**Family Court of Australia**

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| **STEWART & STEWART** | **[2017] FamCAFC 67** |

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| FAMILY LAW – APPEAL – CHILDREN – where the mother sought orders in respect of which school the children would attend – where the mother’s application was silent as to who would bear the financial responsibility for the costs associated with the children’s education –where the mother failed to demonstrate that the parents could afford the proposed school – where the parents had previously reached agreement as to the care arrangements for the children, including for equal shared parental responsibility – where the mother asserted the trial judge failed to follow the legislative pathway – where the mother contended that the trial judge misapprehended her case – where the mother asserted that trial judge failed to give adequate reasons – no error demonstrated – appeal dismissed.  FAMILY LAW – APPEAL – COSTS – where the father sought his costs of and incidental to the appeal – where the father is a solicitor – where by reason of the father being a solicitor his costs are capable of being quantified – costs awarded. |
| Family Law Act 1975 (Cth) |

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| *Australian Coal & Shale Employees’ Federation v The Commonwealth* (1953) 94 CLR 621  *CDJ v VAJ* (1998) 197 CLR 172  *Coulter & Gerardine* [2015] FamCA 287  *Guss v Veenhuizen (No. 2)* (1976) 136 CLR 47  *House v The King* (1936) 55 CLR 499  *Redmond & Redmond and Anor (Costs)* [2014] FamCAFC 55  *Simmons and Anor & Kingsley* (2014) FLC 93-581 |

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| **Appellant:** | Ms Stewart |

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| **Respondent:** | Mr Stewart |

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| **File Number:** | BRC | 1248 |  | of | 2013 |

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| **Appeal Number:** | NA | 41 |  | of | 2016 |

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| **DATE DELIVERED:** | 13 April 2017 |

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| **Place Delivered:** | Brisbane |

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| **Place Heard:** | Brisbane |

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| **Judgment of:** | Bryant CJ, Aldridge & Kent JJ |

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| **Hearing date:** | 8 March 2017 |

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| **Lower court jurisdiction:** | Federal Circuit Court of Australia |

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| **lower court judgment date:** | 6 June 2016 |

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| **LOWER COURT MNC:** | [2016] FCCA 1350 |

### REPRESENTATION

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| **COUNSEL FOR THE Appellant:** | Mr Drysdale |

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| **SOLICITOR FOR THE Appellant:** | North Law |

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| **THE RESPONDENT:** | In person |

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# Orders

1. The application in an appeal filed by the appellant mother on 21 February 2017 is dismissed.
2. The appeal is dismissed.
3. The appellant mother pay the respondent father’s costs of and incidental to the appeal to be agreed, or failing agreement, to be assessed.

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

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

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

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| THE FULL COURT OF THE Family Court of Australia at BRISBANE |

Appeal Number: NA 41 of 2016

File Number: BRC 1248 of 2013

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| Ms Stewart |

Appellant

And

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| **Mr Stewart** |

Respondent

REASONS FOR JUDGMENT

1. On 6 June 2016 Judge Coates made orders pursuant to Part VII of the *Family Law Act 1975* (Cth) (“the Act”) determining two issues in dispute between the parents of J, born in 2006 and L born in 2008. Those issues were, first, the school or schools the children should attend and, second, parental responsibility for the children’s participation in extra-curricular activities. The determination by the trial judge of each of those issues is reflected in, respectively, Orders (1) and (2) his Honour made.
2. The mother did not ultimately pursue her appeal in respect of the trial judge’s determination (by Order (2)) of the issue concerning extra-curricular activities. Her counsel confirmed on the hearing of the appeal that ground 8 of the appeal, being the sole ground directed to that issue, was not pursued. Thus the mother pursues her appeal only in respect of Order (1). The father opposes her appeal.
3. By Order (1) the trial judge ordered that, unless otherwise agreed in writing between the parents, the children were to attend high school at C State High School and, in the event the children were not accepted for enrolment in that school, a state high school in their residential catchment area. The mother’s appeal is confined to an appeal from that order. Before the trial judge, the mother had sought orders by which the parents would do all things to cause the children to be enrolled in a specific boys private school and a specific girls private school respectively, and for the mother to have sole parental responsibility for the children’s extra-curricular activities.
4. The limits upon appellate disturbance of a discretionary judgment are   
   well-established (*House v The King* (1936) 55 CLR 499; *Australian Coal & Shale Employees’ Federation v The Commonwealth* (1953) 94 CLR 621; and *CDJ v VAJ* (1998) 197 CLR 172). The mother must demonstrate that the trial judge acted on wrong principle in making Order (1) or, although the precise error of principle cannot be identified, that the conclusion to make that order was “plainly wrong”.
5. The mother’s case before the trial judge initially included an application to depart from the administrative assessment of child support, such that the father would bear 60 per cent of the costs associated with the children’s private school education. It was within this matrix which the mother’s affidavit material was cast, and which informed important contextual information for his Honour’s determination.
6. The mother’s child support departure application was dismissed by his Honour on the morning of the trial of the proceedings in advance of the trial proper. However, that dismissal does not form part of this appeal.
7. It was common ground before the trial judge (reasons at [23]) that even on “present day figures” the estimated tuition fees alone for the children’s attendance at the specific private schools would cost $250,000 to $300,000 and for each year the children were both in attendance at the same time, the combined costs of tuition alone would be $50,000 per year. That is, these were the estimated costs only of tuition fees (not including the “numerous other costs associated with schooling costs” – reasons at [43]) and these estimates included no allowance for probable increases in tuition fees over the future period of some 10 years, to and including the 2026 year when the younger child was anticipated to be completing year 12.
8. A substantial component of the father’s opposition to the mother’s application was that the parents simply could not afford this cost.
9. The trial judge determined that on the evidence, the mother had not established her case that the cost of likely private school fees for the children to attend the specific private schools was affordable. The trial judge found that commencing J at the boys private school and then removing him would be contrary to his best interests (reasons at [58]). The trial judge further found that the State provides a “capable education system” and that the children will not be disadvantaged by attending at a state school (reasons at [62]).
10. Reference has already been made to the mother’s abandonment of ground   
    8 – the only ground challenging Order (2) determining the issue concerning extra-curricular activities. The mother’s summary of argument for the appeal also confirms that ground 7 is not pursued. The duplication and overlap between several of the remaining grounds of appeal (for example, grounds 3 to 6 (inclusive) express essentially the same complaint) resulted in counsel for the mother dealing with the remaining grounds together as “each is, in essence, a complaint as to the adequacy of reasons for His Honour’s decision concerning the childrens [sic] schooling” (paragraph (11) of the mother’s summary of argument).
11. Taken from the mother’s summary of argument (paragraph (4)) her challenges on appeal devolve into the following asserted errors on the part of the trial judge:
    1. Failure to “identify the need to follow the pathway set down by Part VII of the [Act]”;
    2. Failure to consider the mother’s proposal that she would meet 100 per cent of the children’s school fees;
    3. Failure to give adequate reasons for rejecting the mother’s evidence as to her capacity to meet the costs of the children’s school fees;
    4. That the above errors “infected” the trial judge’s findings as to the school the children should attend.

## Mother’s application to adduce further evidence

1. By an application in an appeal filed on 21 February 2017 the mother sought leave to adduce further evidence on appeal in the form of an affidavit filed by the mother accompanying that application.
2. By his response filed on 2 March 2017 the father sought that the application be dismissed, although his accompanying affidavit is not confined to facts in dispute but is in itself in the nature of further evidence.
3. Whilst the mother’s application appeared to be framed as an application pursuant to s 93A(2) of the Act for this Court to receive further evidence in support of the mother’s challenges on appeal, on the hearing counsel for the mother confirmed that the application was not pursued for this purpose. Rather, counsel confirmed that the evidence was only sought to be relied upon in the event that this Court, having found merit in the appeal, sought to   
   re-exercise the discretion.
4. For the reasons which follow we find no merit in this appeal and thus the appropriate order is to dismiss the mother’s application.

## Did the trial judge misapprehend the mother’s case?

1. As noted, one of the mother’s central contentions on appeal is that the trial judge misapprehended her case in that the mother asserts that her case before the trial judge was that the mother be solely responsible for “100 per cent of the children’s school fees”.
2. However, a fundamental difficulty with this contention is, as will shortly be demonstrated, that at no point in the proceedings below did the mother seek or advance orders having the effect that the mother would solely bear this liability eliminating any recourse by the mother to seek contribution from the father via the child support agency. A second fundamental difficulty with this contention is that if it was open to the trial judge to conclude that the mother did not establish a case that she could afford 40 per cent of the fees (a finding recorded at [41] of the reasons) any error of this kind, even if established, could not be material.
3. Counsel for the mother, whilst not suggesting that this reason was advanced to the trial judge, submitted that s 66E(1) of the Act would have, in any event, precluded the trial judge from making orders to the effect that the mother be solely responsible for the costs. Section 66E(1) provides:

(1) A court having jurisdiction under this Part must not, at any time, make, revive or vary a child maintenance order in relation to a child on the application of a person (the ***applicant***) against, or in favour of, a person (the ***respondent***) if an application could properly be made, at that time, by the applicant under the *Child Support (Assessment) Act 1989* for the respondent to be assessed in respect of the costs of the child, or vice versa.

(Emphasis as in original)

1. Whilst without the benefit of full argument on a point not specifically raised by any grounds of the appeal we do not express a concluded view upon it, our preliminary view as expressed during the hearing is that it is difficult to see how orders for the mother to be solely responsible for private school fees could be characterised as a “child maintenance order … against, or in favour of, [the father]” within the meaning of s 66E(1).
2. In each of her amended application in a case filed on 26 May 2016; her response filed on 27 May 2016 and her outline of case filed on 24 May 2016, the mother advanced, amongst the orders that she was seeking at trial, these orders appearing at (5) and (6) inclusive in each of those documents:

5. That the parents do all things necessary and sign all documents necessary so as to cause the enrolment and attendance of:

a. [J] at [the boys private school] as soon as a placement becomes available at [that school] and until then the child shall remain enrolled at [his current] State School;

b. [L] at [the girls private school] commencing in year seven, or the 2021 academic year, whichever comes first;

6. In accordance with Section 117 of the *Child Support (Assessment) Act 1989* there is to be a departure from the Administrative Assessment of Child Support for the children whereby the father pay the following:

a. 60% of the private tuition fees at [the specific private schools] as struck and when due and owing and as provided to him by the mother;

b. 60% of the costs of uniforms, camps, excursions and/or tutoring to a maximum of $1000 per year by way of reimbursement to the mother within 14 days of her providing evidence of payment by her;

c. Periodic child support in a sum of $492.00 per week varied by the changes in the consumer price index for Brisbane as at the 1 July of each year such to be payable from the date of these Orders;

d. The father’s obligations in respect of the children continue until the later of the following events:

e. (i) each child attains the age of 18 years;

f. (ii) each child completes their secondary education.

1. The mother’s trial affidavit filed on 20 May 2016 in support of the orders she sought included the following:

37. In relation to the fees, I say that [the father] should be able to pay 60% of those fees if he reduces the amount of money that he spends on his wife’s three children on things such as overseas holidays, the latest electronics and clothing etc.

…

45. [The father] says that the school fees for both [the boys private school] and [the girls private school] will, in fact, be about $50,000.00 per annum, but I am only asking that [the father] pays for 60% of those fees in the amount of $30,000.00.

…

55. I say that that **if [the father] pays child support as assessed and 60% of the school fees to [the boys private school], then I will be able to pay the balance.**

56. I say that my weekly income is approximately $370.00. I currently receive $491.30 per week by way of child support from [the father].

57. I draw the Court’s attention to my Financial Statement filed with this affidavit. Whilst I agree that I do not earn a large sum, I do have assets that I am quite prepared to sell, **so that my 40% share of the costs of the school fees can be met**. For example, I have readily available funds in the amount of $50,000.00 after the sale of my share portfolio. I also own a house in [a northern Brisbane suburb] which is worth about $1,350,000.00. This house has a $50,000.00 mortgage registered over it, and therefore has an enormous amount of equity attached to the house, which I could also use to pay the school fees.

…

78. … I agree that I have modest savings remaining from my property settlement but I say that it certainly should not be the case that I am expected to devote all of my savings towards the children’s expenses. Clearly I have utilised a lot of my savings to meet my ongoing commitments.

…

106. I am certainly able to provide for the emotional needs and care arrangements of the children however, I am struggling financially. [The father] has not provided me with any other support apart from his child support payments.

107. If [the father] was responsible and agreed to pay the school fees for [J], the financial needs of the children whilst in my care would also be met.

(Emphasis added)

1. To this may be added the feature that on 22 May 2016, Mr X, a psychologist, prepared a family report. Mr X records at paragraph 4.30 in his report that during the mother’s interview the mother reported:

… She said that while [the father] is happy for her to send him [a reference to J] to [an alternative private school], he will not contribute to the fees beyond what he pays in child support. She is happy for the issue of fees to be determined by the Court or by the Child Support Agency. She is not particularly enamoured of the thought of having to mortgage her house to finance the children through their private schooling and she believes that [the father] should contribute equally.

1. As the trial judge recorded, commencing at [13] of the reasons:

13. As to payment of fees, the mother, until recently, was not clear as to what she sought.

14. When I set the matter for trial in October 2015, I made the comment that on her submissions then her case seemed to be a matter for an application to the Child Support Agency, although what she was seeking was not particularly clear.

15. Her position became clear a fortnight before the trial, when she filed an Application in a Case seeking a departure from child support assessment payable by the father.

16. She sought departure orders which would put her in the position of being responsible for 40 percent of the school fees and with the father being responsible for 60 percent of the school fees (for both the [boys private school and the girls private school]).

17. I dismissed the application on the day of trial (31 May 2016) giving reasons, including:

a) That I had previously (in October 2015) indicated that the matter may be more suitable to be determined administratively by the Child Support Agency;

b) That the matter was not taken to the Child Support Agency by the mother;

c) The mother’s subsequent non-compliance with the rules in bringing the departure application after the trial was set, and

d) The new matter was not the trial matter I had given directions to hear, based on the original materials filed by the parties.

18. The mother’s case then became:

a) That [J] should attend [the boys private school] because his father and grandfather attended there;

b) That [L] should attend [the girls private school];

c) That the father could afford 60 percent of the school fees;

d) That she could afford 40 percent of the school fees;

e) That [J] wished to go to the school;

f) That both parents had planned to send [J] to [the boys private school] and [L] to [the girls private school], and

g) The two girls in the father’s home, daughters of his wife, go to a private school now (…) and, by inference, he must be paying or contributing to the fees.

1. The trial judge also recorded at [40]:

40. I had indicated to the mother in October that her case then sounded like a child support issue, yet she failed to take the matter there where decisions can be made as to capacity to pay, taking into account a range of considerations.

1. Notwithstanding that on the morning of the hearing (31 May 2016) the trial judge dismissed the mother’s application for departure orders, essentially in advance of the trial proper as the trial transcript reveals (transcript, 31 May 2016, p. 21 l. 45) no amendment to the orders sought, as regard funding the substantial costs of school fees, was proposed by the mother.
2. The mother’s position, in light of the dismissal of her departure application, was expressed by her counsel at trial in the following exchange with the trial judge:

The mother intends to inform his Honour that in the first instance she has the financial ability and will pay the children’s respective – as and when they fall due, because in respect of [L] it’s quite some time away. Her intention is to, in the first instance, be responsible for the payment of those private school fees, and that in respect of the father’s contribution it will be a matter for the child support agency to determine that question…

(Transcript, 31 May 2016, p. 22 l. 12 to 17)

1. As the father, who represented himself below, pointed out during his evidence in cross-examination by the mother’s counsel, the mother had only adduced evidence that she may be able to pay for 40 per cent of the fees; and if the balance could not be paid, a consequent change of schools for the children would be detrimental to them (transcript, 31 May 2016, p. 23 l. 10 to 18).
2. Against this background it is contended that the mother’s evidence under   
   cross-examination by the father and the following exchange with the trial judge supports the proposition that the mother’s case was that she would be solely responsible for “100 per cent of the school fees”:

[The father]: Can I refer you to paragraph 57 of your affidavit where you draw the court’s attention to your financial statement?---Yes.

You say:

*Whilst I agree that I do not earn a large sum, I do have assets that I’m quite prepared to sell so that my 40 per cent share of the costs of the school fees can be met.*

?---Yes.

I put it to you that there’s no way you can pay 100 per cent of these fees for that period of time?---Are you saying that I could not sell my house for a cheaper house?

HIS HONOUR: No. That’s not what he’s saying?---I put it to you that I can.

He said, very clearly, that in his view, looking at your financial circumstances, you could not afford to pay 100 per cent of these fees?---That’s not true.

[The father]: Well, if that’s not true, then why did you say in your material that you can only afford to pay 40 per cent?---Because I would like to keep my home. I think I’m entitled to have the house that, you know, we live in. I would like to stay in the area that we live in. I think that you should be responsible for some of the school fees.

HIS HONOUR: Ms [Stewart], you’re not telling me, are you, that if the father doesn’t co-operate he’s going to be responsible for you selling the home you would like to stay in?---No. No.

Is that what you’ve just started to tell me?---No. I’m trying to say - - -

Well, it sounded like it?---I’m trying to say that I do have the funds. Nobody wants to sell their home. I’m saying that if I have to pay 100 per cent of the fees, I’m prepared to do that.

I read in your affidavit that you had, in fact, made a statement that you may sell and move closer to the city?---When – when [L] finished school.

When [L] – what, primary?---Primary school, yes. And if she went to [the girls private school], [J] went to [the boys primary school] and I lived in the city – I mean, and I worked in the city, I would look at living somewhere around Parklands or somewhere like that, that was convenient. That’s all.

Is there – on your present assets and income, is it possible that you could move to somewhere like Parklands?---Yes.

That’s the old Roma Street railway development?---I think so. I haven’t looked into it properly but, yes, I think I could.

Well, I don’t have evidence of it, but it occurs to me that those units are very expensive?---I think for a 3 bedroom unit they’re about $800,000.

All right. All right. If you’re paying the – for school fees, though, because the father may not be assessed to be liable, that may dampen your prospects of moving to an area such as Parklands, wouldn’t it?---I would still have approximately $500,000 left from my house to pay the school fees.

What are you going to do? Rent?---No. I would – I could pay a house, buy an apartment, and pay the school fees with the money left over.

All right. What’s your total asset pool at the moment?---I think it’s about $1.3 million.

All right. Have you made any assessment, on today’s figures, what the total cost of the private education you envisage for your children at the [private] schools would cost?---I think it would cost about $250,000.

Right. You say you think, my question was have you made an assessment?---I have assessed between 250 and 300 thousand dollars.

Now, that’s for both together?---Mmm.

Right. And are you telling me that you are prepared to pay that if there is no order or no mechanism in place for the father to contribute?---Yes, your Honour.

(Emphasis as in original)

(commencing at transcript, 31 May 2016, p. 43, l. 11)

1. To put the mother’s evidence about the prospect of her selling her home when the child L finished primary school in proper context, as at the hearing L was in year 2 of primary school and was thus five years away from completion of primary school.
2. Notwithstanding the evidence she gave in cross-examination, no relevant amendment was sought by the mother to the orders she sought, addressing responsibility for the school fees. Moreover, her counsel’s final submissions at trial were contrary to the conclusion that the mother was advancing a case that she would be, and remain without recourse to the father, wholly responsible for the costs. Counsel’s closing submissions included the submission that the mother would pay the fees “in the first instance”, repeating by necessary inference that the mother would be resorting to an application to the child support agency to have the father contribute.
3. We are not persuaded that there was any misapprehension on the part of the trial judge as to the mother’s case. Her case was plainly advanced on the basis, given her evidence as to her own financial circumstances, that she could afford 40 per cent of the school fees if the father contributed 60 per cent.
4. The trial judge recorded:

41. The mother said she could afford 40 percent of the fees, yet on her income, I do not see she has proven her case.

42. She said she will sell some of her property, and enrol the children and then seek a child support departure assessment, but even then, she put forward no persuasive material that she could afford   
on-going, and very probably rising fees, over the years, if her child support application was not successful.

43. I will take judicial notice that not only would school fees be an issue, but there are numerous other costs associated with schooling costs to be paid by parents.

1. More will be said about the mother’s evidence at trial in dealing with the topic discussed below but suffice to note here that we do not accept that the trial judge was under any misapprehension as to the case the mother was advancing.
2. In summary, the mother advanced an application for orders that the father be responsible for 60 per cent of private school fees. When that application, by way of departure from child support, was dismissed, the mother’s application for orders remained silent as to the funding. The mother’s evidence in support of her application was in support of orders that the father pay 60 per cent of the school fees and that she be responsible for 40 per cent. Her affidavit evidence concerning sale of assets was in the context of that being the means by which the mother might meet her 40 per cent share, not 100 per cent. The mother never formally amended her position to reflect her asserted willingness to meet all costs associated with the children’s schooling. Indeed, as we have pointed out, during the course of final submissions counsel then appearing for the mother submitted that the mother “informs the court she intends to pay those fees in the first instance”. That is the highest of any submission about the mother’s willingness or ability to meet the significant expenses associated with the children’s education.
3. We thus find no merit in grounds 3 to 6 (inclusive) of the appeal each of which being predicated on the proposition that the trial judge misapprehended the mother’s case in the respect addressed.

## The parties’ respective financial positions

1. The father’s evidence by his financial statement filed on 30 May 2016 was that his weekly expenditure exceeded his weekly income and that his net asset position (excluding superannuation) disclosed less than about $100,000 in equity. There being no challenge whatsoever at trial to that evidence, in the cross-examination of the father by the mother’s counsel, the trial judge recorded his acceptance of it (reasons at [32]); and the consequent finding that the father did not have the ability to pay 60 per cent of the estimated costs of the schools the mother proposed (reasons at [39]).
2. The mother’s financial statement filed on 20 May 2016 revealed that she was not receiving income from employment, her income comprising social security payments and child support; and that her weekly expenditure exceeded her weekly income by about $290 per week. Whilst the mother deposed to an estimated total value of her property at $1,459,036 some $55,000 of that comprised her motor vehicle and household contents and her liabilities included a $64,523 HECS debt and a debt of $130,000 owed to a family member.
3. We have already made reference to the mother’s affidavit evidence concerning her financial position. Importantly, the mother advanced no firm evidence of a plan to sell assets and the possibility she advanced of selling her home was tied to her proposed funding of 40 per cent of the costs of school fees, and read in its full context, the mother had no immediate plan to sell her home.
4. The mother advanced no evidence in chief of what funds she was likely to be left with if she sold her home and purchased a replacement. That evidence only arose for the first time during the mother’s cross-examination by the father and notably the mother initially asserted, to which we have already made reference, that while “[n]obody wants to sell their home … if [she had] to pay 100 per cent of the fees, [she was] prepared to do that” (transcript, 31 May 2016, p. 43 l. 42). In that same passage of evidence the mother indicated that she had considered selling her property and moving closer to the city when the youngest child finished primary school (five years hence) and the mother anticipated being able to purchase a three bedroom unit for approximately $800,000. From this sale and re-purchase, the mother gave an estimate that she would retain $500,000 from which she could meet the school fees.
5. However, the mother produced no cogent evidence in chief about the likely cost of a replacement property or even of any investigation she had undertaken. She confirmed in cross-examination in the passage to which we have referred “I haven’t looked into it properly but, yes, I think I could.”
6. The figures advanced by the mother make it apparent that she had not taken account of, inter alia, the $130,000 liability to her family member she had sworn to in her financial statement as an existing liability.
7. We note in passing that on the further evidence the mother would seek to rely upon on any re-exercise of discretion, the retained sum is in fact approximately $298,000 (and not $500,000) resulting from the sale and re-purchase of housing she has effected, but this sum likewise takes no account of the $130,000 existing liability sworn to. That is, the mother in fact retains less than $300,000 subject, it would seem, to a liability of $130,000.
8. On the state of the mother’s evidence before the trial judge, advanced in the context of the case the mother advanced at trial, it was well open to the trial judge to make the findings his Honour recorded at [41] to [43] of his reasons which we have earlier set out.
9. It bears repeating with respect to the trial judge’s finding at [43] that as his Honour recorded at [23], the estimate of $250,000 to $300,000 was on present day figures (ignoring probable fee increases over a future 10 year period) and was based only upon tuition fees and not also the “numerous other costs associated with schooling costs” (reasons at [43]).
10. We therefore find no substance in any contention to the effect that the trial judge was in error in his findings as to financial capacity or, perhaps more accurately, financial incapacity, for the probable future and ongoing costs of the mother’s proposed schools.

## Did the trial judge act on a wrong principle or fail to provide adequate reasons?

1. Much of the preceding discussion addresses the specific complaints concerning the adequacy of the trial judge’s reasons and need not be repeated.
2. Ground 1 of the mother’s appeal contains the complaint that the trial judge “failed to give adequate reasons with respect to Section 60CC factors in making his decision rejecting the Appellant’s proposal that the children attend [the private schools]”. That ground morphed into the contention in the mother’s summary of argument, as earlier noted, that the trial judge “failed to identify the need to follow the pathway set down by Part VII of the *Family Law Act*.”
3. Ground 2 of the appeal contends that the trial judge erred in failing to give any or any adequate consideration to the recommendations of the family consultant, the single expert earlier referred to, Mr X.
4. The issue the trial judge had to decide concerning the schools the children should attend was a narrow one. It is trite that the principles engaged and the application of them as well as the need for reasons are delineated by the judicial act to be performed: here the exercise of judicial discretion to determine the narrow issue between the parents as to which schools the children should attend.
5. The narrow nature of the dispute is further informed by the fact that on 11 July 2014 the parents had entered into final orders made by consent in respect of the parenting arrangements for their children. Those orders provided that the parents have equal shared parental responsibility for the children “including but not limited to their education, choice of schools and extracurricular activities; health and medical treatment and religious observance and instruction.” Pursuant to those consent orders the children were to live with their mother and spend time with their father on alternative weekends and for half school holidays.
6. On 11 May 2015 the father filed an initiating application seeking to vary the final parenting orders, only to the extent of changing the weekend on which the children were spending time with him; and on 20 October 2015 the trial judge made interim parenting orders by consent largely consistent with the existing parenting orders. It was on that occasion that his Honour appointed a family consultant to prepare a family report.
7. Thus in the context of the parents having agreed upon orders on 11 July 2014 for them to have equal shared parental responsibility for the children, the issue ultimately for the determination of the trial judge came about in circumstances where they were unable to reach agreement, in the joint exercise of their equal shared parental responsibility, as to the children’s schools. No issues remained surrounding other parenting arrangements for the children.
8. The path of reasoning of the trial judge to the conclusion that the mother had not established her case as to the affordability of her proposal that the children attend the private schools is readily discernible; and for the reasons already discussed that conclusion was well open to the trial judge on the case presented by the mother and on the evidence.
9. That conclusion in turn informed the trial judge’s task including the obligation to give reasons. For example, no degree of exhaustive discussion of s 60CC considerations could disturb the practical and factual conclusion as to the affordability of the mother’s proposal.
10. Having properly determined the affordability issue, as earlier referred to the trial judge recorded (at [58]) his acceptance of the father’s contention that commencing J at the boys private school and then removing him (because of the unsustainability of the costs) would be detrimental to the child’s best interests. As also earlier observed, the trial judge recorded at [62] his finding that the children would not be disadvantaged by attending a state school.
11. Both of these findings were central findings quintessential as to the children’s best interests as the paramount consideration (s 60CA). Moreover, by necessary implication those findings resonate with one or more of the s 60CC considerations in any event.
12. With respect to the expert evidence, again, those central findings referred to inform the extent to which the trial judge needed to consider and address the expert evidence of the family consultant. No degree of forceful expression of opinion by an expert as to, for example, the views held by the children or either of them in favour of the mother’s proposal could change the fundamental conclusion about its affordability.
13. The trial judge plainly had regard to the expert evidence of the single expert referring to it as he did in [45], [49] to [55], [76], [88] and [89] of his reasons.
14. The trial judge specifically recorded a finding at [37]:

That the mother relies on [J’s] strong view that he would attend at [the boys private school] does not take into account the real issue of whether each of these parents can afford the school.

1. At [51] the trial judge quoted from Mr X’s report and accepted the facts there recorded. Earlier, at [45] the trial judge observed that the expert had left open the question as to whether the mother was influencing the child J. The ultimate conclusion the trial judge reached expressed at [56] concerning J was:

In my view the child will cope with not going to [the boys private school] if that is the order, if the mother responsibly handles the situation for the child, even though such an order would be a great disappointment to her. It may be more of a disappointment to her than to the child, given all of the remarks in the family report.

1. We are not persuaded that the trial judge failed to give adequate consideration to the evidence of the family consultant which, in any event and contrary to the mother’s contention the trial judge was not bound to accept (see the summary of the authorities in *Simmons and Anor & Kingsley* (2014) FLC 93-581 at [42] to [46]).
2. We therefore find no merit in ground 2 of the appeal nor in the balance of the grounds containing challenges as to the adequacy of the reasons of the trial judge.

## Conclusion and orders

1. There being no merit in any of the grounds of appeal the appeal will be dismissed.
2. In the event the appeal was to be dismissed the father sought an order that the mother pay his costs. Whilst the father represented himself in the appeal he is a qualified lawyer.
3. In *Redmond & Redmond and Anor (Costs)* [2014] FamCAFC 55 (“*Redmond*”) the Full Court discussed the limited exception to the general rule that litigants in person are not entitled to be compensated for the value of their time, emanating from the case known as “*Chorley’s Case*” and applied by the High Court, where the litigant is a qualified lawyer. At [27] to [30] the Full Court there observed:

27. Whilst it is well settled that litigants in person are not entitled to be compensated for the value of their time there is a limited exception to that general rule where a solicitor self-represents. The general rule and exception were articulated by the House of Lords in *The London Scottish Benefit Society v Chorley, Crawford and Chester (“Chorley’s Case”)* (1884) 13 QBD 872 at p 877 as follows:

… only legal costs which the court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes. Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs…

28. In *Guss v Veenhuizen (No. 2)* (1976) 136 CLR 47, a self-represented solicitor sought taxation of costs on the basis that he fell within the rule of practice that a solicitor should be entitled to costs in those circumstances. The High Court, applying Chorley’s case, described the basis of the rule in the following terms at p 51:

… the litigant in person does not recover such costs in such circumstances in the capacity of a solicitor, but because he happening to be a solicitor, his costs are able to be quantified by the court and its officers.

29. In *Khera v Jones* [2006] NSWCA 85, the New South Wales Court of Appeal affirmed the limited scope of the rule allowing solicitors in litigation to claim professional costs. Likewise, in *Worchild v Petersen* [2008] QCA 26, Mackenzie AJA, with whom McMurdo P and Holmes JA agreed, articulated the general rule and the exception under Australian law as follows at [4]:

… the principle said to be derived from *Guss v Veenhuizen* … [is] that a solicitor who appears in person is entitled to costs for his professional time, not because he is a solicitor in the formal sense, but because, being a solicitor, his costs can be quantified…

30. Whilst in *Cachia v Hanes* (1994) 179 CLR 403 (“*Cachia’s case*”) the High Court questioned the principle that a self-represented solicitor may be entitled to costs it was unnecessary to overrule that principle for the purpose of deciding that case. However, it would seem that in *Cachia’s case* the majority thought the exception “questionable” in a situation in which a successful litigant not only receives the amount of a verdict but actually profits from the conduct of the litigation. Here, there was no verdict or money judgment in favour of the solicitors at stake.

1. We note that the question was subsequently considered by Watts J at first instance in *Coulter & Gerardine* [2015] FamCA 287 at [30] to [42] by reference to an extensive discussion of authority including *Redmond*, and his Honour expressed conclusions consistent with *Redmond*. We accept the approach of Watts J as correct.
2. We are satisfied that the *Chorley* exception, applied by the High Court in *Guss v Veenhuizen* (supra) applies here and in circumstances where the mother has been wholly unsuccessful in this appeal there are justifying circumstances within the meaning of s 117(2) of the Act, for a costs order as sought by the father.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Bryant CJ, Aldridge & Kent JJ) delivered on 13 April 2017.

Associate:

Date: 13 April 2017