Start at the beginning

The Hon. Justice Michael Jarrett
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Introduction

Have you ever wondered about how judges go about writing their decisions? The idea for this discussion came to me after receiving a call from a newly admitted barrister who had been admitted to practice in the United Kingdom before coming to Australia. She told me of a practice whereby new members of the bar were given the opportunity to shadow a judge for a month or so. During that period, the reader saw how the judge went about his or her task of deciding cases. According to counsel, it was an illuminating experience.

Having asked a few of you about your understanding of how judges go about deciding a case, it became apparent that it was a mysterious subject. Indeed, unless you have had the advantage of being a judge's associate, I would expect that very few of you will have given the issue much thought. Certainly, at the time of my appointment to the Federal Magistrates' Court (as it then was) it was not something to which I had given a great deal of thought. Despite the exhortations at the Bar Practice Course that when preparing a case for trial, counsel should construct a draft judgment that might form the framework around how a case would be run and which should go some way towards assisting the judge to produce a coherent set of reasons, those exhortations did little to explain the practicalities of judicial decision-making.

Before going further, it is necessary to begin with some disclaimers. *First*, this discussion is directed to primary decision making following a trial or an interlocutory application in the Federal Circuit and Family Court of Australia (Division I) and Federal Circuit and Family Court of Australia (Division 2). It is not directed to decision making on appeals or decision-making in administrative tribunals, although much of what I say could be applied in the latter.

Second, just like snowflakes, no two judges are the same. We are each precious and unique in our own special ways. And just as different judges may come to different decisions on any given set of facts, especially in areas of discretionary decision-making such as that under the Family Law Act, there is no single way that judges go about constructing and writing their reasons for decision and reaching their conclusions in a case. Pick up any volume of any series

of law reports and you will see various judgment writing styles which must necessarily be the product of different ways of approaching the task of making a decision. Indeed, I know of one former judge who would write his judgments in sonata form. He liked to have a thematic and harmonic organisation of materials presented in an exposition, elaborated on and contrasted in a development and then resolved harmonically and somatically in a recapitulation. Sometimes added to that was an introduction and a coda. I suspect he would much rather have been a professional musician than a lawyer.

So, what follows is my attempt to describe to you how I go about the judicial decision-making task. It is just one judge's approach. It is my intention to focus upon the practical rather than the theoretical, which brings me to the third limitation. Time does not permit of any significant discussion of the great many factors that are said to impact upon judicial decision-making. Factors like heuristics and cognitive biases, professional motivations or a judge's personal characteristics like gender, race and ethnicity, age and experience, religion or politics might all have their part to play. You can add to that list a litigant's gender, age and ethnicity, sexual orientation and other characteristics. All of these things have been demonstrated to have an impact upon judicial decision making, for better or for worse. For more reading about these matters, you might care to look at *How Judges Judge – Empirical Insights into Judicial Decision-Making*, by Brian M Barry. The impact of personal characteristics, on both sides of the bench, are interesting matters. Each would lend themselves to their own session.

To many of you, none of what I am about to say will be surprising. However, I hope that nonetheless you find it helpful in organising your thoughts when it comes to preparing cases for trial.

Start at the beginning

It sounds obvious, but when deciding a case, I start at the beginning and the beginning is *always* to ask myself: "What am I being asked to do?" Not in some general way, but by reference to the outcomes sought by each of the parties. At this point, it is necessary to draw a distinction between the *issues* in the case and the *outcomes* for which each party contends. As those of you who have sat in my courtroom will know, I prefer to describe the orders sought by the parties as the *outcome* of the case as opposed to the *issue* or *issues* in the case. Although broadly speaking one might describe the difference in competing outcomes as an issue, I prefer

to reserve the use of the term *issue* for questions of fact or law which need to be resolved to arrive at the *outcome* in the proceedings. It avoids confusion (for me at least).

Generally speaking, the court's only function is to resolve justiciable controversies between the parties to the proceedings before it. It has no general licence to embark upon a roving enquiry into matters that might be related to the issues parties are trying to agitate in the proceedings, or indeed into the welfare of a child or children generally. Nonetheless, under the Family Law Act, the court does have a role in granting relief or making orders where no real controversy exists (for an example see s.60G of the *Family Law Act 1975* (Cth) -leave for proceedings to be commenced for the adoption of a child). But, by and large, the purpose of a judge is to resolve justiciable controversies.

Now you might think that the best way to figure out what the court is being asked to do is to look at the orders each of the parties is seeking. After all, orders and judgments are the manifestations of the Court's exercise of its jurisdiction and powers to quell justiciable disputes between parties. My first step is always to compare the orders that are being sought by each of the parties. It is through the orders they seek that each of the parties reveal the outcome that they seek in the case. On more than one occasion when I have done that exercise it has become apparent that the difference in outcomes and in respect of which a decision is required is quite narrow. I derive great assistance from clearly drawn orders that properly reflect the outcome sought by a particular party. I am here referring to the orders sought at the conclusion of a hearing. As we all know, the orders sought by the parties often change over the course of proceedings and over the course of a trial.

I have had one or two cases over the years where an Independent Children's Lawyer has not proffered any orders, preferring to leave the formulation of orders to the parties and the court. That is inappropriate and a failure to discharge the duty cast upon an ICL by ss.68LA(2)(a) and 68LA(3) of the Act.

You may encounter the situation where your client's desired outcome cannot be achieved by orders that can be made by the court because the court has no jurisdiction to make the orders that are being sought, or the orders are not within the court's power. In that circumstance, it is your duty to manage your client's expectations so that you are not asking the court to make orders that it cannot or should not make. The family law courts are statutory courts established by the Commonwealth Parliament. They are not courts of unlimited jurisdiction. Their

jurisdiction must be conferred by some Act of Parliament. In the case of family law that Act is the Family Law Act.

If you ask the court to make an order, you must ensure that the order that is being sought is *first*, within the court's jurisdiction and *second* within the court's power. The first is usually easily answered and in the great majority of cases will warrant no more than a moment's thought. But an application for property adjustment orders, for example, requires some thought because of the special rules around jurisdiction in such cases. If those rules are not met, even the consent of the parties will not confer jurisdiction upon the court to make an order: see for example *Horrigan & Jennings* [2015] FamCA 923.

The second enquiry can sometimes be a little more problematical: see for example *Yannes & Judkins* [2019] 59 Fam LR 527 and *Shaw and Shaw And Anor* [2016] FamCAFC 159 esp. at [81] and following. Moreover, just because an order is within the court's jurisdiction and it has power to make the order does not necessarily follow that the court will make the order even if all parties to the proceedings consent.

Having satisfied myself that there is a justiciable controversy between the parties within the jurisdiction of the court that can be quelled by orders the court has power to make and having analysed the orders sought by both parties, I generally arrive at a point where I have two (or three) competing orders or sets of orders to be considered.

Sometimes a difference in outcomes is more apparent than real and what is in fact holding the parties apart are questions of form over substance.

So the first task I set myself when deciding a case is to clearly delineate the differences between the outcomes that are contended for by each of the parties or, if the case is not one involving a dispute between parties but the exercise of some other curial jurisdiction, just what orders or declarations or other relief I am being asked to give.

What do I have to decide

At this point, it is time to start considering the *issues* that might need to be resolved to reach a conclusion about an appropriate outcome. As you know, issues can be questions of law, questions of fact or a mixture of both. Sometimes discerning one from another is difficult. But the role of issue identification is central to the decision-making process. An identification of the relevant issues of fact or law and a resolution of them is central to determining an outcome.

Were it otherwise, the determination and pronouncement of an outcome would be an arbitrary process with little connection to the cases advanced by either party.

The role played by the parties and their advisers in identifying relevant issues is critical and cannot be understated. There is an obligation on the Court, parties and their advisers under the *Federal Circuit and Family Court of Australia Act 2021* (Cth), the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 and Part VII of the Family Law Act to identify and refine the issues in a case. Additionally, the *Central Practice Direction – Family Law Case Management* requires parties and their advisors to identify the real issues in a case.

That is a concept reinforced *ad infinitum* within the text. It is in the document's purposes:

> 1.4 […] In everything they do, parties and lawyers are expected to approach proceedings in a manner directed towards identifying the issues in dispute and ascertaining the most efficient, including cost efficient, method of resolution or determination. This includes giving proper consideration to identifying the issues in dispute, complying with their obligation to provide full and frank disclosure in a timely manner (see Part 6.1 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) (the Family Law Rules)). […] At all stages in the proceedings, parties must avoid filing evidence that is unnecessarily lengthy or only of limited relevance to the issues genuinely in dispute. […]

It is central to both principles 8 and 9 of the Core Principles which the document enshrines:

> 3.13 [Core principle 8]: Issues in the case are to be narrowed to those issues genuinely in dispute. […]
>
> 3.14 [Core principle 9]: Parties and their lawyers are to be familiar with the specific issues in the case and be fully prepared for court events and the final hearing in a timely manner. […]

I first like to consider if any issues of law arise or are likely to arise in the case. Usually there are none. The law under the Family Law Act is relatively well-settled, although that is not to say that issues of law can never arise. We all relish the idea that a case we have, either as practitioners or as a judge, harbours somewhere within in it, a deep and esoteric question of law, the answer to which will not only shine a light on the path out of the mire in the case at hand but also assist thousands of others who are also wallowing in that same mire. As Spigelman CJ pointed out in his *Address on the retirement of James Wood* (given in Sydney

on 31 August, 2005), amongst lawyers generally, there is an intellectual snobbery which accords higher status to legal reasoning and the resolution of questions of law than to more mundane aspects of cases and decision making. But as the then Chief Justice pointed out, that is not so. The most important job done by judges is the resolution of factual issues – the finding of the facts of a case.

Sadly, the truth is that, at least in family law, real questions or issues of law are nowadays rare. The real work to be done by a trial judge is fact finding – described as the "labour on the factory floor of the judicial system": Ipp J, *Problems with Fact-finding* (Speech to the Winter Conference of the New Zealand Bar Association, Queenstown, 2 September 2006). That is especially so in family law. In his farewell speech delivered on the occasion of his retirement from the Family Court of Australia on 31 March, 2010 the Hon. Bernie Warnick described the lot of a judge as "a job of discipline and often dour application". Later in that speech, speaking in relation to the need for a superior court in the area of family law, he said:

> "… though some hold the view that because a field of law is largely discretionary, it is easier than those in which there is formulaic application of principle. This is not so. In many family disputes, the determination of relevant facts is often such a lengthy exercise that this, alone, requires a high level of skill and concentration. The need to properly identify and determine the issues joined by parties who do not plead material causes of action and then to dispose of those issues supported by a reasoned judgment in a way consistent with values, at least implicitly accepted through the way the parties ran their cases, consistently with what emerges from precedent and in accordance with the Act, would, in certain types of cases, require the judicial skills of a superior court."

The facts…and just the facts

Fact finding, or the resolution of issues of fact is critical. Much has been written on the topic of fact finding by judges. There are innumerable texts, essays and papers on the topic. As those manuscripts show, the question of how judges go about finding facts in cases could be the subject of many sessions like the present. Time simply does not permit of a full exploration of that topic. However, a couple of short matters should be noted.

In his paper *The Methodology of Judging* (1994) 1 James Cook UL Rev 135, the Hon. Jim Barry observed:

> "It is quite extraordinary the extent to which litigants will exhaust themselves on disputed facts which have little relevance to the overall issue. In most instances, such disputes are found to be immaterial and may safely be left unresolved by the trial judge. A cautious judge would normally advert to the fact that he has found such issues irrelevant and has deliberately not attempted to resolve such conflict."

Times have not changed. Litigants still exhaust themselves on disputed facts which have little relevance to the outcomes that need to be determined by the court. That maelstrom of disputed facts is a distraction and requires a judge to undertake the time-consuming task of determining which of the disputes of fact need to be resolved and which do not. Master Evan Bell, Queen's Bench and Matrimonial Divisions, Royal Courts of Justice, Belfast in his essay, *An introduction to judicial fact-finding*, Commonwealth Law Bulletin, (2013) 39 Commonwealth Law bulletin, 519 drew attention to statements by Megarry J in his paper entitled *Law as Taught and Law as Practised* (1966) 9 JSPTL 176, as follows:

> "Megarry J has suggested that a judge spends a large part of his life in identifying and in provisionally discarding the irrelevant. He provisionally throws away most of the facts, examining the remainder with a microscope. Nevertheless, the throwing away is provisional because every now and then a discarded fact is suddenly seen to be of great value."

My own practice is to start by considering the issues identified by the parties in the case outlines, if any, and in their submissions at the conclusion of the case. They are the best places to obtain information from which one can form at least a broad preliminary overview about the issues of fact that will need to be resolved to derive an outcome of the case. In most cases, these issues are expressed by the parties and their documents as conclusions for which they contend. Nonetheless, it can be helpful at this point to state the issues in broad terms such as "Does a risk of physical harm to the children exist because they will be exposed to abuse or violence in one or other of their parents households?" Another example might be "Is there a dispute of fact about the property owned by the parties at the commencement of their relationship?"

But this is only a generalised starting point. Findings about conclusions of fact are or no benefit without findings about the facts that underpin those conclusions.

In most cases there are, to the surprise of some, a great many uncontested facts. A close analysis of the parties' affidavits and evidence in cross-examination will often reveal that what

is seemingly a disputed fact is not that at all, but simply each party putting that fact in their own way. The starting point is to identify the agreed uncontested facts and those which can be wheedled out of the evidence. Not all of these facts will find their way into reasons for decision but it is necessary to identify them to determine whether they are relevant or can be safely discarded. Those that have a bearing or a potential bearing upon the broad issues identified earlier can be retained at this point.

Dealing with the events said to be relevant in a case chronologically helps reveal the issues of fact that need to be determined. It also helps keep a sense of order to the reasoning process. Comparing one party's evidence about an incident said to have occurred on a particular occasion with the evidence of the other will generally expose whether there is an issue of fact that needs to be determined. One hopes that these issues of fact are both relevant and when resolved provide the factual substratum that will lead to a resolution of the broader conclusory outcomes contended for by the parties.

In practice, comparing what one party alleges occurred on a particular occasion with what the other party alleges occurred is not so simple. That is because, often, what is said to be evidence is in fact not. Rather it is opinion or conclusion: "he abused me" or "she spent the money she received for her own purposes" instead of evidence of what, in fact, happened. "Evidence" given in the form of opinions, conclusions or speculation which is properly characterised as assertion is not evidence upon which the court can make findings of fact.

One can see why it is that parties present their cases in such a way. The statutory framework against which cases are decided, whether they be parenting cases or property cases, requires the court to take into account various matters. Those matters are stated in a general way in the Act (see s.60CC generally and s.79(4) generally) and invite the court to reach factual conclusion about them.

It is immeasurably helpful to receive a list of the findings of fact for which a party contends in a case. It is not a list that I often receive and, having directed the preparation of such list on many occasions, I can say that it is rarely done in any useful way. Practitioners tend to confuse findings of fact with argument, submission and conclusions of fact for which their party contends rather than the facts themselves. I have often thought that a useful procedure to adopt in matrimonial cases is to have the parties prepare a statement of agreed facts given that, despite outward appearances, much of the factual matrix of the case is often not in dispute. Maybe I

will start making such directions and limiting evidence-in-chief to those facts which are truly in issue.

The resolution of the facts that are genuinely in issue between the parties and which are relevant to the statutory task that the court has to perform is next on the agenda. As I have said above, much has been written about judicial fact-finding. Perhaps the most comprehensive collection of those writings is to be found in Master Bell's paper *An introduction to judicial fact-finding* that I referred to a moment ago. In that paper, Master Bell collects the various matters and techniques that might be utilised by a judge to find the facts of the case. I will refer to them shortly but first, the passage which introduces Jim Barry's article, extracted from a paper authored by Wells J, Supreme Court of South Australia, *The Finding of Facts*, (1983) Canberra Judicial Conference neatly, with respect, sums up the position:

> "Finding facts is not based on technique, or, indeed, upon precepts or principles of any kind; it is based on a judge's essentially personal and human qualities of judgment of character, temperament, and reliability, of wisdom, of sympathy and understanding, combined with hard work and concentrated thought - in short, on the faculties, qualities, skills, and experience, that make a juror a good juror...."

A finding in relation to a disputed fact necessarily requires a judge to accept one witness's version of that fact over the version of the other witness or witnesses. To say that the task is accomplished by simply accepting the evidence of one witness over the other or others masks the complexity involved in the fact-finding process. Many factors, both conscious and unconscious are brought to bear on that process. I referred to the unconscious factors that might be present at the commencement of this paper. As to the matters that a judge might consciously bring to bear to determine a factual dispute, a useful list of those matters can be found in the essays by Master Bell and others such as the Hon. Jim Barry and Wells J. Those matters will include the following:

- a witness's objective reliability;
- the internal consistency of witness's evidence;
- the consistency of the witness's evidence by reference to the objective facts proved independently of that witness's testimony;
- a witness's truthfulness or veracity;
- a witness's demeanour;
- motive;

- inherent improbability; and
- character.

I will briefly say something about each of these matters.

A witness's reliability concerns his or her ability to observe or remember the events that he or she is reporting. Questions concerning the witness's opportunity to gain the knowledge about which there giving evidence, their memory and the circumstances in which the observations about which they are testifying took place all bear upon the reliability of that witness's testimony. Reliability is not necessarily truthfulness and a witness can be saying what he or she genuinely believes to be true but, because of difficulties arising from the circumstances in which they made their observations, or experienced the relevant event, the reliability of their testimony is low.

Highlighting the internal inconsistencies in a witness's evidence is a common way in which advocates seek to persuade a judge to disregard the testimony of that witness on a particular point. It is a common way in which judges are able to justify disregarding the testimony of a witness on a particular point. Identifying and highlighting those inconsistencies is a useful way to demonstrate a witness's testimony is either untruthful or unreliable.

However, witnesses have faulty memories and sometimes their evidence is genuinely mistaken and so care must be taken not to treat an internal inconsistency as determinative. Equally as important, indeed some suggest more important, is a comparison of the witness's testimony to other objective facts proved independently of the witness's own evidence. Again, a common technique seen in the courtroom especially by reference to documents that might tend to contradict the oral or written testimony of the witness. Inconsistency with external facts is also a useful, and often compelling way, to demonstrate that the witness's testimony is either untruthful or unreliable.

Much has been written about the usefulness of demeanour in assessing the credibility of a witness. The modern approach is to eschew reliance upon demeanour as an indicator of reliability or truthfulness. Truthful witnesses can be nervous, anxious and intimidated by the courtroom. Witnesses who set out to deceive and be untruthful can be calm, coherent and collected. A conman is likely to be a conman irrespective of the setting.

There is an interesting research paper by Mr Blake McKimmie and others from the University of Queensland who carried out some research into the extent to which mock jurors were

influenced by the strength of a witness' testimony: Blake M. McKimmie, Barbara M. Masser & Renata Bongiorno (2014) *Looking Shifty but Telling the Truth: The Effect of Witness Demeanour on Mock Jurors' Perceptions, Psychiatry, Psychology and Law*, 21:2, 297-310, DOI: 10.1080/13218719.2013.815600. Mock jurors were given some background information concerning a robbery and then watched an eyewitness to the robbery give evidence. The evidence was given by a witness who displayed stereotypical deceptive behaviour while giving evidence. The mock jurors could see the witness and the results were as expected – the jurors demonstrated that when the witness appeared to be deceptive due to non-verbal behaviours, they were less influenced by the strength of the evidence compared with when the witness appeared to be non-deceptive. The study was repeated, this time with the witness giving evidence by audio-visual or audio only means. The removal of the jurors' ability to see the witness resulted in a more accurate assessment of the evidence.

The conclusion from the research was that where evidence was given in person in front of the jury, there was the tendency for the jury to be distracted by matters which inaccurately depict deception such as body language and demeanour. That translated into an inaccurate assessment of the witness's evidence. Without being distracted by matters such as body language and demeanour, the jury was able to focus on the content of the evidence and make a more accurate assessment as to its accuracy having regard to matters such as its internal consistency.

Applying the facts to the law

Once the fact-finding expedition has been undertaken and I have made findings about disputed matters of fact that are relevant it is necessary to then apply those facts to the legal framework against which the case must be judged.

At that point, I returned to the broad generalised issues identified earlier to determine whether any of the facts as found permit of the conclusions contended for by either party. For example if I was considering whether there was a need to protect a child from physical harm by reason of being exposed to abuse, I would review the factual findings that I had made relevant to that general issue and decide whether I can reach the conclusion contended for by one or other of the parties. This step involves a number of subsidiary steps such as identifying the nature of the abuse of which the child is said to be at risk and making findings about whether the risk exists at all and, if so, the magnitude of that risk.

In a property adjustment case for example, it is at this stage of the process where assessments are made about the weight to be given to the respective contributions said to have been made by each of the parties and what adjustments there might be to those contributions is assessed by reason of the matters set out in s.79(4)(d), (e), (f) and (g) of the Act.

Leaving aside the important work to be done in submissions in relation to the earlier process of fact-finding, at this point the parties submissions are of vital interest. It is hard, sometimes, to avoid the feeling that practitioners see submissions as somehow unimportant and that once the evidence is before the court, it is up to the court to sort out the outcome. For my part, I am always anxious to receive good, useful submissions at the conclusion of a case. I have a preference for oral submissions, or an outline of submissions supplemented by oral submissions for a number of reasons, including brevity, immediacy and because it presents an opportunity for discussion that might arise from the submissions. Whatever method is adopted, the power of good, well delivered submissions should never be underestimated.

The orders

At this point, I return to the orders sought by each of the parties with a view to determining the orders that ought to be made.

It is worth bearing in mind that when exercising jurisdiction under the Family Law Act, the court is not bound by the orders sought by either of the parties (or the independent children's lawyer if there be one) but is free to construct appropriate orders should it see the need to do so, subject of course to the court's obligation to hear the parties in respect of those orders should they differ significantly from the orders sought by one or other of the parties. In addition to the orders sought by the parties in parenting cases, where there is an order for equal shared parental responsibility the court is obliged to consider the matters required by s.65DAA(1) and s.65DAA(2) of the Act, and subject to that consideration, where the parties' proposals have the capacity to adequately meet the best interests of the children, the court is not obliged to put forward its own proposals: cf. *Whisler v Whisler* (2010) 42 Fam LR 633, 643.

Conclusion

Judicial decision making requires an appreciation of what the Court is being asked to do by reference to the explicit terms of the orders it is asked to make. Approached logically, it

requires the decision-maker to consider his or her jurisdiction and power to do what is asked, then the legal framework within which the relief is being sought. Identification of the facts of the matter, including critically, fact-finding where the facts are in dispute is necessary so as to provide the context for the application of principle in the case at hand. The relief to be granted following that process usually informs itself.

Practitioners can assist a judge's decision making by:

- ensuring that the outcome for which their client contends is realistic and can be delivered by explicit orders that the court has power to make;
- identifying early in a trial or application, any common ground and uncontentious facts;
- identifying and stating explicitly (preferably in writing), with a high degree of precision, the critical findings of fact contended for by that party;
- identifying the factors that will impact upon the court's fact finding in relation to those contested facts; and
- providing in submissions, a clear path to the relief for which that party contends.