

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

CDJ

APPELLANT

AND

VAJ

RESPONDENT

CDJ v VAJ (S32-1998) [1998] HCA 67
22 October 1998

ORDER

1. *Appeal allowed.*
2. *Set aside Orders 2, 3, 4, 6, 7 and 8 of the Full Court of the Family Court of Australia and, in lieu thereof, order that the appeal to that Court be dismissed in so far as it relates to issues of residency and contact.*
3. *The parties have liberty to file, within 14 days of the date of this Order, written submissions with respect to the making of orders concerning the alteration of property interests and whether Order 1 made by the Full Court should be set aside.*
4. *The parties have liberty to file, within 14 days of the date of this Order, written submissions with respect to the order for costs in this Court and the Full Court and the granting of certificates pursuant to the Federal Proceedings (Costs) Act 1981 (Cth).*

On appeal from the Family Court of Australia

Representation:

D M J Bennett QC with T L P Hodgson for the appellant (instructed by Barwick Boitano Lawyers)

D F Jackson QC with P Hanna for the respondent (instructed by Mark Phillip Symonds)

Intervener:

P I Rose QC with R Flohm for the children's representative (instructed by Terence Murphy, Solicitor, Legal Aid Commission of New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

CDJ v VAJ

Family law – Appeals – Appellate jurisdiction of Full Court of the Family Court of Australia – Parenting orders made pursuant to *Family Law Act* 1975 (Cth), s 64B – Principles to be considered in appeals concerning parenting orders – Whether different to principles requiring consideration at first instance.

Family law – Appeals – "paramountcy principle" in *Family Law Act* 1975 (Cth), s 65E – Best interests of a child – Relevance to decision whether or not to admit further evidence or set aside orders of primary judge in appeals concerning parenting orders.

Family law – Appeals – Discretion of the Full Court of the Family Court of Australia to receive further evidence on appeal – Statutory origins of the discretion – Relevance of common law principles governing admission of fresh or further evidence.

Family law – Appeals – Discretion of Full Court of the Family Court of Australia to receive further evidence on appeal – Extent to which limitations imposed by terms of conferring statute – Principles governing exercise of discretion – Whether discretion improperly exercised.

Evidence – Taking opposing party by "surprise" at trial – Whether late-filed affidavit material gave rise to "surprise" meriting an order for retrial.

Family Law Act 1975 (Cth), ss 64B, 65E, 93A.

Wollongong Corporation v Cowan (1955) 93 CLR 435, considered.

1 GAUDRON J. This is an appeal from a decision and orders of the Full Court of the Family Court of Australia¹. The appellant and respondent are the father and mother, respectively, of three children. The children were referred to in the reported decision of the Full Court as "B", "C" and "D". It is convenient to refer to them in the same way in these reasons.

2 The Full Court allowed an appeal by the mother and, in consequence, set aside orders made by Baker J on 14 March 1997. His Honour had ordered that two of the three children, namely, C and D, reside with their father. Other consequential orders were made but it is not necessary to make further reference to them.

3 The decision of the Full Court was based, in significant part, on evidence admitted by it pursuant to s 93A(2) of the *Family Law Act* 1975 (Cth) ("the Act"). The Full Court did not, itself, determine the outstanding issues between the parties. Instead, it remitted the matter for further hearing by a judge of the Family Court other than Baker J and ordered that C and D reside with their father pending the outcome of that further hearing².

4 It is contended on behalf of the father that the Full Court erred in receiving further evidence in the mother's appeal. Additionally, it is put that the Full Court erred in ordering that there be a rehearing of the matter. Before turning to the arguments, it is necessary to say something of the background circumstances and, also, of the course of proceedings in the Family Court.

Background circumstances

5 The parties were married in 1972. They adopted their first two children, both girls. It is convenient to refer to the elder child as "A", as was done in the reported decision of the Full Court. B is the younger of those two children. A was adopted in 1978 and B in 1981. The elder child, A, committed suicide in December 1994. That tragedy and its consequences featured prominently in the proceedings at first instance. The children with whom this appeal is concerned are C and D, the parties' natural children. C, a girl, was born in 1988 and D, a boy, in 1990.

6 The parties separated in May 1996 but continued to live in the matrimonial home until December of that year, the father and the three children upstairs and the mother downstairs. It seems that, at or about the time of separation, the relationship between B and her mother broke down completely, with B refusing to speak to her and aligning herself with her father. The breakdown of that relationship also featured prominently in the proceedings at first instance. By

1 (1997) 22 Fam LR 166.

2 (1997) 22 Fam LR 166 at 202.

comparison, relatively little attention was directed to the circumstances of C and D, the only children in respect of whom orders were made.

7 C was born prematurely and, according to the evidence, has developmental difficulties for which she has received treatment from a child psychiatrist, Dr Sara Williams. Dr Williams gave evidence in the Family Court that C has some "cerebral dysfunction" which causes learning difficulties and memory and comprehension problems. Dr Williams also testified that C has "always [been] an anxious child with a lot of difficulties, difficulty making friends, difficulty adjusting at school and learning."

8 The mother also consulted Dr Williams with respect to D after she and the father separated and while they were still living under the same roof. It is clear that there was a very considerable degree of stress associated with that arrangement. Dr Williams formed the view that D was "finding the pressure of being divided in loyalty between his mother and father ... too difficult to handle." By that stage, proceedings had been commenced in the Family Court and a separate representative appointed for B, C and D ("the separate representative").

9 After seeing D, Dr Williams contacted the separate representative requesting that the opinion of an independent psychiatrist be obtained. She declined to make further appointments for D because she did not wish to contaminate the interviews he might have with that psychiatrist. B, C and D were later interviewed for the purposes of the proceedings in the Family Court by Dr Rikard-Bell, a specialist in family, child and adolescent psychiatry.

10 In December 1996, the mother left the matrimonial home to reside in rented premises, taking C and D with her. C was then aged eight and D six. B, who was then 16, remained with the father.

Applications, affidavits and pre-trial procedures

11 In June 1996, after the parties had separated and while living under the same roof, the father made an application for orders that B, C and D reside with him and that he have sole responsibility for their long-term care, welfare and development. He sought various other orders, including that he have sole responsibility for their discipline, medical treatment, education, and their leisure and sporting activities. In October 1996, in her amended response, the mother sought various orders to the contrary, including that the three children reside with her and that she have sole responsibility for their day-to-day care and long-term welfare.

12 Correspondence ensued between the solicitors for the father and those acting for the mother. The solicitors for the father made complaint as to various incidents which took place after the parties separated but while living under the same roof. The separate representative was appointed to act for the three children and, at some

stage, the matter was listed for final hearing for six days commencing on 10 March 1997.

13 On 11 December 1996, the day the mother moved out of the matrimonial home with the two younger children, the father swore an affidavit seeking an order that those two children continue to reside with him. In that affidavit he asserted that the mother's "emotional condition [was] such that she [was] unable to provide the necessary standard of care and attention required for the children." He also deposed to an incident during the evening of 1 December 1996, when, it was said, the mother was in an uncontrollable rage and abused and insulted B. In passing, he also made reference to a complaint for an apprehended violence order which had been made against the mother on his behalf. That complaint had, by then, been dismissed.

14 The mother swore an affidavit on 12 December 1996 in which she acknowledged that she had moved into rented premises with C and D. She claimed that she had been their primary caregiver and had attended to their day-to-day needs until October 1996 when the father ceased full-time employment. Thereafter, according to her affidavit, he involved himself to a greater extent in their day-to-day activities. The mother also acknowledged that there had been a breakdown in her relationship with B and that there had been an incident which led to complaints on behalf of the husband and B for apprehended violence orders which were later dismissed. She attached copies of the complaints and the solicitors' correspondence in which reference was made to various incidents that had occurred since separation. On 16 December 1996, consent orders were made for C and D to reside with their mother for various specified periods and with the father for other specified periods pending further order.

15 In the meantime, on 13 November 1996, directions were given requiring the parties to file and serve the material on which they intended to rely at the hearing by 10 January 1997. The mother swore an affidavit on 23 December 1996. In it she elaborated her role as primary caregiver, her difficulties with B, and her proposals for the care of C and D. She also set out details of the relationship between B and the two younger children. Contrary to the directions given, the father did not swear an affidavit until 3 March 1997. It was served on 5 March and came to the attention of the mother on the evening of Thursday 6 March, less than four days before the matter was listed for hearing.

16 In his affidavit, the father gave an account of various incidents which occurred during their separation under the same roof. In most of those incidents, according to his affidavit, the mother had spoken to him in a derogatory manner in front of the children or there had been an unpleasant confrontation between the mother and B. He also briefly related the events which led to the proceedings for apprehended violence orders. None of this was new material, it having been raised in the correspondence between solicitors and in the father's affidavit of 11 December 1996.

17 The affidavit contained other material which was new in the sense that it was not raised in the correspondence, in the affidavits sworn immediately after the mother left the matrimonial home nor, apparently, in any other way. That new material included a claim by the father that, throughout the marriage, he and the mother had been equally responsible for the day-to-day care of all their children, and that, in some respects, he had been principally responsible.

18 Most of the material which was new, in the sense indicated, related to the mother's conduct in the period prior to the parties' separation in May 1996. That material referred, in the main, to the mother's relationship with A. It was said that there had been serious conflict between them, that the mother had verbally abused A, been over-strict in her discipline, broken up her friendships, and required her to leave school and attend business college against her will. It was claimed that these matters had contributed to A taking her own life.

19 It was also asserted in the new material that, following A's death, the mother had become unduly strict in relation to B's activities and details were given of the conflict that had developed between them. Other new material included a claim that the mother had constantly discouraged the friendships of all four children and that she had had trouble relating to their educational needs beyond year 4 at primary school. There was also new material concerning the period after the mother left the matrimonial home. It was said that she had been unco-operative in her dealings with the father in relation to contact visits by C and D.

20 Amongst other annexures to the father's affidavit were a statement made by B in relation to the proceedings for apprehended violence orders and the brief of evidence provided to the inquest into A's death. It will be necessary to refer again to those annexures.

The hearing before Baker J

21 When the matter came on for hearing, Baker J indicated that there were five, not six hearing days available. His Honour was informed that the central issue was the residence order to be made with respect to C and D and that there was no issue as to B. It had, by then, been agreed that she would remain with her father. So far as is presently relevant, the mother's counsel objected unsuccessfully to those annexures to the father's affidavit to which reference has already been made. No complaint was made by him as to the affidavit containing new material or as to its late delivery.

22 The father was the first to give evidence. His examination-in-chief was brief. It included the concession that C and D sometimes expressed the view to him that they preferred to live with their mother. He was then cross-examined at length. Early in his cross-examination, he was asked whether, as might reasonably have been concluded from his affidavit, his case was that his wife could not look after the children, particularly as they got older. He replied that that was part of his

case, but the other part was that "she is completely overprotective of the children and doesn't give them space in which to develop; doesn't let them have friends; she verbally abuses all the children." The latter claims extended beyond the matters raised in his affidavit and were repeated three times in the course of cross-examination. In the main, the material upon which he relied for those claims related to A and B, but it was also said that some of the mother's restrictions in relation to phone calls and sleepovers were inappropriate for C.

23 The mother was called to give evidence on completion of the father's. There was a brief examination-in-chief during which she denied that she had stopped the children from having friends and produced photographs of them in the company of other children. Her cross-examination by counsel for the father was lengthy and, the transcript suggests, aggressive.

24 In the course of her cross-examination, the mother said that it was a joint decision that A should leave school when she did and the only point of disagreement between herself and her husband had been as to whether A should go to TAFE or to business college. She was cross-examined in greater detail as to her relationship with B and, more particularly, those events involving B which occurred while the parties were separated but living in the matrimonial home.

25 Although not directly asked as to the father's claim that he was equally responsible for the children's care and principally responsible in some areas, the mother conceded that he had played a significant role for a period following her injury in a car accident in 1987. Otherwise, her answers suggested that his role was much less significant than he claimed.

26 So far as concerns C and D, nothing was put to the mother in the course of cross-examination to suggest that she discouraged their friendships, that she was overprotective of them, did not give them space in which to develop or that she verbally abused them. To the contrary, she said in cross-examination that the father would not allow the children to have birthday parties until they were eight years of age and, then, only every second year. And she denied that she had told C and D what to say when interviewed by Dr Rikard-Bell for the purposes of the Family Court proceedings.

27 Finally, the mother acknowledged during cross-examination by the separate representative that some of her actions during the period in which the parties were separated and living under the same roof had not been in the best interests of any of the children. She said, however, that she would not have acted like that in other circumstances and would not do so in the future. Her re-examination was only brief and was concerned with events during the parties' separation under the same roof and with financial matters.

28 Apart from the evidence of a school counsellor with respect to B, the remaining evidence came from psychiatrists. That evidence was predominantly in

favour of the mother's case. Dr Whetton, whom the mother had consulted with respect to her grief some ten months after A's death, expressed the opinion that she was "a caring and responsible mother" in relation to the physical and emotional needs of her children and that she was "totally fit to love and care for [them]".

29 Dr Rikard-Bell, who interviewed the mother, father and the three children for the purposes of the Family Court proceedings, prepared a report which was tendered in evidence. In his report, he recommended that "the younger two children remain ... with their mother." It was his opinion that, if that were to occur, B, C and D "would continue to develop normally in the care of their respective parents." He also indicated that, if the younger children were to reside with their father, they would be very distressed in the short-term but "in the long-term they would develop normally."

30 In his report, Dr Rikard-Bell also stated that "the major factor influencing the breakdown of the relationship [between B and her mother] was [A's] death." And he expressed the opinion that it was "very destructive" for the father and B to place so much blame for the death of A on to the mother.

31 Dr Rikard-Bell also gave oral evidence during which he elaborated his statements with respect to A's suicide. He explained B's reaction to that event by saying that "it's been much easier to align herself with one parent and make him the good parent and make the other parent the bad parent to explain why something so terrible as a suicide should occur." He also said that B and her father had a "unified view" that the mother had contributed largely to A's death and expressed the opinion that, if C and D were to live with B and the father, there was a risk that they would adopt the same view and "attribute blame to the mother". He said that was a "real risk" so long as A's death was "an unresolved family issue".

32 In his oral evidence, Dr Rikard-Bell also said that "there was a danger that in trying to hold onto [C and D] ... [the mother] may feel the need to perhaps denigrate the father". He gave examples of statements made to him by C and D which led him to believe they had been influenced by her "to say negative things about their father". However, he was of the view that that would not continue if the mother felt secure that the two younger children would be staying with her. He also said that "there was a certain rigidity in [the mother's] approach" and that she "probably had some difficulty being able to shift her parenting style in order to manage adolescence".

33 The other psychiatric evidence came from Dr Williams. As earlier indicated, she had been treating C for some time and had been consulted with respect to D. She had seen B once in a family situation, but had not treated her. She expressed the view that it would not be an ideal situation for B, C and D to reside in the same household "unless [B] gets a great deal of help to resolve her difficulties." She also gave evidence as to her consultations with C and D and her observations of them, including some weight loss. However, some of her records were lost

following production to the Family Court and she was unable to give complete details. She was cross-examined aggressively by counsel for the father to suggest that she was biased in favour of the mother. And it emerged in cross-examination that the father, with whom she had had some contact, was quite antipathetic towards her.

- 34 One other matter should be noted. The separate representative put submissions to the effect that C and D should continue to reside with their mother.

The decision of Baker J

- 35 In his reasons for decision, Baker J recounted the evidence. He said that he did not find the oral evidence of Dr Williams particularly helpful and rejected her evidence of the younger children's weight loss. Thereafter, his Honour set out his "assessment of the personality, demeanour and motives of the parties". In this respect, he was of the view that the father presented as "an intelligent man who gave his evidence in a candid and straightforward fashion." On the other hand, his Honour said that the mother "gave her evidence in a slow and rather measured fashion." He added that she "appeared to lack warmth and remained expressionless in the early part of her evidence, but later became quite emotional". He expressed the view that her "serious and humourless mien and her volatility as displayed in the witness box [was] a cause for concern" and he thought that, perhaps, her life had "become overburdened with grief and remorse." Further, in his Honour's assessment it was "not at all surprising" that her relationship with B had broken down.

- 36 Having given his assessment of the "personality, demeanour and motives of the parties", his Honour proceeded to state his conclusions. He accepted the father's evidence that the mother "[s]houts at the children"; "[v]erbally abuses them"; "[p]laces strict limits upon their behaviour" and "[b]ehaves selfishly and inappropriately in their presence". On that basis, his Honour concluded that the issue was whether "the wishes as expressed by the younger children and their attachment to [their mother]" were such that "a change in their custodial placement is against their best interests."

- 37 His Honour stated a number of reasons for concluding that it was in the best interests of C and D to reside with their father, not all of them self-evidently consistent with the evidence. For example, his Honour expressed the view that the father had accepted A's death while the mother was "endeavouring to shift the blame upon the rest of the family and in particular, the [father]." That was an inference drawn by his Honour. However, it is not clear on what it was based. And so far as concerns the father's acceptance of A's death, it was contrary to the evidence of Dr Rikard-Bell. Further, his Honour was of the view that because of the mother's "over-protectiveness and her failure to give the children reasonable space" she would "actively sabotage" contact with their father, and "inevitably ... alienate [them] from [him]." That, too, was an inference drawn by his Honour.

And it was contrary to the evidence of Dr Rikard-Bell that the mother would not seek to do that if she were secure in the knowledge that C and D would stay with her and that "in fact she ... thinks it is in [C and D's] interests to maintain a relationship with their father and sister".

- 38 One other matter should be noted. His Honour said that he had taken the children's wishes into account but, apparently, gave little weight to them because "[a]lthough those wishes were certainly expressed to both Dr Williams and to Dr Rikard-Bell, they were either expressions of what the children wanted their mother to hear or were an echo of the wife's perceptions." It is not at all clear why his Honour thought that C and D were not genuine in the expression of their wishes, particularly when they had been expressed to their father and, presumably, to the separate representative who supported the mother's case.

The decision of the Full Court

- 39 The mother's appeal to the Full Court included various grounds of appeal challenging particular findings made by Baker J. However, the Full Court held that "save for the issues relating to the fresh evidence, any errors demonstrated in the approach taken by his Honour ... would not amount to appealable errors when viewed in light of the test set out in *Gronow v Gronow*³ ... or *House v [The King]*⁴⁵. As already indicated, the appeal was allowed by reason of further evidence admitted in the Full Court. Before turning to that evidence, it is convenient to say something of *Gronow v Gronow* and, also, of *House v The King*.

- 40 It is well settled that discretionary judgments and decisions based on value judgments (for example, determinations as to the best interests of a child) can be set aside only on strictly limited grounds. In *House v The King*, those grounds were identified in these terms:

"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his

3 (1979) 144 CLR 513.

4 (1936) 55 CLR 499.

5 (1997) 22 Fam LR 166 at 197.

order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."⁶

41 The principles stated in *House v The King* were applied to a custody decision of the Family Court in *Gronow v Gronow*⁷. And of course, those principles have to be applied in conjunction with the well established rule that an appellate court will not reverse findings of fact that depend to any substantial degree on credibility or demeanour, unless the trial judge "'has failed to use or has palpably misused his advantage'⁸ or has acted on evidence which [is] 'inconsistent with facts incontrovertibly established by the evidence' or which [is] 'glaringly improbable'⁹."¹⁰

42 Although the question was not raised in this Court, there appear to be a number of difficulties associated with the decision of Baker J which might properly have attracted appellate review consistent with the principles to which I have referred. As already indicated, there is no obvious reason why his Honour should have treated the expressed wishes of C and D as not being genuine, as apparently he did. Reference has also been made to the difficulties associated with his Honour's finding that the mother would "actively sabotage" the relationship of C and D with their father. Further, it is difficult to identify any basis for his

6 (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

7 (1979) 144 CLR 513 at 534, 537-538 per Aickin J. Similar principles were expressed at 519-520 per Stephen J and at 525-526 per Mason and Wilson JJ. See also *Lovell v Lovell* (1950) 81 CLR 513 at 518-519 per Latham CJ, which concerned an application to the Supreme Court of Victoria under the *Marriage Act* 1928 (Vic) for an order for custody.

8 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

9 *Brunskill v Sovereign Marine and General Insurance* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

10 *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ. See also *Paterson v Paterson* (1953) 89 CLR 212 at 218-224 per Dixon CJ and Kitto J; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178 per McHugh J (with whom Mason CJ, Deane, Dawson and Gaudron JJ agreed); *Dawson v Westpac Banking Corporation* (1991) 66 ALJR 94 at 99 per Mason CJ, 105 per Dawson and Toohey JJ; 104 ALR 295 at 304, 314-315; *Louth v Diprose* (1992) 175 CLR 621 at 641 per Dawson, Gaudron and McHugh JJ.

Honour's findings that the father had accepted A's death and that, in contrast, the mother was attempting to shift the blame on to him.

43 Of greater significance than the matters just mentioned is the fact that Baker J apparently gave no account at all to the uncontroverted evidence of Dr Rikard-Bell that there was a risk of C and D coming to blame their mother for A's death if they were to live with B and the father. It is equally significant that findings were made as to C's best interests without taking account of the difficulties for which she was receiving treatment from Dr Williams and without ascertaining the father's proposals in that regard. I mention these matters because they provide some reason for thinking that the Full Court may have taken an overly strict view as to its function in relation to decisions which turn on facts found by a trial judge and involve a value judgment with respect to the best interests of a child.

44 It is convenient now to turn to the further evidence tendered in the Full Court. The evidence was in affidavit form. It falls into three categories. The first category includes the evidence of a relative, neighbours, friends and the family doctor directed to establishing that the mother was always the primary caregiver. In this category, there is also evidence that she was a giving and gentle person; that she had a satisfactory relationship with A and that she and the father both agreed that A should leave school. That evidence, if accepted, casts doubt on the findings that the mother shouted at and verbally abused the children and that she had a difficult relationship with A "to the extent that she forced her own views and opinions in relation to leaving school and employment upon the child".

45 In the second category is an affidavit of a neighbour and grief counsellor who counselled the family after A's death. Her evidence, as summarised by the Full Court, was to the effect that the mother was adored by her children and responded appropriately to A's death, whereas the father did not respond as expected and, in consequence, was referred for further counselling. This evidence casts doubt on the trial judge's assessment of the parties' personalities and attitudes, which assessment seems to have played a not insignificant role in his decision that C and D should live with their father.

46 The third category comprises evidence from neighbours that, since living with their father, the younger children appear depressed. There is also evidence that C was heard on one occasion to speak of killing herself.

47 In reaching its decision, the Full Court referred to the principles governing the reception of further evidence, including the decision of the Full Family Court in *In the Marriage of N (No 2)*¹¹. It was emphasised in that case that the discretion to admit further evidence should be exercised but rarely. And, it was held that where a decision was made not to call available evidence at trial, "it would only be

11 (1981) 7 Fam LR 889.

in rare, exceptional and compelling circumstances that a court of appeal would permit the tendering of further evidence and then on that basis set aside the judgment and direct a re-trial."¹²

48 In deciding to admit further evidence and to order a retrial in the present case, the Full Court noted "various unsatisfactory elements of the manner of which the case proceeded."¹³ They were identified as including the very late delivery of the husband's affidavit and the admission into evidence of B's statement in support of the complaint for an apprehended violence order and the statements of two of A's friends included in the brief of evidence provided to the inquest into her death. The other "unsatisfactory element" identified by the Full Court was "[t]he significant emphasis on the events subsequent to A's death and the lack of emphasis on the quality of care provided by the [mother] towards all of the children in her role as their primary care-giver over a period of almost 18 years."¹⁴

49 The Full Court concluded that, when regard was had to the unsatisfactory aspects of the proceedings before Baker J and the further evidence tendered on appeal, "the best interest of [C and D] may not be served by allowing the residence order to stand."¹⁵ It was for that reason that it ordered that the matter be reheard.

The reception of further evidence

50 Power to receive further evidence on appeal is conferred on the Family Court by s 93A(2) of the Act. Subject to s 96, which is concerned with appeals from courts of summary jurisdiction, that sub-section provides:

"... in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given by affidavit, by oral examination before the Family Court or a Judge or in such other manner as the Family Court may direct."

51 By his Notice of Appeal to this Court, the father contends that the Full Court was in error in departing from "established principles as to the admission of ... fresh evidence". The argument to that effect was based on the decision of this

12 (1981) 7 Fam LR 889 at 895 per Evatt CJ and Fogarty J.

13 (1997) 22 Fam LR 166 at 197.

14 (1997) 22 Fam LR 166 at 197.

15 (1997) 22 Fam LR 166 at 197.

Court in *Wollongong Corporation v Cowan*¹⁶. That case was concerned with the common law rules that govern "the grant of new trials on the ground of the discovery of fresh evidence"¹⁷. Those rules apply only if the evidence in question was not available at the trial and could not have been obtained by the exercise of reasonable diligence¹⁸. They require that, for a decision or verdict to be set aside on the ground of newly discovered evidence, it be reasonably clear that, if the evidence had been available at trial, "an opposite result would have been produced or ... must have been so highly likely as to make it unreasonable to suppose the contrary."¹⁹

52 There is, in my view, no reason for thinking that the common law rules which govern the admission of fresh evidence apply automatically to confine the discretion to receive further evidence conferred by s 93A(2) of the Act. Rather, the terms of that sub-section suggest otherwise in that they refer to "further evidence", rather than "fresh evidence". Moreover, the sub-section confers power on the Family Court to receive further evidence "in its discretion" and is silent as to any matter limiting or governing the exercise of that discretion.

53 It is well settled that if a discretionary power is conferred by a statute which is silent as to the matters which govern its exercise, the discretion is confined only by the subject-matter with which the legislation is concerned²⁰. At least that is so if the discretion is conferred on an administrative tribunal. Where a general and unconfined discretion is conferred on a court, it is also governed by the requirement that it be exercised judicially and consistently with the judicial process²¹. It is also well settled that, where a power is granted to a court, it is not

16 (1955) 93 CLR 435.

17 (1955) 93 CLR 435 at 444.

18 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 per Dixon CJ. See also *Gallagher v The Queen* (1986) 160 CLR 392 at 395 per Gibbs CJ; *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140-141.

19 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 per Dixon CJ.

20 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49.

21 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ; *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 582 per Gaudron and Gummow JJ, 591 per McHugh J (with whom Brennan CJ agreed on this point); 152 ALR 83 at 89, 101.

to be confined by reference to matters which are not required by the terms of the statutory provision by which it is conferred or the context in which it appears²².

54 The principles of statutory construction to which reference has been made make it impossible, in my view, to conclude that the discretion conferred by s 93A(2) is necessarily confined by the rules which govern the setting aside of a verdict or decision on the basis of the discovery of fresh evidence. Rather, the principles of statutory construction require that the question whether the discretion is confined and, if so, in what way, be answered by having regard to the Act itself and the consideration that the power in question is conferred on a court exercising appellate jurisdiction.

55 The fact that the power to admit further evidence is conferred on a court exercising appellate jurisdiction is of considerable relevance. More particularly, it is relevant that it is a power to be exercised after a hearing conducted in accordance with procedures that allow the parties to put their case and, also, to answer the case made against them. That consideration requires that, ordinarily, further evidence should not be admitted on appeal if it was available, or could reasonably have been obtained, at the time of the hearing. Except for the evidence of subsequent events, there is no reason to suppose that the evidence admitted by the Full Court was not available or could not have been obtained at the time of the hearing before Baker J.

56 The subject-matter of the appeal may also bear on the scope of the discretion conferred by s 93A(2) of the Act. The Family Court has power to vary or discharge orders specifying a parent's rights and obligations with respect to his or her children²³. Thus, ordinarily, evidence of subsequent events should not be admitted on an appeal from a parenting order if that evidence would more appropriately ground an application for variation of the order in issue. However, as will later appear, there may be circumstances in which evidence of subsequent events is

22 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ, 316 per Toohey and Gummow JJ; *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 582 per Gaudron and Gummow JJ; 152 ALR 83 at 89; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 72 ALJR 873 at 900 per Gaudron J; 153 ALR 643 at 678.

23 Section 65D(2) of the Act provides:

" Without limiting the generality of subsection (1) and subject to this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order."

relevant to the question whether, other evidence having been received, the appeal should be allowed.

57 Notwithstanding what has been said as to what should ordinarily be the case, different considerations may apply if the question is whether there has been some irregularity in the proceedings such that a party was unable to put his or her case effectively or effectively answer the case made by the other side. And that may be so even if the irregularity was not such as to constitute a denial of procedural fairness.

58 Given the lateness of the father's affidavit which, as already pointed out, contained new material, the refusal of an adjournment, if one had been sought by the mother's counsel, would almost certainly have constituted a denial of procedural fairness. As already indicated, however, there was no such application. Perhaps that was because of reluctance to surrender the time set aside for the hearing; perhaps, because an early resolution of issues affecting C and D was perceived to be in their best interests; perhaps, simply, because it was thought that the strength of the mother's case, supported, as it was, by the independent report of Dr Rikard-Bell, was such that an adjournment was unnecessary. Whatever the reason, it can be seen in hindsight that the case was not conducted in a manner that enabled the mother to meet the case against her.

59 As earlier indicated, the case against the mother emerged, in some respects, in the father's affidavit but, in others, only during the course of his cross-examination. The lateness of his affidavit inevitably had the consequence that the mother had only a limited ability to call evidence to rebut the claim set out in the father's affidavit that she was responsible for A's death. That claim was buttressed, to some extent, by statements from two of A's friends included in the brief of evidence for the coronial inquest which was attached to the father's affidavit. The makers of those statements were not available for cross-examination and, thus, their statements could not be tested in any way. Nor was the mother's counsel able to cross-examine or otherwise test B's version of events as set out in her statement in relation to the proceedings for apprehended violence orders.

60 Perhaps of greater significance is the fact that the father's claim that the mother was overprotective of C and D and did not give them space in which to develop emerged for the first time during his cross-examination. The mother was not asked a single question concerning those matters by her counsel or by the separate representative. And not surprisingly, she was not asked any question on that subject in the course of her cross-examination by counsel for the father. Similarly, she was not examined at any stage with respect to the allegation that she verbally abused C and D.

61 Although the Full Court did not say so in terms, the general thrust of its reasoning is to the effect that, by reason of the late delivery of the father's affidavit

and the way in which the case was conducted before Baker J, the mother was, in a practical sense, prevented from meeting the case against her. In my view, that conclusion was well open. And in my view, there is no reason to confine the discretion conferred by s 93A(2) so as to prevent the reception of evidence that was available at the time of the trial if there was some irregularity that resulted in a party not being able to make an effective reply to the case against it. And that is so, in my view, notwithstanding that that irregularity does not constitute a denial of procedural fairness²⁴.

24 See *Jeffrey v Jeffrey* (1931) 31 SR (NSW) 535. It was held in that case that the failure to request an adjournment at trial is not necessarily the "end of the matter" in deciding whether a new trial should be granted on the grounds of surprise: at 541 per Street CJ.

The order that there be a rehearing

62 It was argued for the father that the Full Court erred in not considering whether the fresh evidence was likely to have affected the outcome of the case. In this regard, it was put that the evidence was "standard evidence in custody cases" and was unlikely to have had any bearing on the result which turned substantially on the views formed by the trial judge as to "the parties' character and conduct" on the basis of their oral evidence and his observation of their demeanour. It was also put that the Full Court erred because the "true ratio" of its decision was that "in matters involving the welfare of children, the established principles relating to the acceptance of fresh evidence ... do not apply so long as the Full Court forms the view that the ultimate welfare of the children would be promoted by disregarding them."

63 It is convenient to first consider the significance of the fact that the appeal to the Full Court arose out of proceedings for a parenting order under Pt VII Div 6 of the Act. Section 65E, which is in Div 6, provides:

" In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

A "parenting order" is defined by s 64B of the Act to include an order as to "the person or persons with whom a child is to live"²⁵ and, also, an order under Pt VII "discharging, varying, suspending or reviving an order [of that kind]"²⁶. An order made on appeal is not a parenting order under Pt VII²⁷ and is, thus, not governed by s 65E or what is commonly referred to as "the paramountcy principle". Even so, the fact that the paramountcy principle informed the decision and order of Baker J was necessarily relevant to the question whether, by reason of further evidence, that order should be set aside.

64 A decision as to a child's best interests is of a different character from a decision as to existing rights and obligations or the consequences to be assigned

25 Section 64B(2)(a).

26 Section 64B(1)(b).

27 Section 94(2) sets out the powers of the Full Court on appeal. It provides:

" Upon such an appeal, the Full Court may affirm, reverse or vary the decree or decision the subject of the appeal and may make such decree or decision as, in the opinion of the court, ought to have been made in the first instance, or may, if [it] considers appropriate, order a re-hearing, on such terms and conditions, if any, as it considers appropriate."

for infringement of a right. In proceedings involving the existence of a right or the consequences to be assigned for the infringement of a right, there is good reason for asking, in relation to fresh evidence, whether that evidence was likely to have affected the outcome of the case. However, different considerations apply in a context in which the paramount consideration is "the best interests" of a child.

65 When applied to an order as to the parent with whom a child is to live, the concept of the child's "best interests" necessarily looks to the future, with all the uncertainties that that involves. In that context, it seems to me that the more pertinent question is not whether the evidence would have produced a different result at the trial but whether, having regard to that further evidence, there is a real risk that the order under appeal is not in the child's best interests. If there is no risk of that kind, then there is no reason to interfere with the order. On the other hand, if there is such a risk, there is good reason why the order should not stand.

66 In the present case, the Full Court allowed the appeal and ordered a further hearing on the basis of its decision that "the best interest of [C and D] may not be served by allowing the residence order to stand."²⁸ Although it is not entirely clear, the better view is that the Full Court concluded that there was a real risk that that was so. After all, it is difficult to conceive that the Full Court would have set aside the order under appeal and ordered a rehearing on the basis that there was but a remote, tenuous or fanciful risk, as distinct from a real risk, that the best interests of C and D were not served by that order.

67 The remaining question is whether it was open to the Full Court to conclude that there was a real risk that the best interests of C and D were not served by the order made by Baker J. That question is not answered by having regard to the further evidence in a vacuum. Rather, it must be considered in the light of the evidence led at trial and, also, the trial judge's findings.

68 As already indicated, some of the trial judge's findings in this case are not self-evidently consistent with the evidence that was before him. When regard is had to the difficulties associated with some of those findings, the expressed wish of C and D that they live with their mother and Dr Rikard-Bell's independent opinion that that was the preferable course, it was well open to the Full Court to conclude that there was a real risk that the best interests of C and D were not served by the order of Baker J. And the further evidence that, since living with their father, C and D appeared depressed, could only serve to reinforce that conclusion.

Conclusion

69 The appeal should be dismissed with costs.

28 (1997) 22 Fam LR 166 at 197.

- 70 McHUGH, GUMMOW AND CALLINAN JJ. This is an appeal from a decision of the Full Court of the Family Court (constituted by Lindenmayer, Kay and Maxwell JJ)²⁹. Three questions arise in the appeal. The first is whether the power conferred on the Full Court by s 93A of the *Family Law Act* 1975 (Cth) ("the Act") to receive further evidence on appeal is governed by the principles laid down in this Court in *Wollongong Corporation v Cowan*³⁰. The second is whether and, if so, to what extent the Full Court "must regard the best interests of the child as the paramount consideration"³¹ in determining the admissibility of further evidence in an appeal involving a parenting order. The third question is whether the Full Court erred in the exercise of its discretion in admitting further evidence or alternatively in ordering that the matter should be remitted to a single judge for a new hearing of the proceedings.

The history of the proceedings

- 71 The appeal is brought by a husband against an order of the Full Court ordering a new trial of his application for a parenting order. Baker J who heard the application effectively granted custody and day to day care of the two younger children of the marriage to the husband. The wife was given weekend and holiday access to the children.
- 72 The husband and wife were married on 14 January 1972. They separated on 31 May 1996. There were four children of the marriage, A (an adopted child born 1978), B (an adopted child born 1981), C (born 1988) and D (born 1990). On 9 December 1994, the eldest child A committed suicide by hanging herself in the garage of the matrimonial home. Baker J found that A's death "in all probability rendered inevitable the final break up of the marriage".
- 73 Upon the adoption of A in 1978, the wife ceased paid employment and remained at home as a full-time carer of the children until 1986. During 1986 and 1987 and again in 1993, she did some intermittent part-time work but was otherwise responsible for the care of the children.
- 74 Although the husband and the wife separated in May 1996 about 18 months after A's death, they lived under the same roof until 11 December 1996 when the wife left the matrimonial home with the two younger children.

29 (1997) 22 Fam LR 166.

30 (1955) 93 CLR 435.

31 *Family Law Act* 1975 (Cth), s 65E.

75 On 26 June 1996, the husband applied to the Family Court for a parenting order in respect of the three children giving him responsibility for their day to day and long-term care. That application came before Baker J on 10 March 1997. The husband contended that the children's interests would be best served by orders in his favour for reasons which the trial judge summarised as follows:

- "(a) The wife is over-protective of the children;
- (b) She does not give them space;
- (c) She verbally abuses the children;
- (d) She does not encourage the children to sleep over, to have their friends at her unit except on structured occasions or to have telephone calls during the week;
- (e) Finally, the husband asserts that, because of a combination of all the above factors, as both [A] and [B] progressed to puberty, the relationship between the wife and her daughters deteriorated to the extent that in the case of [B] no such relationship presently exists."

76 The husband led evidence to show that, after service of the application, the wife's behaviour towards the husband and the child B deteriorated markedly. The husband and B sought an Apprehended Violence Order against the wife in September 1996 which was dismissed after a contested hearing. Uncontradicted evidence at the hearing before Baker J showed, however, that, on several occasions between October 1996 and December 1996, the wife verbally abused the husband and B.

77 On 14 March 1997, Baker J made the custody and access orders to which we have referred. His Honour also ordered that the parties and children attend therapy sessions and that the husband pay the wife \$379,730; the wife was ordered to transfer to the husband her title in the matrimonial home. The wife's application for spousal maintenance was dismissed.

78 In making these orders, his Honour referred to and contrasted the husband's outlook and calming demeanour with the "wife's serious and humourless mien and her volatility".

79 His Honour said:

"The wife, in my opinion sees life in black and white terms. Her behaviour in relation to the dog incident and the sewing machine incident in particular, and the events referred to in annexure 'C' to the husband's affidavit sworn 3 March 1997 in general, represent an insensitive and inappropriate attitude to the overall needs of the family. It is not at all surprising that the wife's relationship with [B] has broken down. The wife, I am satisfied, has on frequent occasions behaved inappropriately and insensitively towards [B] and has made no effort to effect any reconciliation with their daughter. Indeed, it is the wife's view and the view of her parents that any reconciliation attempt must come from [B] rather than from themselves.

...

The wife seems to have been able to care for the children appropriately whilst they were young, but is incapable in my view of coping with teenagers. [A] and then [B] clashed with their mother in large measure because of her inability to understand the needs of older children and the need which they have to expand their horizons and act with a certain amount of freedom. The wife's extraordinary behaviour ... and the circumstances surrounding the AVO proceedings, cast very real doubt upon the wife as a suitable custodian of the children."

80 On 9 July 1997, the wife appealed to the Full Court of the Family Court against the orders made by Baker J and sought leave to adduce further evidence in the form of several affidavits sworn after the trial. The wife claimed that the further evidence would bring into better perspective her long-term parenting abilities and demonstrate that some aspects of her conduct after A's death were isolated aberrations. The Full Court found that the further evidence consisted of material which was available at the trial but not then produced and material relating to events that had occurred since the trial. The further evidence was not tested by cross-examination or otherwise in the Full Court of the Family Court.

81 Section 93A(2) of the Act confers on the Full Court a discretionary power to receive further evidence upon questions of fact. Subject to the provisions of s 96 which are not presently material, that sub-section declares that:

"[I]n an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given by affidavit, by oral examination before the Family Court or a Judge or in such other manner as the Family Court may direct."

82 During the hearing of the appeal by the Full Court, the parties agreed that if the appeal was allowed, the matter should be remitted for retrial to a judge other than Baker J. After referring to the criticisms of the wife's evidence by Baker J to which we have referred, the Full Court said³²:

"It is convenient to interpose that some aspects of this criticism seem prima facie to be of doubtful justification, given the very difficult circumstances that prevailed in the home in the period between the institution of these proceedings and the wife's final departure from the home, especially with regards to the collapse of the wife's relationship with B."

Notwithstanding these criticisms, the Full Court held³³ that "save for the issues relating to the fresh evidence, any errors demonstrated in the approach taken by his Honour ... would not amount to appealable errors when viewed in light of the test set out in *Gronow v Gronow*³⁴ or *House v The King*³⁵". However, the Full Court exercised its discretion to receive the further evidence and remitted the matter for retrial. In doing so, their Honours said³⁶:

"Our discretion whether or not to admit the fresh evidence, needs however to be exercised in the shadow of the various unsatisfactory elements of the manner [in] which the case proceeded. In summary they were:

1. The very late delivery of the husband's material.
2. The admission into evidence of the statements of the daughter B and the witnesses KW and MD.
3. The significant emphasis on the events subsequent to A's death and the lack of emphasis on the quality of care provided by the wife towards all of the children in her role as their primary care-giver over a period of almost 18 years.

Once all these matters are viewed together, and when regard is had, in particular, to the evidence of the witness CB as to the manner in which the

32 (1997) 22 Fam LR 166 at 175.

33 (1997) 22 Fam LR 166 at 197.

34 (1979) 144 CLR 513.

35 (1936) 55 CLR 499.

36 (1997) 22 Fam LR 166 at 197-198.

wife responded to her professional help relating to the death of A, coupled with the material relating to the quality of care that the wife provided for the children both prior to and after A's death, we have concluded that the best interest of these children may not be served by allowing the residence order to stand. Accordingly, we have concluded that this is one of the rare and exceptional cases in which the discretion to admit fresh evidence on appeal should be exercised. The result of our so deciding is that there must be a re-trial of the residence proceedings."

83 The husband appealed to this Court on the following grounds:

1. That the Full Court of the Family Court was in error in applying the "paramountcy principle" to remit the matter for rehearing, when the requirement for a rehearing was not otherwise made out.
2. That the Full Court of the Family Court was in error in admitting fresh evidence in circumstances in which the established principles as to the admission of such fresh evidence had not been satisfied.

The paramountcy principle

84 The reference to the paramountcy principle is a reference to s 65E of the Act which states:

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

85 Until amendments to the Act in 1995, the paramountcy principle was contained in s 64³⁷. The learned Judges of the Full Court thought that the 1995 amendments may have changed the scope of the paramountcy principle in applications for parenting orders. Their Honours said³⁸:

37 Section 64, now repealed, provided:

"(1) In proceedings in relation to the custody, guardianship or welfare of, or access to, a child –

(a) the court must regard the welfare of the child as the paramount consideration".

38 (1997) 22 Fam LR 166 at 181.

23.

"The change from 'In proceedings in relation to' to 'In deciding whether to make a particular parenting order' may have the effect of limiting the application of the paramountcy principle in appellate cases. In this case the issue of whether or not a particular parenting order should be made by this court only arises if this court is to attempt to exercise its own discretion on what parenting order would be appropriate. The direct issue under consideration is whether to allow fresh evidence and remit for retrial. The application of the paramountcy principle in light of the legislative change was not argued before us and it is therefore inappropriate to do more here than identify the problem as one that either the legislature or a future Full Court might look at."

86 Their Honours then continued³⁹:

"The meaning of the term 'parenting order' is defined in s 64B as follows:-

- (1) A parenting order is:
 - (a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or
 - (b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).
- (2) A parenting order may deal with one or more of the following:
 - (a) the person or persons with whom a child is to live;
 - (b) contact between a child and another person or other persons;
 - (c) maintenance of a child;
 - (d) any other aspect of parental responsibility for a child.

Is an appellate court when deciding whether to admit fresh evidence in the course of hearing an appeal against an order concerning the person with whom a child is to live *deciding whether to make an order* as to the person with whom a child is to live? It seems to us that we would be required to find significant elasticity in the language to achieve a positive answer to that question. Assuming that we cannot stretch the language that far, then, in our view, the constant shadow of the paramountcy principle in child welfare

39 (1997) 22 Fam LR 166 at 183.

cases is such that at the very least, the best interest considerations are powerful matters to be weighed up against a competing principle such as finality."

87 An order admitting or rejecting further evidence is not a parenting order within the terms of s 64B and therefore does not directly invoke the application of the paramountcy principle. Nevertheless, their Honours were plainly right in concluding that that principle was relevant to the questions whether further evidence should be admitted by the Full Court and whether the orders made by Baker J should be set aside. In an appeal in which the upholding, varying or setting aside of a parenting order is the ultimate matter in issue, the principles which govern the resolution of that issue are the same for the Full Court as they are for the judge at first instance. Consequently, the Full Court is bound to have regard to the best interests of the child as the paramount consideration when determining the appeal. It necessarily follows that, in exercising its discretion to hear further evidence in respect of an appeal concerning a parenting order, the Full Court must have regard to the effect that the further evidence may have in determining whether the best interests of the child require the upholding, varying or setting aside of the parenting order.

88 It is not to the point that the Full Court in this case was not asked to make a parenting order as such. An order admitting or rejecting further evidence is part of the appeal process in which the best interests of the child are the paramount consideration. In determining whether or not to admit that evidence, the effect that it may have in determining what are the best interests of the child is a factor of great weight. It will be one of the most important discretionary considerations to which the Full Court must have regard.

The common law principles concerning fresh evidence and the s 93A(2) discretion

89 The husband contended that the power of the Full Court to receive further evidence was governed by the principles authoritatively laid down in this Court in *Wollongong Corporation*⁴⁰, that is to say:

- (i) that the evidence sought to be admitted could not with reasonable diligence have been obtained for use at the trial; and
- (ii) that, if the evidence had been available at the trial, it is reasonably clear that an opposite outcome would have resulted.

The husband submitted that the further evidence relied on by the wife could not satisfy the tests settled by that case.

90 The question of the applicability of the reasoning in *Wollongong Corporation* presents issues of construction concerning Pt X of the Act and requires an understanding of Pt X in its historical and constitutional context.

91 Part X⁴¹ of the Act is headed "Appeals". Section 93A(1)(a) confers upon the Family Court jurisdiction with respect to matters arising under the Act or under any other law made by the Parliament in respect of which appeals referred to in s 94 are instituted. Subject to s 94AA, which requires leave to appeal in some cases, s 94(1)(a)(i) provides that an appeal lies to a Full Court of the Family Court from a decree of the Family Court exercising original jurisdiction under the Act. It was by this path that the present litigation came before the Full Court.

92 Upon an appeal, the Full Court has the powers conferred by s 94(2). These are to "affirm, reverse or vary the decree or decision the subject of the appeal" and to "make such decree or decision as, in the opinion of the court, ought to have been made in the first instance" or if it considers it appropriate to "order a re-hearing, on such terms and conditions, if any, as it considers appropriate". Provision with respect to the admission of further evidence on appeal is made by s 93A(2), the terms of which we have already set out.

40 (1955) 93 CLR 435.

41 ss 93-96.

- 93 An appeal lies to this Court only by special leave of this Court or upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved⁴².
- 94 These provisions of Pt X are the product of exercises by the Parliament of the power conferred by the joint operation of ss 77(i) and 73(ii) of the Constitution. The provisions define the jurisdiction of the Family Court, which is federal jurisdiction, by providing for appellate jurisdiction within that Court and they provide exceptions and prescribe regulations with respect to the hearing and determination by this Court of appeals from the Family Court.
- 95 The operation of Pt X is to be contrasted with the procedures developed in the English common law courts which have influenced, if indeed they have not determined, the doctrinal foundation for the admission of new evidence after verdict. Appeal is not a common law remedy⁴³. It derives from the civil law⁴⁴. Exceptionally, in 1675 the House of Lords declared its right "as the delegate of the Sovereign to receive and determine 'appeals' from inferior Courts, 'that there may be no failure of justice in the land'."⁴⁵ But, apart from this special jurisdiction of the House of Lords, in the absence of statute there was and still is no basis for an appeal from a verdict of the common law courts⁴⁶. If a right of appeal is conferred by statute, the terms of the statutory grant determine the nature of the appeal⁴⁷ and consequently the right, if any, to adduce further evidence on the appeal. Thus, the procedure for appeal to this Court, provided by s 73 of the Constitution, is not

42 s 95.

43 *Attorney-General v Sillem* (1864) 2 H & C 581 at 608-609 [159 ER 242 at 253]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 552-553; *Grierson v The King* (1938) 60 CLR 431 at 436; *Paterson v Paterson* (1953) 89 CLR 212 at 218-219.

44 *Wiscart v D'Auchy* 3 Dall 321 at 327 [3 US 253] (1796).

45 *South Australian Land Mortgage* (1922) 30 CLR 523 at 553.

46 *South Australian Land Mortgage* (1922) 30 CLR 523 at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108.

47 *Victorian Stevedoring* (1931) 46 CLR 73 at 108-110.

stated to be by way of rehearing. In *Mickelberg v The Queen*⁴⁸ it was recently reaffirmed that this Court has no power to admit further evidence on appeal.

96 At common law, the verdict of a jury might be set aside in one of two ways. First, it might be set aside by way of writ of error. Second, it might be set aside where the jury had given a general verdict subject to the opinion of the court *in banc* on a question of law involved in the case, the question being stated in a special case or in a point reserved⁴⁹. But once judgment had been entered after trial before a jury, the common law courts would not entertain any fresh action to set aside the judgment. Entry of judgment might, however, be delayed until the next Term and, in the meantime, the disaffected party might move for a new trial. An order for a new trial was an interlocutory remedy⁵⁰. It was an exercise of what in modern times is called original jurisdiction, the common law having no conception of appellate jurisdiction. In that respect, the order for a new trial was an exercise of original jurisdiction just as the issue by this Court under s 75(v) of the Constitution of a writ of prohibition or mandamus is an exercise of original and not appellate jurisdiction. The grounds relied upon on the motion for a new trial might include fraud or the discovery of new evidence. In addition, Chancery entertained suits to impeach for fraud in earlier judgments, including those obtained in the common law courts⁵¹. But that jurisdiction is of no present relevance.

97 The principles laid down in *Wollongong Corporation* and the similar appeal in *McCann v Parsons*⁵² are to be understood by reference to the procedures of the common law courts. Those cases have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal. They came before this Court on appeal from judgments of the Full Court of the Supreme Court of New South Wales on motions for a new trial in accordance with s 160 of the *Common Law Procedure Act* 1899 (NSW), after

48 (1989) 167 CLR 259.

49 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 483.

50 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 443.

51 *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6 at 10-11; *McDonald v McDonald* (1965) 113 CLR 529 at 532-533; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538; *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 238-241; Gordon, "Fraud or New Evidence as Grounds for Actions to Set Aside Judgments", (1961) 77 *Law Quarterly Review* 358 (Pt 1), 533 (Pt 2).

52 (1954) 93 CLR 418.

verdicts given by juries in the trial of common law actions for damages. Accordingly, the principles with respect to the allowance of a motion for a new trial on the ground of discovery of fresh evidence which were propounded by this Court in *Wollongong Corporation* and *McCann* were informed by the position in the English common law courts. In those cases, this Court was not concerned with the terms of any modern statute expressly conferring upon an appellate court a power to receive additional evidence. To regard *Wollongong Corporation* and *McCann* as defining the jurisdiction or controlling the discretion to admit evidence in statutory appeals is erroneous.

98 Mention should be made, however, of *Orr v Holmes*⁵³, where this Court allowed an appeal against an order of the Full Court of the Supreme Court of Queensland which had set aside a jury verdict upon the ground that there existed new evidence that had not been before the jury. Dixon J stated the principles to be applied in admitting fresh evidence on appeal in terms similar to those later laid down in *Wollongong Corporation* and *McCann*. In the course of his judgment, his Honour referred to observations by Lord Penzance in *Scott v Scott*⁵⁴ to the effect that it had never been the habit in Westminster Hall to grant new trials on the ground that the seeking party could make the case stronger by newly discovered evidence. Since *Scott* was a matrimonial cause, an area of the law governed by statute, it might be thought that the reference by Dixon J to *Scott* means that his Honour thought that principles of the kind later laid down in *Wollongong Corporation* are of general application. But that is not so.

99 Although *Scott* was decided in the Court for Divorce and Matrimonial Causes established by s 6 of the *Matrimonial Causes Act* 1857 (UK)⁵⁵, s 38 of that Act provided for trials by a special or common jury. Section 18 of the *Matrimonial Causes Act* 1858 (UK)⁵⁶ provided for the grant of rules nisi for a new trial. It was an application for a new trial under that provision that was before Lord Penzance in *Scott*⁵⁷. The statutes of 1857 and 1858 are examples of legislation which adopted the procedures of the common law courts, hence the reference by Lord Penzance to what was done in those courts in Westminster Hall.

53 (1948) 76 CLR 632 at 640-641.

54 (1863) 3 Sw & Tr 319 at 326 [164 ER 1298 at 1300].

55 20 & 21 Vict c 85.

56 21 & 22 Vict c 108.

57 (1863) 3 Sw & Tr 319 at 320 [164 ER 1298 at 1298].

100 In contrast to the common law position, s 93A(2) of the Act and s 27 of the *Federal Court of Australia Act 1976* (Cth) confer upon the Full Court of the Family Court and the Full Court of the Federal Court respectively an express power to receive further evidence. The terms of the two provisions do not coincide but they are similar. Both confer a power to be exercised by the court "in its discretion" and both use the expression "further evidence" rather than "fresh evidence"⁵⁸.

101 In making these provisions with respect to the Full Court of the Family Court and the Full Court of the Federal Court, the Commonwealth Parliament has assumed that the power derived from s 77(i) of the Constitution, in so far as it allows for the provision of an appeal within a federal court, extends to the provision of an appeal the characteristics of which differ from those of an appeal under s 73(ii) of the Constitution from a federal court to the High Court. No question arises here as to the correctness of that assumption.

102 The question of the circumstances in which the Full Court of the Family Court should exercise its discretion to receive further evidence, in exercise of the power conferred by s 93A(2), is therefore to be determined as a matter of statutory construction. That matter should not be approached as if the common law procedures which gave rise to the principles laid down in such authorities as *Wollongong Corporation* conclusively indicate the proper construction of the statutory provision⁵⁹.

58 Section 27 states:

"In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which evidence may be taken:

- (a) on affidavit; or
- (b) by video link, telephone or other appropriate means in accordance with another provision of this Act or another law of the Commonwealth; or
- (c) by oral examination before the Court or a Judge; or
- (d) otherwise in accordance with section 46."

Section 46 deals with orders and commissions for examination of witnesses.

59 However, the submissions in *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, with respect to s 27 of the *Federal Court of Australia Act 1976* (Cth), appear to have proceeded on that footing: see (1991) 178 CLR 134 at 135-138.

103 The common law procedures were interlocutory in nature in the sense that they were directed to the issue whether there should be an order for a new trial. They involved the exercise of original jurisdiction. In contrast, the statutory appeal is directed to whether the orders made below should be set aside and, if so, what orders should be made in their place to determine the outcome of the litigation. An order for a retrial is one, but not the only, order that the appellate court may make. Moreover, such an order is an order of last resort. In that context, the admission of further evidence has to be seen from a different perspective from that which would be appropriate if the statute did no more than repeat the common law procedures. For example, in a statutory appeal it may be the respondent who seeks to introduce further evidence to buttress the favourable findings already made and to resist the substitution by the appellate court of its orders for those of the trial court.

The scope of s 93A(2)

104 In the exercise of the discretion conferred by a power such as s 93A(2), the critical factor is the subject matter of the proceedings with which the appeal is concerned. This is because the purpose of the power to admit further evidence is to ensure that the proceedings do not miscarry. Tests such as those stated in *Wollongong Corporation* based on the need for finality in litigation are therefore not necessarily applicable to cases in which the interests of third parties, such as children, are at stake⁶⁰, although factors such as finality, discoverability of the evidence and its likely effect on the orders made are usually relevant to the exercise of the discretion. In an application at common law to admit further evidence, the court applies principles, bordering on fixed rules. In an application under s 93A(2) and similar provisions, the Full Court or Court of Appeal weighs factors, although it may of course develop guidelines for weighing those factors and exercising the discretion.

105 Moreover, even at common law, the grounds for admitting further evidence of matters occurring before judgment were not inflexible. The common law courts have always reserved to themselves an exceptional power to set aside a verdict on the ground of further evidence where the interests of justice require it. In *McCann*⁶¹, Dixon CJ, Fullagar, Kitto and Taylor JJ said:

60 See *R v Watt; Ex parte Slade* [1912] VLR 225 at 239, 245; see also *Re Australasian Meat Industry Employees' Union (WA Branch)*; *Ex parte Ferguson* (1986) 67 ALR 491 at 494; *Totterdell v Nelson* (1990) 26 FCR 523 at 529; *Makhoul v Barnes* (1995) 60 FCR 572 at 576-577.

61 (1954) 93 CLR 418 at 430-431.

"The grounds upon which the court proceeds in granting the remedy ... have never become completely stereotyped; they have always possessed some flexibility and have been governed by the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to a final end."

106 Other features of the statutory regime laid down by Pt X also distinguish the power to admit evidence under s 93A(2) from that existing at common law. Unlike courts *in banc* hearing applications for new trials, the Full Court of the Family Court can evaluate the facts of the appeal for itself and in many cases is in a position to evaluate the further evidence and take it into account in considering the appeal without the necessity to have the proceedings re-heard.

107 The discretion conferred by s 93A(2) to receive further evidence on appeal is not expressed to be limited in any way. In particular, the sub-section contains no requirement, comparable with that often found in statutes conferring power on an appellate court to receive further evidence, that "special grounds" or "special leave" be shown before the evidence can be adduced⁶². Nor, in contrast to the common law position, must the motion to receive the evidence be designed to set aside the verdict at first instance. Nothing in s 93A(2), for example, prevents the respondent to the appeal from bringing a motion to adduce further evidence to support the orders made.

108 When regard is had to Pt X and its place in the scheme established by the Act, it is apparent that the common law rules which govern the admission of fresh evidence in the common law courts cannot exhaustively define the scope of the discretion. The discretion is more ample than the principles applicable in common law proceedings and applied in *Wollongong Corporation*. That, of course, does not mean that the discretion reposed in the Full Court by s 93A(2) is unfettered, a point recognised by the Full Court in *In the Marriage of Abdo*⁶³. Although the discretion to admit further evidence is not attended by any express words of limitation, the subject-matter, scope and purpose of the appeal provisions in Pt X of the Act and the issues involved in each appeal will point to the considerations which are or are not extraneous to the exercise of the power.

109 One consideration in construing s 93A(2) is its remedial nature. Its principal purpose is to give to the Full Court a discretionary power to admit further evidence

62 See for example *Supreme Court Act* 1970 (NSW), ss 75A(8), 75A(9); *Rules of the Supreme Court* (WA), O 63 r 10(1); *Supreme Court Civil Procedure Act* 1932 (Tas), s 48(3).

63 (1989) 12 Fam LR 861.

where that evidence, if accepted, would demonstrate that the order under appeal is erroneous. The power exists to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures. A further, but in practice subsidiary, purpose is to give the Full Court a discretion to admit further evidence to buttress the findings already made.

110 Another consideration is the effect of the principle that a provision conferring judicial power upon a court should be construed liberally and without the making of implications or the imposition of limitations not found in the words used by the legislature⁶⁴. That is so whether the limitation derives from the common law principles governing the grant of new trials upon proof of fresh evidence or from some other source⁶⁵.

111 Still another consideration is that the discretion is given to an appellate court hearing an appeal against an order made in the exercise of original jurisdiction. No doubt it is true that, because the appeal is by way of rehearing, the Full Court's jurisdiction is neither purely appellate nor purely original⁶⁶. In *Attorney-General v Sillem*⁶⁷, Lord Westbury LC pointed out that "[a]n appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below."⁶⁸ Appellate jurisdiction in the strict sense is jurisdiction to determine whether the order of the court below was correct on the evidence and in accordance with the law then applicable⁶⁹. In contrast, the Full Court of the Family Court must decide the rights of the parties upon the facts and in accordance with the law as it exists at the time of hearing the appeal⁷⁰. Speaking of the similar jurisdiction of the English Court of Appeal, the Master of the Rolls, Sir George Jessel, said that the appeal is a "trial over again, on the evidence used in the Court

64 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313, 316.

65 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203, 205.

66 *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR(NSW) 283.

67 (1864) 10 HLC 704 [11 ER 1200].

68 (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

69 *Ponnamma v Arumogam* [1905] AC 383 at 388; *Victorian Stevedoring* (1931) 46 CLR 73 at 109.

70 *Victorian Stevedoring* (1931) 46 CLR 73 at 107.

below; but there is a special power to receive further evidence."⁷¹ Nevertheless, it is highly unlikely that Parliament in conferring jurisdiction on the Full Court to hear appeals intended that s 93A(2) should be construed in a way that would have the practical effect of obliterating the distinction between original and appellate jurisdiction. Nor can the availability of further evidence relevant to the issues in the appeal be treated as equivalent to a ground of appeal, proof of which *prima facie* entitles the appellant to a new trial. The power to admit the further evidence exists to serve the demands of justice. Ordinarily, where it is alleged that the admission of new evidence requires a new trial, justice will not be served unless the Full Court is satisfied that the further evidence would have produced a different result if it had been available at the trial. Without that condition being satisfied, it could seldom, if ever, be in the interests of justice to deprive the respondent of the benefit of the orders made by the trial judge and put that person to the expense, inconvenience and worry of a new trial.

- 112 In the context of a custody case in *G v G*⁷², Lord Fraser of Tullybelton referred to "usefulness" as a test for the reception of additional evidence on appeal, saying that "it must be a matter for the discretion of the court in each case to decide whether the additional evidence which it is asked to look at is likely to be useful or not and to reject it if it considers it unlikely to be so."⁷³ We doubt whether his Lordship intended to propound "usefulness" as a universal or exclusive test for admitting further evidence whether generally or in custody or parenting cases. Having regard to the context, it is likely that in referring to "usefulness" his Lordship had in mind evidence of events occurring after trial and before the hearing of the appeal. Immediately before the reference to "usefulness", Lord Fraser said⁷⁴:

"Additional evidence dealing with events that have occurred since the hearing in the court below is readily admitted, especially in custody cases where the relevant circumstances may change dramatically in a short period of time."

- 113 In any event, we cannot accept that the discretion to receive further evidence is so wide that the Full Court can admit further evidence *merely* because it is useful.

71 *In re Chennell; Jones v Chennell* (1878) 8 Ch D 492 at 505.

72 [1985] FLR 894.

73 [1985] FLR 894 at 901.

74 [1985] FLR 894 at 901.

Such a criterion is inconsistent both with the nature of the appellate jurisdiction exercised by that Court and with the perceived purposes of s 93A(2).

114 No doubt the Full Court will readily admit further evidence which is not in dispute and which the Court is able to evaluate and take into account in considering the appeal without the necessity to have the proceedings re-heard. Further evidence of this kind is particularly likely to be admitted where the evidence relates to events occurring after trial. In the case of undisputed evidence which the Full Court can evaluate as part of the evidence in the appeal, the discretion to admit the evidence may even be properly exercised without the Full Court considering what effect it would have had on the trial judge's decision. In that context, the likely effect of the further evidence on the Full Court's view of the evidence before the trial judge is the important consideration. Where there is no need for a new trial or extensive taking of evidence, other discretionary factors such as the availability of the evidence at the trial and the need for finality of litigation are likely to be more relevant in the exercise of the discretion than the effect that the evidence would have had at the trial.

115 Other limitations on the exercise of the power arise from the fact that the discretion which s 93A(2) confers must be exercised judicially. In most cases concerned with parenting orders that means that it should only be exercised in favour of the receipt of the further evidence if that evidence is not only relevant to the welfare of the children but is also admissible according to ordinary principles or by statute, and if there is no reason apparent to the Full Court of the Family Court for believing that the evidence is not credible.

116 The failure to have adduced the evidence before the primary judge will be a variable factor, the weight of which will depend upon all the other factors pertinent to the case. Where the evidence has been deliberately withheld, the failure to call it will ordinarily weigh heavily in the exercise of the discretion. In other cases, the failure to call the evidence even if it could have been discovered by the exercise of reasonable diligence may be of little significance. No invariable rule concerning the failure to call the evidence can or should be laid down in view of the wide discretion conferred on the court by the section.

Section 93A(2) and parenting orders

117 The discretion to admit further evidence obviously needs to be exercised with much care in parenting cases. The decision as to who should have the day to day care of children will so often be an agonising one, as indeed it is in the present case where both parents are anxious for their children's welfare. The advantage said to be attached to the opportunity of a judge at first instance to see and hear the witnesses on issues of credibility and the like may perhaps on occasions be exaggerated. Nevertheless, those advantages are likely to be real ones in a

parenting case heard by a specialist judge whose decision will involve a choice of who will be a better "custodian" of the children: sometimes either parent would be an excellent choice, and often neither would be ideal.

118 The need for caution is particularly great when an order for a change in the residence of children has been made and the appellant seeks to tender further evidence pointing to changes in circumstances, outlook or apparent welfare. In all but the most ideal of circumstances, some time will be taken by children to adapt to their different situations. So too the public and private interest in the finality of litigation must be given some weight even in cases of this kind. The important private interests of children are unlikely, save in special circumstances, to be served by frequent displacements of them and the uncertainty of prolonged and repetitive proceedings.

119 Furthermore, the operation of s 65D, which contemplates subsequent applications, has to be taken into account:

"(1) In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper.

(2) Without limiting the generality of subsection (1) and subject to this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order."

Applications for a variation of an order, rather than resort to s 93A(2), will generally be the preferred mode of procedure even where there has been a change of circumstances between the making of the order and the hearing of any appeal.

The exercise of the discretion by the Full Court

120 In our opinion, even giving s 93A(2) the wide ambit that we think it has, the Full Court of the Family Court erred in thinking that, by reason of "the various unsatisfactory elements of the manner [in] which the case proceeded ... this is one of the rare and exceptional cases in which the discretion to admit fresh evidence on appeal should be exercised."⁷⁵

121 The first of the "unsatisfactory elements" identified by the Full Court was the lateness of the filing of the husband's affidavit of 3 March 1997. This was a matter that assumed almost no significance at all in the proceedings at first instance. On the first day of the proceedings, counsel for the wife referred to the affidavit of the

75 (1997) 22 Fam LR 166 at 197-198.

husband and said that he objected "to the way in which the affidavit is drafted in its later parts, where it is strictly an affidavit in reply." He went on to say:

"[W]hat has happened is directions were made for all parties to file and serve. The husband did not file and serve. He waited until after the wife had filed her material clearly and then chose to reply to it. That is what we object to.

HIS HONOUR: There is a defect in the rules as you know. There is no provision for a reply.

[COUNSEL]: Precisely your Honour.

HIS HONOUR: But if you want to have an opportunity to do the same well then you can do it.

[COUNSEL]: Your Honour, perhaps moving to objections of more substance---

HIS HONOUR: More substantive matters, yes."

122 Counsel appearing for the wife did not seek an adjournment or to take up his Honour's offer to put on a further affidavit. Counsel appearing as the Children's Representative expressed concern at the size of the affidavit but did not complain that she was prejudiced by the late filing of the affidavit. Furthermore, for reasons which we set out later when dealing with the issue of "surprise", we are unable to conclude that the wife was taken by surprise at the trial. Notwithstanding the lateness of the affidavit, counsel for the wife clearly took the view that neither he nor she was at any disadvantage.

123 The general nature of the husband's case concerning his wife's behaviour had been clearly outlined in an earlier affidavit sworn on 11 December 1996, in respect of interim orders, and the correspondence between the solicitors annexed to that affidavit. Furthermore, the wife and no doubt her counsel were fully aware of the matters alleged against her in the proceedings for an Apprehended Violence Order. In the affidavit, sworn on 11 December 1996, the husband had outlined his general concerns regarding the wife's fitness to care for the children and had referred to a few specific incidents in more detail. The affidavit of 11 December alleged, among other things, physical and psychological abuse, violence and threats, intimidation and alcohol abuse.

124 Paragraphs 7-9 of the affidavit of 11 December stated:

"7. The relationship between the Wife and me has been deteriorating since we separated. I have been physically attacked by her and there have been

numerous instances of shouting and abuse and loss of temper on her part. I say that these incidents are unprovoked.

8. An incident took place on the 1st December, 1996 at about 7.45 pm when I was giving the child D a 'wheelbarrow' to bed. This is a game we commonly play whereby I hold the child's legs and he walks on his hands. During the course of this activity, the Wife bumped into the child D and caused his head to hit a skirting board. She then began to shout at me and the children and to make references to recent Sutherland Local Court Proceedings which involved an Application brought by me for domestic violence. (The Department of Community Services was also involved in these proceedings which arose out of incidents which took place on 19th September, 1996 during which the Wife, having been drinking alcohol, assaulted the child D on a number of occasions.) She called the child B a liar. She was unable to control herself. The Wife then threw a plate at a wall and cut her own hand in the process. There was blood flowing from her hand and blood dropped on the carpet and floor of the kitchen. She then stood over the child B and blood dripped onto B's person (sic) and clothing. B was crying uncontrollably. For her protection, I removed B from the home that evening.

9. I say that no conduct on my part provoked or contributed in any way to the incident and that there have been many similar occasions where, for no apparent reason, the Wife has lost control of herself, raised her voice, made threats and shouted abuse. This particular incident, as with others, occurred in the presence of all three children."

125 Though lacking the detail and comprehensiveness of the affidavit of 3 March, the December affidavit forewarned the wife of the sort of material likely to be raised against her at trial and upon which she was likely to be cross-examined.

Husband's affidavit of 3 March 1997

126 The husband's affidavit of 3 March 1997 consisted of 27 pages together with annexures. This affidavit alleged that the wife:

(in respect primarily of the husband)

- assaulted the husband and D;
- in the children's presence, made lewd remarks about and gestures toward the husband, some relating to the husband's new girlfriend;
- attacked the husband's character in the presence of C and D;

- taunted and denigrated the husband and encouraged C and D to join in the taunts;
- refused to provide adequate clothes, toys and necessary medicinals for the children while they were on access visits with the husband;
- denigrated the girlfriend of the husband and encouraged the children to distrust her;
- made repeated nuisance telephone calls to the husband and his girlfriend;
- gained unauthorised entry to the husband's residence, disturbed his personal papers and strewn other household items around the floor;

(in respect of all the children)

- showed no interest in the extra-curricular and sporting activities of the children;
- locked up the family dog so it could not be taken for a walk by the husband and children;
- had permitted little after-school contact between the children and their friends;
- prior to separation, had showed little affection towards the children;

(in respect primarily of C and D)

- instructed C and D as to how they should answer the questions of a child psychiatrist regarding their preferred living arrangements;
- took C and D to psychiatrists unnecessarily;
- would cause D to be "disadvantaged educationally and vocationally" if he were in her custody rather than the husband's;
- had trouble meeting the children's educational needs, such as homework;
- caused D anxiety leading him to wet his bed;
- offered C and D inducements (sweets, toys, etc) to spend time with her during the husband's agreed contact times;

- restricted unreasonably C and D's telephone contact with the husband while in her care;

(in respect primarily of B)

- abused and photographed B in bed with the husband on Father's Day morning;
- prevented B from mending her school uniform by removing the sewing machine from the house;
- made an unprovoked obscene gesture to B;
- in the presence of C and D, denigrated and insulted B;
- cut herself and deliberately dripped her blood on B;
- imposed severe, often illogical, discipline on B, regarded her distress at this as an indication that B was mentally ill, and took her to a psychiatrist;
- "promoted conflict" with B;
- attempted to undermine the good relationship between B and the younger children;
- had caused B to become frightened of her and caused her nightmares;

(in respect of A)

- showed little emotion at the suicide of A;
- had a poor relationship with A prior to the latter's suicide, exercising excessive control over her friendships, social activities and career/schooling decisions;

(in respect of the wife's own psychological stability)

- had throughout the marriage been a regular drinker and, when intoxicated, screamed abuse at the children very close to their faces, causing them to cry;
- has a distrust of all males, leading her to curtail severely the children's social activities; and
- overused prescription drugs.

The wife's response

- 127 The affidavit of the husband was received by the wife's solicitors on Wednesday 5 March 1997 and was passed on to the wife the following day⁷⁶. Over the weekend, the wife made extensive notes in response to the allegations and gave these notes to her barrister on the first day of the trial, Monday 10 March 1997. Prior to trial, the wife did not put on a further affidavit in response to the husband's allegations. In her examination-in-chief at trial, the wife responded to just one of the husband's allegations. She denied that she discouraged the children from forming friendships and gave evidence that they each had many friends. In re-examination, she conceded having struck her husband but stated that she apologised shortly thereafter. In cross-examination, the wife responded to other allegations of her husband:

76 (1997) 22 Fam LR 166 at 183.

41.

(in respect of the husband)

- she denied that she had disturbed household items in the husband's residence while he was at work;
- she could not recall having made derogatory remarks about the husband in the presence of the children;
- she denied having made obscene or offensive gestures to or in front of the children;
- she could not recall having revealed her contempt for the husband to the young children;
- she denied that the children's chanting of derogatory statements about the husband was encouraged by her;
- she admitted having made derogatory references to the husband's girlfriend in front of the children;
- she admitted that she may have made derogatory statements about the husband to C;
- she admitted having told the husband, in the presence of the children, that he and his belongings were "contaminated";
- she denied having punched the husband, but admitted slapping him, claiming that this was not deliberate and that she apologised shortly afterwards;
- she denied having under-supplied the children with clothes for contact visits with the husband;

(in respect of all the children)

- she admitted having locked up the family dog, preventing the husband and children from walking it, claiming she did so because it was "her" dog;

(in respect of C and D)

- she admitted that she had removed C and D from the marital home without the husband's agreement;
- she admitted that she refused to allow the children to wear clothes made for them by the husband's girlfriend;

- she denied having attempted to influence the children in what they said to a psychiatrist about their preferred living arrangements;
- she admitted taking C and D to psychiatrists regularly;

(in respect of B)

- she admitted photographing B and the husband in bed on Father's Day. She said this was prompted by their being in an affectionate pose, causing the wife concern that B may be at risk of sexual abuse;
- she admitted having taken the sewing machine away from B while B was using it, saying she did so because the machine was "hers";
- she admitted that her relationship with B had broken down, but claimed that her failure to reconcile with B was due to her being "prevented" from approaching the child;
- she denied having called B a liar, but admitted suggesting to C that C had been "conned" by B;
- she admitted having dripped blood onto B, but denied that she did so maliciously;
- she admitted having ordered C to take off, outside the house, and return to B a blouse she had been given by B;
- she admitted, after much evasion, that her behaviour has contributed to the poor relationship she has with B;
- she admitted imposing severe constraints upon B's activities outside the home and her contact with friends;

(in respect of A)

- she denied that her relationship with A had been poor and that she had subjected A to severe discipline;

(in respect of the wife's own psychological stability)

- she denied having drunk alcohol to excess; and
- she denied taking any prescribed medication.

Cross-examination of the husband

128 At trial, the husband underwent lengthy and detailed cross-examination on the contents of his affidavit of 3 March 1997. Cross-examination by counsel for the wife extended over 45 pages of transcript. This cross-examination covered all of the key issues raised in the husband's affidavit. It dealt specifically with many of the particular incidents recounted in that affidavit including the physical attack on the husband, the locking up of the dog, the sewing machine incident, the Fathers' Day photograph incident, the decision to remove A from school and send her to business college and the overuse of psychiatrists. The cross-examination of the husband by the Children's Representative covered another 14 pages of transcript.

129 The husband adhered to his affidavit evidence in all but one respect: he conceded that the wife appeared to have cut back her alcohol consumption since an approach by Department of Community Services officers. One matter that was not in his affidavit but emerged during the husband's cross-examination was the apparent ultimatum he received from the wife prior to separation to the effect that he would have to "choose between B and [the wife]". This disturbing allegation went un rebutted by the wife. No doubt it influenced the trial judge in his assessment that the wife "sees life in black and white terms", an assessment that the Full Court criticised as being too harsh.

130 Significantly, none of the original 21 grounds of appeal alleged that the late filing of the affidavit resulted in a denial of natural justice. By amendment, a ground 22 was added which alleged:

"That to preserve procedural fairness and to protect the interests of the children

- (a) The trial judge should have declined to proceed with the hearing because of the late filing of crucially important material upon which the case ultimately turned when it was obvious that the wife's case in answer to it had not been prepared".

However, on a reading of the transcript it is far from obvious that the wife's case in answer to the husband's affidavit had not been prepared. Counsel for the wife, who was in the best position to assess any disadvantage, made no complaint that

his conduct of the case was hampered. His cross-examination of the husband was wide ranging. Nor do the wife's answers in cross-examination suggest she had difficulty in dealing with the matters raised in the husband's affidavit. Many of the matters were dealt with in her diaries.

131 The late filing of the affidavit appears at best to have had an insignificant effect on the conduct of the trial, if it had any effect at all. So far as one can judge from all the evidence, including the post-trial affidavits of the wife, counsel for the wife would probably have conducted the case in the same way even if the husband's affidavit had been filed weeks before it was. In an affidavit sworn 3 July 1997 and filed for the purpose of the Full Court appeal, the wife refers to a number of matters about which she would have called evidence if she had received the husband's affidavit when it should have been filed. Having read this material we find it is impossible to conclude, however, that it would have had any effect on the findings of the learned trial judge. His Honour's findings concerning the conduct and attitudes of the wife, none of which were successfully challenged in the Full Court, were devastating.

132 Baker J said that the wife had been "subjected to a searching cross-examination, but did not appear to grasp the significance of her own behaviour and attitudes. The wife, in my opinion sees life in black and white terms." Later his Honour said:

"The complaints which the husband has made about the wife to which I have adverted earlier, have already had an effect on both [A] and [B] to the extent that [B] has now all but been abandoned by her mother. There is a real risk in my opinion that if the younger children remain with the wife then they will be exposed to the same rigid discipline, verbal abuse, over-protection and lack of space experienced by both [A] and [B].

The wife has been in the habit of keeping a diary and extracts from that diary were put to the wife ... [in] cross-examination. The diary was an attempt by the wife to communicate with [A] following the latter's death and contained the former's innermost thoughts. The extracts referred to reveal a bitter, hateful and vindictive woman who clearly has not come to terms with [A's] death. It may be that the wife has a guilt complex and although initially blaming herself for what happened, as time passes she is now endeavouring to shift the blame upon the rest of the family and in particular, the husband."

133 Most of the matters alleged in the affidavit of the husband filed on 3 March 1997 dealt with the behaviour of the wife in relation to the children and the husband in a domestic setting where only the husband, wife and children were present. Significantly, the further evidence upon which she now seeks to rely does

not deal with the specific incidents of misbehaviour that the trial judge found against her. These are recorded in the judgment of the Full Court as follows⁷⁷:

"The wife, on the evidence of the husband and by her own admission, acted very badly towards the husband and the children for a period of some weeks. A summary of her behaviour, as accepted by the trial Judge, is as follows:

- On Father's Day – 1 September 1996 at about 8.45 am B came into the father's bedroom, climbed into bed with him and for some 15 minutes sat talking to him. The wife came into the room and took a photograph stating 'what is going on in here is unnatural', clearly inferring some inappropriate sexual behaviour was taking place.
- On 19 September 1996, whilst the child D was sitting on his father's knee the wife came upstairs to where the husband had been living and without warning punched the husband in the back. She then dragged the child D away and hit him. This incident led to the issuing of an apprehended violence order application which was subsequently dismissed after a contested hearing.
- On 10 October 1996, as the husband was preparing to take the children and the family dog for a walk, the wife locked the dog in her bedroom. Later that evening B was using a sewing machine to alter the hem of her new school dress. The wife rudely told the child that she had no right to use the sewing machine and confiscated it. She then removed it from the home.
- On 15 October 1996 the wife shouted at the husband in the presence of the children complaining about his sexual infidelity.
- On 16 October 1996 the wife shouted at the husband.
- On 20 October 1996 the wife told C in a loud voice in D's presence 'your father is horrible, cruel and an ugly man' and that she should not be 'greedy and cruel like your father' and that 'I do not want you to turn out like your father'.
- On a daily basis the wife told C and D that B was nasty, bad, awful and horrible, and that the husband was a horrible and bad person.

77 (1997) 22 Fam LR 166 at 170-171.

46.

- On 22 October 1996 the wife abused the husband in front of the children.
- On 24 October 1996 the wife made an offensive gesture to the husband and B with her fingers.
- On 31 October 1996 in the course of an argument between B and the wife, the wife told B she was not a fit person to take the younger children out. Later that day, in the course of another argument, the wife again made an offensive gesture towards B with her fingers.
- On 9 November 1996 the wife incited C and D to call their father a wimp.
- On 11 November 1996 the wife made derogatory comments to C about her sister B. Later that day she shouted at the husband in the presence of the children about his pruning of a tree. The next day she told C that her father was 'contaminated'.
- On 1 December 1996 in the presence of all of the children the wife shouted at the husband and B that they were liars. She blamed B for her own father's hospitalisation for some cranial surgery. She continued to abuse the child B and then threw a plate into the wall, breaking the plate. In the process she cut her hand and shook her blood all over the husband and B. The wife was shouting for about 20 minutes. B refused to spend the night in the house with her mother.
- On 7 December 1996 there was a further bout of the wife shouting at the husband."

134 The Full Court summarised the matters about which the wife seeks to lead further evidence as follows⁷⁸:

- | | |
|------|--|
| "ED | Family GP - states that it was the mother who always brought the children to the surgery prior to the custody case and the father never came until April 1997. |
| [AR] | neighbour of the parties - describes mother/wife as devoted to her children. |

78 (1997) 22 Fam LR 166 at 177-178.

47.

- SG life long friend of the wife - says wife was a patient and tolerant mother, husband was an impatient father with the younger children.
- EG next door neighbour for nine years - says wife was a private caring giving and gentle person - since changing custody the younger children have been depressed.
- DL 33 year old daughter of next door neighbours who had used the wife as a sounding board during the deponent's teenage years - says since separation D and C appear depressed.
- CD neighbour of the parties - talks of the husband's agreement that A should leave school.
- JK wife's father - gives evidence about cash holdings of the wife, which issue was decided in the wife's favour in any event, and deposes to the quality of the wife's care of her children and the husband's lack of care of them. Joins issues (sic) with allegations made against him by the father. Implies that his health precluded him from giving evidence earlier in the proceedings.
- CB neighbour of the parties - grief and bereavement counsellor - observed the wife to be a devoted mother who was adored by her children and counselled the parties after the death of A. Wife responded appropriately. Husband did not respond and was referred for further counselling. Adds that C has told her that she wants to be living with her mother.
- MD close friend of A - deposes to satisfactory nature of relationship between the wife and A.
- The wife Her affidavit seeks to explain why the material was not previously before the court. She asserts that her counsel acted inappropriately. She annexes directions orders requiring the filing of affidavits by 10 January 1997, a letter of 26 February 1997 demanding the husband's documents be served that day, and a further letter of 4 March 1997 asking where the documents were. There are further annexures of transcript of the proceedings for a domestic violence order brought by the husband and B, correspondence in relation to forthcoming proceedings, some extracts from A's diary and a draft affidavit by one CP who says she has been a friend of the family for the past 8 years, that the wife was extremely close to A and had

placed her children first, by contrast with the husband who was mean with money and showed little interest in caring for the younger children. The draft affidavit asserts that immediately after A's death it was the wife who attended to the personal needs of people around her while the husband sat and did nothing. The wife was a caring mother with a very good relationship with B pre-separation."

135 On its face, this summary in our opinion falls well short of justifying the admission of the evidence in a case where a new hearing of the husband's application would be required. However, we have also carefully examined the details of the further evidence to determine whether the evidence was such that it was open to the Full Court to admit it. As we have pointed out, the further evidence was not tested and fully weighed with the evidence given at first instance in proceedings in which the court could see and hear all the witnesses. However, even accepting the evidence at face value, we have concluded that it was not open to the Full Court in the proper exercise of its discretion to admit the evidence.

136 Some of the evidence was available at the time of the trial. That evidence on its face does not appear to have substantial probative value. A deal of it amounts to little more than partisan advocacy of the wife's cause. Some of it, such as that of SG who purports to attribute different motives to the parties, is probably not even admissible.

137 Other evidence from neighbours suggested that the children's happiness and conduct may have deteriorated since the proceedings at first instance. Some of the proposed evidence repeats self-serving statements of the wife. Quite a lot of it may not be admissible. One witness, EG, says nothing that persuasively indicates that the wife would now be a better custodian of the children than the husband or that her evidence, if heard by Baker J, would probably have affected the orders which he made, although she describes one incident which does give rise to some concern. She overheard a threat by the child C to kill herself after she was chastised by her father. However, she then goes on to describe the satisfactory way in which the husband subsequently comforted the child.

138 One of the witnesses, JK, is the wife's father. Understandably, his proposed evidence is highly supportive of her. His own health is not good and that may explain why evidence from him was not led at the trial. His evidence does, however, suffer from the disadvantage that most of it is in respect of less recent times than the current events to which the primary judge gave greater weight. But, as his Honour's reasons show, he did have regard to the wife's parents' attitude to the children which was the subject of evidence at the trial.

- 139 If the evidence of other proposed witnesses, DL, CD, AR, ED, SG and CB were accepted, it would merely prove what is really beyond debate, that the wife was, for a long time, a conscientious and loving parent who was much distressed by the tragic suicide of A. If accepted, this evidence would also tend to prove that, currently, the wife is capable of looking after the children. But in that respect, we do not think that it adds anything significant to the evidence of Dr Rikard-Bell or Dr Williams whose evidence supported the wife's claim that she should have the day to day care of the younger children. The opinions and reasons of those doctors were examined by the primary judge, but, after a full examination of the evidence, the learned judge was unable to accept them.
- 140 The Full Court said⁷⁹ that the evidence of CB, "if accepted, could well lead to the opposite conclusion being reached about the wife's appreciation of the need for counselling." Accepting that that is so, nevertheless, none of the evidence of these witnesses is such that it is likely to have resulted in the primary judge reaching a different conclusion. It is of course possible that their evidence might assist in persuading another judge to make a different parenting order from that made by the trial judge. But that is not a sufficient ground for admitting the evidence. Another judge with different perceptions might make a different order on the same evidence as was before Baker J. The evidence in residency cases is often such that the same body of evidence may produce opposite but reasonable conclusions.
- 141 With great respect to the learned judges of the Full Court, the late filing of the husband's affidavit was not a reason for admitting further evidence and ordering a new hearing of the application. We find it impossible to accept that this evidence would have made the slightest difference to those findings of the primary judge which were determinative of the residency orders. Plainly, it could not affect his Honour's findings concerning the specific incidents which are recorded in the Full Court's judgment. Nor is it likely that the further evidence would have affected his Honour's findings concerning the wife's fitness to have day to day custody of the children. Those findings were firmly based on her proven or admitted behaviour over a considerable period of time, her demeanour and answers in the witness box, her diary entries and the breakdown of the relationships between the wife and the daughters, A and B.
- 142 The second of the three elements referred to by the Full Court was the admissibility of evidence of the statements of the daughter B and the witnesses KW and MD. The Full Court questioned whether it should have been admitted taking the view that, although legally admissible, the evidence should have been

79 (1997) 22 Fam LR 166 at 175.

rejected because of its disproportionate prejudicial effect⁸⁰. However, as their Honours acknowledged, the failure of the primary judge to consider whether to reject the evidence on the ground of prejudice "does not ... vitiate the findings of the trial Judge as it is unclear whether he relied to any extent on any of the matters contained in any of those statements, and there was ample other evidence to support the findings he made." ⁸¹ There being no basis for thinking that this evidence had any effect on the outcome of the proceedings, it was not a matter that could justify the admission of the new evidence.

143 The third of the three elements relied on by the Full Court was the "significant emphasis" by the primary judge "on the events subsequent to A's death and the lack of emphasis on the quality of care provided by the wife towards all of the children in her role as their primary care-giver over a period of almost 18 years."⁸² However, it was plainly open to the primary judge to decide whether the recent conduct of the wife was of greater weight in relation to the issues that he had to decide than conduct more remote in time. It by no means strikes us as

80 The trial judge was never asked to exercise his discretion. It is highly doubtful whether at common law, in proceedings other than criminal proceedings, otherwise admissible evidence could be rejected on the grounds of prejudice. However, ss 135 and 136 of the *Evidence Act* 1995 (Cth) have now introduced such a rule conferring a very wide discretion upon trial judges.

Section 135:

"The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time."

Section 136:

"The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing."

81 (1997) 22 Fam LR 166 at 196.

82 (1997) 22 Fam LR 166 at 197.

unreasonable for the trial judge to give greater weight to the former than the latter. Indeed, in the circumstances of this case that would appear to be an entirely appropriate approach. Their Honours were in error in concluding that it was a matter relevant to the exercise of the discretion conferred by s 93A(2).

144 It is clear that, but for concluding that the trial before Baker J was flawed by virtue of these three "unsatisfactory elements", the Full Court would not have received the further evidence and ordered a new hearing. With great respect to their Honours, we do not think that either individually or collectively these matters provide any ground for admitting the further evidence and ordering a new trial. It follows that their Honours having erred in respect of these three matters their discretion to admit the evidence has miscarried.

145 There are, we think, two further important matters in respect of which the Full Court's discretion miscarried. The first of these additional matters relates to the fact that, notwithstanding their Honours' criticism of the course of the proceedings before the primary judge and their evaluation of the further evidence, they were prepared to say no more than "that the best interest of these children *may not be served* by allowing the residence order to stand."⁸³ (emphasis added) Earlier, when discussing the evidence of CB, their Honours said that, if her evidence was accepted, it "*could well lead* to the opposite conclusion being reached about the wife's appreciation of the need for counselling."⁸⁴ (emphasis added) Later, their Honours referred to the findings of the primary judge that the mother was "*over-protective* of the children", "has become dependent upon them", "suffers from an *anxiety state*" and "*is unable to separate her own needs from those of the children.*"⁸⁵ (original emphasis) Their Honours said that "the fresh evidence, if accepted *may well lead* to different conclusions being reached about these observations."⁸⁶ (emphasis added) These remarks indicate that their Honours admitted the further evidence without coming to any conclusion as to whether it would have caused the primary judge to make a different order or, for that matter, would on the probabilities compel another judge to make a different order.

146 Given the nature of the evidence at the trial and the nature of the further evidence, their Honours' words would seem to have been carefully chosen and to reflect the way that the wife's case was put to them on the appeal. They recorded counsel for the wife as submitting that, by reason of the late filing of the affidavit

83 (1997) 22 Fam LR 166 at 197.

84 (1997) 22 Fam LR 166 at 175.

85 (1997) 22 Fam LR 166 at 176.

86 (1997) 22 Fam LR 166 at 176.

of the husband, the "strong recommendations of a psychiatrist and the court counsellor" and the submissions of the Child Representative, it would be a proper exercise of discretion to allow the fresh evidence and remit the matter for a retrial⁸⁷. Their Honours said that counsel for the wife "made those submissions on the basis that if the Full Court accepted at face value the fresh evidence, then the residence orders made *did not necessarily advance* the welfare of the children and thus there *may have been* a miscarriage of justice."⁸⁸ (emphasis added)

147 It is clear that their Honours admitted the further evidence and ordered a new hearing because they regarded three aspects of the trial before Baker J as unsatisfactory and considered that the further evidence could or might lead to a different order in a new trial. They plainly concluded that the order made by Baker J may not have been in the best interests of the children. However, in our opinion, in the circumstance of this case, that was not a proper basis for admitting the evidence and ordering a new trial.

148 Indeed, even if the Full Court had been correct in concluding that the trial before Baker J had exhibited the three "unsatisfactory elements" to which their Honours referred, we would not accept that it was open to the Full Court to exercise its discretion on the basis that a new trial could or might result in a different order. After all, neither individually nor collectively did those features constitute appealable error. The power conferred by s 93A(2) is not a solvent for correcting orders that the Full Court regards as unsatisfactory but which contain no appealable error. New hearings are not to be ordered merely because there is a real chance that a different order might be made by a different judge or that there is a real chance that the order under appeal does not serve the best interests of the child. It is true that finality of litigation cannot play the part in the exercise of the s 93A(2) discretion that it does in the exercise of the discretion to order a new trial in common law proceedings. Nevertheless, it does have a role to play in the exercise of the s 93A(2) discretion. Whatever the limits of that role, it at least rules out the admission of further evidence where the appellant cannot establish any error in the making of the orders but seeks to have a new trial because on the whole of the evidence now available different orders might be made at that trial.

149 In exercising the discretion to receive the further evidence in this case, the Full Court had to bear in mind the purpose to which that evidence was directed. That purpose was to provide the evidentiary ground for setting aside the order of the primary judge and ordering a new hearing of the husband's application, it being common ground that, if the appeal should be allowed, the Full Court could not

87 (1997) 22 Fam LR 166 at 184.

88 (1997) 22 Fam LR 166 at 184.

determine the matter. The Full Court also had to bear in mind that, in the context of a case such as this one, the relevant purpose of s 93A(2) is to facilitate the correction of an error where that error has probably occurred because the further evidence was not before the primary judge. Because that is so, the proper exercise of the discretion in the circumstances of this case required the Full Court to be affirmatively satisfied of two things. The first was that, given the findings of the trial judge, the further evidence if tendered before him was likely to have produced a different result. It was not enough that the Full Court thought that, upon the whole of the evidence including the further evidence, another judge might make a different order. The second was that the best interests of the children required rehearing of the husband's application, notwithstanding that all members of the family would likely suffer stress, inconvenience and uncertainty as the result of a new hearing. In that context, the financial cost of a further hearing and its impact on the family could not be ignored.

150 In some exceptional cases - those concerned with allegations of physical or psychological abuse of a child are an example - it might arguably be a proper exercise of discretion for the Full Court to admit further evidence and order a new hearing even though it is not reasonably satisfied that the evidence would have produced, or at a new hearing would now produce, a different result. In such cases, it may be enough that the court thinks that there is a very real risk, although not a probability, that the current order may actually endanger the child. The consequences for the child may be so grave that arguably the best interests of the child might require the admission of the further evidence and a new hearing to investigate all the available evidence. But if such cases would entitle the Full Court to order a new hearing, they should be regarded as truly exceptional. Ordinarily, even those cases are best left to be dealt with by an application, made pursuant to s 65E, to vary the order the subject of appeal. However, assuming such cases are an exception to the general rule, they are quite different from cases where there is merely a difference of opinion as to whether the child's best interests require him or her to be in the care of one parent rather than the other.

151 Wide as the discretion conferred by s 93A(2) undoubtedly is, apart from such truly exceptionable cases, more is required for its exercise and the ordering of a new hearing than a real chance that the order under appeal does not serve the best interests of the child. Given the nature of applications for parenting orders, there must often be a real chance that the order under appeal is not in the best interests of the child. Such applications necessarily involve predictions and assumptions about the future which are not susceptible of scientific demonstration or proof. Perceptions, predictions and even intuition and guesswork can all play a part in the making of an order. The views of appellate judges about the proper order to be made will not infrequently conflict with those of the primary judge. Yet, absent legal error or a plainly unjust result, the order of the primary judge must stand,

irrespective of any views that the appellate judges have about the conclusions of the primary judge.

152 The evidence in residency cases is often such that the same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. It is a mistake to think that there is always only one right answer to the question of what the best interests of a child require. Each judge is duty bound to make the order which he or she thinks is in the best interests of the child. But the fact that other judges think that the best interests of that child require a different order does not necessarily prove that the first order was not in the best interests of the child. Best interests are values, not facts. They involve a discretionary judgment in respect of which judges can come to opposite but reasonable conclusions. In *G v G*⁸⁹, Lord Fraser of Tullybelton pointed out:

"The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory."

153 Nothing about the present case indicated that it had any exceptional feature. It was not one of those arguably exceptional cases where the best interests of the children required a new trial on all the evidence now available whether or not the Full Court could be reasonably satisfied that a different order would probably have been made if the further evidence had been before Baker J.

154 The second additional matter which discloses an error in the exercise of the Full Court's discretion is that it is not apparent from their Honours' reasons that they weighed in the balance two relevant considerations: (1) whether improvement (if any) in the children's circumstances as a result of a different parenting order at this stage might be marginal at best; and (2) whether such a marginal improvement could justify the pain, expense, delay and uncertainty of a second set of prolonged proceedings and the consequences that would flow from a different order. In respect of (2) it must be noted that, at the time of making the order for a retrial, the children were with the father and that was to continue pending the rehearing.

155 Although it was a matter for the Full Court, it is difficult to see, on the evidence, how a different parenting order from that made by Baker J could bring about more than a marginal improvement in the children's welfare. Dr Rikard-Bell, a psychiatrist who prepared a Family Report at the request of the Children's

89 [1985] FLR 894 at 897-898.

Representative, recommended that the two younger children stay with their mother because he believed "they would be very distressed at leaving their mother."⁹⁰ Dr Rikard-Bell also "formed the view that the two younger children had a close, loving relationship with their mother", that they "were extremely dependent on her and influenced directly by her thoughts and feelings", that the wife "was a capable, caring parent and that the children were developing normally in her care."⁹¹

156 So far as the husband was concerned, Dr Rikard-Bell said⁹²:

"I formed the view that the father had a close, loving relationship with the three children. The younger two children related well to their father and I formed the view that they were close to him despite their negative statements. B was closely aligned with her father. I formed the view that he was a capable, caring parent.

...

Should the three children be placed into the father's care, I believe they would develop normally and be well taken care of. In the short-term the younger two children would be distressed about being separated from their mother and they would be very concerned about her welfare. I believe in the long-term they would develop normally."

Dr Rikard-Bell also said that, if the wife should actively attempt to sabotage the relationships between the husband and the children, "it would then be in the children's best interests to be placed into the care of their father."⁹³

157 Although the learned primary judge did not accept Dr Rikard-Bell's recommendation as to the residency order that should be made, he clearly took into account Dr Rikard-Bell's concern about the effect a change of residency would have on the younger children. His Honour said:

"I agree with Dr Rikard-Bell that for the children to be separated from their mother may be initially distressing for them, but eventually they will settle down. They will have the benefit of regular contact with their mother, which contact will not in any way be sabotaged or obstructed by the father. A

90 (1997) 22 Fam LR 166 at 172.

91 (1997) 22 Fam LR 166 at 171.

92 (1997) 22 Fam LR 166 at 172.

93 (1997) 22 Fam LR 166 at 173.

change of custody for (sic) the parent who has always been the children's caretaker is always a difficult step to take, however, for all the above reasons I am satisfied in the present case it is in the children's best interests for that to occur."

158 Part of those reasons was:

"[I]f the children remain with their mother, contact with the father is problematic with a real risk that inevitably the wife will alienate the children from their father and that they, that is to say the children, will ultimately abandon her altogether as [B] has done. On the other hand, if the husband obtains an order for residence, contact will not be a problem and the children will pass from one household to the other on a regular basis, free of any interference or attempts at indoctrination at least on the husband's part."

159 Given the evidence that the father had a close, loving relationship with all three children, that he was a capable, caring parent and the fact that the residency order had been implemented, the proper exercise of the Full Court's discretion required that it consider two things: first, the extent to which, if at all, a different parenting order at this stage would improve the children's welfare; second, whether any improvement justified putting the family through a new hearing and would outweigh any adverse consequences that might flow from another and different residency order. The judgment of the Full Court gives no indication, however, that the learned judges gave any consideration to these important matters.

160 The discretion of the Full Court to receive further evidence in an appeal should not be lightly set aside. It is a discretion of great width. Absent discernible legal error, the discretion should be set aside only when the case for or against its exercise is so overwhelming that the contrary conclusion must be the product of a failure to understand the nature of the discretion. For the reasons that we have given, however, the exercise of the discretion to receive the evidence and the ordering of a new trial in this case was vitiated by legal error. It follows that the orders of the Full Court must be set aside. Before we consider what orders should be made in substitution of those orders, it is necessary to deal with a further argument by which counsel for the wife sought to uphold the order for a new trial.

Surprise

161 Counsel for the wife argued that she was taken by "surprise" at the trial in that the husband's affidavit of 3 March 1997 introduced at the last minute a series of new issues with which she and her counsel were ill-prepared to deal, placing her at an unfair disadvantage. He contended that this fact alone entitled her to a new hearing. Much authority supports the proposition that, where a party has been taken by "surprise", an appellate court may order a new trial if to do so would best

serve the interests of justice⁹⁴. However, the wife in the present case did not suffer any surprise in the relevant sense.

162 As we have already pointed out, the husband's affidavit of 3 March 1997 was the second that he had filed in the proceedings. Though lacking the detail and comprehensiveness of the affidavit of 3 March, the earlier December affidavit forewarned the wife of the sort of issues likely to be raised against her at trial and upon which she was likely to be cross-examined. Some of the material contained in the husband's affidavit of 3 March related to events referred to in detail in the diaries of the wife. So there could be no lack of surprise concerning these matters. The first 31 paragraphs of the March affidavit were concerned with financial matters. There then followed lengthy paragraphs largely relating to events which occurred in or about the home and at the children's schools and other places, all matters obviously always likely to be in controversy between the parties. The affidavit alleges a lack of co-operation by the wife to facilitate the husband's access to the children. The balance of the affidavit, some 54 paragraphs, directly responds by explanation or denial to matters contained in material already filed on behalf of the wife. Both sets of material are, sadly, largely a predictable catalogue of claims and counterclaims which might be expected in the case of a marriage in decay and an anxious desire of each parent to have the day to day care of the children and to restrict or deny that responsibility to the other.

163 The husband's affidavit of 3 March was in the wife's hands by the Thursday before the Monday upon which the case was to begin. It was not proved or even alleged that some intervening circumstance prevented careful consideration of, and a response to, the affidavit. Indeed, over the weekend preceding the trial, the wife made extensive notes in response to the allegations in the affidavit of 3 March and passed these on to her counsel at trial. The wife did not put on a further affidavit by way of response. Neither when the case started nor later was any application for an adjournment of the proceedings made. Counsel for the wife informed Baker J at the commencement of the trial that "we are set for six days and we might take that". He told the judge that the case was listed to go over to the following "Monday, if need be."

164 It is true that in her examination-in-chief the wife addressed only one of the allegations made in the husband's affidavit of 3 March. But this falls short of demonstrating that either she or her counsel was taken by surprise. Her counsel may well have formed a view about the likelihood of her evidence being accepted in preference to that of the husband. He may well have made a tactical decision that the less said about the wife's behaviour, some of which was admitted, the

94 *McDonald* (1965) 113 CLR 529; *Jeffrey v Jeffrey* (1931) 31 SR(NSW) 535; *Rowe v Australian United Steam Navigation Co Ltd* (1909) 9 CLR 1.

better. Significantly, most of the further evidence upon which she now seeks to rely does not deal with the specific incidents of misbehaviour that the trial judge found against her. The strength of the wife's case lay not in dwelling on the details of her recent behaviour but relying upon more general considerations such as her long period of primary responsibility for the children, the age of the two younger children and the opinions of Dr Williams and Dr Rikard-Bell whose evidence generally supported her claim that she should have the custody of the younger children.

165 Furthermore, although the wife was cross-examined at length on the material in that affidavit, her evidence gives no indication that she was taken by surprise and unable to deal with the matters put to her. She was cross-examined over some 27 pages of transcript upon the diaries she had kept. There were entries relating particularly to her relationship with the children and the husband's attitude to her and to the children. The diaries recorded some of the incidents upon which the husband relied as instances of conduct disqualifying the wife from having the day to day care of the children. Counsel for the wife made no application to allow her to confer with him after cross-examination and before re-examination. Moreover, the wife's cross-examination was interrupted from time to time by the interposition of other witnesses and extended over three days.

166 We have also carefully examined the cross-examination of the husband by the wife's counsel at the trial. Her counsel in this Court (who did not appear at the trial) did not suggest that the lateness of the husband's material actually disabled or inhibited the cross-examiner. Nor could he. The cross-examination of the husband was extensive and informed. It ranged very broadly over the issues joined in the affidavits and went into detail about matters the subject of the husband's affidavit.

167 In these circumstances, it is impossible to conclude that the wife was taken by surprise and did not have adequate opportunity to deal with the material in the affidavit of 3 March 1997. We reject the contention that the order for a new trial of the application can be justified on the basis of "surprise".

168 For the reasons we have given, the Full Court's exercise of the discretion to receive the evidence and to order a new trial was vitiated by legal error. It follows that the orders of that Court must be set aside. This Court is in as good a position as the Full Court to exercise the discretion which, in point of legal theory, the Full Court has failed to exercise.

169 As we pointed out earlier in our reasons, we have examined the further evidence to determine whether it was open to the Full Court to admit it and have come to the conclusion that it was not open to that Court to admit the evidence. That being so, we are satisfied that the proper exercise of the discretion requires

that the tender of the further evidence be rejected. Given the findings of the trial judge, we think it highly unlikely that the further evidence would have caused him to make any different orders from those which he made. Moreover, once the three "unsatisfactory elements" that the Full Court took into account are rejected, there really is no basis at all for admitting the further evidence and ordering a new hearing. All that can fairly be said about the application is that the wife seeks a new trial because she now wishes to lead further evidence, evidence which, for the most part, merely confirms the case that she relied on before Baker J. In a few respects the evidence, if accepted, may strengthen her case, but not to the extent that it would have affected the decision of his Honour. The bulk of the matters relate to events occurring before trial. Having regard to the affidavit of 11 December 1996 and the correspondence between the solicitors annexed to that affidavit, neither the wife nor her legal advisers could have been under any misunderstanding about the case that would be made against her to substantiate the husband's application for parenting orders. Apart from the evidence of post-trial matters, the further evidence could and should have been produced at the hearing before Baker J. To set aside the parenting orders made by the learned judge in this case would inevitably tend to throw into jeopardy the finality of orders made by primary judges and give them a merely provisional status. Neither the public interest nor the best interests of the children in this case require a new hearing of the husband's application for parenting orders.

- 170 The appeal to this Court should be allowed. Orders 2, 3, 4, 6, 7 and 8 made by the Full Court on 17 September 1997 should be set aside. In place thereof it should be ordered that the appeal to that Court be dismissed in so far as those orders deal with the issues of residency and contact. The parties should have 14 days to file such written submissions as they may be advised with respect to the making of orders concerning the alteration of property, the order for costs in this Court and the Full Court, the granting of certificates, pursuant to the *Federal Proceedings (Costs) Act* 1981 (Cth) and whether Order 1 made by the Full Court should be set aside.

171 KIRBY J. This appeal, from the orders of the Full Court of the Family Court of Australia⁹⁵, arises out of a contest as to where two children should reside following the dissolution of the marriage of their parents. More particularly, it concerns the approach taken by the Full Court on an appeal from residence orders made by the primary judge⁹⁶. He had ordered that the children should reside with the husband. The Full Court set that order aside⁹⁷. It determined that the matters relating to the issues of residence and contact should be remitted for urgent hearing before a different trial judge.

172 The husband complained that, in so ordering, the Full Court had erred in principle in important respects. It had admitted evidence in the appeal, allegedly in contradiction of principles established by this Court⁹⁸. It had misdirected itself as to the applicability of the provisions of the *Family Law Act* 1975 (Cth) ("the Act") concerning the paramountcy of the best interests of children⁹⁹. Moreover, the three specific grounds nominated by the Full Court to justify disturbing the orders of the primary judge did not, in the husband's submission, sustain the conclusion which the Full Court reached. The husband therefore asked this Court to restore the residence order made in his favour.

173 Disputes of this kind are amongst the most difficult and painful that fall to any court. The reasons of the judges below demonstrate the anxious concern which they brought to their decisions. This Court must now perform its function. But just as this Court, in the past, has emphasised the restraint to be observed by the Full Court before disturbing discretionary and evaluative decisions made at trial¹⁰⁰, in supervising for itself the discretionary and evaluative decisions of the Full Court, this Court (no constitutional error being asserted) must show the same restraint.

95 *In the Marriage of VJ and CJ* (1997) 22 Fam LR 166 (Lindenmayer, Kay and Maxwell JJ).

96 *J v J* unreported, Family Court of Australia, 14 March 1997 (Baker J).

97 (1997) 22 Fam LR 166 at 202.

98 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444.

99 *Family Law Act* 1975 (Cth) ("the Act"), s 65E. See (1997) 22 Fam LR 166 at 183.

100 *Gronow v Gronow* (1979) 144 CLR 513; *Mallet v Mallet* (1984) 156 CLR 605; *Norbis v Norbis* (1986) 161 CLR 513.

The facts

174 The appellant CDJ (the husband) and the respondent VAJ (the wife) had four children whom I shall describe (as the Full Court did¹⁰¹) as A (born in 1978), B (born in 1981), C (born in 1988) and D (born in 1990). A and B, both girls, were adopted as babies. C and D, a girl and a boy, were the parties' natural children. A committed suicide in 1994 at the age of 16 years. This event traumatised the entire family. The relationship of the couple collapsed within two years of the suicide and they separated. The wife eventually took C and D with her from the matrimonial home. B refused to live with the mother, apparently blaming her for A's suicide. She remained with the father.

175 Both parents, in their differing ways, displayed love for the children. But because of their separation, and the serious differences and animosity between them (especially on the part of the wife towards the husband), it fell to the Family Court to make an order, previously described as a custody order¹⁰² but now called a "parenting order"¹⁰³, dealing with "the person ... with whom a child is to live". The primary judge had before him a separate dispute in relation to property. The resolution of that dispute, in terms of the orders originally made, depended, in part, on the outcome of the contest on the "residence application" in respect of the two young children. This inter-relationship was recognised by the Full Court¹⁰⁴. This Court has not been concerned with the property disposition. However, its outcome may be affected by the resolution of this appeal.

Decision of the primary judge

176 The trial at first instance lasted five days. It began on a Monday and concluded with an ex tempore decision on the Friday. In this respect, it conformed to the hearing schedule that had been fixed by the court. That schedule was, however, departed from to some extent. Although the wife's affidavit and financial statements were filed as directed, the pre-trial affidavit of the husband, required to be served by 4 March 1997, was not served on the wife's solicitors until the following day. It was not then made available to the wife until one day later. This was the Thursday immediately prior to the week set aside for the trial. The husband's affidavit was 109 pages long. It included several detailed annexures. Counsel appearing for the wife at the trial objected to some of the material claiming that it was new, late and in breach of the practice of the Family Court. The primary

101 (1997) 22 Fam LR 166 at 169.

102 See the Act (as originally enacted), Pt VII "Welfare and Custody of Children".

103 s 64B.

104 (1997) 22 Fam LR 166 at 198.

judge offered an opportunity to counsel, in effect, to seek an adjournment or to call further evidence. This was declined. The case proceeded to its allotted hearing.

177 On the issue of the residence order, the reasons of the primary judge commenced by setting out the background of the relationship of the parties and the issues as each of them viewed them. The primary judge then summarised a "family report" prepared, at the request of the children's representative, by Dr Chris Rikard-Bell (a family, child and adolescent psychiatrist)¹⁰⁵. This was followed by a review of the evidence. The primary judge then made his own assessment of what he described as "the personality, demeanour and motives of the parties"¹⁰⁶. Mention was made, in closing, of the submissions, made on behalf of C and D, by the children's representative.

178 There was remarkable unanimity in much of the evidence recounted by the primary judge. The wife's case was that she had been the children's primary care giver since birth and that "the younger children [had] expressed a strong preference to live with her."¹⁰⁷ Dr Rikard-Bell recommended that the two younger children "remain staying with their mother" because "they would be very distressed at leaving [her]"¹⁰⁸. Dr Peter Whetton, a psychiatrist called by the wife, described how he had seen the two young children "who appear to be bright and happy children, delighted to be with their mother" whom he assessed as "totally fit to love and care for her children."¹⁰⁹ Dr Sarah Williams, a practising child psychiatrist who had been seeing the younger children, likewise observed that they "were closely bonded to the mother and wanted to live with her."¹¹⁰ In Dr Williams' opinion, "it was not in the interests of the children that they be removed from the care of the wife"¹¹¹. Whilst the judge expressed the view that Dr Williams had become "identified with the wife's case"¹¹², no similar criticisms were made of Dr Whetton or Dr Rikard-Bell. The latter was an independent expert chosen by the Court. The most that was suggested was that, to the extent that their opinions rested on the children's own expressed preferences, these were contaminated by

105 Pursuant to Family Law Rules, O 25 r 5.

106 *J v J* unreported, Family Court of Australia, 14 March 1997 at 17 per Baker J.

107 *J v J* unreported, Family Court of Australia, 14 March 1997 at 4.

108 *J v J* unreported, Family Court of Australia, 14 March 1997 at 8.

109 *J v J* unreported, Family Court of Australia, 14 March 1997 at 12.

110 *J v J* unreported, Family Court of Australia, 14 March 1997 at 14.

111 *J v J* unreported, Family Court of Australia, 14 March 1997 at 14.

112 *J v J* unreported, Family Court of Australia, 14 March 1997 at 15.

concepts put to them by their mother, with whom they were then living¹¹³. To the submissions put on behalf of the children's representative of the younger children (to the effect that the children should remain with the mother with reasonable contact to the father) the primary judge responded that the representative had adopted "a simplistic and rather naive approach"¹¹⁴.

179 It is in this context, and against the background of such fairly consistent expressions of expert opinion, and of the children's own expressed wishes, that the grounds of the primary judge for disturbing the residence of C and D with their mother must be understood and would have been understood by the Full Court.

180 In his conclusions, the primary judge referred to the wife's humourless demeanour in court and what he saw as her insensitive and inappropriate behaviour towards the alienated child B. He concluded that she was incapable of coping with teenagers. Several passages in his Honour's reasons (to which the Full Court made reference¹¹⁵) suggest that the primary judge was much affected by the "calm personality" of the husband - an intelligent man, with a professional position, and a much more "relaxed attitude towards parenting" than the wife evinced¹¹⁶. He concluded that the wife suffered "from an anxiety state and is unable to separate her own needs from those of the children."¹¹⁷

181 In part, the foregoing impressions were clearly affected by the apparent lack of warmth and appearance of rigidity which the primary judge felt the wife had shown when giving evidence. But in part, they also turned on evidence tendered in the husband's case. This included "[t]he wife's extraordinary behaviour as set out in annexure 'C' to the husband's ... affidavit and the circumstances surrounding the AVO proceedings" also deposed to in that affidavit¹¹⁸. In part, it also arose out of cross-examination of the wife in respect of a diary which she had kept relating to the period after the suicide of A. Of this, the primary judge said¹¹⁹:

"The diary was an attempt by the wife to communicate with A following the latter's death and contained the former's innermost thoughts. The extracts

113 *J v J* unreported, Family Court of Australia, 14 March 1997 at 24.

114 *J v J* unreported, Family Court of Australia, 14 March 1997 at 25.

115 (1997) 22 Fam LR 166 at 174-177.

116 *J v J* unreported, Family Court of Australia, 14 March 1997 at 17, 18 per Baker J.

117 *J v J* unreported, Family Court of Australia, 14 March 1997 at 21 per Baker J.

118 *J v J* unreported, Family Court of Australia, 14 March 1997 at 19 per Baker J.

119 *J v J* unreported, Family Court of Australia, 14 March 1997 at 21-22 per Baker J.

referred to reveal a bitter, hateful and vindictive woman, who clearly has not come to terms with A's death. It may be that the wife has a guilt complex and although initially blaming herself for what happened, as time passes she is now endeavouring to shift the blame upon the rest of the family and in particular, the husband. Her behaviour in relation to all the events referred to in annexure 'C' to the husband's affidavit sworn 7 March 1997 was bizarre in the extreme and was another example of the complete failure on the wife's part to perceive where the best interests of her children lie in the circumstances of all those events. Despite what she says I doubt that the wife has any real commitment to the husband exercising regular contact to his children, as witnessed in comments made by her in her diary in relation to him and ... the children."

The primary judge made orders providing that the children, C and D, reside with the husband, the husband have sole parental responsibility for their day to day care, welfare and development and the wife have contact each alternate weekend, each alternate Tuesday evening and for half of the school holidays.

Decision of the Full Court

182 Leaving aside the treatment of the property dispute, the Full Court had before it 24 grounds of appeal relating to the residence orders. Most of these concerned challenges to particular remarks in the judge's reasoning and to the approach which those remarks were said to evidence. But some of them related to the suggested inadequacy of the primary judge's reasons¹²⁰; inappropriate treatment of the children's expressed wishes¹²¹; inadequate attention to the evidence of Dr Rikard-Bell¹²²; undue attention to the evidence of the husband rather than the wife¹²³; erroneous admission into evidence and use of testimony at the coronial inquest into the death of A¹²⁴; erroneous admission into evidence of a statement by B (taken for the purposes of bringing proceedings for an AVO), in which B detailed what she perceived to be significant and inappropriate behaviour on behalf of her mother¹²⁵; inadequate consideration of the disruption of the change of the

120 Grounds 10, 11 and 12. See (1997) 22 Fam LR 166 at 185-186.

121 Grounds 13 and 16. See (1997) 22 Fam LR 166 at 186.

122 Grounds 14 and 15. See (1997) 22 Fam LR 166 at 186.

123 Grounds 17 and 18. See (1997) 22 Fam LR 166 at 186-187.

124 Ground 23. See (1997) 22 Fam LR 166 at 187-192.

125 Ground 24. See (1997) 22 Fam LR 166 at 192-196.

children's residence, having regard to their tender age¹²⁶; and inappropriate and adverse comments about the wife¹²⁷. Patiently, the Full Court dealt with all of these grounds. Within the ambit of the matters litigated at trial, it rejected them all. It concluded¹²⁸:

"[S]ave for the issues relating to the fresh evidence, any errors demonstrated in the approach taken by his Honour either as to the admissibility of evidence or as to the findings made by his Honour, would not amount to appealable errors when viewed in the light of the test set out in *Gronow v Gronow*¹²⁹ or *House v [The King]*¹³⁰."

183 It was in this way that the Full Court made it clear that its decision to allow the appeal on the issue of the residence orders rested upon its discretion to admit "fresh evidence"¹³¹ which the wife had tendered to it. It identified "[i]n summary" the three issues which most affected the decision to admit the "fresh evidence". It also mentioned the evidence of CB. She had been a neighbour of the parties at the time that they were living together and was a professional grief and bereavement counsellor. This material, in particular, led the Full Court (in the passage which the majority have extracted) to conclude "that the best interest of these children may not be served by allowing the residence order to stand."¹³² It was here that the husband argued that the Full Court had erred in its approach, in principle and in fact.

The applicable legislation

184 The relevant provisions of the Act are set out in the reasons of the majority. The crucial provisions are those which govern the reception of further evidence on an appeal to the Full Court of the Family Court¹³³; those which relate to the making

126 Ground 25. See (1997) 22 Fam LR 166 at 196.

127 Grounds 26-28. See (1997) 22 Fam LR 166 at 197.

128 (1997) 22 Fam LR 166 at 197.

129 (1979) 144 CLR 513.

130 (1936) 55 CLR 499.

131 (1997) 22 Fam LR 166 at 197.

132 (1997) 22 Fam LR 166 at 197.

133 s 93A(2).

of a "parenting order" (including one as to the residence of a child)¹³⁴; those which permit variation of such an order¹³⁵; and the provision establishing the "paramountcy principle" requiring that "the best interests of the child" is "the paramount consideration" for the Court "[i]n deciding whether to make a particular parenting order in relation to a child"¹³⁶. Because of the way in which the husband fought this appeal, both before the Full Court and in this Court, I will content myself with repeating only the applicable provision of the Act, empowering the Full Court to receive evidence that was not before the primary judge. Relevantly, s 93A(2) provides:

"[I]n an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given by affidavit, by oral examination before the Family Court or a Judge or in such other manner as the Family Court may direct."

185 In this case, the Full Court decided to receive further evidence upon questions of fact. It then received affidavits, including an affidavit of CB to which it made specific reference. Before this Court may disturb the decision of the Full Court, exercising the discretion which the Parliament has conferred upon it, it is necessary to consider the principles which, in an appeal of this kind, govern the approach that should be taken.

134 ss 65D(1) and 64B(2)(a).

135 s 65D(2).

136 s 65E. This may be contrasted with s 64(1)(a) in the Act as it stood before the 1995 amendment (as set out in the reasons of the majority).

Discretionary and evaluative decisions

186

A number of general propositions may be stated:

1. Neither this Court, nor the Full Court in relation to appeals to it, has authority to disturb a decision under appeal simply because the appellate judges, faced with the same material, would have reached a conclusion different from that under appeal. To approach the appellate function in such a way would contravene established authority. It would involve one level of the judicial hierarchy, without lawful warrant, intruding into the decisions of another¹³⁷. To authorise appellate disturbance, where the decision under appeal is discretionary or involves quasi-discretionary evaluation, it is necessary for those mounting the challenge to demonstrate that, in reaching the orders the subject of the appeal, the court below has acted on a wrong principle or (although the precise error of principle cannot be identified) has reached a conclusion which is plainly wrong¹³⁸. Obviously, what is "plainly wrong" will vary in the eyes of different beholders. It is not necessary for an appellant to demonstrate the kind of unreasonableness that must be shown to authorise judicial intervention in the decision of an administrator otherwise acting within power¹³⁹. The reference to "plainly wrong" is designed to remind the appellate court of the need to approach an appeal with much caution in a case where an error of principle cannot be clearly identified.
2. Such reasons for appellate restraint are of general application. However, they have particular relevance to appeals within, and from, the Family Court of Australia. This is because of the functions and purposes of that Court and the difficult and evaluative decisions which it often has to make. The peculiar nature of decisions relating to the intensely personal questions of the division of the property of parties to a failed marriage and the welfare of their children makes it essential that those who decide appeals respect the onerous responsibilities of those whose decisions they review. They need to recognise that it is of the very nature of such decisions, including those relating to the residence of children, that any two decision-makers may, with complete integrity and upon the same material, often come to differing

137 *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345 cited in *G v G (Minors: Custody Appeal)* [1985] FLR 894 at 898, 903.

138 *House v The King* (1936) 55 CLR 499 at 504-505.

139 So called Wednesbury unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See discussion in *Re F (A Minor) (Wardship: Appeal)* [1976] Fam 238 and in *G v G (Minors: Custody Appeal)* [1985] FLR 894 at 900.

conclusions¹⁴⁰. This is an inescapable feature of the nature of this jurisdiction¹⁴¹.

3. An additional peculiarity of appeals within, and from, the Family Court is that, in respect of what in Australia are now called "parenting orders", very vulnerable and significant interests are at stake. It is commonplace to say that, in all appeals, public and private costs and the stresses, delays and other burdens of litigation, are reasons for adding an element of self-restraint to those ordinarily proper to the discharge of appellate judicial functions. Retrials in civil cases following an appeal have been described as "an enormous evil", to be avoided as far as possible¹⁴². Whilst this rather emotional phrase may overstate the dangers, the public costs of litigation have lately come to be given more weight in such decisions¹⁴³. In family disputes, and particularly those relating to the welfare of children, there are special stresses. They tend to pull in opposite directions. On the one hand, it is highly undesirable that arrangements for the residence, education, health and familial relationships of a child should be needlessly disturbed by successive court orders. Such changes may add intolerably to the tensions which a child, fought over by members of the family, already feels. On the other hand, so important are such decisions for the life of the child and its relationships with the parents, siblings and other family members, that it is proper that the courts should take special pains, so far as they can, to avoid decisions impermissibly distorted by factual or legal error, by error of principle, by prejudice or by giving weight to irrelevant considerations.
4. The law books are full of general statements about the interests of the public, and the long-term interests of litigants, in finality of judicial decision-making: *interest reipublicae ut sit finis litium*¹⁴⁴. Such statements go back

140 *In the Marriage of Lea* (1981) 7 Fam LR 553 at 555-556; *G v G (Minors: Custody Appeal)* [1985] FLR 894 at 897-898.

141 *In re K (Infants)* [1965] AC 201 at 218-219; *In the Marriage of Abdo* (1989) 12 Fam LR 861 at 870.

142 *Scott v Scott* (1863) 3 Sw & Tr 319 at 322 [164 ER 1298 at 1299]; *Bonette v Woolworths Ltd* (1937) 37 SR (NSW) 142 at 156 per Jordan CJ; *Eggins v Brooms Head Bowling & Recreation Club Ltd* (1986) 5 NSWLR 521 at 524 per McHugh JA.

143 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 153-154 per Dawson, Gaudron and McHugh JJ, and at 170-172.

144 *Mulholland v Mitchell* [1971] AC 666 at 674.

for centuries¹⁴⁵. They have been repeated in recent times¹⁴⁶ and in the context of family law cases¹⁴⁷. In a general sense, the principle has universal application. However, because of the peculiarities of family law, concerned as it often is with deeply felt human emotions from which it may be difficult or impossible for the parties to escape and from which money may not extricate them, some of the emphasis on finality needs to be qualified. Decisions affecting the welfare of children partake of the traditional *parens patriae* jurisdiction of the Crown's courts¹⁴⁸. Necessarily, decisions on such questions have consequences for persons (namely the children) who are ordinarily not parties to the proceedings before the Court, even if today, in Australia, they are sometimes separately represented (as they were in this case). Such decisions also have consequences for the community, which has its own wider concern that the disruptive outcomes of incorrect or inappropriate decisions could have long-term consequences. Where the interests of others and of the public are affected, courts have for a long time treated the decisions which they must make in ways different from those made in ordinary civil litigation between parties of full capacity, represented and before the court¹⁴⁹. This consideration (as I shall show) has sometimes affected the admission of fresh evidence in an appeal. It may distinguish such cases from the ordinary civil case.

5. Because appeal was unknown to the common law and derives wholly from statute, the incidence and operation of particular appellate procedures depend, ultimately, on the legislative provisions which give birth to them¹⁵⁰. So it is in relation to the facility to receive evidence in an appeal afforded by the Parliament to the Full Court of the Family Court. Textually, there are several points that must be noted about s 93A(2) of the Act which founds the power of the Full Court in question here. First, the facility appears in the Act

145 For example, *Young v Keighly* (1809) 16 Ves 348 at 351 per Lord Eldon LC [33 ER 1015 at 1016].

146 See also *Edie Maud Leeder v Nance Ellis* [1953] AC 52 at 69-70; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 170-171; cf *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023 at 1027-1028, 1030-1031; [1969] 2 All ER 949 at 952-953, 955.

147 For example, *In the Marriage of N (No 2)* (1981) 7 Fam LR 889 at 894-895.

148 *P v P* (1994) 181 CLR 583 at 598.

149 *R v Watt; Ex parte Slade* [1912] VLR 225 at 239, 245.

150 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225; *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 72 ALJR 1055 at 1060; 155 ALR 1 at 8.

and in the context of the Family Court. This brings with it all of the peculiar reasons for accuracy, caution and infinite pains to which reference has already been made. Secondly, the facility exists within a procedure described as an "appeal". That it is not intended that the "appeal" should be by way of complete rehearing is made plain by the words of the sub-section which follow. Ordinarily, it is clear that the Full Court must decide an appeal by having regard to the evidence given "in the proceedings out of which the appeal arose". But that Court is not hostage to the trial evidence as some procedures called "appeal" require¹⁵¹. It is expressly empowered "to draw inferences of fact". This it may do although the primary judge has made no findings or conflicting findings. It is also empowered "to receive further evidence upon questions of fact".

6. Two further points need to be noticed about s 93A(2) of the Act. The sub-section emphasises that what is involved in admitting further evidence is the exercise of a discretion by the Full Court. It is a discretion which is not, in terms, hedged about by adjectives. Unlike the rules of the English High Court¹⁵² which have given birth to, or influenced, statutory and rule provisions common to most of the superior courts of record of Australia¹⁵³, the powers of the Full Court of the Family Court are not restricted in this regard either to the establishment of "special grounds" or to the procedural requirement of "special leave". This point of differentiation requires that considerable care be exercised in relying upon the decisions of other courts, of England, Australia and elsewhere, when dealing with the reception of fresh evidence. Ordinarily, such courts are obliged to be satisfied that there is something "special" about the case in order to justify the reception of fresh evidence. For the Family Court, the Parliament has left the decision to "its discretion". Furthermore, it has, apparently deliberately, refrained from describing the "evidence" in question as "new", "fresh", or by some other appellation suggesting that it was not earlier available. It is enough that it is "*further* evidence upon questions of fact". An additional indication of

151 For the variety of procedures encompassed by "appeal" see *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA; cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-111; *Mickelberg v The Queen* (1989) 167 CLR 259 at 267-268.

152 Rules of the Supreme Court 1875 (UK), O 59 r 10(2). See *Mulholland v Mitchell* [1971] AC 666 at 675 per Lord Hodson.

153 *Supreme Court Act* 1970 (NSW), ss 75A(8), (9): *Radnedge v Government Insurance Office of New South Wales* (1987) 9 NSWLR 235; *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284; Rules of the Supreme Court (Q) O 70 r 10(3); Rules of the Supreme Court (WA), O 63 r 10(1); *Supreme Court Civil Procedure Act* 1932 (Tas), s 48(3)(b).

flexibility inherent in this statutory scheme lies in the procedures which the Family Court may adopt to receiving such "further evidence". All of these features of the text of the empowering legislation, save perhaps for any suggestions to be derived from the fact that the procedure is one of "appeal", lay emphasis upon the peculiarly broad discretionary power afforded to this appellate court for the discharge of its particular functions. It is inappropriate that the discretion of the Full Court to receive further evidence should be circumscribed by reference to limitations contained in other legislation, but not expressed in the Act¹⁵⁴.

7. The statutory power in the case of the Family Court is similar to that afforded to the Full Court of the Federal Court of Australia¹⁵⁵. The latter was a nearly contemporaneous creation of the Parliament. The Federal Court, in a series of decisions, has developed a jurisprudence (which it is inappropriate here to analyse or to question) under which it is ordinarily necessary to establish that a special case exists before further evidence will be received on an appeal¹⁵⁶. However, in the Federal Court, it has been recognised that a wider approach is appropriate where the interests of persons other than the parties, or where the public interest, may be affected by the determination of the appeal in question¹⁵⁷. Thus, a greater willingness to receive further evidence on appeal has been evidenced in a case involving bankruptcy affecting the interests of creditors generally¹⁵⁸, and another in which the status of an industrial organisation was involved¹⁵⁹. Obviously, a case concerned with the status, welfare, residence and other rights of children bears close similarity to the last-mentioned cases.
8. Apart from the language of the enabling provision, it is clear enough that the purpose of s 93A(2) of the Act is intended, within the context of an appeal,

¹⁵⁴ *Hyman v Rose* [1912] AC 623 at 631; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284; *In the Marriage of Abdo* (1989) 12 Fam LR 861 at 870; *In the Marriage of Cipars* (1989) 13 Fam LR 793 at 795.

¹⁵⁵ *Federal Court of Australia Act* 1976 (Cth), s 27.

¹⁵⁶ *Lynch v Howard* (1980) 44 FLR 71 at 78; *Government Insurance Office of New South Wales v Maher* (1981) 55 FLR 187 at 191-192; *Federal Commissioner of Taxation v Walker* (1984) 2 FCR 283 at 296.

¹⁵⁷ *Makhoul v Barnes* (1995) 60 FCR 572 at 576-577.

¹⁵⁸ *Totterdell v Nelson* (1990) 26 FCR 523 at 529.

¹⁵⁹ *Re Australasian Meat Industry Employees' Union (WA Branch); Ex parte Ferguson* (1986) 67 ALR 491 at 494 per Toohey J.

to afford a discretion designed to permit the Full Court to relieve a party, and others affected (including children) of the risk of injustice which could flow if a more rigid or restrictive approach to the Full Court's powers were adopted. In this sense, the provision is a remedial one¹⁶⁰. It would be contrary to principle to construe such a provision as if it were subject to limitations which do not appear in the text and which, by inference, the Parliament chose not to impose¹⁶¹. It is true, as the Full Court of the Family Court has observed, that the power should not be described as "unfettered"¹⁶². This is because it appears amongst the facilities of a superior court created under the Constitution performing the function of an "appeal". That process itself assumes that there will have been a trial, conducted on evidence. Most disputes should finish at trial. It is nonetheless an extremely broad power, both in its terms and by contrast with the analogous, but more limited, powers enjoyed by other Australian superior appellate courts.

9. The circumstances of the tender of evidence under s 93A(2) of the Act are so infinitely varied that it is impossible and inappropriate to adopt precise rules¹⁶³. It is necessary to recognise the function of the primary judge. The advantages which that judge ordinarily enjoys make it appropriate that the reception of further evidence on appeal should be exceptional. Where the evidence existed at the time of the trial, it will ordinarily be relevant to consider whether, by the exercise of reasonable diligence, it could have been tendered at the trial¹⁶⁴. Where a party, knowing of its existence, chooses not to tender it there, that fact may afford a reason for rejecting it on appeal¹⁶⁵. The facility of alternative remedies may also be relevant. Thus, it was argued in this appeal that the fact that, in law, the custody of an eligible child is never finally determined¹⁶⁶ and that it is always open to a party to seek variation

160 cf *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J.

161 See *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290 per Gaudron J.

162 *In the Marriage of Mistilis* (1989) 12 Fam LR 175 at 178. See also *In the Marriage of Banh* (1981) 6 Fam LR 643 at 652.

163 *In Re Neath Harbour Smelting and Rolling Works* (1885) 2 TLR 94 per Lord Halsbury LC.

164 *In the Marriage of Abdo* (1989) 12 Fam LR 861 at 870.

165 *Makhoul v Barnes* (1995) 60 FCR 572 at 577; *In the Marriage of Cantarella* (1976) 1 Fam LR 11,483 at 11,492.

166 *In the Marriage of Boman* (1981) 7 Fam LR 586 at 588.

and amendment of the order made by the primary judge¹⁶⁷ was an added reason for discouraging the reception of further evidence by the Full Court. Certainly, that facility, and its suitability to some circumstances, is a consideration properly to be taken into account. But a Full Court of the Family Court would be fully aware of the principles which restrain disturbance of parenting orders, made (as in this case) after a hard fought trial. Ordinarily, such orders will not be revoked or varied unless a party can demonstrate something akin to a mistake or change of circumstances. The Family Court, for understandable reasons, has expressed itself to be "extremely loath" to reopen such orders¹⁶⁸. The power to admit further evidence in an appeal is provided out of recognition of the fact that the circumstances that pertain to a parenting order can alter very rapidly, even in the interval during which the appeal is pending¹⁶⁹. Where, as here, the objection is that the order ought never to have been made in the first place, the demonstration of that fact may sometimes, exceptionally, be assisted by further evidence directed towards the suggested defects of the challenged decision. The provision for receiving further evidence cannot be written out of the Act because, elsewhere, the Act provides for the variation of orders which have been entered.

10. A final consideration is pertinent, both to the approach that is proper to the Full Court reviewing the primary judge and to this Court reviewing a decision of the Full Court involving the evaluation of competing considerations and the exercise of a judicial discretion. Every appellate judge knows that the reasons given for a decision can never express the entire range of matters which the decision-maker has taken into account. In matters of evaluation and discretion, this would be impossible to achieve and undesirable to attempt. Judicial reasons, whilst they must be adequate for the purposes of the exercise of any right to appeal¹⁷⁰ cannot possibly catalogue all of the subtle considerations that lie behind a judicial decision¹⁷¹. This is true of the decision of the primary judge, expressing the combination of "main considerations" that led to his ultimate conclusion that the children should reside with one parent rather than another. But it is also true of the Full Court in performing its appellate function and concluding that, exceptionally,

¹⁶⁷ *In the Marriage of Abdo* (1989) 12 Fam LR 861 at 871; *Re X and the Adoption of Children Ordinance 1965* (1984) 2 FCR 533 at 536.

¹⁶⁸ *In the Marriage of D and Y* (1995) 18 Fam LR 662 at 672.

¹⁶⁹ *G v G (Minors: Custody Appeal)* [1985] FLR 894 at 901.

¹⁷⁰ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.

¹⁷¹ *In the Marriage of Sanders* (1976) 1 Fam LR 11,433 at 11,444.

further evidence should be received, that an error has occurred and that a retrial should be ordered. Inescapably, at both levels of the judicial process, intuition plays a part in the ultimate decision¹⁷². It will sometimes be hard to explain. An appellate court will recognise the fact that it is dealing with the orders and reasons of a specialist judge. This Court, for its part, will appreciate that it is hearing an appeal from a specialist court. One function of the Full Court of the Family Court is the achievement of general consistency in the approaches taken within the Court. Where questions of evaluation and discretion are involved this Court, constitutional issues apart, should interfere as little as possible out of a recognition of the Parliament's purpose in establishing a specialist Family Court with its own appellate structure, functions and remit.

No error in the admission of further evidence

- 187 Much of the husband's attack on the Full Court was addressed to the approach which that Court took to the admission of further evidence. In essence, it was the husband's case that the fundamental flaw in the reasoning of the Full Court was its failure to conform to the instruction of this Court on the reception of fresh evidence contained in *Wollongong Corporation v Cowan*¹⁷³. In that case, Dixon CJ, with whom Williams, Webb, Kitto and Taylor JJ agreed, said of this subject¹⁷⁴:

"The law which governs the grant of new trials on the ground of the discovery of fresh evidence is not in doubt ... If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to produce at the first trial."

172 *In the Marriage of N (No 2)* (1981) 7 Fam LR 889 at 907 per Strauss J.

173 (1955) 93 CLR 435. See also *Orr v Holmes* (1948) 76 CLR 632 at 640; *McCann v Parsons* (1954) 93 CLR 418 at 428.

174 (1955) 93 CLR 435 at 444.

188 *Cowan's* case concerned an appeal to the Full Court of the Supreme Court of New South Wales from a jury verdict in a civil damages action. The decision was governed by legislation expressed in terms quite different from s 93A(2) of the Act¹⁷⁵. That legislation had a different history, different purposes and, as a consequence, different judicial elaboration¹⁷⁶. No doubt the factors referred to in that test are considerations relevant to the exercise of the discretion under s 93A(2), but they are by no means determinative as to the manner of its exercise.

189 A moment's reflection on the considerations which govern the proper exercise of the functions of the Full Court of the Family Court will demonstrate the unacceptability of the husband's basic proposition. The complaint that the Full Court did not approach its task in conformity with *Cowan* fails at the threshold. It amounts to yet another attempt to take judicial instruction out of context and to graft it on to statutory language to which it is inapplicable. The fundamental complaint of the husband about the decision of the Full Court therefore fails. A review of that Court's opinion shows that it approached both the decision to receive further evidence and the decision on the disposition of the appeal that followed such reception, in full conformity with the principles which I have collected and which applied to it. This leaves the alternative submission for the husband which was that the decision to permit fresh evidence and to utilise it, as it did, produced a result vitiated by error of principle or otherwise plainly wrong.

No misapplication of the paramountcy principle

190 To establish the error of principle of which he complained, the husband referred, first, to the suggested mistake of the Full Court in applying the paramountcy principle in deciding whether to admit fresh evidence and in otherwise approaching its appellate function. The foundation for this argument was the submission that the statutory expression of the paramountcy principle¹⁷⁷ did not, by its terms, apply to the Full Court's performance of its appellate function. This was because it is expressed to be limited to cases where the Family Court is "deciding whether to make a particular parenting order in relation to a child". Especially when the predecessor of this statutory provision is remembered, it was submitted that the section had been narrowed. The only kind of decision that would invoke it was a substantive one. The issue would present itself to a Full Court only if, having allowed an appeal, that court decided to proceed for itself to exercise the discretion found to have miscarried at trial¹⁷⁸. Instead, the Full Court had allowed the paramountcy principle to distract it from its appellate function

175 *Common Law Procedure Act* 1899 (NSW), s 160.

176 Walker, *Supreme Court Practice (NSW)*, 4th ed (1958) at 109-123.

177 The Act, s 65E.

178 As it may: see the Act, s 94(2).

when it was common ground between the parties that, if error were shown, the matter would have to be returned for retrial. Only then, it was submitted, would the paramountcy principle apply.

- 191 There is no substance in this submission. The Full Court recognised, in terms, that the statutory expression of the paramountcy principle did not govern either the performance of appellate functions generally or the particular decision to admit further evidence in this appeal. It recognised that it "would be required to find significant elasticity in the language to achieve a positive answer" to the question whether the statutory paramountcy principle governed the Full Court for such purposes. Their Honours went on¹⁷⁹:

"Assuming that we cannot stretch the language that far, then, in our view, the constant shadow of the paramountcy principle in child welfare cases is such that at the very least, the best interest considerations are powerful matters to be weighed up against a competing principle such as finality."

- 192 In this approach, there is no error. Although the statutory expression of the paramountcy principle is particularly emphatic in respect of the cases to which it applies, the general obligation to approach any judicial decision which might impinge on the welfare of a child with at least a broad appreciation of the implications of the decision for that child's welfare is consistent with the longstanding *parens patriae* jurisdiction of the courts which have successively been involved in such cases¹⁸⁰. The mention of this consideration in relation to particular provisions of the Act does not exclude it totally from relevance to other decisions under the Act¹⁸¹. The principle is founded upon a universal rule common to most legal systems and now expressed in international law¹⁸². In deciding whether to admit further evidence, a Full Court would necessarily have had to consider whether such evidence, if taken into account, would have been relevant to the ultimate question in issue at the trial. In the case of an appeal against a

179 (1997) 22 Fam LR 166 at 183.

180 *Monticelli and McTiernan* (1995) 19 Fam LR 108 at 110; *Re Z* (1996) 20 Fam LR 651 at 660-661.

181 cf *J v C* [1970] AC 668 at 697 per Lord Guest.

182 *Declaration on the Rights of the Child* 1959 (UN General Assembly Resolution 1386(xiv)), Principle 2: "In the enactment of laws ... the best interests of the child shall be the paramount consideration."; *Convention on the Rights of the Child* (1989), Art 3.1: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." See also Art 18.1, dealing with upbringing and development of the child, which provides: "The best interests of the child will be their basic concern."

parenting order that would require consideration of the paramountcy principle stated in the Act. In this way, testing the available hypotheses, it would be inevitable that a Full Court would consider the proffered evidence as it was, or might well be, relevant to the matters that would arise on a retrial. It would be completely artificial to dissect the issues and to require that the welfare of the child or children should be completely ignored. The metaphor of the "shadow" was an apt one. Whilst not governing the decision on the admission of further evidence or on the appeal as it was conducted, the welfare of the children, as the ultimate issue, was properly kept in mind. This complaint too should be rejected.

No error of principle appears in the reasons

193 Finally, the husband submitted that the three reasons specifically mentioned by the Full Court, to warrant the admission of fresh evidence and the order of retrial that followed, did not, on analysis, support that Court's conclusion. It is here that I part company from the majority. I do so, in part, as a consequence of my understanding of the very broad statutory powers enjoyed by the Full Court of the Family Court. And in part, as a consequence of my understanding of the identified matters when fully explained, and of the approach which it is proper for this Court to take in considering the complaint now before it.

194 The three topics are clearly not an exhaustive statement of the considerations which the Full Court took into account in making its decision¹⁸³. First, the section of the reasons in which the three items appear comes at the conclusion of a very long and careful opinion in which the bulk of nearly 20 pages of the published report is devoted to a description of the issues, quotation from and emphasis of passages in the primary judge's reasons which concerned the Full Court, and identification of the many grounds of appeal, most of which were dismissed. It is not a fair reading of the Full Court's reasons to isolate, and concentrate exclusively upon, the three particular considerations mentioned in the last couple of paragraphs of its reasons. They appear in what is expressed to be a "summary"¹⁸⁴. They can only be understood after reading all of the preceding reasons. It would be absurd to ignore the detailed references in earlier passages to the experts' unanimous opinions that a change in the residence arrangements of the children was undesirable and that they were bonded to their mother. Or the obvious concern of the Full Court that the judge had been unduly affected by his impression of the husband's "calm personality" and his perception of the mother's lack of "warmth" and "humour"¹⁸⁵. Her demeanour may have been understandable in a predicament in which she was vulnerable and when her residence with C and D was under

183 (1997) 22 Fam LR 166 at 197.

184 (1997) 22 Fam LR 166 at 197.

185 (1997) 22 Fam LR 166 at 175-177.

threat. Only by reading the entirety of the Full Court's reasons is the balance, neutrality and thoroughness of its consideration of the case borne out. The nominated grounds were not intended to be read on their own. This is placed beyond doubt by the Full Court's express statement that the discretion to admit fresh evidence was to be understood in the light of "the various unsatisfactory elements of the manner in which the case proceeded."¹⁸⁶ Clearly enough, the reasons represented the ultimate and intuitive assessment which the Full Court made. Whilst a party is entitled to test a court's reasoning by reference to the expressed grounds for its conclusions, fairness requires that all of the reasoning be given due weight. Isolating the three reasons contained in the "summary" does less than justice to the Full Court.

- 195 In any case, each of the three nominated reasons has force. The importance to the primary judge of the lengthy affidavit of the husband, together with the numerous annexures, can be seen in repeated passages in his Honour's reasons: many of them quoted by the Full Court. Thus, at one point the judge refers to "the wife's extraordinary behaviour as set out in annexure C to the husband's ... affidavit"¹⁸⁷. At other points throughout his reasons he refers to the wife's conduct in the aftermath of the suicide of A. The husband complained that the wife's then counsel was given a chance to object, to seek an adjournment or to file later evidence, but omitted to do so¹⁸⁸. All of this is true. Clearly it is relevant. On the other hand, the objective fact which obviously troubled the Full Court was that trial counsel, neither in examination in chief nor in reply, had sought to deal with the voluminous material presented just two working days before the commencement of the hearing¹⁸⁹:

"[Trial counsel] did not seek either to have the matter adjourned or to call any further evidence ... In examination-in-chief of his client, which occupied two and a half pages of transcript, [trial counsel] did not attempt to take his client to the husband's affidavit and the material therein contained nor seek to reply to it."

Instead, the wife was left exposed to extended questioning on the matters contained in the husband's affidavit and annexures. Clearly enough, the Full Court concluded that the wife's counsel had acted inappropriately or inadequately. The Full Court would not have overlooked the emotional, financial and other pressures on both parties, but especially the wife, to proceed with the trial on the allotted day. Plainly, it was troubled by the coincidence of the very late supply of the husband's

186 (1997) 22 Fam LR 166 at 197.

187 Per Baker J cited (1997) 22 Fam LR 166 at 175.

188 (1997) 22 Fam LR 166 at 184.

189 (1997) 22 Fam LR 166 at 184.

substantial material and the apparently constricted presentation of the wife's case on the many matters raised by it. Given the broad discretion conferred on the Full Court, I am far from convinced that the first nominated reason was irrelevant or insubstantial. In any case, its weight was entirely a matter for the Full Court.

196 The second nominated reason concerned the decision of the primary judge to admit into evidence, and apparently to rely upon, the testimony of the daughter B, statements of the witnesses KW and MD, and a note from A's diary (admitted in the coronial inquest inquiring into A's death). These documents contained many statements highly prejudicial to the wife. They would not have been admissible at common law, nor possibly under the provisions of the *Evidence Act 1995* (Cth). They only became so by reason of the operation of the Act. However, even then they were subject to a discretionary exclusion on the ground that they were unduly prejudicial and incapable of being properly tested at the trial in the Family Court¹⁹⁰. This is the conclusion to which the Full Court ultimately came¹⁹¹. When I examine the statements I can understand why. For example, KW, a 16 year old school friend of A, deposed before the coroner to the "hard time" the wife was said to have given the deceased, to a reported fight between A and the wife and to an alleged statement of the wife to A that what happened to A did not matter "because she wasn't hers", ie was adopted. MD's statement to the coroner was along similar lines. She deposed to fights between A and the wife and to the alleged statement by A "God I hate my Mum". Although the proper impact of this evidence, in a trial lasting several days, might appear insubstantial, it could well have added to an understandable sense of grievance on the part of the wife who had no effective way to test or answer it in the way the trial unfolded and the evidence was admitted. Perhaps it explains her mien in court, which appears greatly to have influenced the primary judge despite the great care needed in the assessment of credibility, personality and fitness to parent children by reference to such impressions. Putting it no higher, such impressions may be affected by the gender of the observer, cultural considerations and the circles in which the observer has mixed and from which he or she has constructed opinions about the behaviour and mien that is appropriate and inappropriate to an occasion.

197 The primary judge was the sole trier of fact. Even if he had excluded the coronial statements, he would have read them for the purposes of making his ruling. But, at least, he would then have been obliged to consider the issue of prejudice to which such material contributed. Such evidence tended to reinforce the judge's view of the wife as an inflexible parent, with a rigid personality, unsuitable to raising teenage children. The Full Court acknowledged that the failure to consider excluding the reports on grounds of prejudice did not vitiate the judgment of Baker J. For the Full Court, it was simply another indication of the

190 *Evidence Act 1995* (Cth), s 135.

191 (1997) 22 Fam LR 166 at 196.

way the primary judge had allowed his mind to be unduly influenced by the events preceding, and immediately following, the suicide of A, rather than looking at the wife's parenting skills more generally and over the longer interval of the children's lives.

198 In the third consideration, the Full Court mentioned specifically the disproportionate attention which it felt the primary judge had given to the events subsequent to A's death and his failure to give any apparent weight to the wife's functioning as the "primary care giver [of the children] over a period of almost 18 years."¹⁹² Whether this impression properly arises from reading the primary judge's reasons as a whole is a matter for debate. However, for my part, I consider that the stated conclusion was open to the Full Court. The reasons of the primary judge were substantially devoted to recounting expert reports which concluded contrary to the decision that he reached. His assessment of the wife was extremely critical and negative. His focus was substantially upon her allegedly inappropriate response to A's death. Clearly, the Full Court considered that the broader issues had been overlooked or undervalued. That was a conclusion to which, as a specialist appellate court, it was perfectly entitled to come.

199 The further evidence which the wife offered to the Full Court included some which clearly could have been obtained before or during the trial. But that is hardly fatal to its reception on appeal. The further evidence proposed was summarised by the Full Court¹⁹³. Many of the statements, I agree, add comparatively little to the evidence given at the trial. Several of the statements, from neighbours, long term friends and a relative had the utility that they recounted the deponent's observations of the relationship between the wife and the children over an interval longer than that upon which the primary judge had concentrated. The most important of the further witnesses, proposed by the wife, was CB who was singled out for particular mention. Her affidavit shows that she had been a neighbour to the family from 1994. She deposed to special experience in the area of youth suicide. She contested the suggestion that the wife imposed rigid restrictions on the children playing with her children. She considered that the wife was "an extremely good mother". After the death of A, she had been called upon to afford grief counselling to the whole family. Although she believed that the wife had responded "in an appropriate manner", she described her efforts in relation to the husband as unsuccessful. She recounted a recent observation of the wife in the company of C and D who, by then, were residing with the husband. She described C's expressed wish "to live with Mummy again". This was in July 1997. It was open to the Full Court to conclude that such evidence, on a retrial, would be relevant and helpful to the determination of the parenting order. The fact that the children's representative appeared in this Court in essence to resist the husband's

192 (1997) 22 Fam LR 166 at 197.

193 (1997) 22 Fam LR 166 at 177-178.

claims and to support the approach and conclusions of the Full Court, suggests, to my mind, that nothing much had changed in the intervening year¹⁹⁴.

200 Plainly enough, the Full Court felt very uncomfortable in this case with the approach, reasoning and conclusions of the primary judge. They recognised "that this is one of the rare and exceptional cases in which the discretion to admit fresh evidence on appeal should be exercised."¹⁹⁵ Only an unduly pernicky concentration on a very small section of the Full Court's reasons would justify disturbance of its orders. No error of approach or of principle being shown, this Court should respect the Full Court's wide discretion and large statutory functions. All members of this Court have rejected the primary argument of the husband that the Full Court's discretion was controlled by considerations analogous to those stated in a very different context in *Cowan's* case¹⁹⁶. The majority agree that the Full Court's discretion was one of "great width"¹⁹⁷; that the Full Court's statutory powers must receive a liberal construction being provided to serve the demands of justice¹⁹⁸; that intuition and impression play a part in a decision of the Full Court on whether to admit or reject fresh evidence¹⁹⁹; and that this Court should not lightly set aside the exercise by the Full Court of the discretion which the Parliament has conferred on it and not on us²⁰⁰. The majority allow that in "exceptional cases", where the best interests of children require a new trial on all of the evidence, such may be ordered conformably with the Full Court's statutory powers²⁰¹. Yet what is an "exceptional case" is assigned by law to be decided by the Full Court not by this Court. It would take a very clear instance of error to authorise this Court to intervene. This is not such a case.

194 The affidavit filed in support of the motion to intervene in the proceedings, by the children's representative, deposed to the numerous interviews and discussions which the children's representative has had throughout the litigation with all of the children, both separately and together, as well as conversations with "various teachers, doctors, psychologists and counsellors in relation to the welfare of the children".

195 (1997) 22 Fam LR 166 at 198.

196 [1998] HCA 67 at 51-54 per Gaudron J, 102 per McHugh, Gummow and Callinan JJ.

197 [1998] HCA 67 at 160 per McHugh, Gummow and Callinan JJ. See also at 151.

198 [1998] HCA 67 at 111 per McHugh, Gummow and Callinan JJ.

199 [1998] HCA 67 at 152 per McHugh, Gummow and Callinan JJ.

200 [1998] HCA 67 at 160 per McHugh, Gummow and Callinan JJ.

201 [1998] HCA 67 at 150 per McHugh, Gummow and Callinan JJ.

201 Far from reaching a decision which was plainly wrong, it is my opinion that
the orders made by the Full Court were correct. In any case, they were well open
to the Full Court and that is enough. This Court should not disturb them.

Orders

202 The parties, including the children's representative, asked to be heard
separately on the issue of costs. They should have that opportunity. But the appeal
should be dismissed.