

CAUGHT IN THE CROSSFIRE
GRANDPARENTS' CONTACT AFTER SEPARATION

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On a daily basis, families all around Australia appear in the Family Court of Australia, seeking that the Court make decisions about who their children will live with – known as Residence – and how often their children will see the other parent.

Whilst some parents are able to resolve these issues by negotiation and frequently, by compromise, many are unable to agree on what is best for their children.

In the midst of the heat of a Family Court battle, there is something of a forgotten element. The Grandparents. A recent study has shown that contact with grandparents can help children adjust to divorce.¹

This paper discusses contact between grandparents and their grandchildren after separation, in particular their legal standing and suggestions how they can best maintain a relationship with their grandchildren. It attempts to explain the legal position and offer practical solutions.

The Family Law Act (1975)

Section 60B(2) of the *Family Law Act* ("the Act") provides as follows:

"... except when it is or would be contrary to a child's best interests:

...

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;"

S. 65C provides further

"A parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or

(b) the child; or

(ba) a grandparent of the child; or

(c) any other person concerned with the care, welfare or development of the child"

Paragraph (ba) was inserted by the *Family Law Amendment Act* (2000). Prior to that time, a Grandparent had to come within s. 65(c) to obtain a parenting order.

It is suggested that the explicit inclusion of grandparents in this section of the Act is an indication from the legislature of the importance with which they hold the grandparent-grandchild relationship. A grandparent no longer has to establish that they have

standing to bring an application. They are entitled to bring an Application which is then determined as any other Application in relation to the parenting of a child.

Despite s. 60B of the Act, there is no guarantee that a grandparent will obtain an Order for contact from the Court. The Court must first be satisfied that the best interests of the child will be served by the making of such an Order. This is, in fact, the same criteria used to assess with which parent a child will live and the contact the non-residential parent will have.

The criteria applied by the Court in determining whether to make a particular parenting Order are set out in section 68F(2) of the Act.²

Read with s. 60B, it is clear that it is **the right of the child** to have contact with a parent, grandparent or significant other person in their life. Despite having standing to apply for a parenting Order, this does not, of itself, guarantee that a grandparent will obtain an order for contact.

Stevens and Lee³ concerned an application by the paternal grandmother to have contact with her five (5) year old grandchild. Her son was deceased and there was a great deal of hostility between the mother and the paternal grandmother.

The trial judge, Kay J summarised the position taken by the Court in relation to the issue of Orders for contact between children and persons other than their biological parents: (at 78,383-4):

"...where there is no present relationship between the child and the applicant in terms of ongoing day to day contact, but there exists significant biological ties. In my view, in those circumstances the words of the Full Court expressed by Strauss J. in E. and E. have significant application. His Honour there said, and I quote from p. 78,395:

"Generally, an order for access constitutes a substantial interference with the life of the custodian. It imposes a continuing relationship with the person who has access not only upon the child, but also upon the custodian. It restricts and interferes with the activities of the custodian in a number of ways, and not infrequently, it is found burdensome and irksome. In many cases, it leads to tensions and results in further litigation, and the child suffers from the conflict between the adults ... Unless there are cogent reasons for doing so, the Court should not seek to interfere with the right of litigants to order their own lives and those of their children. Where, as here, the question of access by strangers, [and I interpose to say that that means in legal jargon, anyone other than the parent] arises, it cannot be assumed, as is in the case of a natural parent, that a continuing association will benefit the child. Before any such order is made in favour of strangers, there ought to be convincing evidence, that the welfare of the child requires it."

His Honour then went on to express the following sentiments (at 78,385):

“For my own sociological part, I would say that the more loving, caring people this child can have contact with, the better for the child. The greater exposure the child can have to its biological links with its paternal grandparents, the better for the child, short and long-term. We live in troubled economic times and by way of example, in 20 years' time D may have need for finance in establishing a house, in purchasing a car, in any number of areas. The more people that are loving and close to him and can help him, who feel an obligation towards him, the healthier it will be for D.”

However, in the circumstances of that case, Kay J was so concerned that the Mother's hostility towards the paternal grandmother would impact on her own relationship with the child, he made no Orders for physical contact stating (at 78,385):

“I do not think that the benefits the child would get at this stage from direct contact would outweigh the trauma and difficulties which would be brought about by the mother's attitude, whether the mother's attitude is well held or not.”

The only Orders made by His Honour, were for the paternal grandmother to receive photographs and updates about the child's educational progress.

Since Kay J's decision in *Stevens and Lee*, the *Family Law Amendment Act* has now included grandparents as having standing. However, it is suggested that this is unlikely to have altered His Honour's decision, as he was bound to treat the best interests of the child as the paramount consideration.

Accordingly, grandparents in Australia will have to establish to the Court that it is the best interests of the child for an Order to be made for them to have contact. There is no specific requirement for them to show that the child will suffer by not having contact nor that the child will actually receive a positive benefit from the contact. All of the factors in s. 68F(2) of the Act will be taken into account.

The United States example

In the US, all 50 states have Grandparent Visitation Statutes.⁴ A quick search of the internet reveals a plethora of sites espousing the rights of grandparents to have contact, versus the rights of parents to choose with whom their child will have a relationship.⁵ Perusing these sites gives an insight into just how strongly each of the parent and grandparent groups feel about this issue.⁶

It is suggested that using the best interests of the child as the yardstick against which the question should be measured, is the best means of ensuring that children are not the losers in this equation.

Should an Order be made?

Faced with a situation where the Court is satisfied that there should be a relationship between the children and a grandparent, does it necessarily follow that an **Order** should be made?

Every family has a different set of circumstances with different commitments such as schooling, sport, extracurricular activities, leisure time as a family and time with extended family and friends to juggle. Separated families can have even more to juggle as these activities are shared between two parents who each have, for the most part, half the number of weekends or school holidays they previously had.

To then, by Court Order, share that time between not just the two parents, but the grandparents as well, may not always be in the best interests of any given child.

Each case needs to be looked at on its own merits, taking into account the individual circumstances of not only the parents and grandparents, but the child.

It is suggested that Grandparent contact should be approached in a creative way, rather than assuming that contact should be along similar lines to that enjoyed by a parent. Consider attendances at school functions, sports training and games, afternoon tea on a school day or assistance with babysitting. Use Grandparent contact time to give the child time out from the stress of the relationship breakdown, rather than embroil him in the conflict.

It is suggested that it would go a long way to serving the best interests of grandchildren if both grandparents and parents adopted the following:

Grandparents

- do not involve, or seem to be involving themselves in the dispute between their child and the other parent. Whilst their child needs support, there is more than one side to every story;
- respect the role of the other parent and do not attempt to subvert, undermine or denigrate the other parent or impose their own parenting values;
- be flexible in when they can spend time with their grandchildren and offer assistance (such as offering child minding) rather than demanding time

Parents

- recognise the importance and value to the grandchild of having a relationship with his/her grandparents;
- be tolerant of the grandparents' different set of values and parenting ideas;
- avail themselves of opportunities which allow the grandchild to spend time with the grandparents such as child minding or the grandparents attending sporting functions.

Conclusion

Grandparents have an important role to play in the lives of children, but that role can drown in the murky waters of a relationship breakdown

Too many children do not have the opportunity to enjoy their grandparents because they have passed away before the child's birth or early in the child's life. It would be a shame for Australian children if they were to miss out because the adults in their lives –

including their parents and grandparents - cannot see past the adult issues of a separation or divorce.

¹ Journal of Family Psychology 2002;16:363-376

² **68F How a court determines what is in a child's best interests**

- (2) The court must consider:
- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
 - (b) the nature of the relationship of the child with each of the child's parents and with other persons;
 - (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
 - (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
 - (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
 - (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
 - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
 - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (i) any family violence involving the child or a member of the child's family;
 - (j) any family violence order that applies to the child or a member of the child's family;
 - (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
 - (l) any other fact or circumstance that the court thinks is relevant.

³ (1991) FLC ¶92-201

⁴ For discussion on the US position and the US Supreme Court decision on the constitutional validity of such statutes, see *Troxel v. Granville: Not the End of Grandparent Visitation* Harris, L.J. Dorothy Kliks Fones Professor of Law University of Oregon available online <http://www.abanet.org/srlawyers/troxel.html>

⁵ The sheer volume of websites makes it impossible to list them all, but a search for the phrase "grandparent visitation" on most internet search engines will list hundreds of sites.

⁶ See for example www.parentsoup.com which claims as follows

"According to an online poll conducted by Parent Soup, one of the largest parenting Websites in the U.S., 52% of those quizzed think parents, not grandparents, should have the last word with visitations. A little more than 40% said grandparents have a right to visit their grandchildren even if the parents object."

