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GRANDPARENTS

GRANDPARENTS AND FAMILY LAW

Many grandparents feel anguish and grief about being deprived of a relationship with their beloved grandchildren - the grandparents are often the forgotten victims of a relationship breakdown.

What is the position of grandparents in respect of their entitlement to have a relationship with their grandchildren? Has the position changed since the revision of Part 7 of Family Law Act relating to parenting in 2006?

Prior to those amendments there were two principal decisions on this issue:-

The first case was *Stevens & Lee (1991) FLC 92-201*. In that case the paternal grandmother was being denied any relationship with her five year old grandson. Her only son had died in an act of arson. In the years since then, great hostility had developed between the grandmother and the mother. The grandmother seemed to be partially at fault for this and could not control her anger, perhaps blaming the mother in part for the death of her son. She saw fit to take out an AVO against her ex-daughter in law. The judge in that case sympathised with the Grandmother. Plainly her grandchild was the remaining link with her son and she was desperate to maintain contact. The judge considered it important for children to have links with their biological history and with as many persons as possible who could love and support them. But in the circumstances of the case, with the level of animosity between the mother and the grandmother, he denied the grandmother any direct contact with her grandchild.

The second case was *Bright (1995) FLC 92-570*, where the Grandparents had fallen out with their own son and his wife for no particular reason specified. The Grandparents had managed to build a relationship with their two and a half year old grandson and wanted to continue it. They obtained interim orders to see him once a month for a weekend with an overnight stay. This had been successful. The parents lived a few hundred kilometres away from the Grandparents and the Grandparents applied for orders for the current arrangements to continue and for the parents to share the driving. The judge agreed Grandparents had a good relationship with their grandson and that the orders should continue and he was very critical of the harsh attitude of the parents. However, he ordered that the Grandparents had to do all the driving.

Following those cases there was a revision of the parenting section of the Family Law Act in 1995.

Grandparents were specifically mentioned in the Act for the first time as being one of the category of persons entitled to make a parenting application.

An “objectives” section was inserted at the commencement of the Part 7 which specified an entitlement of children to spend time with their parents as well as other persons significant to their care, welfare and development which appeared to be some increased recognition of the importance of the relationship of Grandparents with their grandchildren.

There was a second major review of the Part 7 Parenting Section of the Family Law Act in **2006**. In the new amendments Grandparents were specifically mentioned some 14 times in 11 separate sections of the Family Law Act. These sections are 4, 13C, 60B (3 times), 63C, 64B, 65C, 65G, 66F, 66(7), 66T and 69C. The most significant mentions are as follows:

1. **s60B** – sets out the objects and principles underlying the Parenting Section of the *Family Law Act* and now includes specifically a mention of Grandparents, that a child has a right to spend time on a regular basis and communicate on a regular basis with both parents and other persons significant to their care, welfare and development, “*such as **grandparents and other relatives***”;
 1. **s60CC(3)** sets out amongst the “Additional considerations” the court must consider in parenting matters, “*the nature of the relationship of the child with..parents and other persons including any **Grandparent** or other relative of the child*” and at (d) ..“*the likely effect of any changes in the child's circumstance including the effect of separation from a parent or another person including any **Grandparent** or other relative of the child*”. Further at (f), the court must consider “*the capacity of each of the child's parents and any other person, including any **Grandparent** or other relative of the child*” to provide for the needs of the child.
 2. **s65C** – retains among the definition of persons who may apply for a Parenting Order “*a **grandparent of the child***”;
 3. **s65G** – provides for special conditions prior to a Court making a Parenting Order by consent, including the parties must first see a counsellor but notes that this doesn't apply if the applicant is a parent or a **grandparent** or other relative of the child;
 4. **s66(7)** – includes a **grandparent** amongst persons who can apply for a “**Location Order**”, to locate a child who has been taken away;
 5. **s66T** – similarly provides for **grandparents** to apply for a “**Recovery Order**” for the immediate location and return of a child who has been improperly taken away;

The new Amendments also brought in a new structure as to how the court should approach parenting matters. Basically in each case the court must follow a “**pathway**”.

The court must consider the objectives and principles as set out in the front of the section. In each case, **the best interests of the child is the paramount consideration**. To determine the child's best interests, the court first considers **primary considerations** relating to the child having a *meaningful relationship* with both parents and the need to protect the child from harm, abuse, neglect and violence. The court must consider approximately 12 **additional considerations** as appropriate including the views of the child and other issues. In most cases, unless there is violence or abuse, there is a presumption of **equal shared parental**

responsibility between the parents which means responsibility to make major decisions together concerning the child. The court in each case must then consider the child spending “*equal time*” with each parent if *practical* or if not, *substantial time* with the other parent, if *practical* or not make appropriate orders.

As a result of the increased mentions and prominence of grandparents in the 2006 amendments to the Family Law Act, grandparents were entitled to think they had new rights and increased prospects in applications concerning their grandchildren. There followed an increase in court applications of grandparents to see and spend time with their grandchildren. But if that was the expectation of grandparents, they may have been disappointed.

A summary of the current law was provided in a carefully considered judgment by Justice Benjamin, in the case of *Church & Overton (2008) FamCA 953* relating to the position of grandparents in family law disputes.

In that case the grandfather had fallen out of contact with his three daughters and his various grandchildren and had not had any relationship with the grandchildren for about eight years following his divorce from the daughters' mother. He then applied to see them for a period of hours once a month and other communication. He gave evidence of having remarried and now having a warm and loving relationship with his new family and step-grandchildren. He asserted in his case that the changes in the Family Law Act in 2006 gave grandparents a “*special place*” which entitles them to spend time and communicate with their grandchildren.

Justice Benjamin posed the question: “*Do grandparents have special entitlements to see or communicate with grandchildren?*”

He went through the changes to the Parenting Section of the Family Law Act. He noted that the Family Law Act **clearly gave a “special position” to parents**. However they were the only persons who were given a special position.

The importance of grandparents was mentioned on a number of occasions. He went into the background of the Bill and explanatory memoranda, as well as speeches in Parliament where it was emphasised that one of the objectives was to support the grandparents' relationship with grandchildren. Nevertheless the clear wording of the section specified that grandparents were a prime example but in the same position as other relatives. Grandparents clearly had a right to make applications to the Court to see their grandchildren, but they didn't have any special position.

The two most important paragraphs of the judgement are at 60 and 61 which are as follows:

60 *If a Court is satisfied that an approach to the upbringing of a child by a parent or parents in whatever way is contrary to the child's best interests, then the Court should interfere by putting in place appropriate orders. In the absence of substantive issues as to the child's best interest, it is not the role of the Court to peer over the shoulders of functional parents and second guess the decisions they make regarding the upbringing of their children. A Court should only intervene in such decision-making in a cautious, careful and thoughtful manner and consider whether a better approach is to make no order at all.*

61 *That is not to say that a parent who acts capriciously in isolating a child from a grandparent with whom the child had a meaningful relationship or not be the subject of orders, nor should this derogate from the role of any parents or relatives who have taken up the care of children in circumstances where the parents were unable or unwilling to care for them”.*

He seems to be saying that in a “functional family”, the court would not ordinarily interfere with the decisions of the parents about spending time with grandparents and would be reluctant to “peer over the shoulder” or “second guess” parents. There are two broad exceptions. One is where the parents are acting capriciously (“guided by whim, inconstant, irregular”) and if there is a good existing relationship between grandparent and grandchildren and the other is where the grandparents have been acting as “parents” because of the inability or unwillingness of the parents.

In this case the judge said there was a long history of a very bad relationship between the grandfather and his children and there had been many years in which he had not had any relationship or taken any particular interest in his grandchildren, who did not know him. For him now to seek to have a relationship with them against the strong wishes of each of his three children and their partners was something the judge was not prepared to support. He dismissed the grandfather's application saying that the grandfather had a right to send letters which the parent could decide to handover to the children when they were of an age to understand.

Some other cases involving grandparents are summarised below:

- In *Cowles & Cowles & Madden (2008) FMCAfam 1091*, the maternal grandparents had been the primary carers and stable force in the life of their grandchildren now aged ten and eight for significant periods of time. The grandparents had done what they could to support their daughter as a parent. However the final straw came when she reinvolved herself with an unsuitable partner with a long criminal history and was not sending the child regularly to school. The grandparents thought they had to do something to protect their grandchildren. The children were in the care of the mother at the time they went to the Court. Nevertheless, considering parenting history and the mother's failures, the Court considered the children were not likely to receive a proper upbringing with the mother and ordered that the children be returned to the grandparents and spend alternate weekends and half holiday periods with their mother.
- *Irwin & Irwin (2011)* was a dispute between sisters, but similar principles apply. The mother entrusted her child then aged 2, to live with her sister, his maternal aunt, and he did so for four years with the mother having no communication during that period, due to the mother suffering from and coping with mental illness. After she recovered she sought to re-establish her parenting role with her son. By that stage the child was closely bonded with the maternal aunt. Although the fact of parenthood was an important factor to be taken into account, in the end the Court considered the child's best interests lay remaining with his current stable arrangement in the primary care of his aunt, with the mother spending significant, regular time with him at weekends and holidays.

- In *Bemert & Swallow (2009)* the court dismissed and struck out an application by a grandparent at a summary (preliminary) stage. The grandparent had a long history of litigation in the Family Court and other courts and there were allegations of abuse, violence and AVOs against the Grandparent by his children. The grandparent was found to be a “vexatious litigant” and obsessed with his rights and entitlements rather than the welfare of his grandchildren. Sadly by his past behaviour, the grandparent was such a disruptive influence that the court wouldn't countenance even allowing him to pursue his case.
- In *Samson and Jacks (2008)* there was a dispute between a mother and her parents in respect of two children aged 10 and 8. The grandchildren had had not seen the grandparents for 6 years, although the grandchildren had some positive memory of them. There were allegations by the mother of sexual abuse against the grandparents and the mother was strongly opposed to the grandchildren having any relationship with their grandparents. The abuse allegations were determined to be unfounded. The grandparents were allowed limited “supervised” time initially to be expanded to unsupervised time each third weekend and some holiday time for day periods of 4 hours to start in 2 years time.
- In *Ni and Zang (2008)* the paternal grandparents, father and mother were ethnically Chinese with the father working regularly in China whilst the grandparents and mother resided in Sydney. The grandparents were separate applicants in the case with their son. There was one 2 year old child. The mother wished to relocate to New Zealand against the wishes of the father and grandparents. She was permitted but the grandparents and son were each given time, together or separately, to spend with the grandchild 3 times a year for one week in Sydney or New Zealand.
- In 2012 two decisions were handed down by the Court involving grandparents – the cases of **Oldfield** and of **Sykes and Agnes**. In both cases the Grandparents were denied orders to spend time with their grandchildren because of the past and present history of conflict and disharmony between the grandparents and the parents.
- In *N & LS (2004)* the background facts were that the father of a four year old child could not have any contact with his child now or in the future for certain reasons. His parents the grandparents were the applicants. They had a close relationship and involvement with their grandchild and wished to continue it. The mother strongly objected in view of the history and emotional trauma caused to her if the grandparents were to have any contact with the child. Principally she blamed them because they did not support her in her accusations against their son. This was true. But importantly the grandparents had made every effort to maintain as good a relationship as possible with the mother, despite the difficulties. In the end, in view of their previous close relationship and involvement with the grandchild, Her Honour ordered that it was in the grandchild's interest to continue the relationship with her paternal grandparents and allowed them one day a month for about 6 hours, on the basis that they did all the travelling and upon strict conditions including that the grandparents allow no communication or involvement with the child's father.

So what are the principles and guidelines to be taken from the cases both prior to and subsequent to the 2006 amendments?

- Needless to say, each case is different and depends upon and determined by its own facts and what is reasonable and in the grandchildren's best interest in that particular circumstances.
- There is a separate category of cases where the grandparents have been acting effectively as parents because of the unwillingness or inability of the parents or either of them to care for the child, whether because of drug problems, mental health issues, lack of interest and commitment or other reasons. The court will look carefully at orders to protect the children's best interests often by continuing the care of the grandparents or giving them great involvement. In such cases, the grandparents start on a fairly equal basis to the parent or parents in seeking parenting orders in the child's best interests.
- There are many intermediate cases where the care of the parent or parents is questionable but they claim to be providing effective care. The grandparents may have had an exceptional involvement with their grandchildren for various reasons. The Court puts great emphasis on "parenthood" and will generally support parents over grandparents if there is a dispute and particularly where the grandparent is perhaps overstepping their role and starting to interfere in parenting decisions with insufficient justification. Parents will tend to be given every opportunity to be good parents. However the grandparent may well have a good case to continue significant involvement with their grandchild to monitor the situation and ensure the grandchild's welfare.
- However where the parents have been acting as functional parents and there is no real issue as to this, then the situation is different. Generally grandparents should see their grandchildren at the same time as their own child and allow the parents to divide time between them. They should not make their own applications. However there are exceptions to this for a variety of reasons. This is particularly the case where their own child is unable or unwilling to spend time with the child for a variety of reasons and where the grandparent had a significant involvement with the grandchild in the past which should continue.
- Grandparents should do everything possible to avoid becoming embroiled with a dispute with or between the parents. It is so important not to be involved in a dispute and not to get involved in the emotions of Family Law and particularly not take out AVOs or seek unhelpful orders. Their applications to the court should be as positive as possible, emphasising the benefits they can bring to their grandchildren by continuing their relationship, rather than criticising the parents and asserting their rights. Grandparents as with parents don't have rights to their grandchildren.

It is the children and grandchildren who have the rights to know and spend time with both parents and grandparents and other persons significant to their welfare, if that is in the child's best interests.
- Grandparents should make every effort to show you have acted reasonably and supportively of the parent. This often includes trying to fit in with the parents' and children's arrangements,

including the activities of the children are doing on weekend and the grandparents doing the transporting to and fro to make it as easy as possible for the parents. Hopefully the parents can look positively upon the opportunity of having a break.

- It is much better if you already have a strong and loving relationship with the grandchild which the court will want to continue. If this is not the case, it is harder but not hopeless. If it has not been possible to establish or maintain a relationship with the grandchild for good reason, particularly because the grandchild is a baby or because of distance or other reason, or if you the grandparent has lost contact and communication for a period of years, there may still be a basis to see grandchildren regularly, provided the grandparent can show they have previously and are still attempting to act reasonably.
- As to the amount of time the grandparents should seek, this depends on the circumstances. But it should generally be less than a parent would seek. I note overnight time was allowed in the case of Bright for a weekend a month and overnight night time allowed in other cases. However often the sort of time which a grandparent will be granted will be daytime periods once a fortnight, three weeks or a month, similar to the orders in *N & S*, to allow a pleasant outing to maintain the relationship. If the grandparent previously had much greater involvement which they suggest for reasons should continue, they may well have a case for greater time. Holiday times could be possible as children get older and particularly if the child is keen.

In terms of practical arrangements of what grandparents should do, who are being deprived of a relationship with their grandchild, the answer is that they need to tread carefully. Obviously court proceedings are a last resort.

It is best to try to resolve disputes informally. Things often improve with time and Christmas and birthdays are excellent opportunities. However you can't allow the relationship to fade away and delay can affect prospects of success in undermining what was a close relationship.

Grandparents can and should seek to convene **Mediation** in appropriate cases, through a **Family Relationship Centre** or a community mediation organisation such as **Unifam, Relationships Australia or Centacare**. They will provide a lot of assistance. Indeed it is a condition that prior to starting parenting proceedings at a Court, an attempt must usually be made to convene and participate in mediation and it is necessary to produce a Certificate that you have done so, when you file court proceedings.

If court is necessary, do it wisely and well. The Courts are supportive and helpful to Grandparents who can show they are acting reasonably and in their grandchildren's best interest. Generally the application would be made in a **Federal Magistrates Court** by filing an Initiating Application and an Affidavit.

The answer to the question posed at the beginning as to the position of Grandparents in respect of their grandchildren and whether their position has changed since 2006 seems to be this. It is clear and

obvious that the relationship of grandparents with their grandchildren is a beautiful and wonderful thing which brings enormous mutual benefits to both sides. Grandparents have always had a right to make application to see their grandchildren. They have often been successful. It depends on the circumstances of the case and that the grandparents can show they have and are acting reasonably and responsibly and their continued relationship with their grandchildren is in the grandchildren's best interests. However parenthood has been given special prominence by the 2006 amendments and where the grandparents are acting in a disruptive and negative way, they will often be denied orders.

However for grandparents the important thing is never to give up. Always attempt to maintain communication and attempt to make sure the grandchildren know that your door is open and phone number is available to be called.



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