aside the return order. The father's application was subsequently set aside and then dismissed by the court and thus he appealed to the Court of Appeal. One of the father's grounds of appeal related to the Judge incorrectly substituting evidence that could have been provided by a CAFCASS officer with the opinion evidence of the child's solicitor. The Court of Appeal concluded that the evidence of the solicitor guardian was both admissible and relevant. The appeal was dismissed.

Conclusion

Both of these cases have brought sharp focus to the child's voice and the participation of children in *1980 Hague Convention* proceedings. Such was the importance of the issues that were being grappled with, the Court of Appeal gave intervening status to the Association of Lawyers for Children[9] and Reunite

6 Practice Guidance, Case Management and Mediation of International Child Abduction Proceedings (Web Page) <https://www.judiciary.gov.uk/wp-content/uploads/2018/03/presidents-practice-guidance-case-management-mediation-of-international-child-abduction-proceedings-20180227.pdf>.

7 *Re D (A Child) (Abduction: Child's Objections: Representation of Child Party)* [2023] EWCA Civ 1047 <https://caselaw.nationalarchives.gov.uk/ewca/civ/2023/1047>.

8 *C v M (A Child) (Abduction: Representation of a Child Party)* [2023] EWCA Civ 1449 <https://caselaw.nationalarchives.gov.uk/ewca/civ/2023/1449>.

9 The Association of Lawyers for Children (Web Page) <https://www.alc.org.uk/>.

International Child Abduction Centre.[10] As outlined above, the Court of Appeal referred this matter to the Rules Committee in light of the issues raised.

Tensions are always high in these cases as such is the magnitude of the decision that needs to be made. There is little doubt that the child at the centre of the case will likely have strength of feeling either way about a return and it is imperative that the court process takes this into account. It remains to be seen in which way the jurisprudence develops in this area and what happens in cases where: an application is made by a child to be represented by a solicitor guardian, the ambit of oral evidence given by a solicitor guardian and how a solicitor guardian's evidence may be challenged. It also remains to be seen whether the procedure rules will indeed be amended.

10 Reunite International (Web Page), <https://www.reunite.org/about/>.

AUSTRALIA CAN STOP LIVING THE FAILED SURROGACY EXPERIMENT

STEPHEN PAGE

Stephen Page is a parent through surrogacy. He is a legal practice director at Page Provan, Brisbane. Stephen was admitted as a solicitor in 1987. He has been an accredited family law specialist since 1996, and is a Fellow of the International Academy of Family Lawyers and the Academy of Adoption and Assisted Reproduction Attorneys.

He is a member of several committees, including Secretary of the Fertility Society of Australia and New Zealand, and an international representative on the Artificial Reproductive Technologies Committee of the American Bar Association.

Since 1988, he has advised in over 2,000 surrogacy journeys for clients throughout Australia and in 39 other countries. He is the author of When Not If: Surrogacy for Australians (2022) and International Assisted Reproductive Technology, American Bar Association (2024), as well as numerous articles and presentations.

Stephen was awarded the inaugural Pride in Law Award (2021) and Queensland Law Society President's Medal (2023). He is a co-founder of the International Surrogacy Forum.

Introduction

While most family law concerns clients who are unhappy after their worlds have fallen apart, family formation through surrogacy, while complex, is joyful.

In December 2024, then Attorney-General Mark Dreyfus KC MP called upon the Australian Law Reform Commission to recommend as to reform of surrogacy law, both domestic and international. The commission is to report by July 2026, 10 years after the House of Representatives surrogacy inquiry, which was a rushed report produced quickly before a federal election.

What is Surrogacy?

A person becomes pregnant and gives birth, with the agreement that someone else will care for the child.

There are two types of surrogacy:

- **traditional surrogacy,** where the person who gestates the child is also the genetic parent, and
- **gestational surrogacy,** where the person who gestates the child is not the genetic parent.

Most commonly, surrogacy involves IVF. However, it can occur with traditional surrogacy via artificial insemination or via sex.[1] Although experience says that intended parents want a genetic connection with the child, sometimes there are no viable eggs or sperm,[2] resulting in no genetic connection between intended parent and child.

1 For example, see the attempts in *Seto & Poon* [2021] FamCA 288; and conception via sex in *CDA v TRA* [2024] QChC 12.

2 For example, a gay or lesbian couples who needed both a sperm donor and an egg donor, and a surrogate.

What is Commercial Surrogacy?

In broad terms, the surrogate does not profit but is not out-of-pocket.

There is no consistent definition among our country's surrogacy laws as to what is and what is not commercial surrogacy. It depends upon what each State and Territory Parliament has defined as allowable costs.

TABLE 1 – AUSTRALIA'S SURROGACY LAWS	
Jurisdiction	**Law**
Commonwealth	*Australian Citizenship Act 2007* *Australian Passports Act 2005* *Family Law Act 1975* *Family Law Regulations 1984*
Australian Capital Territory	*Parentage Act 2004*
New South Wales	*Surrogacy Act 2010*
Northern Territory	*Surrogacy Act 2022*
Queensland	*Surrogacy Act 2010*
South Australia	*Surrogacy Act 2019*
Tasmania	*Surrogacy Act 2012*
Western Australia	*Human Reproductive Technology Act 1991* *Surrogacy Act 2008*
Victoria	*Assisted Reproductive Treatment Act 2008* *Status of Children Act 1974*

Interstate surrogacy journeys—where the intended parents live in one State and the surrogate in another—are common. The parties have to navigate inconsistent surrogacy laws. Most allowable expenses are now reasonably consistent between the States, but Western Australian remains an outlier. It may be that following the State election due at the end of March, that reforms finally occur there. Currently, the *Surrogacy Act 2008* (WA) does not appear to allow reimbursement of travel or accommodation. Therefore, if intended parents live in New South Wales but the surrogate lives in Western Australia, reimbursement of the surrogate's travel and accommodation to the IVF clinic in Sydney, while lawful in NSW is illegal in Western Australia.

Entering into surrogacy arrangements should not be so hard. There should be a consistent template for laws throughout the country, as the House of Representatives called for nine years ago. Sadly, whilst the States and Territories have slowly and incrementally made changes to be consistent, the pace of change has been out of kilter with the reality of Australians undertaking surrogacy.

> Only single women, lesbian couples and heterosexual couples can access surrogacy in WA, the only state that still discriminates on sexuality. Gay couples or single men cannot. Nor can those somewhere else in the LGBTQIA+ spectrum, unless they come within the allowed categories.

Tasmania requires that everyone must reside there when entering into the surrogacy arrangement.

Western Australian and Victorian laws continue to, in effect, require intended parents only to go to clinics in those States.[3] It doesn't matter if the intended parents want to go to a doctor of their choice who happens to be interstate—that option is not available, unless they move there.

Thankfully, in most States the surrogate has bodily autonomy over the pregnancy and childbirth.[4]

However, surrogacy arrangements are not binding, posing a barrier for straightforward recognition of parentage, in the face of a capricious or dishonest surrogate.[5]

3 Victoria does not permit traditional surrogacy, except via at home insemination.
4 For example, *Surrogacy Act 2010* (Qld) s 16.
5 For example, *Tickner & Rodda* [2021] FedCFamC1F 279. The surrogate said she had lost the pregnancy, but continued to full term, and sought to keep the child.

Who Wants to Do Surrogacy?

In essence, anyone who needs to. There is a requirement that there be a medical or social need.[6] The reason that need is specified by law is to reduce maternal mortality risk. Australia has one of the lowest maternal mortality risks in the world, with an estimated lifetime risk of death to any woman who is pregnant and giving birth of one in 19,000. In some countries, the risk is much higher. In Nigeria, for example, where surrogacy is practised, the estimated lifetime risk is one in 19.

> Those who want to do surrogacy are those who wish to become parents and need to do surrogacy. Surrogacy is the most complex way of human reproduction, of which the most complex form is international surrogacy. Surrogacy is the reproduction option of last resort, or for gay couples or single men, the only option.

How Many Children are Born via Surrogacy?

Uniquely, Australia keeps statistics on the number of children born by descent born overseas via surrogacy who apply for Australian citizenship. I obtained these statistics by freedom of information requests.

Only three States collate data as to the number of surrogacy births—Queensland through the annual report of the Children's Court of Queensland as to the number of parentage orders made; Victoria through the then Victorian Assisted Reproductive Treatment Authority, as to the number of children born via surrogacy and the County Court as to the number of substitute parentage orders made; and Western Australia through the annual reports of the Reproductive Technology Council of the number of children born. The other States and Territories do not collate data. No Births, Deaths and Marriages registry collates the data, even though it is available to them.

The only reasonably accurate figure of Australian surrogacy births is that published by the Australian New Zealand Assisted Reproductive Database, published in its annual reports by the University of New South Wales, as to the number of gestational surrogacy births from Australian IVF clinics.[7]

Between 2009 and 2024,[8] over 3,155 children were born via surrogacy to Australians overseas.[9] On a per capita basis, over 1,500 of those were born to residents of the ACT, NSW and Queensland, jurisdictions that criminalise overseas commercial surrogacy. Not one person has been prosecuted for those offences.[10]

Between 2009 and 2022,[11] 773 children were born through gestational surrogacy in Australia.

In 2010, the then NSW Minister for Communities stood up in Parliament on the third reading of the Surrogacy Bill 2010 (NSW) and moved an amendment to criminalise NSW residents for undertaking commercial surrogacy overseas. The amendment was made without any consultation or notice. There was a community and media firestorm in reaction. Many who did not know that surrogacy was an option, suddenly realised that it was.

> Rather than cause a falling off of demand for surrogacy overseas, the measure resulted in a huge increase in demand for overseas surrogacy.

This showed for the year ended 30 June 2012 when 266 children were born overseas through surrogacy. As seen in **Table 2,** that number has remained fairly stable since then, although recently has almost doubled.

6 For example, *Surrogacy Act 2010* (NSW) s 30.

7 I am the Secretary of the Fertility Society of Australia and New Zealand, which is one of the key partners of ANZARD. ANZARD does not set out the Australian figure in the reports, but a combined Australian and New Zealand figure. However, it separately publishes the New Zealand figure.

8 Financial years.

9 Source: Department of Home Affairs obtained under freedom of information requests.

10 In *Lloyd & Compton* [2025] FedCFamC1F 28, Carew J referred a Queensland couple to the DPP for engaging in commercial surrogacy in North Cyprus. They cannot be prosecuted, as the time limit for prosecution of that offence had expired.

11 Calendar years.

TABLE 2 – AUSTRALIAN OVERSEAS AND LOCAL SURROGACY BIRTHS 2009-2024			
Financial Year	**Overseas surrogacy births[12]**	**Calendar Year**	**Local surrogacy births[13]**
2009	10	2009	19
2010	<10	2010	16
2011	30	2011	23
2012	266	2012	19
2013	244	2013	35
2014	263	2014	36
2015	246	2015	52
2016	207	2016	45
2017	164	2017	62
2018	170	2018	86
2019	232	2019	73
2020	275	2020	91
2021	223	2021	100
2022	213	2022	131
2023	236		
2024	376		

In those early years, India was the prime surrogacy destination, peaking in 2012 with 227 births, but then trailing off, so that by 2017 there were only 14 births and by 2021, no births.

> The change in India has not been because of any change in Australian laws, but because of continued tightening of administrative rules and laws in India.

In 2022, there were less than five Australian surrogacy births in India. In 2023 there were five, but none in 2024. Following the enactment of the *Indian Surrogacy Regulation Act 2021*, one might have thought that no Australians can now undertake surrogacy in India. It would appear that Overseas Citizens of India are able to access surrogacy there, resulting in the small numbers.

One might have thought, following the *Baby Gammy* scandal and the Thai baby farm in 2014, resulting in a crackdown of Thai surrogacy laws, in effect, only permitting Thai citizens to undertake surrogacy there, that Australians undertaking surrogacy in Thailand was a thing of the past. The numbers demonstrate otherwise, as seen in **Table 3**.

TABLE 3 – AUSTRALIAN SURROGACY BIRTHS IN THAILAND 2009 TO 2024[14]	
Year	**Number of Births**
2009	0
2010	<10
2011	<10
2012	<10
2013	23
2014	91
2015	97
2016	19
2017	12
2018	9
2019	10
2020	11
2021	8
2022	6
2023	6
2024	11

Anecdotal reports are that Thai surrogacy agencies market to Australians of Chinese origin via WeChat, and that advantage is taken of porous borders between Thailand, Laos and Cambodia to facilitate the journey.

Until Covid, the world's two largest surrogacy destinations were the United States and Ukraine. Then, in February 2022, Russia invaded Ukraine. The world's surrogacy destinations are continuing to react to those two significant events. Whilst surrogacy has long since been available again in Ukraine, most Australian intended parents do not want to go there. For the last few years, the United

12 Source: Department of Home Affairs.
13 Source: ANZARD.
14 Source: Department of Home Affairs.

States has been the leading destination, although that is likely to change in light of the high cost of undertaking surrogacy there.

Where Are Children Born Overseas?

The top ten surrogacy destinations for Australians in 2024 are shown in **Table 4**.

TABLE 4 – TOP 10 SURROGACY DESTINATIONS FOR AUSTRALIANS, 2024[15]

Rank	Country	Ranking last year/ movement[16]	Number of children born via surrogacy year ended 30 June 2024	Number of children born via surrogacy year ended 30 June 2023
1.	United States	1. Steady	121	68
2.	Georgia	3. +1	76	33
3.	Canada	4. +1	37	22
4.	Colombia	5. +1	32	12
5.	Ukraine	2. – 3	21	43
6.	Mexico	6. Steady	18	14
7.	Greece	7. Steady	15	7
8.	Thailand	8. Steady	11	6
9.	Argentina	NA	7	0
10.	Iran	NA	5	<5

According to the Department of Home Affairs Australian children were, for the first time, born via surrogacy in 2024 in Israel, Peru and Samoa, which reflects that in our country of migrants, many intended parents do not go to known surrogacy destinations, but to their home country.[17]

The numbers demonstrate that many Australian intended parents go overseas for surrogacy, rather than at home. This reflects what most intended parents say—there are no available surrogates.

After all, unless a woman were connected to the intended parents by family or friendship, or to the idea of surrogacy, why should she risk her life for no compensation when everyone else—the doctors, lawyers, nurses, embryologists, counsellors and the judge—are all paid?

Overseas Hurdles

Aside from significant conflict of laws between Australia and overseas, there are three hurdles intended parents have to jump over to undertake surrogacy overseas:

1. Human cloning laws that criminalise commercial egg donation with up to 15 years imprisonment, which in 6 of 8 jurisdictions can apply overseas, as seen in **Table 5**.
2. Criminalisation of overseas commercial surrogacy by both specific extraterritorial laws **and** longarm laws in the ACT, NSW and Queensland, and by longarm laws in the NT, SA and WA, as seen in **Table 6**.
3. If the **form** of surrogacy parentage recognition overseas is via adoption,[18] then intended parents can be caught by the various *Adoption Acts*, by paying for the surrogate's expenses, as seen in **Table 7**.

15 Source: Department of Home Affairs.
16 Ranked by the author.
17 The other countries children were born in the year ended 30 June 2024 were Argentina, Brazil, China, Cyprus, Ghana, Kazakhstan, Kenya, Nigeria, Pakistan, South Africa and Sri Lanka.
18 For example, various US states and New Zealand.

TABLE 5 – WHEN EGG DONOR LAWS MAY APPLY OVERSEAS		
Jurisdiction	**Law**	**How it may apply overseas**
Commonwealth	*Prohibition of Human Cloning for Reproduction Act 2002*, s 21	S.4 international trade and commerce
Australian Capital Territory	*Human Cloning and Embryo Research Act 2004*, s 19 *Transplantation and Anatomy Act 1978*, s 44	*Criminal Code 2002*, s 64
New South Wales	*Human Cloning for Reproduction and Other Prohibited Practices Act 2003*, s 16 *Human Tissue Act 1983*, s 32	*Crimes Act 1900*, s 10C *Crimes Act 1900*, s 10C
Northern Territory	*Transplantation and Anatomy Act 1979*, s 22E	*Criminal Code 1983*, s 43CA
Queensland	*Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*, s 17 *Transplantation and Anatomy Act 1979*, s 40	*Criminal Code 1899*, s 12
South Australia	*Prohibition of Human Cloning for Reproduction Act 2003*, s 16 *Transplantation and Anatomy Act 1983*, s 35	*Criminal Law Consolidation Act 1935*, s 5G
Tasmania	*Human Cloning for Reproduction and Other Prohibited Practices Act 2003*, s 18 *Human Tissue Act 1985*, s 27	N/A
Western Australia	*Human Reproductive Technology Act 1991*, s 53Q	*Criminal Code 1913*, s 12
Victoria	*Prohibition of Human Cloning for Reproduction Act 2008*, s 17 *Human Tissue Act 1982*, s 39	N/A

TABLE 6 – HOW ARE SURROGACY LAWS APPLICABLE OVERSEAS?			
Jurisdiction	**Surrogacy law**	**Extraterritorial law**	**Longarm law**
Commonwealth	N/A		
ACT	*Parentage Act 2004*, s 41	*Parentage Act 2004*, s 45	*Criminal Code*, s 64
NSW	*Surrogacy Act 2010*, s 8	*Surrogacy Act 2010*, s 11	*Crimes Act 1900*, s 10C
NT	*Surrogacy Act 2022*, ss 48 & 49	N/A	*Surrogacy Act 2022*, s 8 *Criminal Code 1983*, s 43CA
Queensland	*Surrogacy Act 2010*, ss 56 & 57	*Surrogacy Act 2010*, s 54	*Criminal Code*, s 12
SA	*Surrogacy Act 2019*, s 23	N/A	*Criminal Law Consolidation Act 1935*, s 5G
Tasmania	*Surrogacy Act 2012*, s 40	N/A	N/A
Victoria	*Assisted Reproductive Treatment Act 2008*, s 44 *Assisted Reproductive Treatment Regulations 2019*, Reg 11, 11A	N/A	N/A
WA	*Surrogacy Act 2008*, ss 8 & 11	N/A	*Criminal Code 1913*, s 12

TABLE 7 – AUSTRALIAN ADOPTION LAWS THAT APPLY TO PAYMENTS OVERSEAS			
Jurisdiction	**Adoption Act**	**Offence section**	**Application relating to overseas adoption**
Commonwealth	N/A		
ACT	*Adoption Act 1993*	s 94	s 88
NT	*Adoption of Children Act 1994*	s 69	s 67
NSW	*Adoption Act 2000*	s 177	s 177
Queensland	*Adoption Act 2009*	s 303	s 301
SA	*Adoption Act 1988*	s 28	*Criminal Law Consolidation Act 1935*, s 5G
Tasmania	*Adoption Act 1988*	s 107	s 102
WA	*Adoption Act 1994*	s 122	s 121
Victoria	*Adoption Act 1984*	s 119	s 116

Barriers Coming Home

There is no consistent definition of who is a parent. The Family Law Council in 2013 recommended that there be a federal Status of Children Act. That recommendation was never taken up. There are different definitions of **parentage** for the purposes of:

- Citizenship
- Family law
- Passport

The definition of parentage for the purposes of the *Australian Citizenship Act* has been a beacon of stability since 2010. In that year, the Full Federal Court adopted a definition of who is a parent, namely, someone seen in the wider view of Australian society to be a parent, criticised by the Family Court, but taken up by the High Court in *Masson v Parsons* [2019] HCA 21. The Full Federal Court held that in the right circumstances a parent can include someone who is not genetically a parent.

Subsequent to *Masson*, the Family Court determined in three cases that the biological father through surrogacy was a parent under the *Family Law Act*.[19]

> There ought to be certainty of parentage for children born overseas, given the obligation under the *International Convention on the Rights of the Child*, taken up by the Act in section 60B, that the child has a right to an identity under article 8.

If the overseas order is by way of adoption (for example, in several US States or New Zealand), then on the face of various State *Adoption Acts*,[20] that parentage is not recognised for the purposes of State law, though recognised under the *Family Law Act*.[21]

The Department of Foreign Affairs and Trade has a fixed view that a surrogate for a child born overseas is a parent for the purposes of parental responsibility under the *Australian Passports Act 2005* (Cth), because she gave birth, irrespective of whether under foreign law she is a parent, or that, consistent with *Masson* she did not intend to parent. The "solution" is to have her consent to an Australian passport issuing for the child, including each renewal every five years.

Victorian Arrogance

Notwithstanding the full faith and credit clause of the *Constitution*,[22] taken up by the *Evidence Act 1995* (Cth),[23] and *Family Law Act* s 60HB recognising parentage of children the subject of State and Territory parentage orders,[24] if a child is born in Victoria and the subject of an interstate parentage order, the Victorian *Status of Children Act 1974* requires that a registration order is made in Victoria before the intended parents are recognised as the parents on the Victorian birth certificate.

> Aside from what appears to be the law's unconstitutionality, the requirements are largely duplicative (and therefore increases costs and delay), covering best interests, consent and the surrogate's age. The registration order requirements do not allow for conception to have occurred overseas.[25]

South Australian Forgetfulness

It is unlawful in South Australia to enter into an interstate surrogacy arrangement. This is presumably due to an oversight. Under the *Surrogacy Act 2019* (SA), s 9, except as may be provided for in the Act, a surrogacy agreement is void and of no effect. What is a lawful surrogacy agreement is provided for in s 4 as meaning either a lawful surrogacy agreement under the Act or

19 *Seto & Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FedCFamC1F 279; *Gallo & Ruiz* [2024] FedCFamC1F 893.
20 For example, *Adoption Act 2000* (NSW) s 105.
21 *Family Law Act 1975* (Cth) s 4.
22 *Constitution* s 118.
23 *Constitution* s 185.
24 Through *Family Law Regulations 2024* (Cth) reg 49.
25 Allowable in most States and both Territories.

> a surrogacy agreement … entered into in accordance with a prescribed corresponding law of the Commonwealth or another State or Territory.

South Australia has not prescribed such a corresponding law.

Commonwealth/State Inconsistency

Under *Status of Children Acts*, intended parents are not parents of a child born through surrogacy. The parents are the surrogate and her partner (if any).[26] By contrast, the biological father, at least, is a parent under the *Family Law Act*.[27] It is possible that if a court exercising power under the *Family Law Act* determines that the other intended parent (whether genetic or not) is a parent under the *Family Law Act,* based on intention,[28] as seen for example, in California,[29] Mexico[30] and Colombia,[31] then the regime of obtaining parentage orders under State and Territory laws is rendered immediately redundant.

> There ought to be consistency between State and Territory laws and the *Family Law Act*.

Queensland Issues

The problem of who is a parent is highlighted in Queensland.[32] In two single judge decisions in *Lamb & Shaw*[33] decided before *Masson*, Tree J found that the *Status of Children Act 1978* (Qld), s 23, which said that a man who provided semen for the conception of a single woman had no rights and liabilities in relation to the child, was a parent, albeit one with no rights or liabilities.

In *RBK v MMJ* [2019] QChC 42, decided post-*Masson,* Richards DCJ rejected Tree J's interpretation, finding that an intended parent was not a parent under the *Status of Children Act*, because if a consistent approach were taken of the *Status of Children Act*, Tree J's interpretation would mean that a sperm donor to a lesbian couple was a parent, when the Queensland Parliament has been clear to limit the recognition of parentage to two parents.

ACT Change For Overseas Commercial Surrogacy

The *Parentage Act 2004* (ACT) was amended in 2024 to allow the Supreme Court to make a parentage order for an overseas commercial surrogacy arrangement.

The Court can only make that order if "there is a pressing disadvantage facing the child that would be alleviated by making" the order.[34]

> Eligible intended parents would be most reluctant to apply, because of the risk of prosecution. The making of the order does not affect the person's criminal responsibility.[35] There is no time limit for prosecution[36] of the offence.[37]

NSW Change For Overseas Commercial Surrogacy

Parentage orders for overseas commercial surrogacy will be able to be made from 1 July 2025 for children who were born by commercial surrogacy both before and after 30 June 2025.[38] However, a parentage order can only be made concerning the latter if the Court finds that there are exceptional circumstances.

Why both the ACT and NSW changes have occurred is that children born in some overseas surrogacy

26 For example, *S v B; O v D* [2014] NSWSC 1533.
27 *Seto v Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FedCFamC1F 279; *Gallo & Ruiz* [2024] FedCFamC1F 893.
28 In the recent case of *Mizushima & Crocetti (No 3)* [2024] FedCFamC1F 542, the applicant was found to be a parent, as he sought, even though s 60H(1) did not apply, because he intended to be a parent. He was not the biological father.
29 *Johnson v Calvert* 5 Cal. 4th 87 (1993); *In re Marriage of Buzzanca* 61 Cal. App. 4th 1412 (1998).
30 Supreme Court of Justice of the Nation, *Amparo 553/2018.*
31 Constitutional Court, 18 December 2009, *Case T-968/09.*
32 Queensland's provisions are unique, reflecting older language as seen in a communique of Attorneys-General, referred to in *B and J (Artificial Insemination)* [1996] FamCA 124.
33 *Lamb & Shaw* [2017] FamCA 769; *Lamb & Shaw* [2018] FamCA 629.
34 *Parentage Act 2004* (ACT) s 28H(2)(b).
35 *Parentage Act 2004* (ACT) s 31(2).
36 *Legislation Act 2001* (ACT) s 192(1)(a).
37 *Parentage Act 2004* (ACT) s 41.
38 *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) schedule 8.

destinations are lumbered with limping parentage. The reality of parentage does not reflect the form. Either only one parent, not two, is shown on the birth certificate,[39] or the biological father and the surrogate are shown.[40] The other parent is invisible.

A difficulty with the requirements in the ACT and NSW is that there must be a **surrogacy arrangement** in the first place. If the surrogacy arrangement is written as only being between a single intended parent (as used to be the case in India for gay couples, for example), then the court may not be satisfied that there is a "surrogacy arrangement", and cannot make an order.

The alternative is to obtain leave to adopt under the *Family Law Act*, s 60G, and then bring a separate step-parent adoption application, which may have to wait until the child is 5 years old.[41] This option is expensive, slow, and in one case the Court declined to give leave to adopt in part out of concern that there had been commercial surrogacy.[42]

Some children born through overseas surrogacy are now over 18. Their parental relationship may not have been properly established under the law, which has potential lifelong consequences for them.

The First Medicare Lottery

Undertaking IVF is expensive. Recent estimates give the cost at about $17,000 per IVF cycle, of which about $5,000 is payable by Medicare. In order to attain Medicare benefits, it is necessary to show that there is a **clinically relevant service** under the *Health Insurance Act 1973* (Cth).[43] That clinically relevant service for assisted reproductive services is infertility. There is no definition of infertility in the Act.

Infertility was defined internationally as repeated attempts over the period of 12 months by a heterosexual couple unsuccessfully to conceive by unprotected sexual intercourse. That definition excluded LGBTQIA+ couples and single people. If they were seen as being medically fertile, they were deemed "socially infertile", and did not have the benefit of Medicare.

The medical profession, through various bodies,[44] has now formed the view that infertility, in effect, is anyone who needs to undertake assisted reproductive treatment. Nevertheless, the Federal Department of Health still forms the view that only those who are "medically" infertile are entitled to Medicare benefits.

It is a lottery for intended parents through surrogacy, especially LGBTQIA+ couples and singles, to see if their treating doctor will claim Medicare rebates for them.

The Second Medicare Lottery

When Medicare started funding assisted reproductive services, surrogacy was excluded, as surrogacy was illegal in several States,[45] and generally frowned upon. Surrogacy has long been regulated, not prohibited, but the exclusion remains.[46]

There are differences between IVF clinics as to how the exclusion applies. Some clinics take the view that if it appears that there will be surrogacy (for example, a gay couple seek to produce embryos), then no rebate will be claimed. Other clinics are happy to claim the rebate for embryo creation prior to the surrogacy arrangement being entered into. It is a lottery.

A recommendation by the Medicare taskforce in

39 For example, when gay couples underwent surrogacy in India, only one of the men was shown on the birth certificate, for example, *Blake & Anor* [2013] FCWA 1.
40 For example, Thailand, Malaysia, sometimes in Mexico, and since mid-2024 in Argentina.
41 For example, *Adoption Act 2009* (Qld) s 92(1)(h).
42 *Lloyd & Compton* [2025] FedCFamC1F.
43 *Health Insurance Act 1973* (Cth) s 3.
44 Fertility Society of Australia and New Zealand (December 2023), Royal Australian and New Zealand College of Gynaecologists and Obstetricians (August 2024), Australian and New Zealand Society for Reproductive Endocrinology and Infertility (August 2024).
45 For example, in Queensland: *Surrogate Parenthood Act 1988* (Qld).
46 *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) cl 5.2.4.

2020 to remove this exclusion has not been taken up. On my calculations, the cost to the taxpayer of removing this exclusion would be less than $1 million a year, chickenfeed in the Medicare budget.

The Third Medicare Lottery

The Medicare pain for intended parents continues after the birth. The requirements for the application for a parentage order to be made one to six months post-birth, means that children often do not receive Medicare benefits for months after they are born.

> During those months between when the child is born and the order is made, the child's parentage does not reflect reality. The people who may have parental responsibility do not want it. Those who need to exercise it, the intended parents, may not have it. The band-aid of parenting plans now has to be used to patch who exercises parental responsibility, at a time when a child is especially vulnerable, and may have significant medical challenges.

Surrogacy Costs

Ballpark figures for intended parents' surrogacy journeys are A$70-100,000 for domestic journeys, A$140,000 to Canada and A$300,000+ to the United States.[47] These costs are incurred before the costs of raising a child. Undertaking surrogacy is not for the faint hearted.

Proposals For Reform

I suggest these changes:

1. End discrimination in who can access surrogacy, currently in Western Australia and Tasmania, and who is eligible for Medicare.
2. Recognise that intended parents have the right to choose their doctor and clinic, even if not in that State.
3. Recognise that if intended parents move interstate during the journey, they can still establish parentage, either where they lived or where they now live.[48]
4. Have one national system of surrogacy regulation, not eight.
5. Uphold the right of the child as to their identity, by a simpler and more certain process of parentage establishment. There could be:
   a) an order made after the written surrogacy arrangement is entered into, but before pregnancy (a pre-conception order), the effect of which is at birth that the intended parents are automatically the parents;[49] or
   b) an order made after the written surrogacy arrangement is entered into and after the pregnancy commenced (a pre-birth order);[50] or
   c) an order made **shortly** after the birth of the child, recognising the intended parents as the parents, provided certain prescribed requirements have been met.[51] In Alberta, for example, that order is made 2 to 3 business days post-birth, not typically 5 or 6 months post-birth, as occurs here now;[52] or
   d) by an administrative process with the Registrar of Births, Deaths and Marriages for eligible, gestational surrogacy matters. It would be used when there is not a dispute as to parentage, and an order is not required (for example, for international recognition). This process occurs in two US states[53] and three Canadian provinces,[54] and has been recommended by Law Commissions in both the United Kingdom and New Zealand. Its advantages are low cost, speed and certainty,

47 These estimates arise from me asking clients.

48 South Australia, Victoria and Western Australia have restrictions which in effect limit movement.
49 As occurs in Greece, Israel and South Africa.
50 As happens in many US states.
51 For example, Texas, Florida and several Canadian provinces.
52 From my experience, most intended parents, confronted by lack of sleep and the existence of their baby, are slow to apply for parentage after their child is born.
53 Illinois and Pennsylvania.
54 British Columbia, Manitoba and Ontario.

it upholds the child's human rights (while protecting those of the surrogate and intended parents), and conserves judicial resources for only those cases where an order is needed.

6. Require, as now occurs, before entering into a written[55] surrogacy agreement, the intended parents, surrogate and partner to receive counselling and independent legal advice.

7. Require either:

   a) a binding agreement; or

   b) if the surrogate or partner manifests an intention not to relinquish the child, enable the Court to make orders as to parentage that overrides the consent of the surrogate and partner, if to do so is in the child's best interests.

8. Have surrogacy agencies, as Canada does. Canada requires surrogacy be altruistic only. Agencies help moderate the behaviour of both the intended parents and the surrogate—and are a check and balance to ensure that surrogates are properly reimbursed (a common complaint by Australian surrogates is that they are often left out of pocket).

9. Consider compensating surrogates for their time and effort. Why should doctors, embryologists, nurses, counsellors, lawyers and the judge be paid, but the person who risks death from this process not receive anything, other than expenses? Regulations could limit the amount to be paid, to minimise exploitation. While Australia is very good at exporting intended parents, more surrogacy births should be happening here, thereby reducing risks to women in developing countries.

We have a strong framework of laws with a strong human rights focus, an independent judiciary, and first rate IVF clinics.

10. Provide much more information to intended parents and would be surrogates about the processes of surrogacy, and available options; not the scanty information currently available—as was identified by the House of Representatives in 2016.

11. End criminalisation for those who undertake overseas surrogacy journeys. While painful to admit, the jibe by New Zealand academics that extraterritorial criminality is a "failed experiment"[56] is true.

12. Continue to remain vigilant to prevent trafficking of women or children, principally by the vigilant officers of the Department of Home Affairs in considering applications for Australian citizenship or child visas.

13. Recognise clearly the parentage in Australia, for those who undertake their journey overseas:

   a) Amend s 69R of the *Family Law Act* to replace "prescribed" with "an", so that the person or people shown on the birth certificates born in any overseas jurisdiction are the subject of a rebuttable presumption that they are the child's parents.

   b) Where the parentage shown on the birth certificate does not reflect the reality of parentage, then the intended parents (or the child) be able to apply to a court for a parentage order to correct that parentage.

55 Although in Victoria this can be oral.

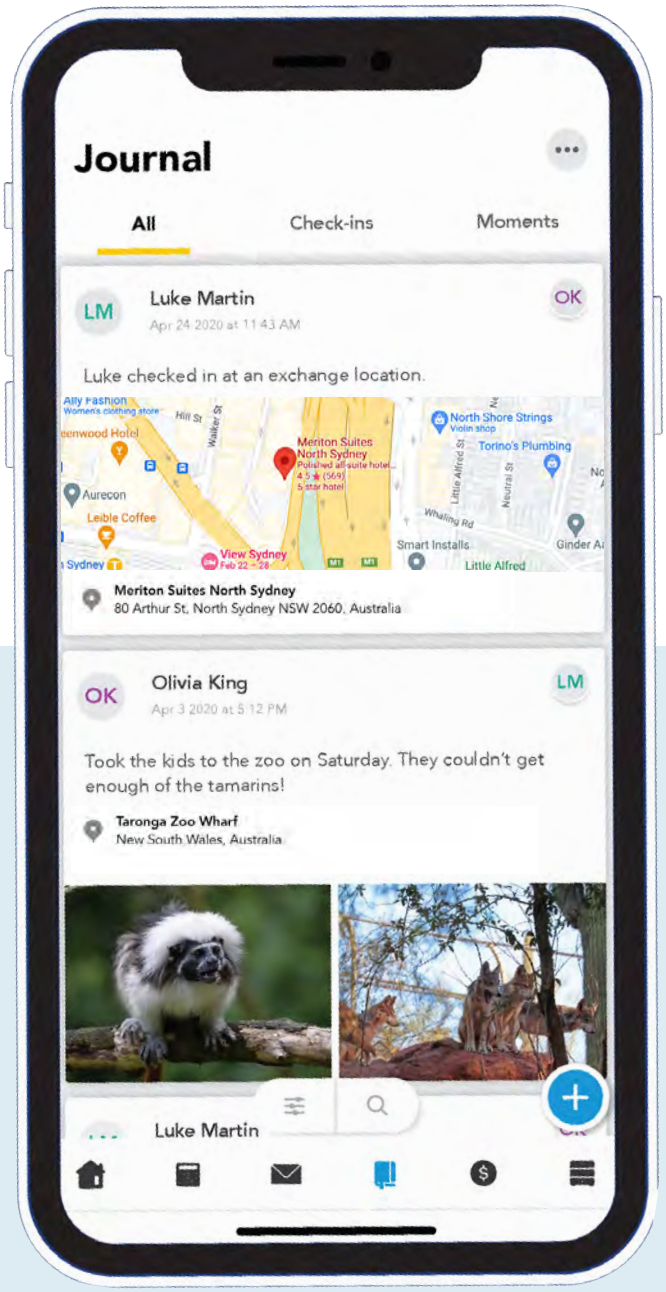
56 Debra Wilson and Julia Carrington, *Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements* (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Parliament of the Commonwealth of Australia, April 2016) [1.70]–[1.71], [1.112]–[1.113]; cited by the New Zealand Law Commission, *Issues Paper 47, Review of Surrogacy* (2021).

OurFamilyWizard®

Moving families forward.

with
ToneMeter™

an emotional spell check for positive and productive communication



scan code for
digital resources

Family Law Section | Law Council OF AUSTRALIA

21ST NATIONAL FAMILY LAW CONFERENCE

20-23 OCTOBER 2026

landscapes of thought

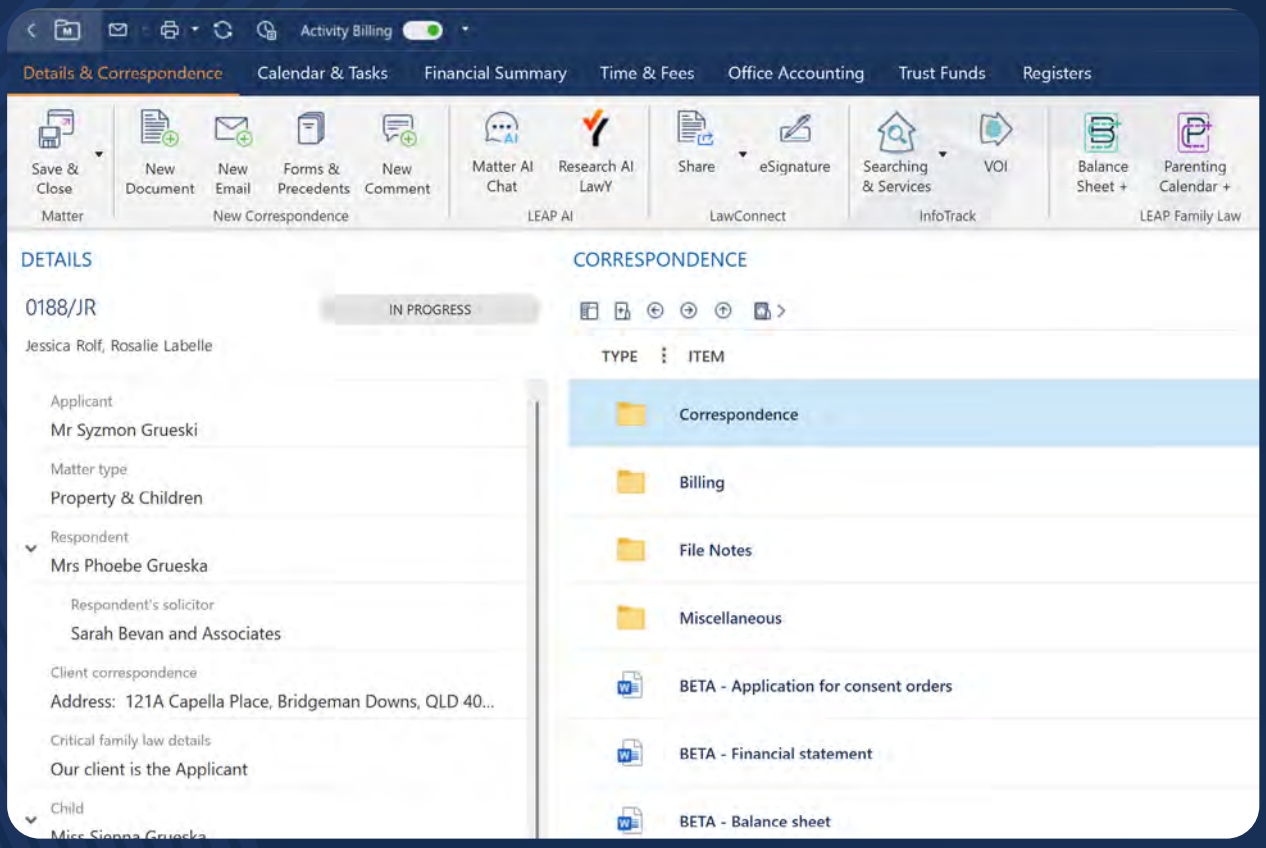
DISCOVERY BEGINS WHERE THE KNOWN ENDS

HOBART CONVENTION & EXHIBITION CENTRE
HOTEL GRAND CHANCELLOR

FAMILYLAW2026.COM.AU

LEAP Family Law

Supporting thousands of family lawyers every day with exclusive and purpose-built family law features, apps, and integrations.



Unlock powerful family law tools included in the LEAP subscription at no extra cost:

- Capture financial information efficiently and access automated property adjustment features with Balance Sheet +
- Simplify and streamline custody arrangements for your clients with Parenting Calendar +

Find out more at leap.com.au/family-law/

Balance Sheet + | Parenting Calendar +

NEURODIVERGENCE IN FAMILY LAW: A DISCUSSION BETWEEN A JUDGE AND AN EXPERT

THE HONOURABLE JUSTICE TOM ALTOBELLI AM

Dr Tom Altobelli was first appointed to the family law bench in 2006 and then elevated to the Federal Circuit & Family Court of Australia (Div 1) in 2020 based in Sydney. He graduated Bachelor of Laws in 1980, Master of Laws in 1986 and Doctorate in Juridical Science in 2000. Tom also has a Graduate Diploma in Divinity and Graduate Certificate in Chaplaincy. He is an Adjunct Professor in the School of Law, Western Sydney University. Tom has authored 4 books on family law and dispute resolution as well as over 50 articles in Australian and international journals. Tom is the Vice-President of the Association of Family and Conciliation Courts (AFCC) and is Chair of the International Committee. In 2023 Tom was appointed as a Member of the Order of Australia in recognition of significant service to the law and legal education.

STEPHANIE LAU

Stephanie Lau is an Educational and Developmental Psychologist, Expert Witness and Board Approved Supervisor who works in the intersection between neurodevelopmental conditions and Children's and Family Court matters. With lived experience as the child of former Chinese-Vietnamese refugees, she has a vested interest in advocating for the positive developmental outcomes of vulnerable children and families. Stephanie consults across a range of settings in an assessment, therapeutic and teaching capacity, including as a Senior Psychologist in the Specialist Autism Team at the Royal Children's Hospital, the Children's Court Clinic, and the Federal Circuit and Family Court in Melbourne, Australia. She is a family report writer in private practice at Vincent Papaleo and Associates and can be found at www.vincentpapaleoassociates.com.au and www.stephanielau.com.au.

Interview

Stephanie, thank you for agreeing to have this conversation with me about neurodivergence in family law. I believe it is one of the great access to justice issues of our time. My fear is that we don't know what we don't know. We talked about calling this article neurodiversity in family law and neuroaffirming approaches in family law practice. Could we start please by exploring the difference? You mentioned to me that it has something to do with the medical model, as opposed to the social model of neurodiversity. Please explain briefly how is this relevant to those in family law practice?

Tom, it is a pleasure to discuss this incredibly important topic with you. The terms 'neurodiversity' and 'neurodivergence' have been well integrated into popular culture and our social discourse. We have a shared language, affording us the opportunity to explore and discuss how each of our brains have strengths, preferences and differences.

Neurodivergence relates to a particular 'neurotype' of brain development, inclusive of conditions in the *Diagnostic and Statistical Manual of Psychiatric Disorders – Fifth Edition* ('DSM-5'), such as autism, attention and learning difficulties, and cognitive and speech/language differences. These conditions are heterogeneous—that is, *there is no 'one size fits all'*.

> **Neurodiversity** refers to the idea that all humans present with inherent differences in our brains and how they function.

The **medical model of disability** has traditionally adopted a deficits approach to what might be seen as typical vs atypical. Treatment and intervention has centered on/around a person's 'deficits' when assessing a person's functional capacity. The **social model of disability** challenges this approach by necessitating inclusive practices to support the community participation of individuals living with a disability. It views disability as the interaction between people living with impairments and barriers in the physical, attitudinal, communication, and social environments.

Rather than viewing differences as *deficits*, a **neuroaffirming approach** necessitates inclusive practices to mitigate barriers to accessibility and community participation, so that all individuals (regardless of their neurotype) can actively contribute in society and live healthy, happy lives. This approach requires us to critically assess and adapt how we view the world and disability from a neurotypical lens and consider how this has been deleterious to the wellbeing and functional capacity of neurodivergent individuals.

There has been a substantial increase in the diagnosis of neurodevelopmental conditions globally. Increasingly, we are seeing neurodivergent children and adults present in Family Court matters: these matters are often highly complex, fraught and present significant overlap with other complex social issues. These cases are anxiety inducing for families and professionals and there is often uncertainty about how to best navigate and support this vulnerable population.

> There is a need for professionals working within the Family Court to understand how to support children and families where someone may present with neurodevelopmental differences, as the likelihood of this will be high and will continue to increase.

It sounds to me as if the social model is more relevant to practising family lawyers. Let's have a conversation about practical issues, but just before we do so, I think we need to zoom out somewhat and gain a broader understanding of what neurodivergence is, and why this has become so visible in society in recent years. Can you help us understand this please?

There are several contributing factors that have led to an increase in the visibility of developmental conditions. Firstly, there is a greater understanding amongst medical, educational and allied health professionals regarding the heterogeneity of

neurodevelopmental conditions. There have been continued changes to the diagnostic criteria which has required professionals to adapt how we conceptualise and assess neurodevelopmental conditions.

Secondly, there has been a much needed and welcome movement towards the destigmatisation of disability and mental health. Community discourse has adapted to include both 'visible' and 'invisible' presentations of disability. These changing societal attitudes are embracing neurotypes that differ from traditional social norms. Social media, popular culture and progressive young people have been part of that shift.

> On a structural level, there have been policy reforms such as early intervention funding for children with developmental delays, the introduction of the National Disability Insurance Scheme (NDIS), and changes to funding in public education.

Our neurodivergent peers require our support to create neuroaffirming, emotionally and psychologically safe spaces. It is about adapting our approach to be flexible to the needs of neurodivergent children and families in order to respond to their psychological, social and physical needs. When I reflect on what has been helpful, curiosity and empathy has been key. I do this by asking simple questions such as, 'What do you need?', 'What can I do to help?' We need to demonstrate genuine curiosity and care; we need to look to our clients and respect that they are the experts on their own individual experiences and lives. It is important that we create psychological safety and space for people to have difficult conversations where they can be vulnerable and authentic.

Stephanie, do we know much about prevalence in Australia? Are we more likely to see neurodivergence in family law? Am I correct in thinking that a lot of 'masking' goes on i.e. neurodiverse people are not necessarily open about this? Indeed, isn't it possible that even not masked it is not discerned by family law professionals including judges?

According to the Australian Bureau of Statistics, in 2022, there were 290,900 (1.1%) Autistic Australians, a 41.8% increase from the 205,200 (0.8%) Autistic Australians in 2018. Autism prevalence was higher for males (1.6%) than females (0.7%). Autism prevalence was higher for people aged under 25 years (3.1%) than people aged 25 years and over (0.3%); 4.3% of people aged 5–14 years were autistic, up from 3.2% in 2018. Almost three quarters (73.0%) of Autistic people had a profound or severe disability.[1] Approximately one in ten children in Australia meet criteria for a neurodevelopmental disorder. The most common of these are Autism, Attention Deficit Hyperactivity Disorder, Cerebral Palsy, and Tourette's Syndrome. Over 80% of these children will meet criteria for multiple diagnoses, and there is a high degree of comorbidity between these conditions.[2]

There is likely to be underreporting in these statistics and prevalence has generally increased over time. The likelihood of us working amongst neurodivergent colleagues and clients is therefore high and, on this basis, I envisage that we are absolutely more likely to see neurodivergence in family law.

The concept of 'masking' is a controversial one. **Autistic masking**, also known as **camouflaging**, refers to the conscious or unconscious efforts by neurodivergent individuals to hide or suppress social communication differences and behaviours to fit in with neurotypical societal norms or expectations. This can include the suppression of repetitive behaviours such as self-regulatory behaviours (i.e. flapping, stimming) and adopting verbal and non-verbal behaviours to mimic neurotypical social communication patterns (i.e., maintaining eye

1 Autism in Australia, 2022, *Australian Bureau of Statistics*, https://www.abs.gov.au/articles/autism-australia-2022, 11/10/2024.

2 'Game changing national summit for children with neurodevelopment disorders', *Sydney University*, https://www.sydney.edu.au/brain-mind/news-and-events/news/game-changing-national-summit-for-children-with-neuro developmen.html#:~:text=Approximately%20one%20in%20ten%20children,meet%20criteria%20for%20multiple%20diagnoses.

contact even though it may be uncomfortable; engaging in conversation using social scripts).

> This is both adaptive and maladaptive: in order to *fit in*, neurodivergent individuals have been expected to repress parts of themselves deemed by society as atypical to avoid judgement and social ostracisation.

We now acknowledge that masking is detrimental to neurodivergent individuals: it is physically and emotionally taxing when one is required to conceal parts of themselves or their 'true self'. There have been incongruencies and perhaps underlying pejorative attitudes in how society genuinely perceives, embraces and accepts difference, and the value of our neurodivergent peers.

An affirming approach is necessary to facilitate the development of professional spaces and environments which are authentically inclusive of neurodivergent social, communication and behavioural differences. It is important that as a society, we re-conceptualise that *difference does not equal deficiency or inferiority*.

Children and their safety are the central focus of family law. Stephanie I know about your passion for neurodivergent children and ameliorating their experience of the family law system. I want to give you the opportunity to say a few things about this.

Thank you for acknowledging this, Tom. We have a duty as professionals (and mere mortals) to do no harm and protect the most vulnerable. Children, particularly neurodivergent children, require our continued protection and advocacy.

> Children are at the mercy of the systems they are born into: they can only grow as much as their immediate environment can nurture and as much as their caregivers can protect, advocate and attune to their needs.

When children are exposed to adverse events—such as family violence, poor parental mental health, displacement or interparental conflict—they are at risk of cumulative harm, neglect in multiple forms and toxic stress. This has immediate and long-term implications for a child's developmental trajectory, physical and mental health, social-emotional growth and academic achievement.[3]

Co-parenting complexities encountered through the family law system are unpleasant but often avoidable and not insurmountable. While family law matters are challenging for caregivers, the child's experience of the dissolution of a family unit and their parents' relationship should always be paramount.

When caregivers are in situations of high stress, this undoubtedly has direct implications on their parenting capacity and ability to prioritise and meet their children's care, developmental and social-emotional needs. It is known that children with developmental differences require greater time, physical, financial and emotional resources; it is therefore critical that caregivers continue to support each other, as this will be central to the child's developmental trajectory, as well as the well-being of each caregiver.

So let's take the first practice issue: how does a family lawyer know they have a neurodivergent client? How then does one take instructions and prepare correspondence and affidavits for neurodivergent clients? You have mentioned to me about the importance of environmental considerations with these clients. Please explain that and how that is relevant in this context?

The way we relate to one another is through both spoken and unspoken forms of communication—everything we do as humans in our adaptive functioning is social. This begs the question: what does the world look like for an individual with cognitive, language, and social communication differences?

3 ACEs and Toxic Stress: Frequently Asked Questions (2024), https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/

> For example, you may have a client who presents with attention and language differences. They may struggle to follow instructions due to comprehension and working memory difficulties. They may be distracted by external stimuli in the environment, as well as internal distractions, such as repetitive thoughts and their own preoccupations. They may have difficulty with remaining seated during a one-hour meeting, seek movement and appear disengaged.

How do we support their participation in the family law context? If we expect them to conform to neurotypical social norms, are we doing them a disservice, and is that a fair and equitable experience of the legal system? What then, is their experience of the Family Court?

What I'm hearing is that effective communication is critical—with all clients of course, but particularly with neurodivergent clients. So, what practical strategies could family lawyers use in this context, especially to ensure that the client has both been understood, and affirmed, as well as understands the advice that has been given?

We want to encourage clients to express their genuine thoughts, feelings and needs by building trust. We want to create space for vulnerability: we can do this through reassurance, maintaining calm and checking in; however, in order to do so, we need to operate in psychologically safe workplaces to model a culture of healthy communication amongst our peers—we must lead by example.

> Adopting a neuroaffirming approach does not need to be burdensome, however, it requires consideration and planning. Regarding strategies, multi-modal methods of information dissemination are important, such as, visual and verbal modes of information sharing. Use plain and simple language and minimise the use of abstract and metaphorical language. Use visual/concrete measures to manage time (i.e., visual schedules, timers) and limit the length of long appointments. It is important to check for comprehension—this responsibility sits with us.

Environmental accommodations can include the provision of a quiet room with minimal distractions and visual stimuli, low lighting, using simple concrete language, and creating structure and predictability.

Does this mean that a family lawyer's communication with a third party such as the court, or another lawyer, on behalf of a neurodivergent client would be different, and if so how? Indeed, should the court be advised as early as possible about the needs of a neurodivergent client?

I hope Family Court processes continue to evolve and that there is a consistent approach to understanding the strengths and differences of each family. For this to be possible, the court needs to be made aware of a child and family's neurodevelopmental needs as soon as is practicable. Such information needs to be communicated in a timely manner so that the court can allocate appropriate time and resources to make reasonable adjustments.

> In saying this, I am cognisant of the limitations of the court and judicial staff: the needs and functional capacity of each child or adult will vary greatly and these considerations will require time and collaboration between judicial staff, family lawyers, and professionals involved in each family's care.

Inclusive adaptations to support neurodivergent individuals are not meant to be burdensome, and my hope is that over time, neuroaffirming practices will become the 'new normal'. This is necessary and will be beneficial to all children, families and professionals in the Family Court.

Evidence in court is given in the form of an affidavit, and then for those few cases that go to hearing, there is cross-examination. What needs to be considered in this context?

Submitting evidence, whether in the form of an affidavit or in person via cross-examination is without question, a highly stressful process. Clients are required to recount distressing experiences and traumatic events; this can include content pertaining to criminal offences and safety risks. We ask clients to dredge up painful memories and experiences, often unresolved, both historical and/or present.

> This places vulnerable children and families at risk of further harm and re-traumatisation, particularly if they do not have adequate emotional/psychological resources, or professional/personal supports.. This would be challenging for any child and family without the overlay of neurodivergence and poor mental health.

We know that stress, even mild acute stressors, can be detrimental to our brain and our body's capacity to remain regulated. Stress activates the body's sympathetic nervous system, resulting in physiological stress symptoms and the release of cortisol, which has been linked to alterations in executive control functions and impaired cognitive flexibility. We know that there are structural impairments to the prefrontal cortex and this presents direct consequences on our cognitive capacity, such as our problem solving, ability to access language, communicate our needs and regulate our emotions.

The process of submitting an affidavit and/or cross-examination presents a multitude of additional stressors and barriers for neurodivergent individuals. The experience of recounting distressing events in an unfamiliar social context will be challenging and present unique complexities for each client. There needs to be greater cross-sector collaboration between clinicians involved in a family's care (such as psychologists, social workers) and family law professionals where possible; the presence of an existing therapeutic relationship will assist clients to better engage. In addition, professionals involved in a mutual client's care may have relevant information and can assist by providing scaffolding and structure, increasing the likelihood of obtaining a more detailed and accurate narrative. This will reduce duplication and mitigate further harm to clients by minimising the need to re-live traumatic experiences. Similarly, with regards to cross-examination, it is important for clients to have access to professionals in their care team who understand their needs, can provide therapeutic support and assist the court when clients cannot engage under high stress.

Stephanie, what you are saying is very important for all judicial officers who assess evidence. I am hearing the need for not just awareness, but continuous training.

Family Court decisions have direct implications on the future outcomes of vulnerable individuals and communities that can change the trajectory of children's and families' lives. The judiciary holds an important role in influencing societal attitudes, community confidence and expectations in and around matters of intersectionality, such as how we view and value disability, mental health and the rights of children and families. With such privilege and authority comes responsibility to ensure that we facilitate change that is inclusive and fair. There is a responsibility for the judiciary to promote and establish systems and structures in society that is inclusive and celebrates diversity in all forms.

This evolution in family law begins with us: there is a duty of care to do no harm by ensuring that we engage in regular professional development. We need to understand the judicial experience from the lens of neurodivergent clients if we are to successfully implement accommodations that are genuine and meaningful.

Let's move away for a moment from the neurodivergent child and client to the neurodivergent lawyer. What about working constructively and collaboratively with neurodivergent family law professionals such as lawyers? Any suggestions?

We need to champion vulnerable and sensitive conversations around diversity (both visible and invisible) by creating psychologically safe workplaces. We have a moral duty to model healthy relationships amongst our esteemed peers. We cannot authentically practice neuroaffirming approaches with clients if we cannot be an example of this within our own profession.

It is important that a culture of psychological safety is cultivated to encourage legal professionals to share personal vulnerabilities in the workplace: this should include honest conversations around mental health, personal stressors and neurodivergence.

My view is that when we go to work, we bring all parts of ourselves—warts and all. It is impossible to separate the 'personal self' from the 'professional self'.

There is a bilateral relationship between our personal and professional identities and both will have direct outcomes on the quality of our professional practice and the quality of our relationships.

We each have a personal responsibility in how we conduct ourselves and contribute to culturally safe workplaces that support honest and open conversations about our personal vulnerabilities. It is important that we examine our expectations and adapt how we communicate and engage with one another.

I hope that we can be allies to our neurodivergent colleagues by showing care, compassion and flexibility. We must acknowledge that they are operating within the social mores of a neurotypical world when they have social communication, thinking styles, interests and behavioural preferences which may not align with what we are familiar with. Understandably, these differences may at times cause distress, which will likely have negative implications for their wellbeing, professional practice and sense of psychological safety. However, these inherent differences should be respected and championed—the lived experiences of neurodivergent lawyers working in this space will provide the court a unique experience when working with neurodivergent families.

Stephanie, I'm worried about the risks of failing to identify neurodivergence in the courtroom and the procedural and substantive unfairness that may flow from that. Is there such a thing as judicial best practice for facilitating evidence by neurodivergent witnesses and to having a neuroaffirming courtroom? Any thoughts?

The judicial system is geared towards well-resourced neurotypical native language speakers, who are educated, cognitively able and have sound social, emotional and psychological skills to manage under high-stress situations. These pressures can be extremely unsettling for most, let alone neurodivergent clients with intellectual, language and social-emotional processing differences. Witnesses cannot be expected to express themselves coherently or be of any assistance to the court if they are in a hyperaroused state. We want the court to be inclusive and affirming of individual differences and these adaptations need not be burdensome to be effective.

For example, before court proceedings, information about the structure of the day, the setting, and schedule could be shared with clients. Avoid ad hoc changes to scheduling, as spontaneous changes may lead to apprehension and distress. Concrete measures of time and information should be readily accessible in addition to forewarning about transitions (i.e., provide sufficient warnings before physical movements and prior to starting or ending sessions)—structure and predictability will reduce anxiety and create a sense of safety.

Multimodal resources (i.e., visual schedules, images of the courtroom, or a video of proceedings) may be helpful. A **social story**, that is a standardised script and images specific to legal processes and the setting, could form part of a bank of resources provided to clients.

Relevant documentation such as assessment and diagnostic reports will provide the court critical information about a child and adult's adaptive functioning, their cognitive abilities and speech or language level. For example, the results of a cognitive assessment (that is, an IQ test) will speak to an individual's verbal comprehension, problem-solving skills, memory and information processing speed. Speech/language assessments will provide insight into an individual's receptive language capacity (that is, their comprehension of both written and spoken language) versus their expressive language skills (their ability to express their thoughts and feelings). These developmental strengths and differences will have profound implications for how a child and adult engages in court proceedings and how the court may wish to consider their future outcomes.

Neuroaffirming accommodations for witnesses could include environmental adaptations, such as the creation of new spaces like separate waiting areas and interview rooms. This will make it easier to manage sensory-specific modifications to the physical environment, like softer, natural lighting to manage light sensitivity, controlling unexpected sound and movement which may cause distress and/or distraction.

Managing interruptions (including announcements and minimising legal theatrics) while a neurodivergent client is giving evidence may also be necessary to prevent disrupting their train of thought, which may cause mental disorganisation, dysregulation and anxiety.

Access to sensory-soothing materials (like movement cushions or fidget materials) may help individuals regulate themselves physiologically and mentally. Movement breaks (for example, adjournments at regular intervals) may support neurodivergent witnesses to remain regulated. Movement-seeking behaviours should not be penalised; oftentimes, neurodivergent individuals will seek movement whilst also maintaining focused attention. Simple language delivered in a calm tone and volume is critical.

Lastly, social communication differences (such as averting gaze or seeking movement) should not be interpreted as a reflection of disinterest, disrespect or nonchalance. Rather, it is important for us to reinterpret these social communication differences: this may instead indicate a stress or anxiety response and attempts to self-soothe. In such circumstances, regular breaks are advisable to provide clients the opportunity to remain calm and regulated.

Stephanie, evidence about neurodiversity, whether of an adult party, or a child, can only be given by a treater (who hopefully has expertise) or an independent expert. Three things come to mind:

finding the right expert, and cost, and timeliness of this evidence. Any suggestions about these issues? For example, is there such a thing as a rapid or short-form neurodiversity assessment?

Neurodevelopmental assessments are a niche area of paediatric, psychological and psychiatric practice. Quality assessments include the examination of an individual's development across the lifespan which requires substantial time, cost and collaboration. This requires nuance, flexibility and adaptation to a child/adult's individual differences and the complexities that present for both intact and separated families.

There are challenges in this space due to inconsistent approaches to assessment, diagnosis and treatment. There are complex diagnostic considerations that must be disentangled by seeking detailed collateral information by caregivers, health and education professionals, in addition to direct clinical assessment and observation of a child or an adult. A quality neurodevelopmental assessment will include a comprehensive developmental history; however, this is not without its challenges, such as: caregiver availability, reliability of retrospective reports and the considerable amount of time and limited resources available to private practitioners working in the community. Each professional is also constrained by their own clinical expertise: a best practice assessment relies on sound clinical judgment and experience which requires years of training and clinical practice. The impact of developmental trauma in addition to an individual's adaptive and intellectual functioning must be considered and often requires additional assessment which may not be accessible and/or possible due to cost and time.

> The consequence of a poor-quality assessment may result in diagnostic inaccuracies (i.e., missed, wrong or delayed diagnosis), which may present implications for children and families, such as delaying supports and missed opportunities for early intervention.

A poor-quality assessment lacks sensitivity, specificity and omits pertinent details regarding an individual's early developmental experiences, such as history regarding developmental milestones, early relational experiences and attachment. Childhood trauma and disrupted attachments can result in social-emotional differences which may appear similar to neurodevelopmental differences.

Due to long waitlists, some clinicians may conduct a 'single clinician diagnosis' to fast track a neurodivergent child's access to funding and supports where their presentation is clear. However, this diagnostic approach relies on a highly experienced clinician, who can consider differential diagnoses and complete a robust assessment independently. For some complex children and families this may not be appropriate, as they require the supports of a comprehensive multidisciplinary team in a wraparound service (such as a tertiary hospital), where resources, time and multiple professionals (i.e., paediatrician, psychologist, psychiatrist, speech therapists) are available to provide best practice assessment and short-term therapeutic support.

> My approach to developmental concerns for children in Family and Children's Court matters is simple: neurodivergent children and families are a vulnerable population—they require advocacy and their needs must be prioritised. The developmental needs of neurodivergent children must be prioritised—there are sensitive and critical periods for children to acquire specific developmental skills and early intervention is key to future proofing a child's trajectory.

In my reports, I provide advice tailored to a child's short and long-term developmental priorities. Depending on the context and nature of the referral, informal or formal assessments are conducted: these outcomes assist with planning and recommendations regarding a child's global

development. Where there is undiagnosed or possible neurodivergence, I provide direction regarding further assessment and short-term goals for caregivers and the court. It is important that the court receives guidance regarding both immediate and long-term priorities for a child, so that decisions can be made to prioritise their optimal development. This will assist the court in understanding the level of care a child is likely to require, their developmental trajectory, and help balance expectations for caregivers, ultimately supporting the court in making decisions about parenting capacity and the ability to meet the needs of a vulnerable child.

Just thinking out loud now Stephanie…. maybe if a judicial officer declines an application for an assessment this could be an error of law. Family law professionals might have a look at a decision of the English Court of Appeal in *Re E (A Child)(Care & Placement Orders)* [2024] 1 FLR 47.

Stephanie, any last suggestions or thoughts?

Managing parenting stress is critical for the wellbeing of all children and is challenging even in the absence of navigating a family law dispute. I encourage family law professionals to refer families to suitably qualified professionals to seek information and therapeutic support for themselves. We want to minimise the impact of interparental conflict on children and encourage role modelling around good mental health. There are many great resources available to families and professionals, such as The Raising Children's Network and Royal Children's Hospital. Information is power and this will help alleviate anxiety for professionals and parents.

> I encourage family law professionals to be vulnerable, curious and seek professional supervision and peer support. It is important that we can acknowledge limitations in our knowledge base and professional practice. By seeking guidance, we will be better placed to support vulnerable children and families so that they can avoid the complexities of the Family Court.

Lastly, consistent self-care, self-compassion and professional boundaries are critical for the longevity and wellbeing of all family law professionals. We need to be well-regulated in order to hold space for vulnerable families who are in high conflict. A healthy workforce is key to a sustainable profession which will ultimately present better outcomes for families. While there is room for improvement in how we embrace diversity and neurodivergence in family law, I am hopeful that these discussions are moving us in the right direction.

4 REASONS WHY FAMILY LAWYERS SHOULD BE TRAUMA-INFORMED

CLAUDIA MACLEAN

Claudia Maclean is Director of Yellow Legal, a modern family law firm designed for social impact. Claudia has an MBA (Social Impact) (UNSW), Master of Applied Law (Family), and Trauma-Informed Lawyer Certification from the Law Society of Scotland, and has been a practising family lawyer for 16 years. She is also a trainer and consultant for Commonwealth and ACT Government, the Legal Assistance Sector, ACT Law Society and large and small private law firms in trauma-informed approaches, ethical practice and managing client relationships.

Claudia is the founder and facilitator of TILCO – the Trauma-Informed Law Collective: an online education group for the legal profession helping grow trauma informed approaches and human-centred design in legal practice. Claudia is also a contributing author to the LexisNexis book 'Wellness for Law: Reflecting on the Past, Shaping the Future (published 28 November 2024).

In 2023, Claudia was awarded the Law Society of the ACT President's Medal for her work in trauma informed legal practice. She is dedicated to modernising legal services to improve long-term life outcomes for clients and professionals.

Trauma-informed. Trauma-aware. Trauma-responsive. Psychosocial hazards. Psychological safety. You may have heard these terms and dismissed them as management jargon. You may associate them with the work of counsellors rather than lawyers. You may have never come across these terms at all.

> However, I posit that anyone working in family law should understand trauma and its effects on human behaviour and have tools to respond to this behaviour– whether that be the behaviour of our clients, other parties, our colleagues, our organisations, our systems, or ourselves. This is the basis of trauma-informed practice.

In understanding this behaviour and its effects, and embedding practices which help us manage this behaviour, we become lawyers who have better relationships with clients, colleagues and ourselves. In turn, I assert we will have safer workplaces and practices. These safer workplaces and practices lead to more productive organisations through better client outcomes, less client complaints, increased staff retention, less risk of worker's compensation claims and more sustainable careers.

This article will address 4 reasons why family lawyers should be trauma-informed.

What is trauma-informed legal practice?

Trauma-informed practice is where 'practitioners are attuned to, respect and validate a person's experience'.[1] Practitioners adopting

1 Mental Health Coordinating Council (MHCC), *Trauma-Informed Care and Practice Organisational Toolkit (TICPOT): An Organisational Change Process Resource* (Toolkit, 2018) Stage 1 — Planning and Audit.

trauma-informed approaches recognise and understand the nature and impact of trauma on people's lives and behaviour, and how trauma may affect client engagement with a service and societal systems, including our legal system.[2]

> This involves asking *what has happened to you?* rather than *what is wrong with you?* and avoids making value-based judgements and assumptions about clients and colleagues.[3]

Trauma-informed approaches recognise the additional barriers clients who are experiencing trauma face in trusting organisations and societal systems, and the need for people to have cumulative positive experiences and relationships to build trust in those organisations and societal systems to mitigate future harm.[4]

The Principles of Trauma-Informed Practice

The five foundational principles of trauma-informed practice are:

1. **Safety** – including physical and psychological safety and cultural competence.
2. **Trustworthiness** – creating and maintaining boundaries, being transparent and delivering on promises made.
3. **Choice** – creating real options and giving the client the opportunity to make choices.
4. **Collaboration** – working with the client and other supports, sharing the power.
5. **Empowerment** – doing with, not for.[5]

Trauma-informed practice focuses on establishing and promoting all these components to establish safe working relationships and workplaces. These relationships include those between clients and legal and non-legal practitioners, as well as between employers and employees within an organisation.

2 Ibid.
3 Ibid.
4 Ibid.
5 'Building a trauma-informed world', *Blue Knot Foundation* (Website) <https://blueknot.org.au/resources/building-a-trauma-informed-world/>

Reason #1 to be Trauma-Informed – It's the Law (Sort of)

Lawyers generally need to assess risk. It is a core component of our jobs, helping us weigh the advantages and disadvantages of options to determine a way through conflict and/or resolving problems.

> One of the biggest risks to lawyers, and law firms, is the risk of psychological injury due to, and contributed by, our work in family law.[6]

Law firms are required to comply with the Model Code of Practice *Managing Psychosocial Hazards at Work* ('the Code').[7] The Code outlines the following four-step risk management process:

1. **Identify** the common safety risks in the workplace.
2. **Assess** these common safety risks.
3. **Control** the common safety risks.
4. **Review** these control measures.[8]

Family lawyers face multiple psychosocial hazards in the workplace: high rates of burnout; vicarious trauma through exposure to traumatic material and trauma histories, as well as their own lived experience of trauma; the highly emotive nature of legal work; client and billing pressures; the constant exposure to conflict, abuse and violence; and high rates of judicial and workplace bullying, to name a few. These factors increase our risk of psychological distress and injury. This injury can present itself through practitioners experiencing vicarious trauma (experiencing the same, if not worse, trauma reactions as our clients due to exposure and absorption of traumatic experiences), burnout, anxiety, depression and post-traumatic stress disorder.

6 Australian Psychological Society. (2019). Review of the Family Law System Discussion Paper (DP86) - APS Response. Australian Law Reform Commission. Retrieved from Australian Law Reform Commission (n 40).
7 Safe Work Australia, *Managing Psychosocial Hazards at Work* (Model Code of Practice, 2022).
8 Ibid.

When organisations prioritise safety, trustworthiness, choice, collaboration and empowerment, they are attuned to, and proactively manage, risk. Adopting a trauma informed approach provides a useful framework for organisations to identify, assess, and control risks and forms a critical part in reviewing these control measures.

The High Court decision of *Kozarov v State of Victoria* [2022] HCA 12 highlights the risk when organisations do not take active steps to control known safety risks. Ms Kozarov was a prosecutor working in the Specialist Sexual Offences Unit (SSOU) of the Victorian Office of Public Prosecutions who developed Post Traumatic Stress Disorder ('PTSD') from her employment. Ms Kozarov successfully sued her employer for negligence in failing to prevent her psychiatric injury. Whilst her workplace had a vicarious trauma policy, it was not well known by staff nor adhered to. The High Court found the workplace breached their duty of care to Ms Kozarov by failing to take reasonable measures in response to signs of vicarious trauma, and that a safe workplace should have and implement an OH&S framework which considers the physical **and** psychological risks of work.

> This includes providing intensive training for management and staff on the risks of vicarious trauma and PTSD, conducting welfare checks, providing referrals for psychological support for staff, and adopting a flexible approach to work allocation. The decision confirms employers must proactively **prevent** injuries and minimise risk, especially where **known stressors** exist.

Ms Kozarov was awarded $435,000 in damages.

In family law, these risks are well known and obvious. Adopting trauma-informed legal practice and creating trauma-informed organisations is a proactive step law firms can adopt to mitigate and prevent psychosocial injury to clients, practitioners and colleagues as part of an employer's duty to proactively manage risks which arise from high stress environments.

Reason #2 – It improves client outcomes

Trauma-informed practice is about shifting our focus from "what's wrong with you" to "what's happened to you?".[9] This approach changes how we work with individuals where we become practitioners who are innately curious and begin to understand behaviour because of adverse life experiences.

> An inquiry over assumption approach also leads to practitioners asking more probing questions, which leads to better client instructions, uncovers the emotional drivers behind decisions and behaviours, helps work towards solutions that will better meet client needs long-term and reduces conflict due to clients feeling listened to.

In understanding behaviour with a trauma lens and reflecting on how systems and organisations may be triggering these behaviours, we can de-personalise these behaviours and learn tools and techniques to mitigate or prevent them.

When practitioners are better attuned to the lived experience of clients, they can adjust their practices to improve clients' engagement in that professional relationship. For example, understanding that trauma can affect memory and how our brains process information, a practitioner may adjust their practice to make legal services more predictable and simpler, such as:

- using infographics to give up front information about court processes;
- using plain language and providing concise advice;
- having appropriate length appointments;
- avoiding providing clients with too much information at one time;
- providing breaks in appointments and mediations; and

9 Helgi Maki et al (eds), *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing* (American Bar Association, 2023) n 4.

- using source material such as police reports to draft affidavits rather than unnecessarily asking clients to recount trauma histories.

This leads to obtaining better instructions which enable practitioners to build stronger cases, conduct more robust risk assessments, and provide clients with more options (usually outside of litigation).[10]

Reason #3 to be Trauma-Informed – It's our job

In our role as family lawyers, we will work with individuals who have been affected by trauma. For example, according to the Australian Child Maltreatment Study, 32% of Australians have experienced physical abuse, 28.5% have experienced sexual abuse, and 39.6% have been exposed to domestic violence as children.[11]

> Therefore, it is likely that clients, legal, and non-legal practitioners have their own lived experiences of trauma. This lived experience may drive decision-making and behaviours, and can affect the trajectory of a matter, someone's engagement with a professional or workplace, and with the profession at large.

To be clear, this is not to say that practitioners should be counsellors or that adopting trauma-informed approaches diminishes our roles as officers to the court and providing legal advice and representation. Such an approach in my view would conflict with one of the core principles of trustworthiness which includes understanding, communicating and maintaining clear boundaries which requires a clear understanding of our role as lawyers.

10 'Trauma Informed Training', *Law Society of Scotland* (Web Page) <https://www.lawscot.org.uk/members/cpd-training/online-cpd/trauma-informed-training/>.

11 D Haslam et al, Queensland University of Technology, *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study* (Report, 2023).

It means that if we are to properly execute our duty of competence as required under the Professional Conduct Rules,[12] we need to have the required skills to do our jobs. This most likely includes have the tools and skills required to work with trauma affected individuals.

Reason #4 – It improves worker satisfaction

Providing a safe workplace is crucial to retaining staff and maintaining productivity. For example:

- According to Safe Work Australia, during 2021–22 the median time off from work taken by employees due to psychosocial injuries was **four times higher** than those who had time off work due to physical injuries and illnesses.[13]
- The same study also found the median compensation paid for psychosocial injury and illnesses was **more than three times the amount** paid for physical injuries and illnesses.[14]
- The Law Forward: Legal Industry Satisfaction Survey 2024 found that 70% of lawyers who responded to the survey reported symptoms of burnout and approximately 25% of respondents reported they planned on leaving their workplace within 2 years due to toxic workplace cultures, a lack of support from leadership and excessive workloads.[15]

> Adversely, 30% of respondents who had considered leaving reported they would be more likely to stay if they had flexible work arrangements. Overall, the survey found that those with more control of their work reported the greatest levels of work satisfaction.[16]

12 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, r. 4.1.3.

13 Safe Work Australia, *Psychological Health and Safety in the Workplace* (Report, February 2024).

14 Ibid.

15 College of Law NSW, Law Forward 2024 Legal Industry Satisfaction Survey <https://www.collaw.edu.au/campaigns/college-of-law/2024/law-forward-2024-satisfaction-survey/download-law-forward-2024-legal-industry-satisfaction-survey/>

16 Ibid.

Organisations that embrace trauma-informed practice prioritise psychologically safe work practices, trustworthiness, choice, collaboration and empowerment. This includes creating healthy feedback cultures, effective supervision, manageable workloads, and a collaborative approach to employer/employee arrangements to empower employees. These approaches are more likely to create safe work cultures which can lead to tangible workplace productivity benefits, including greater staff retention and lower worker's compensation claims due to greater workplace satisfaction.

Conclusion

Adopting trauma-informed legal practices not only enhances client outcomes; it also promotes sustainable and productive organisations and careers. By understanding trauma and its effects on behaviour (whether that be client, colleague or organisational behaviour), and learning tools and designing organisational processes to respond to these behaviours, family lawyers can create more effective, productive and safer relationships and workplaces, benefitting clients, practitioners, organisations and, ultimately, the profession at large.

THE IMPLICATION OF A TERM PREVENTING FAMILY VIOLENCE INTO A BINDING FINANCIAL AGREEMENT

JOSHUA THOMSON SC

Joshua Thomson SC practices from Francis Burt Chambers in Perth and New Chambers in Sydney. He was the Solicitor-General of WA between 2018 and 2023. Prior to that he was at the independent bar in WA for 17 years. He undertakes all forms of advocacy work, from lengthy trials to difficult appeals, mainly in commercial and public law cases. He is the lead author of the book *Commercial Contract Clauses: Principles and Interpretation* (Thomson Reuters) and has published articles in the Australian Law Journal, Australian Bar Review and the Federal Law Review. He was the editor and consulting editor of the Western Australian Reports for 16 years. He is a Fellow of the Australian Academy of Law.

This paper was presented at the 20th National Family Law Conference in Perth

Introduction

Agreements to make a financial adjustment between marriage partners, upon the breakdown of their relationship, have long existed. Such agreements are commonly known as pre-nuptial or post-nuptial agreements, and concern property distribution or maintenance arrangements between the parties after the end of their marriage.

The *Family Law Amendment Act 2000* introduced Part VIIIA into the *Family Law Act 1975* (Cth) in December 2000. This Part provides a legislative basis for financial agreements between marital parties to become binding. As the Family Court of Australia said in *Black v Black* [2008] FamFCA 7:

> The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so, the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement, as the court would otherwise be called upon to do so in the event of a disagreement.

The Further Revised Explanatory Memorandum for the legislation introducing Part VIIIA described the effect of the new provisions (at page 3) as follows:

> People will be encouraged, but not required, to make financial agreements. For these agreements to be binding, each party will be required to obtain independent legal advice as to the legal effect of the agreement before concluding their agreement.

> Because parties will have obtained prior advice, the court will only be able to set aside an agreement in certain limited circumstances, for

example if it were obtained by fraud, including failure to disclose material assets, duress or undue influence that would make it unfair to give effect to the agreement. The grounds for setting aside include all common law and equitable grounds, which includes, for example, that a party engaged in unconscionable conduct in obtaining the agreement.

The effect of removing the Court's general jurisdiction to make property and maintenance orders due to the existence of a binding financial agreement can have particular undesirable consequences. Even if it cannot be established that there was any vitiating factor which operated when the agreement was entered and would justify setting aside the agreement, a binding financial agreement can be oppressive and operate unfairly against vulnerable partners. Spousal parties often do not negotiate financial agreements from equal bargaining positions.

Consider the situation of a wealthy husband and a much younger wife, who has very few assets of her own. If the wife has entered into a binding financial agreement, which only provides her with limited means after a marriage has ended, she may effectively be forced to stay within the marriage even if she is being subjected to family violence.

The example which I have just outlined is by no means theoretical or hypothetical. The effect of binding financial agreements which I have described was raised in submissions to the Senate's Legal and Constitutional Affairs Legislation Committee in 2016, when it was considering amendments to Part VIIIA contained in the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015. See [2.3]-[2.10] of the Committee's Report.

In these circumstances, there is a significant policy question about how the difficulties created by family violence and binding financial agreements may be overcome. I propose to suggest two possible solutions within the framework of the law as it currently stands.

The Legislative Scheme of Part VIIIA

There are three types of financial arrangements which are contemplated by the operation of Part VIIIA. There are financial agreements made before marriage or "pre-nups" (section 90B); financial agreements made during marriage or "post-nups" (section 90C); and financial agreements made after divorce is ordered (section 90D).

A relevant financial agreement under Part VIIIA, which is made before marriage, concerns how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with. It may also concern the maintenance of either of the spouse parties during the marriage, after divorce or during both those periods. See section 90B. There is a similar provision in section 90C for a relevant financial agreement under Part VIIIA made during marriage. The problem which I have outlined is not concerned with the third type of financial agreement, made after separation occurs or divorce is ordered, because that is an agreement made at a time when the parties can choose whether to make the agreement or rely upon orders made by a Court, without fear of being locked into a disadvantageous agreement.

A financial agreement becomes binding "if, and only if" the agreement is signed by all parties; each spouse party has received independent legal advice, which has been verified in the manner required; a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties; the court has made an order declaring that the agreement is binding on the parties; and the agreement has not been terminated and has not been set aside by the court. See sections 90G(1) and (1A).

A financial agreement may only be terminated by a wholly new financial agreement which supersedes the first one, or by the parties making a written agreement (which must satisfy certain tests itself) that the agreement has been terminated. See section 90J.

The jurisdiction of the Court to make maintenance orders is not excluded in a case where the court is satisfied that, when the binding financial agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit: section 90F.

> While this does provide some limit to the exclusion of the court's jurisdiction to make a maintenance order, it is a small qualification and does not specifically relate to the operation of a financial agreement in a manner which is adverse to a spouse party who is suffering the effects of family violence and effectively locked into a marriage by a financial agreement.

A court may make an order setting aside a financial agreement in certain defined circumstances set out in section 90K(1). These include where the agreement was obtained by fraud (including non-disclosure of a material matter) (paragraph (a)); a party to the agreement entered it for the purposes of defrauding a creditor (paragraph (aa)) or another person who is party to a de facto relationship with a spouse party (paragraph (ab)); the agreement is void, voidable or unenforceable (paragraph (c)); the agreement has become impracticable to be carried out due to circumstances that have arisen since it was made (paragraph (c)); since the agreement was made, there has been a material change in circumstances and, as a result of that change, the child or an applicant spouse who is caring for the child, will suffer hardship if the court does not set aside the agreement (paragraph (d)); a party to the agreement engaged in conduct that was, in all of the circumstances, unconscionable in respect of making the financial agreement (paragraph (e)); or certain circumstances arise in respect of the superannuation interests operating under Part VIIIB (paragraphs (f) and (g)).

As can be seen from reviewing this list of reasons, for a court to set aside a financial agreement, there is nothing specifically related to the operation of the agreement in a manner which is prejudicial to a spouse party who is suffering from family violence.

That leaves for consideration the operation of section 90KA, which concerns whether a financial agreement is "valid, enforceable or effective". This provision is in the following terms:

> The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:
>
> (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and
>
> (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and
>
> (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

This provision generates the question whether a binding financial agreement which applies upon the breakdown of a marriage will apply to a spouse party who seeks to leave the marriage due to being subjected to family violence at the hands of the other spouse party. The answer to that question is to be determined

> according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement.

Public Policy Considerations

There is a cogent public policy against a binding financial agreement operating against a spouse party who seeks to leave a marriage due to the other party engaging in family violence (as that term is defined in section 4AB of the *Family Law Act 1975* (Cth)) or, at least, against the operation of a binding financial agreement at the instance of a spouse party who has committed offences amounting to family violence. The effect of preventing a spouse party who has engaged in family violence, or who has committed offences amounting to family violence, from relying upon a binding financial agreement would be to leave the assets of the marriage and the maintenance of the spousal parties to be determined in accordance with the ordinary operation of the *Family Law Act*, as if the existence of the binding financial agreement had not excluded the Court's jurisdiction—although the Court could, if it chose to do so, have regard to the existence and terms of any financial agreement which had been entered.

It will be evident from the way in which I have framed this public policy consideration, that it depends upon civil proof of family violence (as defined in section 4AB of the *Family Law Act*) or at least civil proof of actions which would demonstrate the commission of some form of criminal offence. It seems to me that this is a reasonable starting point, when regard is had to the well-accepted common law standard that a person shall not benefit from his or her own wrongdoing. For example, there is the rule that no person can obtain, or enforce, any rights resulting to them by their own crime. The application of this rule, which generally arises in cases of murder, was extensively discussed in *Edwards v State Trustees Ltd* [2016] VSCA 28. Another cognate rule, which is often attributed to a matter of proper construction of an insurance contract, is that an insurer is not liable to pay upon indemnity in respect of loss intentionally caused by the criminal or tortious act of the person indemnified: *Beresford v Royal Insurance Company* [1938] AC 586.

> The public policy against allowing a person to benefit from their own wrongdoing seems to me to provide a proper consideration for activating a legal rule applicable to a binding financial agreement as a matter of contract law.

So far I have described the public policy consideration as depending upon proof of family violence (as defined in section 4AB of the Family Law Act) or proof of an offence amounting to family violence. The difference lies in the fact that not all actions which amount to "family violence" as defined would amount to an offence in all Australian jurisdictions. Certainly, some actions would do so, such as assault, sexual assault, threats, stalking, and damage to property. However, other actions which amount to coercive control, economic abuse or psychological abuse are not criminalised in all Australian jurisdictions, but may amount to "family violence" for the purposes of the *Family Law Act*.

I consider that it would be undesirable to say that the public policy consideration against allowing a spouse party to enforce a binding financial agreement under the Commonwealth *Family Law Act* could vary by reason of the definition of specific criminal offences under different State and territory legislation. Consequently, I consider that the public policy consideration which I have identified should be linked to the definition of "family violence" under the federal statute. That is, I think that there are good grounds to identify a public policy

against allowing a spouse party to enforce a binding financial agreement against the other spouse party, where the enforcing party is proved to have engaged in family violence.

> The public policy is that it is presumed that parties to a binding financial agreement did not intend it to operate where one party is acting violently to the other party, so that the enforcing party cannot obtain the advantages of having a binding financial agreement and avoiding an ordinary property distribution by the Family Court.

I should make a particular point about the identification of the relevant public policy in this way. It concerns a presumption about the intention of the contracting parties who make a binding financial agreement, not a presumption about the legislature in enacting Part VIIIA. That is significant, as section 90KA of Part VIIIA specifically contemplates that ordinary contractual principles shall apply "in determining the validity, enforceability and effect of" a binding financial agreement. Consequently, a decision to give effect to the public policy which I have identified upon the basis that it is part of a relevant contractual principle is consistent with the legislative intention of Part VIIIA.

> There can be no suggestion that a Court is somehow modifying or partially repealing the operation of Part VIIIA upon the basis of its own view of appropriate public policy.

This leads to the need to consider whether ordinary contractual principles concerning implied terms can accommodate the public policy which I have identified.

An Implied Contractual Term

The implied contractual term which warrants consideration is not one which concerns the termination of a binding financial agreement. The statutory provision of an exclusive list of circumstances which will justify a court making an order to set aside a financial agreement, contained in section 90K, is against the implication of a term making provision for termination of a financial agreement in other circumstances.

The implied term which I suggest squarely relates to the enforceability and effect of a binding financial agreement. The proposed implied term is that, where there is a marriage breakdown, the binding financial agreement shall not be effective or enforceable against a spouse party who seeks to leave the marriage due to the other party engaging in family violence against the first party.

> The first observation which I should make about an implied term of this nature is that the binding financial agreement shall remain wholly effective and enforceable in all other circumstances, except where there has been family violence leading to the other party seeking to leave the marriage. In that sense, the implied term which I have described does not go to the overall validity of the financial agreement, but is confined to its enforceability and effect in a particular situation.

The second observation is that the implied term would be incorporated into the financial agreement from the outset, but would have no operation until the marital breakdown occurred. Consequently, it is concerned with circumstances that arise at the point of marital breakdown, rather than with the situation at the time when the financial agreement was entered. That means that there is no question of having to consider whether there was duress or unconscionability which caused one spouse party to execute the agreement in the first place.

There are different intellectual processes which may be used to imply terms into contracts. There may be a process of deduction or inference based upon the existence of other express terms in the contract.

This is an exercise of interpretation. See Mason J in *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 at 345. However, this process is unlikely to be of any relevance in the case of a financial agreement. Most financial agreements will not address the topic of family violence, and its contractual effect, in any manner. It will be difficult to "interpret", by a process of inference and deduction, any aspect of the contract as addressing the consequences of family violence.

However, there are at least two other intellectual processes which lead to implied terms:

a) the unexpressed terms of a contract may also include those which apply, or are implied, by reason of various rules of law. For example, an unexpressed term may satisfy the requirements of business efficacy derived from *Moorcock* (1889) 14 PD 64 at 68. See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-283, *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347. Often implication upon the basis of the tests set out in these cases is said to be an "implication in fact";

b) alternatively, a term may apply as a legal incident of a particular class of contract, such as in *Liverpool City Council v Irwin* [1977] AC 239. These two types of implied terms are acknowledged in *Geys v Societe Generale* [2013] 1 AC 523 at [55], *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] 3 WLR 1843 at [15] and *Barton v Morris* [2023] UKSC 3 at [44], [135], [209]. These types of term are often described as "terms implied in law".

The existence of terms on either of these bases is not really a matter of orthodox interpretative technique, although Edelman J has said that the implication of terms using the tests in *BP Refinery* and *Codelfa* lies on the continuum of contractual interpretation: *H Lundbeck A/S v Sandoz Pty Ltd* [2022] HCA 4 at [99].

The reference to "business efficacy", in respect of the first of the two processes mentioned in the last paragraph, may be thought to be somewhat out of context in the circumstances of a financial agreement between marital parties. However, the requirement of "business efficacy" must be understood in the context of the commercial contracts being discussed in those cases. The five requirements for implying a term based on the analysis in those cases were that the proposed implied term: (1) must be reasonable and equitable; (2) must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) must be so obvious that it goes without saying; (4) must be capable of clear expression; and (5) must not contradict any express term of the contract.

In truth, the requirement of "business efficacy" is incidental to the nature of the commercial purpose of the contracts being considered in the cases establishing the rule. It is a reflection of making an implication to ensure that the purpose of the contracts is carried through.

> In my view, it would be equally acceptable to rephrase the requirement in a spousal context to be a requirement that the proposed term must be necessary to give effect to the purpose of a financial agreement under Part VIIIA, without which that purpose would not be achieved.

That leads to the question of identifying the purpose of financial agreements under Part VIIIA. The plurality of the High Court did this in *Thorne v Kennedy* [2017] HCA 49; (2017) 263 CLR 85 at [17]. Kiefel CJ, Bell, Gageler, Keane and Edelman JJ referred to the purpose stated in the Further Revised Explanatory Memorandum, which was to

> encourage people to agree about the distribution of the matrimonial property and thus give them greater control over their own affairs, in the event of marital breakdown.

If the purpose of Part VIIIA is to encourage people to enter financial agreements, because this allows them greater control over their own affairs, an implied term which effectively protects a weaker spouse from becoming locked into an impecunious outcome from a financial agreement where offences of family violence have been committed against that spouse would encourage people to utilise the mechanism of financial agreements. On the other hand, if that type of term is not implied, the possibility of being locked into a violent marriage due to financial considerations flowing from having entered a binding financial agreement would discourage their use. On that basis, I consider that implying a term under the tests now accepted from *BP Refinery* and *Codelfa* would be consistent with the second requirement of the tests accepted in those cases.

> I also think that the other requirements would easily be satisfied. The proposed term which I have described is: (1) reasonable and equitable; ... (3) so obvious that it goes without saying; (4) capable of clear expression; and (5) would not contradict any express term of typical financial binding agreements.

For these reasons, I consider that a term of the type which I have contemplated could be implied into a typical binding financial agreement under Part VIIIA upon the basis of the tests set out in *BP Refinery* and *Codelfa*.

This leads to a further point. The type of reasoning which I have adopted in support of this conclusion might be generalised and extended to support an implied term which is a legal incident of the class of contracts described as binding financial agreements under Part VIIIA of the *Family Law Act*. The question of whether a term may be implied in law as a legal incident of a class of contracts was extensively discussed by the Full Federal Court (Lindgren, Finn and Bennett JJ) in *University of Western Australia v Gray* [2009] FCAFC 116; (2009) 179 FCR 346 [135]-[147].

In *Gray* at [136], the Full Court observed that terms which are implied as a legal incident of a class of contracts are not founded solely upon the need to give efficacy to a contract, by contrast to terms implied upon the basis of the tests in *Codelfa*, but there can be a deal of overlap between the implication of terms upon the two different bases in particular contractual settings. The Full Court said that the implication of a term as a legal incident of a class of contracts is informed by more general considerations than "mere business efficacy".

> Later on, the Full Court explained at [142] that the more "general considerations" required that regard be had to the inherent nature of the contract, and could raise issues of "justice and policy" such as the "social consequences" of generally implying a term.

Before an implication in law of a term may be made as a legal incident of a class of contracts, the general considerations of justice and policy must make the implication of the term "necessary": *Gray* at [136], [139], [142], [144], [147]. In this respect, considerations of justice and policy can be a double-edged sword. In *Gray* at [146], the Full Court pointed out that considerations of policy can be of considerable significance in negativing the making of an implication, or in demonstrating that the issues raised by the proposed implication are of such a character or complexity as to make it inappropriate for a court, as distinct from a legislature, to impose the obligation in question.

As I have explained, it is not difficult to identify the public policy underpinning Part VIIIA of the *Family Law Act* and a binding financial agreement made under those provisions. It is to

> encourage people to agree about the distribution of the matrimonial property and thus give them greater control over their own affairs, in the event of marital breakdown.

However, as I have explained, there is a well-recognised public policy against allowing

somebody to benefit from their own wrongdoing. This militates in favour of a general social policy that favours a legal standard which prevents a person obtaining an advantage where they have engaged in family violence, which has then led to the breakdown of his or her marriage.

It should be observed that Parliament has not provided for an implied term similar to the one presently under discussion. Nevertheless, in my view, it is at least arguable that this consideration does not prevent the implication of a term in law that a binding financial agreement under Part VIIIA shall not be effective or enforceable against a spouse party who seeks to leave the marriage due to the other party engaging in family violence against the first party.

> Such a term is precisely consistent with the public policy underpinning Part VIIIA, for the reasons which I have explained previously. Further, the absence of any implied terms being specified in Part VIIIA is easily explicable because Parliament has expressly chosen to leave the contractual operation of a binding financial agreement to the general law.

Moreover, the type of term under discussion is one which relates to a particular situation in which a binding financial agreement might operate, namely the context of family violence. Part VIIIA is not specifically concerned with that particular context, but more broadly relates to setting up a system for prescribing when financial agreements shall be binding. Consequently, it is unsurprising that Parliament did not address a specific matter arising only in one particular context.

For these reasons, separately from implying a term of the type under discussion based upon the tests in *BP Refinery* and *Codelfa*, I consider that there are also good arguments for implying such a term as a necessary incident of the class of contracts which are binding financial agreements under Part VIIIA of the *Family Law Act*.

Conclusion

The statutory mechanism in Part VIIIA, which provides for the enforceability of financial agreements, has an important role to play in giving certainty to marital spouses in similar bargaining positions. However, like many statutory procedures, it is possible that it may be abused, particularly where one spouse is much less able to bargain a just and equitable financial agreement.

In these circumstances, it is necessary to consider whether the existing law may provide a remedy for consequences which seem unfair. This paper has endeavoured to suggest that the implication of a term in financial agreements according to ordinary principles of contractual interpretation may provide a solution to what is a difficult problem. If, however, that is not something which the Courts are prepared to adopt, it is necessary to turn to questions of legislative reform.

BINDING FINANCIAL AGREEMENTS: IS THE EQUITABLE REMEDY OF RECTIFICATION AVAILABLE?

SAMUEL FALLOWS

Samuel Fallows is a solicitor at Broun Abrahams Burreket and was admitted to the Supreme Court of New South Wales and the High Court of Australia in 2024.

Samuel holds a Bachelor of Laws (First Class Honours) and a Bachelor of Arts and graduated with a number of awards.

Prior to his admission, Samuel was the Legal Associate to a judge of the Federal Circuit and Family Court of Australia (Division 1). Prior to his experience at the Court, Samuel was the legal researcher to a senior family law barrister, mediator and arbitrator at a preeminent family law chambers in Sydney.

Is the remedy of rectification available at all to correct binding financial agreements? Justice Aldridge, sitting alone as the Full Court, in *Birdwood & Gravino* (2023) FLC 94-149 (*'Birdwood'*) expressed doubt.[1] His Honour's doubt at [2]–[21] (which this article should be read with) was obiter and has since been referenced in subsequent first instance decisions of the Federal Circuit and Family Court of Australia (Division 1).[2]

Two main points (or concerns) can be distilled from Aldridge J's lucid obiter:

1. It is doubtful rectification is available under s 90KA of the *Family Law Act 1975* (Cth) ('the Act') unless it falls within the issue as to whether the agreement is effective or as part of the "effect of contracts"; and

2. Even if rectification is available by way of the Court being a court of law and equity,[3] compliance with s 90G – a precondition for the enforceability of a financial agreement – may not be possible if a document is rectified some time later.

> The substance of Aldridge J's obiter is yet to expressly confront the Full Court, but one might reasonably anticipate the same.

This article's purpose is to expeditiously analyse whether rectification is available to rectify a binding financial agreement and it aims to do so through

1 No concluded view was expressed as the issue did not arise on the appeal.
2 *Gonsalves & Gonsalves (No 3)* [2023] FedCFamC1F 1069; *Zhong & Yao* [2023] FedCFamC1F 626.
3 *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 9(1), 10(1).

the lens of his Honour's obiter in *Birdwood* and the questions of statutory interpretation it raises.

The law from which the issue arises

Where parties' property is subject to a financial agreement that is binding pursuant to s 90G of the Act, the property settlement provisions will not apply.[4] Section 90G provides that financial agreements are binding "if and only if" certain requirements are complied with.[5]

There is power under s 90K of the Act to set aside a financial agreement. Section 90KA of the Act states:

> The question of whether a financial agreement … is valid, enforceable or effective is to be determined by the court according to the principles of law and equity **that are applicable in determining the validity, enforceability and effect of contracts and purported contracts**… (Emphasis added)

Section 90KA(a) provides that the court may grant the same remedies as the High Court may grant in its original jurisdiction. That includes the equitable remedy of rectification.[6]

Rectification amends an instrument to conform to the true agreement of the parties where the instrument has departed from the parties' common intention.[7] The remedy is based on the equitable principle that it would be unconscientious for a party to an instrument to seek to apply it inconsistently with what they know to be the common intention as at the time of its making.[8]

Does s 90KA curtail rectification?

Justice Aldridge in *Birdwood* interpreted s 90KA as providing that the only powers of the High Court picked up are those in relation to the validity, enforcement and effect of contracts "because that is what s 90KA clearly states", and of which none immediately encompass rectification unless necessary to save an agreement from invalidity.[9] Therefore, constructed literally and in contrast to the Full Court having previously ordered rectification under s 90KA,[10] the section would curtail rectification. This outcome is illustrative of the nature of equity being such that much of its remedies are susceptible to statute.

Separately, as is permissible by s 15AB of the *Acts Interpretation Act 1901* (Cth), Aldridge J calls upon the Explanatory Memorandum ('EM') to ascertain the meaning of s 90KA by having regard to the section's context and purpose. His Honour highlights the difference between, firstly, the specific words of s 90KA (set out above) and, secondly, the EM stating s 90KA

> provides that the validity, enforceability and effect of a [financial] agreement shall be determined by the court according to the principles of law and equity.[11]

In other words, the statement in the EM omits the 'suffixed' qualification in s 90KA that the principles of equity to be applied are those "that are applicable in determining the validity, enforceability and effect of contracts". On that basis, the EM contemplates greater parameters than a literal construction s 90KA allows.

> It follows that his Honour queries "whether the words chosen by the legislature give effect to the intention set out in [the EM]". In the context of rectification, the issue identified is ironic. However, in the writer's respectful view, s 90KA should not be read down to exclude rectification for two main reasons.

Firstly, there is significance in the EM not qualifying, unlike s 90KA, **what** principles of equity are applicable. The reason for that significance is

4 *Family Law Act 1975* (Cth) ss 71A, 90SA.
5 Cf s 90G(1A), which is distinct from rectification in equity.
6 *Sindel v Georgiou* (1984) 154 CLR 661. See also *Judiciary Act 1903* (Cth) s 32.
7 *Franklins Pty Ltd v Metcash* (2009) 264 ALR 15, [446].
8 Ibid [444].
9 *Birdwood* [6].
10 See, eg, *Graham & Squibb* (2019) FLC 93-892.
11 Further Revised Explanatory Memorandum, Family Law Amendment Bill 2000 (Cth) [163].

supported by the High Court urging in *SZTAL v Minister for Immigration and Protection* (2017) 262 CLR 362 at [14]:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense…[12]

The result of the significance is an available inference that in fact it must be intended that rectification be available under s 90KA. It is well accepted that statutes should not be interpreted as withdrawing or limiting the conferral of jurisdiction upon courts unless the implication to do so is clear and unmistakeable.[13] The context and purpose of the statute displaces the, on its face, apparent limitation in s 90KA regarding the equitable principles to be applied.

Secondly, assuming s 90KA does limit the availability of rectification (i.e. altering the traditional scope of the equity), that would confirm that what has transpired is the existence of distinct remedies with different limits and operative areas—that is, one (narrower) remedy of rectification (either permissible by or derived from s 90KA) and one (broader) remedy of rectification in equity that does not extend to financial agreements.[14] An inquiry into the context and purpose of s 90KA does not reveal this outcome being intended by the legislature.

Compliance with s 90G: insurmountable for rectification?

Justice Aldridge explains in *Birdwood* a "further, and perhaps, more important difficulty which arises from s 90G of the Act", namely, if rectification changes the binding financial agreement to accord with that intention which it has failed to record, the requisite advice and certificate is based on the original and unrectified version such that there is no advice and certificate on the rectified agreement, which is a precondition to its enforceability.[15]

Arguably in some instances, advice pursuant to s 90G(1)(b) might accord with a once-inaccurately expressed financial agreement following rectification. If the evidence is sufficient to order rectification on the terms of a financial agreement, the scope for the legal advice to diverge from the common intention of the parties is limited. In those circumstances, and rectification being retrospective such that the rectified instrument is taken to have always been in the form so rectified and acts otherwise invalid under the instrument retrospectively validated, the requirement in s 90G(1)(b) might already be satisfied on the rectified agreement.[16]

> Beyond the narrow band of cases where the above analysis might apply, a remaining issue is whether the s 90G certificate is capable of rectification. Justice Aldridge's doubts about compliance with s 90G and rectification in this respect is irresistible. While the Full Court has previously said such errors are not capable of rectification,[17] the following bears consideration.

The legal effect of compliance with s 90G is that a financial agreement will be binding, meaning the property settlement provisions are barred and property dealt with according to the agreement's terms. Conversely, the legal effect of a financial agreement that is mistakenly non-compliant with s 90G is at best otiose given it unsuccessfully bars the property settlement provisions of the Act. Rectification in equity exists because without

12 *SZTAL* was observed by the Full Court comprising Alstergren CJ, McClelland DCJ, Austin, Bennett and Cleary JJ in *Nevins & Urwin* (2022) FLC 94-084 and more recently by Austin and Williams JJ in *Radecki & Radecki* [2024] FedCFamC1A 246.

13 *Radecki & Radecki* [2024] FedCFamC1A 246 (Austin, Williams JJ) citing *Shergold v Tanner* (2002) 209 CLR 126 at [34]; *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121 at 132.

14 See, eg, Mark Leeming, 'The Limits of Rectification' (2023) *Journal of Equity* 17(2) 122, 138.

15 *Birdwood* [11]–[12].

16 *Malmesbury v Malmesbury* (1862) 54 ER 1196.

17 *Black and Black* (2008) FLC 93-357; *Senior & Anderson* (2011) FLC 93-470.

rectification, an instrument, notwithstanding its mistake(s), will have the legal effect according to its terms such that a party may apply it inconsistently with what they know to be the common intention as at the time of its making. Here, that is a financial agreement that has an otiose legal effect.

> It can be rhetorically asked: how can an instrument with otiose legal effect be applied at law inconsistently with its terms? The basis for rectification does not exist in these circumstances.

Concluding remarks

Binding financial agreements, the equitable remedy of rectification and Aldridge J's obiter in Birdwood are worthy of analysis beyond the limited scope of this article, particularly in respect of the construction of s 90KA. Further guidance from the Full court is eagerly anticipated. Nevertheless, what this article contends is that:

1. Section 90KA ought not be read as limiting or precluding rectification in equity notwithstanding the provision's problematic wording; and
2. Rectification in equity is not available for rectifying non-compliance with s 90G in circumstances where the basis for the equitable remedy does not exist.

WHO SHOULD GET THE FAMILY PET?
A DOG DAY AFTERNOON[1] IN THE FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

NICHOLAS KANAREV

Nicholas practices primarily in Family Law, Intervention Orders and animal welfare. He also has experience relating to aged care, risk management and victims of crime. He is currently on the Animal Ethics Committee, Baker Heart Research Institute and is a member of Lawyers for Animals.

Nicholas's family law practice involves all areas including child recovery, relocation, residency and contact and property settlement.

As a mediator, Nicholas has considerable experience in family law and property settlement. He was first accredited as a Mediator in April 2003 and received his National Accreditation as a Mediator on the 1st July 2008.

Prior to being called to the Bar, Nicholas taught international relations and strategic studies at Deakin University. Subsequently, he worked for the Department of Defence in areas of risk management, crisis decision making and emergency management law.

Nicholas has been a Member of the Football Federation of Victoria Tribunal since 2008.

Part A: What does your pet say about you?

In the 2022/2023 State Budget, the Victorian Government committed to delivering a first-ever Pet Census which was held in July 2023 and received 37,460 responses. The census identified an estimated 4.3 million pets across Victoria. In June 2024, Victoria's population was estimated to be 6,981,400, meaning it was likely that there was approximately one pet for every 1.6 people living in Victoria. In percentage terms, the census found that 58 per cent of Victorian adults owned a pet. If this figure is brought into a national context where Australia's 2024 population was estimated to be 27,204,809, the estimated pet population would be in the vicinity of 17.2 million living in some 6.9 million households.

> Moreover, pet owners in Victoria spent an estimated $6.6 billion in financial year 2023/2024 on pet products and services. In national terms, this figure is estimated to be approximately $33 billion.

Regarding the type of pet owned by those who responded to the census, 41 per cent owned dogs and 24 percent owned cats. The Victorian census also revealed that 79 per cent of the people who responded to the census ranked companionship and love as the primary reason why they kept a pet, while 57 per cent ranked improved mental health and emotional support as the second most important reason for owning a pet.[2]

1 *Dog Day Afternoon* was the title of a 1975 American film starring Al Pacino and John Cazale. The term "dog day afternoon" is an American idiom meaning a long, hot summer's day.

2 Animal Welfare Victoria, Pet Census 2023. Also, Animal Medicines Australia, *Pets in Australia: A national survey of pets and people* at p 4.

This apparent close attachment by many Australians toward their pets is perhaps best characterised by the ascription of names to them, irrespective as to whether the pet is a dog, cat, horse, fish, bird, amphibian, spider or snake.

> The Medibank Pet Insurance website, for example, has listed some of the more popular names for insured pets. These names include Millie, Bella, Charlie, Max, Molly, Ruby, Coco, Oscar, Lucy, Toby, Jack, Rosie, Betty, Millie, Archie, Roxy, Lola, Harry, Rocky, Monty, Zoe, Buster and Rex.

Whether the names are of a human derivative is not the issue; what is germane here is that they are, more likely than not, to be given a name. To quote the often-quoted words of Juliet's question to Romeo from William Shakespeare's play, *Romeo and Juliet*, "What's in a name?", the answer, from the perspective of pet ownership, is twofold. First, a name gives the pet a personal sense of connection, or bonding, for its owner with the pet as well as with members of the owner's family. After all, the pet owner and every member of their family has a name and by providing a name for the pet it provides the most fundamental way of having that pet accepted into the pet owner's family. This notion of "family-named pet" is often reinforced when the pet is required to attend for treatment at a veterinary clinic where the pet is registered at the clinic as though it is a human being. For example, if the owner's surname was Smith and the pet, in this case a dog called Harry, the pet could readily be registered with the veterinary clinic as Harry Smith.

> Second, as the example of Harry Smith the pet dog demonstrates, providing a pet with a name also humanises the pet for the pet owner. That is, it creates in the pet owner a sense that their pet has a distinct identity and individuality just as humans have with their first and familial names.

Nevertheless, humanising a pet has its limitations according to legal principles in Australia. In the seminal case of *Elliott v Weiss* [2001] ACTSC 127 (20 December 2001), Chief Justice Miles examined the case where the owners of two dogs, named Hodesh owned by Ms Elliott and Indiana owned by Mr Elliott, were accused inter alia of not being in control of their dogs which resulted in a dog attack and subsequent death of another dog named Rosie. At first instance, the presiding Magistrate ordered that both dogs be destroyed. The Elliotts appealed that decision. Chief Justice Miles found that the Magistrate had determined that the two dogs had acted in consort and, even though the dog Hodesh was the more aggressive dog, the difference was not much to justify the making of some distinction between the two dogs as far as capital punishment was concerned.[3] Chief Justice Miles disagreed with that line of reasoning noting that:

> …despite the appropriate warning that it was necessary to assess the two dogs independently, the Magistrate does not appear to have been successful in doing so. I do not think it was correct, having found that Hodesh was the lead dog, to conclude that each was equally culpable. That is what I might call the anthropomorphic fallacy of looking at the behaviour of an animal as if it were of a human being. It is trite to say that animals do not have any capacity for moral judgment, but the point needs to be kept in mind. It is common when assessing the culpability of joint offenders for the purpose of sentencing to have regard to their respective positions with respect to the allocation of individual moral responsibility for the joint offence. It is also common that in such circumstances a court is not able to say that one offender is more or less culpable than the other. But in the case of animals, such principles and considerations simply do not apply. The best one can do, so it seems to me in this jurisprudentially unfamiliar territory, is assess as best one can on the past performance of the animal its propensity to behave dangerously in the future,

3 *Elliott v Weiss* [2001] ACTSC 127 at [24].

> bearing in mind that the purpose of the [Dog Control] Act is not to punish dogs but to protect the human public.[4]

The Magistrate's destruction order was rescinded. Hodesh was allowed to return into the care of Ms Elliott and to remain with her in the ACT. Indiana, by contrast, was returned to Mr Elliott but on condition that he take the dog to live with him in Queensland. He was prohibited to have the dog return to the ACT. In passing, Chief Justice Miles made the legal distinction between the rights of human beings and animals in Australia:

> Banishment orders are almost always inappropriate if made against human beings, but I do not think considerations of liberty of the subject and the rights guaranteed under the Australian Constitution of freedom of movement of persons within Australia apply to animals.[5]

From a financial perspective, it would have been considerably cheaper for the Elliotts to agree to have their dogs destroyed. However, they elected to appeal the Magistrate's decision in the ACT Supreme Court. The crucial point being is that the dogs' lives were spared despite the costs involved of achieving that result.

Another dog owner, Ms Tania Isbester, managed to get leave from the High Court of Australia to lodge an appeal against a decision of the Court of Appeal of the Victorian Supreme Court to uphold a council's dog destruction order. What began as a prosecution by Knox City Council in the Ringwood Magistrates' Court in relation to Ms Isbester's pet Staffordshire terrier called "Izzy" for having caused a "serious injury" to a person in August 2012 and a subsequent attack against a person in 2013, became a nationally publicised case. Although Ms Isbester had pleaded guilty to the charges, the council did not seek a dog destruction order at court. Instead, it convened a Panel consisting of three council officers who, having reviewed council's evidence together with critical comments of Ms Isbester as the dog owner by the Magistrate, decided to have Izzy destroyed.[6] Ms Isbester unsuccessfully sought a judicial review of the council's decision and orders by way of certiorari and prohibition under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005*. Ms Isbester then brought the matter to the Court of Appeal of the Supreme of Victoria where the appeal was limited to the ground of apprehended bias by council officer, Ms Kirsten Hughes, who had been involved both in prosecuting the matter and who had sat on the Panel which determined Izzy's fate. The court dismissed the appeal.[7] The High Court came to a different conclusion. The plurality (Kiefel, Bell, Keane and Nettle JJ) concluded:

> A fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision [to destroy the dog]. This conclusion implies nothing about how Ms Hughes in fact approached the matter. It does not imply that she acted otherwise than diligently, and in accordance with her duties, as the primary judge found, or that she was not in fact impartial. Natural justice required, however, that she not participate in the decision and because that occurred, the decision must be quashed.[8]

Justice Gageler agreed with the plurality.[9]

Isbester v Knox City Council is a prime example of the persistence of a dedicated pet owner to save their pet from being destroyed. The matter ultimately found its way to the High Court, the consequence of which was a determination regarding how the operation against bias in Australian administrative proceedings ought to be conducted.

Part B: What do you say about your pet? A tale of two tropical cyclones

In preparation of Tropical Cyclone Alfred crossing the south-central coast of Queensland and the northern coast of New South Wales, the RSPCA New

4 Ibid at [26].
5 Ibid at [31]

6 *Isbester v Knox City Council* [2015] HCA 20, 10 June 2015 at [1], [5-10].
7 Ibid at [11-15].
8 Ibid at [50].
9 Ibid at [68-71].

South Wales issued a media release on March 4, 2025, entitled, *Prepare for Tropical Cyclone Alfred – Include Your Animals in Your Evacuation Plan*. The bulletin noted that:

> Just like you would pack an emergency kit for yourself, your animals need one too. Make sure it includes:
>
> - Food and water (at least three days' supply)
> - Medications and veterinary records
> - Sturdy carriers, leads, or halters
> - Familiar bedding and comfort items
> - Litter, poo bags, or other waste disposal supplies
> - Identification tags and microchip details.

This approach to pet evacuation, which is now standard across all Australian jurisdictions, which at times involves pet evacuation by helicopter at government expense, stands in stark contrast to the Darwin evacuation following the impact of Tropical Cyclone Tracy which struck the city on Christmas Day in 1974. Tropical Cyclone Tracy was a Category 4 cyclone (the highest category being Category 5) resulted in 66 deaths (49 in Darwin and 16 lost at sea), leaving some 44,000 people homeless and destroyed or severely damaged over 70 per cent of the city's homes and infrastructure. At Darwin Airport, thirty-one aircraft were destroyed and another twenty-five badly damaged. Major General Alan Stretton was the head of the Commonwealth's National Disasters Organisation at the time and was tasked by the Federal Government to oversee and co-ordinate the response and recovery effort as the Northern Territory had not yet been granted statehood by the Commonwealth.

> He managed the evacuation of some 36,000 people (many of whom did so under order) out of Darwin within six days. In 1975 he was made Australian of the Year.

Despite the herculean achievement, the single-most criticism of the military-style operation undertaken by Stretton was that he not only prevented the evacuation of pets with their owners but also ordered the military and police to shoot on sight any pets even if they were being cared for by people. Dogs were the primary target. The following is an anonymous account by a former police officer recalling the event 50 years later:

> I was a Police Officer in Darwin after the cyclone. A few days after the cyclone we were ordered to shoot all dogs as it was a concern they would get into the rotting food in the suburbs and cause major disease. I was stationed at the Casuarina High School and shot a couple hundred dogs which haunts me to this day. I recall walking down between rows of survivors and saw a young boy with his little dog on his lap covered with a towel. Doing my job, I took that dog to a pit dug for the purpose and shot it. I will never forget that little boy or his little dog. I hoped as time went by, I would forget. But I have not.

The point of these preceding examples, whether having a dog's life spared by the ACT Supreme Court or the High Court of Australia, or having to destroy hundreds of pet dogs because it was believed to be the right thing to do at the time, is that pets can readily evoke an emotional response in human beings which at times is almost indistinguishable from that of a protective parent in relation to the safety of their child. And where is a parent's emotionally protective response most likely to be felt and fought if not in the highly and emotionally contested jurisdiction of the Federal Circuit and Family Court of Australia (FCFCOA).

Part C: Are pets more than property?

The seminal case regarding pet ownership following a separation in Australian family law is the Full Court decision of *Grunseth & Wighton* [2022] FedCFamC1A 132.

It was a case which involved Roxy the Spoodle and the question of her rightful ownership formed part of a wider appeal in a property dispute. Part of the

appeal required the court to determine which party had the greater claim to Roxy bearing in mind that Roxy had very little commercial value. Roxy was acquired by the appellant in 2014 for the sum of $800. By 2022, Roxy was an aged dog and deemed to be of limited value in economic terms. Indeed, she did not originally appear in the list of assets to be divided. Nevertheless, each party subsequently sought an order for her possession.[10]

> The lower court had determined that although the appellant had been Roxy's registered owner who had also paid for her registration on an ongoing basis, as well as her food, vaccinations, desexing and grooming, because the dog was bought during the course of the relationship, Roxy was held to be joint de facto property.[11]

Moreover, the lower court held that the respondent had assumed an emotional attachment to Roxy to the extent that the judge at first instance came to the conclusion that justice and equity would be best served by transferring the ownership of Roxy from the appellant to the respondent or his nominee.[12] In their decision the Full Court (Alstergren CJ, Aldridge & Brasch JJ) disagreed on the basis that:

> 63. As much as it will pain pet lovers, animals are property and are to be treated as such. Questions of attachment are not relevant and the Court is not, in effect, to undertake a parenting case in respect to them.
>
> 64. If the animals have significant value, they can be valued in the usual way. Of course, as with other assets, a party may have a particular reason for wishing to keep the animal, and that can simply be dealt with in the ordinary course.
>
> 65. It is more difficult in the case of a family pet of limited financial value. If the ownership is contested there is much to be said for each party making a blind bid for the pet, with the highest offer accepted and taken into account in dividing the property.

Although Roxy was retained by the appellant, an adjustment of $800 was provided to the respondent which was Roxy's original purchase price.[13]

In *Grunseth & Wighton* the court made it abundantly clear how the court is to determine pet cases. That is, because pets are property, it is incumbent on the court not to treat such cases as though they were parenting matters.

The decision that pets do not form part of a parenting case was challenged by the husband in *Arena & Arena (No 4)* [2024] FedCFamC1F 22 before Justice Curran. The husband argued that the family pet, which had been transferred to the ownership of the wife by an order of Altobelli J on 2 July 2020, should accompany the child, X, when he was spending time with his father or as agreed between the parties. The husband maintained that the pet was an integral part of his parenting strategy around the child as it provided comfort for X's special needs. The pet not only assisted the father to manage X's challenging behaviours, but it also had significant therapeutic value for X. Hence, the husband's position was that where a pet's presence contributed to the parenting process, it gave the court jurisdiction to make orders in respect of a pet in parenting proceedings.[14]

> Justice Curran rejected the husband's application reiterating the decision in *Grunseth & Wighton* that a pet is a chattel and as such the court had no jurisdiction to deal with pets in parenting proceedings particularly as the ownership of the pet had been settled by the court three and half years previously.

Justice Curran added that even if she did have jurisdiction, she would have dismissed the

10 *Grunseth & Wighton* [2022] FedCFamC1A 132 at [52] and [56].
11 Ibid at [53].
12 Ibid.
13 Ibid at [89].
14 *Arena & Arena (No 4)* [2024] FedCFamC1F 22at [49-57].

husband's application as the parties had great difficulty in communicating or in agreeing to the most simple parenting arrangements. A spend time order involving a pet would likely have had the effect of creating additional tension and the potential for increased parental conflict between the parties which would have outweighed any benefit to the child.[15]

> Despite the ruling that pets are not to be the subject of parenting proceedings, pets do, nevertheless, and not infrequently, form a significant part of parenting cases especially where the family pet is weaponised as a means of collateral attack by one parent against the other or in the guise of coercion and control.

Three recent examples where pets have been weaponised by a parent are: *Dyne & Dyne (No 3)* [2023] FedCFamC1F 1094, *Fitzgerald & Fitzgerald* [2022] FedCFamC2F 1423 and *Bruin & Bruin (No 2)* [2024] FedCFamC2F 176.

In *Dyne & Dyne (No 3)* [2023] FedCFamC1F 1094 a 13 year old child, referred to as W, was caught up in a toxic parental dispute between his separated parents. In mid-2022 he was, in his mother's words, "falling apart". One afternoon, W dropped a heavy "block" of material on one of the family pets and killed it. W told his mother what he had done but also said that he was too scared to tell his father fearing an angry reaction. Nevertheless, his mother had insisted that he have the courage to tell his father the truth. W initially told his father that when he had come home, he had found the pet was dead. According to father's evidence W then started to run away from his mother's house because the mother had threatened to tell the truth to his school counsellor and, invariably, his friends would have found out about what he had done. When W eventually told his father the truth about how the pet died, the father blamed the mother for making a bad situation worse by insisting that W tell him what had really happened to the pet and that the ensuing delay in telling him the truth had caused W additional emotional distress. In his judgment, Justice Altobelli, was critical of the conduct of both parents, akin to another quote from Shakespeare's *Romeo and Juliet*, "A pox on both your houses."

> …[It is an] undisputed fact that W killed the pet with an object. This is concerning behaviour by a child which, in the Court's experience, likely shows how deeply distressed and mentally unstable he was, and may still be. It could not have been more obvious that W needed professional help and needed his parents to communicate effectively and handle the situation together. On both parents' versions of events, they failed to do this. The more obvious failure is by the mother when she did not tell the father what happened and instead left it up to W to disclose the information. The father failed when W disclosed the event to him and his immediate reaction was to tell W how the mother had mishandled the situation. This is yet another situation where the parties were unable to prioritise the children over their parental conflict.[16]

Later in his judgment Justice Altobelli expressed concern that:

> …Killing a pet presents, prima facie, as a violent act of cruelty, but what is not known is how that can be reconciled with what is already known about W. For example, in context, could it signal either current or future propensity toward other violent acts? Could it be part of a yet unidentified pattern of conduct? Is it a manifestation of some underlying behaviour of W? Does it mean he is desensitised to violence? Could this violence graduate into even more serious acts of violence? Could it signal exposure to historical violence in other contexts, whether in the home, or at school? What is clear is that W is a vulnerable child.[17]

15 Ibid at [57], [59] and [62-63].

16 *Dyne & Dyne (No 3)* [2023] FedCFamC1F 1094 at [68].

17 Ibid at [69].

In *Fitzgerald & Fitzgerald* [2022] FedCFam2F 1423 parenting orders had been made whereby the father could spend time with his children X and Y and that the time was to be professionally supervised at a contact centre. On one occasion, which coincided with X's approaching birthday, the father brought a two week-old, unweaned, male pet which he gave to X (a girl) as a birthday present together with a bottle of milk to feed it. According to the "Date of Contact" report prepared by the father's supervisor, although the children were initially excited with the gift, X did not want to keep the pet as the child was unsure how the pet could be transported to their home. The father responded, "It's okay, he'll sit in the car," by which he meant the mother's vehicle, adding that "he [already] thinks you're his mum." X replied, "I don't want to be his mum." X then told her father that her mother would not be happy for her to have the pet to which the father retorted that her mother would be angry with him and not with X. When X persisted that her mother would "freak out" when she saw the pet, the father's response was "she might freak out to start with, but she'll be alright." X then asked her father, "are you going to leave the pet with us?" The father answered, "Yes," then he stated, "I can predict what's going to happen and you will hear daddy laughing all the way to his place." X then asked her father if he had a towel in his car to which the father asked why. X shot back, "because he is going to piss all over the car." The father's response was, "Well guess what, it's not my car" and then he laughed. The matter ended the next day, X's actual birthday, when, to the extreme distress of X, the mother took the pet to a local vet for destruction.[18]

Finally, in *Bruin & Bruin (No 2)* [2024] FedCFamC2F 176, following separation, the mother moved to City K taking the children's pets with her without giving notice to the father or the children. She kept the pets with her for over two years, only agreeing to return them to the children at trial by way of a consent order. The Court held that it was the mother's intention to have the children live with her in City K and for that reason kept the pets in her possession anticipating a change of residence. However, the mother's withholding of the pets caused children, X and Y, considerable distress especially Y who in the family report spoke of how much she missed her pets and how her dog helped her to cope with anxiety and that without the dog her anxiety had resurfaced. X expressed concerns that the pets might be dead.[19] The children even asked their mother to return the pets as their Christmas present.[20] For her part, the mother kept telling the children that she was going to think about returning the pets to them but never did. Judge Harland concluded that the mother's conduct around the children's pets showed a

> lack of attunement and an inability or unwillingness to put the children's needs ahead of her own. The children repeatedly expressed their distress about missing their pets. Despite this, and despite the mother acknowledging the importance of their pets in assisting the children's anxiety, it was only at the trial that the mother agreed to return them despite knowing how distressed the children were and were fearful that their pets were dead.[21]

Judge Harland concluded that although the children loved their mother and wanted to spend time with her, they felt neither safe nor prioritised by her. Consequently, Judge Harland made orders that the children were at an unacceptable risk of harm if the mother was to have unsupervised time with her children.[22]

Part D: What does the future hold?

On 22 August 2024, the Family Law Amendment Bill was introduced to the Parliament of Australia. On 10 December 2024, the *Family Law Amendment Act* ('the Act') received Royal Assent and, while some amendments took immediate effect, the majority of the amendments will come into effect on 10 June 2025. Broadly speaking, the legislation is an endeavour to make clearer how property

18 *Fitzgerald & Fitzgerald* [2022] FedCFam2F 1423 at [90-91].

19 *Bruin & Bruin (No 2)* [2024] FedCFamC2F 176 at [134-135].
20 Ibid at [137].
21 Ibid at [211, 4].
22 Ibid at [211. 5].

and financial relations of parties are to be divided following the breakdown of a marriage or de facto relationship in the context of behaviour that could constitute economic or financial abuse of a family member. This is to include unreasonably denying a family member the financial autonomy that the family member would otherwise have had such as controlling the family member's money or assets, sabotaging the family member's employment or income potential and accumulating debt in the family member's name without their knowledge. Other areas for the court to consider include (a) whether a party has unreasonably withheld financial support needed to meet the reasonable living expenses of the family member, or the family member's child; and, (b) coercing the family member through physical or emotional or psychological abuse particularly in the context of the practice of dowry.[23]

> This incorporation of family violence into the current legislation regarding alteration of property interests, has also introduced a new category of property interest referred to as the companion animal.

The Act defines a companion animal as

> an animal kept by the parties to a marriage or either of them, or the parties to a de facto relationship or either of them, primarily for the purpose of companionship, but does not include:
>
> (a) an assistance animal within the meaning of the *Disability Discrimination Act 1992*; or
>
> (b) an animal kept as part of a business; or
>
> (c) an animal kept for agricultural purposes; or
>
> (d) an animal kept for use in laboratory tests or experiments.[24]

The Act does not, however, elucidate as to the meaning of "companionship", but the *Macquarie Dictionary* defines the word as one of "fellowship" and "association." The Act specifically excludes working animals such as guard dogs or sheep dogs as companion animals. One explanation for this might be that if an animal can be categorised on a tax return form as a deduction, then the reason for keeping the animal cannot be primarily for the purpose of companionship.

The Act has also provided the court with additional powers under new ss 6 and 7 which have been added to s 79 (married couples) and s 90SM (de facto couples) of the *Family Law Act 1975* which are identical in construction.

> Considerations relating to companion animals
>
> (6) In property settlement proceedings, so far as they are with respect to property that is a companion animal, the court may make an order (including a consent order or an interim order):
>
> (a) that only one party to the marriage/de facto relationship or only one person who has been joined as a party to the proceedings, is to have ownership of the companion animal; or
>
> (ab) that the companion animal be transferred to another person who has consented to the transfer; or
>
> (b) that the companion animal be sold.
>
> The court may not make any other kind of order under this section with respect to the ownership of the companion animal.

This subsection, in conjunction with the meaning of companion animal, removes the often-cited notion that to whom the animal is registered is by default the presumptive rightful owner of the animal. Instead, this subsection clearly places the companion animal as joint property of a marriage or a de facto relationship. As to who subsequently becomes the post-separation owner of the companion animal needs to be measured against

23 *Family Law Amendment Act 2024* at 4AB(2)(2A).
24 Ibid s 4(1)

the criteria contained in s 7:

> (7) In considering what order (if any) should be made under this section with respect to the ownership of property that is a companion animal, the court is to take into account the following considerations, so far as they are relevant:
>
> (a) the circumstances in which the companion animal was acquired;
>
> (b) who has ownership or possession of the animal companion;
>
> (c) the extent to which each party cared for, and paid for the maintenance of, the companion animal;
>
> (d) any family violence to which one party has subjected or exposed the other party;
>
> (e) any history of actual or threatened cruelty or abuse by a party towards the companion animal;
>
> (f) any attachment by a party, or child of the marriage/de fact relationship, to the companion animal;
>
> (g) demonstrated ability of each party to care for and maintain the companion animal in the future, without support or involvement from the other party;
>
> (h) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

The companion animal subsections contained in the Act would, in all probability, not provide much in the way of relief in *Dyne* type cases where the pet has been killed or in *Fitzgerald* type cases where one parent tries to offload the pet onto the other parent. However, in *Bruin* type cases where one parent endeavours to use the family pet for tactical advantage in the FCFCOA, the new legislation empowers the court to make decisions about who should get the family pet in an efficient and timely manner. Although family pets are still relegated to a category of property, companion animals as they are now to be known, nevertheless, are to have an elevated status and one which is distinct from that of a jointly owned refrigerator, dining table or lawnmower.

VALE: AUSTIN ASCHE AC KSTJ KC

In the words of Ian Kennedy AM

A piece of the history of family law in Australia ended with the death of the Hon Austin Asche on 14 December 2024 at the age of 99.

> Keith John Austin Asche (always Austin) was the second judge, after foundation Chief Judge Elizabeth Evatt, appointed to the newly-formed Family Court of Australia in 1975, heading the Melbourne Registry for its first decade and acting as Chief Judge from 1985 to 1986.

Austin was born in New Guinea and spent his early years in Darwin before coming to Melbourne for his secondary and tertiary education. Graduating BA, LLM from the University of Melbourne after wartime service in the RAAF. He joined the Victorian Bar where he established a thriving practice under the *Matrimonial Causes Act*, taking silk in 1971. His Darwin childhood left him with a deep and abiding love of the Territory, which was to play a major role in his post-Family Court life and career.

The early days of the Family Court were a pioneering period. It was a new court with new legislation and rules which had to be considered, interpreted and applied against a background of the freshly-introduced concept of no-fault divorce (a huge and controversial departure and transition from the previous fault-based legislation). No one had any better knowledge than anyone else, and everyone—judges, lawyers and administrators—worked collaboratively to facilitate the introduction and operation of the Court, a process in which Austin's collegiate approach and personality were fundamental.

As a judge, Austin was fair, courteous and patient with litigants, recognising the stress of the Family Law environment. The Act was new, with no guidelines as to its interpretation, so almost every case threw up issues requiring determination—with Austin's early judgements covering a range of novel issues as diverse as the transition from the Supreme Court-administered Matrimonial Causes regime to the new Court (including the power of the Family Court to determine a divorce application where proceedings for ancillary relief were pending in the Supreme Court; the criteria for the transfer of proceedings between the two Courts; and the power of the Family Court to vary Supreme Court maintenance orders); the public interest principle of open court; the power of the Family Court to order the sale of assets; the importance of non-financial contributions to property; the weight accorded reduction of earning capacity resulting from the marriage; and the role of the child's appointed legal representative—and at appellate level the impact of conduct during the marriage on property division; the ambit of a trial judge's discretion; the correct approach to determination of lump-sum maintenance; The nature of the Family Court's appellate powers; the meaning of "just and equitable"; the basis of voidability of a consent order; and the role of natural justice in Family Court proceedings.

Having played a seminal role in guiding the Family Court through its foundation years, Austin then took the opportunity to act on his long-held desire to return to the Northern Territory, initially taking up a position on the Supreme Court and then as Chief Justice and, following his retirement from the Court, as Administrator of the Northern Territory.

> Throughout this period and beyond, Austin and his wife Dr Val Asche AM—an esteemed microbiologist who continued her research work in Darwin with a particular emphasis on diseases prevalent in the northern parts of Australia—made extraordinary contributions to the Territory, its life and its academic and other institutions over several decades.

On a personal note, I first encountered Austin as an articled clerk when my firm instructed him to draw and settle our petitions and appear in Matrimonial Causes matters in the Supreme Court of Victoria. The fault-based nature of the jurisdiction meant that clients were often embarrassed and ill-at-ease having to confront and share with their legal advisers (and ultimately the Court) deeply personal events in their lives. Austin's calm, urbane and nonjudgemental manner did much to the ease process for them, as did the clarity and practicality of his advice. I learned much from him about client management and drafting (it being a moment of great pride whenever a petition I had drafted was sent to him for settling and came back with the tick of approval).

> In 1975, with the *Family Law Act* about to come into effect, I was asked to teach it as a new component in the still-nascent Leo Cussen practical training course with Austin and John Fogarty (both of whom were very shortly afterwards appointed to the court) guiding me in its development, and again gained great benefit from their experience and knowledge at an early stage of my career.

In 1977, I became foundation President of the Family Lawyers Association of Victoria, formed as a forum for solicitors and the bar to liaise and work together with each other and the court, an initiative very actively supported by Austin and the Melbourne judiciary as we all found our feet in the new world of family law created by the Act.

After Austin and Val moved to Darwin they would have an annual visit to Melbourne, and host a function at the Savage Club for their Melbourne friends—a natural environment for Austin with his love of literature and Australian poetry and his ability to engage an audience with a rendition of *The Man from Snowy River* or other verses. This was always a wonderful opportunity to keep in touch, as was their hospitality, including at Government House, on occasions when I found myself in Darwin.

> Austin was a renaissance man, and his contributions throughout his lifetime to the law and public life were many and varied—but none of them more important than his contribution to the establishment and early development of the Family Court. His life and work are truly worthy to be honoured and celebrated.

VALE: BARBARA MARY PHELAN

In the words of Cath Devine

Barbara Phelan was admitted to practice on 30 March 1989 and was called to the Bar on 31 May 1990, reading with Andrew Crozier-Durham RFD. Barb was a registered nurse before studying law in her 30s. Barb's diligence is best shown by the fact she completed her law degree whilst raising three small children.

> Barb primarily practiced in family law, and was also a Member of the Victorian Racing Appeals and Disciplinary Board. Barb loved horse racing, spending hours in chambers reviewing the form guide and the pedigree of different thoroughbreds. She enjoyed golf, travel and Geelong Football Club—not necessarily in that order.

At the Bar, Barb was well known as a fierce and formidable advocate for her clients, going above and beyond to protect and advance their interests. She was briefed for her careful preparation and zealous cross-examination techniques.

> Barb's opponents always knew they had a fight on their hands. Barb's intelligence and wit commanded the respect of the judiciary and her colleagues. In contrast to her Court persona, Barb was a kind, devoted and loyal friend.

Barbara Phelan

Barb had three readers—Richelle Sherman, Cath Devine, and Judge Jennifer Howe. She remained a mentor to them well beyond their readers' period, and relished in their success.

Barb retired in 2018 after 28 years at the Bar.

Barb's first passion was always her family. Barb was married for over 50 years to her beloved husband Pierce. Barb often spoke of her love for her children: Kathleen, Bridget and Conor, and their spouses. Barb doted on her four grandchildren, Cara, Nell, Callan and Thomas.

VALE: THE HONOURABLE JOHN GERALD BARLOW

In the words of the Honourable Rodney Burr AM

On the morning of 8 May 2025, one of the original members of the Family Law Committee, the forerunner to the Family Law Section, the Honourable John Gerald Barlow, passed away.

> John was born in Western Australia and received a Bachelor of Laws degree from the University of Western Australia in 1966. He was admitted to practice in December 1968, and his professional career commenced in 1967 when he was articled with *Ilbery Toohey & Barblett*.

He served articles with the Honourable Alan Barblett AO, former Chief Judge of the Family Court of Western Australia (FCWA) and Deputy Chief Justice of what was then the Family Court of Australia (FCA). He became a partner of the firm in 1972, and senior partner in1978—the firm then renamed *Ilbery Barblett & O'Dea*—before forming the firm *Holden Barlow* in 1987 with another former Chief Judge of the FCWA, the Honourable Michael Holden.

John remained at *Holden Barlow* until 1988, when he was appointed to the District Court of Western Australia, where he served as judge for the next 10 years, presiding over the general jurisdiction. From his appointment to the District Court bench, he earned the respect and admiration of the profession, proving to be equally adept at presiding over both civil and criminal matters.

> John was known for his politeness to counsel and witnesses and for approaching all matters with great sensitivity and understanding of the human condition; qualities that would serve him well when, on 9 February 1998, he was appointed as a Judge of the FCWA.

His involvement in family law early in his career resulted in a great appreciation of the importance of the FCWA's jurisdiction. In June of that same year, he was granted a simultaneous commission as a Judge of the FCA, without having relinquished his District Court judge commission. He retired in all three capacities on 11 February 2005.

> In addition to his judicial duties, John also made a substantial contribution to the legal community through his participation as a member of a significant number of committees, including, the Family Law Committee of the Law Council of Austraila, the Costs Committee, the Legal Aid Committee, the Ethics Committee, the Equal Opportunities Committee and the Courts Federal Committee of the Law Council of Australia.

As a member of the original Family Law Committee of the Law Council of Australia, John was effectively a foundation member of the Family Law Section. He was also a prominent and active member of the Family Law Practitioners Association.

> John was known for his subtle sense of humour, his meticulous work ethic and his love of travel, food, wine, and photography. Some of his functions at the "Soap Factory" and his performances at discos bear the hallmarks of legend status.

John is survived by his wife Sheila and his children Cate, Lizzie, Michael and Jo.