

Episode 121: Summary

Episode name: Balancing the Scales: Best Practices When Dealing With Self-Represented Litigants

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What area(s) of law does this episode consider?

Family law; working with self represented litigants.

Why is this topic relevant?

Dealing with self-represented litigants can be a difficult task for many practitioners. Understanding how to navigate this dynamic is a vitally important skill for any practitioner whose day-to-day work involves advocacy.

What legislation is considered in this episode?

Family Law Act 1975 (Cth)

Family Law Amendment Act 2023 (Cth)

What cases are considered in this episode?

Tomasevic v Travaglini & Anor [2007] VSC 337

- This case considers the duty of a trial judge to ensure a fair trial, particularly when dealing with self-represented litigants. It highlights that self-represented litigants often lack legal skill, ability, and objectivity, placing them at a disadvantage in legal proceedings. The judge's duty is to provide assistance to these litigants to ensure fairness and balance in the trial. However, the judge must not become the advocate of the self-represented litigant and must maintain judicial neutrality. This case also refers to guidelines from the Family Court of Australia on how to assist self-represented litigants. The duty to ensure a fair trial applies whether the litigant has chosen to be self-represented or is unable to obtain legal representation.

Johnson v Johnson (1997) 139 FLR 384

- This case highlights the obligations of a court or tribunal towards an unrepresented party. These obligations include: (1) informing the litigant in person about the trial proceedings, the order of witness testimonies, and their right to cross-examine; (2) explaining any relevant litigation procedures to the litigant in person; (3) assisting them by gathering basic information from witnesses, such as their name, address, and occupation; and (4) if requested by other parties, explaining to the unrepresented party the implications and potential drawbacks of deviating from normal procedures, and their right to object to such changes.

H v OL [2024] NSWSC 271

- In this case, the Supreme Court of New South Wales addressed the question of whether to authorise intensive medical treatment for a 14 year old girl suffering from Pre B Acute Lymphoblastic Leukemia and multiple severe pre-existing health conditions. The hospital sought the court's permission to proceed with treatment against the wishes of the child's parents, who preferred palliative care to avoid the distressing side effects of chemotherapy. The

parents argued that the burdensome treatment would exacerbate their child's suffering, given her severe disabilities and frequent seizures. The court, exercising its *parens patriae* jurisdiction to prioritise the child's best interests, authorised the treatment, acknowledging its challenges but emphasising the potential to significantly extend the child's life.

What are the main points?

- Self-represented litigants are increasingly common due to the high cost of legal representation, particularly in criminal courts, local courts, and areas like employment and family law. Many seek advice from Legal Aid, duty solicitors, and duty barristers before proceeding.
- In places like NCAT, self-represented litigants may need to seek permission to have legal representation, but there are resources available to help navigate the legal system effectively.
- Although considering the best interests of the child has always been paramount to the court as per section 60CA of the *Family Law Act 1975* (Cth), the recent changes introduced by the *Family Law Amendment Act 2023* (Cth) emphasise the importance of considering individual circumstances of a family and tailoring custody arrangements to suit the child's routine and the parents' schedules. This approach aims to facilitate co-parenting relationships and prioritise the child's well-being over strict statutory obligations for equal time. These amendments, among others, include the new list of factors used to determine the best interests of the child in section 60CC, and the removal of section 61DA, which had included a presumption of equal shared parental responsibility.
- Quality time with children is important for parents, but practicality should also be considered. It may not be necessary for children to constantly move between households with equal time requirements. Allowing flexibility in visitation schedules can make children's lives easier and help them understand that both parents love them, regardless of where they stay each night.
- Dealing with difficult self-represented litigants often involves deciding whether to engage with their numerous emails and demands. Judges' associates may choose not to bring these emails to court's attention. It is crucial for practitioners to assess the legitimacy of the issues raised and decide whether to respond or refer them to the appropriate authority to avoid unnecessary and costly communication battles.

What are the practical takeaways?

- In a professional setting, it is important to consider the long-term implications of decisions made during legal proceedings. Encouraging clients to cooperate and compromise, rather than exacerbate conflicts, can lead to smoother co-parenting relationships in the future.
- Providing assistance by being the first to draft letters to experts or prepare orders by consent can significantly simplify procedures for individuals navigating legal processes, fostering better relationships and outcomes in the long run.
- It is important to efficiently address legal matters, especially those involving parenting, always with a bigger picture focus on the children involved.
- It's likely that a self-represented litigant has little or no previous experience with court proceedings. As a practitioner, your manner and behaviour demonstrates to self-represented litigants on how they too, should behave in dealings.

- Prioritising relevant and concise information that aids the judge's understanding is crucial for a successful outcome.
- To effectively communicate with self represented litigants, it is advisable to provide clear, concise information in dot points to ensure understanding. Transparency in legal submissions can prevent surprises and unnecessary adjournments, without prejudicing your client's case, ultimately saving time and costs for clients.

Show notes

Law Council of Australia, '*Addressing the Legal Needs of the Missing Middle*', November 2021 ([link](#))