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## Grandparents in the Family Court

# The rights of grandparents and grandchildren on family breakdown

*John Pollard*

In many cultures, grandparents have traditionally played an important role in the family. With family breakdown continuing to increase, and the ageing of Australia's population, more grandparents are wanting to know what right they have to regular contact with their grandchildren and what they can do to help care for their grandchildren.

In many families, grandparents play an important role as caretaker of the children, particularly in families where both parents work. Sometimes grandparents live in the same home as the parents and children and share many parental responsibilities with the working parents. In these situations, breakdown of the marriage impacts dramatically upon the whole family — the separating couple, the children, the grandparents and other members of the extended family with whom the children have had regular contact.

Sometimes the family break is a compound fracture. The family divides and loyally supports the spouse from its side of the family and is alienated from the other side. On occasions, this means retribitional punishment for the parent who does not foster contact with her or his spouse's extended family.

### Grandparents' rights

In the final stages of the passing of the *Family Law Reform Act 1995* (Cth) there was much talk of 'grandparents' rights'. However, when the dust had settled and the provisions of the Act were closely analysed, it became clear that no 'grandparents' rights' as such were created. The reference to grandparent in s 69C did not add very much to 'grandparents rights' in practice, but it was a political achievement to gain

an express reference to grandparents in the Act. Until recently, to apply for parenting orders for children, grandparents had to qualify as 'any other person concerned with the care, welfare or development of the child'.

In most cases it was a simple task for a grandparent to establish that he or she was a 'person concerned with the care, welfare or development of the child' by virtue of being a grandparent. Since the commencement of the *Family Law Amendment Act 2000* (Cth) on 27 December 2000, grandparents are now specifically entitled to bring proceedings for parenting orders.

### Residence orders

A grandparent can seek a residence order and a specific issues order for the care, welfare and development of a grandchild, if it can be established that the arrangements made by the parents are not in the child's best interests: for example, where there has been a serious breakdown in the health of one or both of the parents, or the parents are addicted to alcohol or drugs or are not competent to adequately care for the child. In these situations, rather than allow the State to take the child into care or place the child in foster care, it is common for a grandparent or other family member to seek orders under the *Family Law Act* for the children. A residence order would ordinarily be combined with an order giving the grandparent responsibility for the day to day care, welfare and development of the child. The combination of these two orders is the equivalent of the old 'custody' order. The grandparent may also seek an order for the long term care, welfare and development of the child (which is

equivalent of the old 'sole guardianship' order).

There is often a contest between one natural parent and his or her parents-in-law about whom the child should live with. This can occur following the death of one parent where the surviving parent wishes to take over the full time parental responsibility for the child. A grandparent who has lost a son or daughter often feels some greater responsibility to step into the place of their deceased child and take over the parenting of the grandchild. This is particularly so if they had a close relationship with the grandchild while they were in the full time care of their son or daughter.

Another common situation is where the mother of a young child, because of ill health or drug or alcohol dependence, is unable to care for her child and virtually places the child in the care of her parents. When a close bond develops between the child and grandparents, the child regards the grandparents as the surrogate parents and looks to the grandparents for nurturing and physical and emotional security. Difficulties arise if that parent then wants to take the child back.

In these cases, if the adults cannot resolve the problem by counselling, discussion, negotiation or mediation, the court has to determine what is in the best interests of the child.

### Reported cases

There are a number of reported cases where grandparents and more distant relatives have managed to obtain a custody order in competition with one or both biological parents.

*Rice v Miller* (1993) FLC 92-415 was a case between the father of an ex-nuptial four year old child and the maternal grandmother. The child had spent a considerable amount of time in the care of the grandmother. The grandmother was awarded custody. The father appealed and the Appeal Court dismissed the appeal, rejecting the father's submission that a natural parent should be preferred to a grandparent in a claim for custody. The Court said:

We are thus of the view that the fact of parenthood is to be ➤



'Has the child had a lot of contact with the grandparent, and has a strong bond been established between them? Has the grandparent demonstrated a capacity to cope with the child?'

➤ regarded as an important and significant factor in considering which of the proposals best advances the welfare of the child. We would reiterate, however, that the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the Court commences its decision-making process. Each case must be determined according to its own facts, the paramount consideration always being the welfare of the child whose custody is in question.

In the 1994 case of *McMillan v Jackson* (Appeal no EA48 of 1994; No PA6351 of 1993) the custody of an 18 month old child was awarded to her maternal great-grandmother, who was 60 years old. The father of the child was the applicant and he was supported by his parents. The father gave evidence that he intended to stay at home and provide for the child's day to day care and control until the child was ready to go to school, when the father intended to return to the workforce. In the meantime he would be dependent on social security. The trial judge, in awarding custody to the maternal great-grandmother, referred to the undesirability of the father remaining at home to care for the child, saying

this will have an effect of entrenching him — and therefore the child — in welfare dependency. Such an outcome would have unfortunate implications not only for the child's long term living standards, but also for Mr McMillan's own prospects as a role model for his son.

For this and other reasons, the Full Court upheld the appeal and ordered a retrial but ultimately an order for custody was made in favour of the maternal great-grandmother.

### **Best interests of the child are paramount**

In deciding whether to make a particular parenting order, a court must regard the best interests of the child as the paramount consideration. The criteria set out in s 68F (2) of the *Family Law Act* are:

(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. ➤



### Examples of problems which commonly arise

- • How should the Court deal with the wishes expressed by a child as to the person with whom he or she should live? Are the wishes an emotional response by the child so as not to offend an adult or a realistic and mature decision made by a child who understands the problems ahead? Children often say one thing to someone they do not wish to hurt and say the opposite to another adult. Such inconsistent responses are often the product of a 'loyalty conflict' within the child.
- At what age can the child's wishes be taken into account? In the case of *H v W* the Court had held that the wishes of children aged eight and six years old had to be taken into account, but this was a borderline case. Normally the Court is reluctant to rely too much on wishes expressed by children under 10 years of age because young children can be easily influenced.
- Has the child had a lot of contact with the grandparent, and has a strong bond been established between them? Has the grandparent demonstrated a capacity to cope with the child?
- The Court places importance on maintaining the bonding which the child has established with other people. If the child has progressed well in the past, the Court will be reluctant to change the caretaker of the child unless there is good reason to do so. (This is called the 'status quo' factor.)
- The Court will take the age and state of health of the grandparent/s into account and will want to be reasonably confident that the grandparent will be able to provide an adequate standard of care until the children grow up.
- Regardless of who is the daily carer of the children, the other parent and other significant people, including grandparents, are entitled to contact on a regular basis. If the person seeking to have the children is not likely to facilitate contact with the other parent that may be a reason to disqualify that person from obtaining a residence order.
- The Court must compare the physical

and mental capacity of each parent and grandparent to provide for the needs of the child.

- If grandparents are elderly and have had little formal education and so cannot help teenagers with their homework, this may be a relevant factor. Similarly, if the grandparents do not read and write English fluently, this may disadvantage them.
- The child's maturity, sex and background was a new factor added by the 1995 Act. In the case of Aboriginal people or Torres Strait Islanders, the Court must decide if it is necessary to maintain a connection with the lifestyle, culture and traditions of those people. When the child comes from a non-English cultural background, that may be an important factor if the grandparents can demonstrate that they have the time, capacity and patience to assist the child to understand his or her cultural background.
- The need to protect a child from physical or psychological harm is now given greater emphasis, whether the child is exposed to it or witnesses it. However, it does not follow that because one parent has been violent to his or her spouse that they will be a danger to the child. Each case will depend on its own facts.
- If the parent has not shown a responsible attitude to the child in the past and the grandparents can demonstrate that they are likely to be able to provide a more supportive environment, the grandparents are likely to succeed.
- In many cases the grandparents will have the time, patience and life experience to demonstrate that they understand the responsibilities of parenthood. The fact of a grandparent having been in a lengthy contented marriage will often be indicative of stability and responsibility about family matters, including the welfare of children.
- Normally the Court will opt to make an order which is least likely to lead to further proceedings. However, further proceedings may be tolerated if the Court makes an order with a focus on the child's short term developmental needs, or if there is evidence that the rifts

or disharmony are likely to settle over time.

- The Court is entitled to take into account 'any other fact or circumstance that the court thinks is relevant'. This can include a whole host of factors, such as the age and state of health of the grandparents, their physical and mental fitness and agility, the age of the child, their likely role as de facto parents of the child, their communication skills, their philosophy of life, their flexibility and capacity to cope with change, their level of education, and if they can discipline the child and counsel and assist the children passing through puberty. Sometimes there is a 'generation gap' if the grandchildren are better educated than their parents and grandparents.
- On the other hand, the courts appreciate that many grandparents have an advantage in being retired or semi-retired, having time to give to the children when they return home from school or having the patience, maturity and wisdom to listen to the children's problems. Often they also have financial security and are able to provide a better education for the children. The grandparents can of course also be a valuable role model for their grandchildren and teach them many skills that the child's parents did not learn or pass on to the child.

### Exercise of discretion

Parenting order cases are often very difficult. Each judge unconsciously draws on his or her own value system and experience when exercising the discretion to decide what is in the best interests of the particular child. This explains the observations of experienced family lawyers that judges vary in their approaches to cases of a particular type. In this article's context, a judge's interpretation of disputed facts may be affected by whether the judge is a grandparent and has felt the joy or disappointment of either having a full relationship with their grandchildren or being limited or denied the opportunity of a close, warm relationship. Ethnic and cultural considerations may also be ➤



➤ relevant, because in many cultures the role of grandparents differs widely.

### A grandparent's right of contact

Judges, counsellors, mediators and lawyers are now conscious of the fact that children have a right of contact on a regular basis not only with both their parents but with other people, such as their grandparents and extended family members, who have played an important role in the past and who can assist or enrich their lives in the future.

The right is expressed as the right of the child, not of the grandparents. However, if grandchildren have a right to see their grandparents, it may be thought that grandparents have the right to enjoy the opportunity of having contact with their grandchildren. Grandparents can certainly apply to fulfil the right of the grandchildren to see them.

Even though the law recognises the right of the child to see grandparents, if there is conflict between the grandparent and the parent with whom the child ordinarily lives, the Court still has to decide whether it is in the best interests of the child to enforce that right. If the hostility is too intense and it is going to cause further conflict for the child or endanger the child's relationship with his or her parents, the Court may refuse to grant the contact. There have been cases where even a parent has been denied contact because of some unjustified and unreasonable attitude of the residence parent, and the Court has had no alternative but to deny contact based on what the court decided to be in the best interests of the child because the contact parent could not seriously seek residence. These cases are tragic, but continue to occur and always provide great difficulties for judges to resolve.

A good outcome for grandparents was the case of *Bright v Bright* (1995) FLC 92-570 where paternal grandparents sought access for part of a weekend each month to their 2 1/2 year old granddaughter, against the wishes of the parents of the child. The parents of the child were still together and for some reason did not want the husband's parents to have contact with the child. The late Justice Treysvaud started his judgment by saying:

This case has not taken very long to hear or to

determine and one might be pardoned for thinking that it is an unimportant piece of litigation. That is not the position at all in my view. Proceedings of this sort between grandparents seeking access to their grandchildren, and the parents of the children opposing access, or attempting to restrict it, are becoming quite commonplace, which in general is a matter of regret, in my view.

We live in a society in which the term 'the nuclear family', which means father and mother and the children, is well understood. The community seems to accept that all that is needed for the proper upbringing and development of a child is to be part of a nuclear family. If that were the common perception that is not one which I share ... it is very important for children's proper upbringing and development that they have contact with a much wider family than merely the parents of the relevant child. It is very important for a child to understand that he or she is part of a wider family, that he or she has grandparents on both sides, uncles, aunts and cousins, so that the child grows up feeling part of an extended and supportive family.

In that particular case the Court overruled the parents' objections and allowed the grandparents to have access for one weekend a month, the judge saying that it was unfair to deny a 2 1/2 year old contact with her grandparents because of a falling out between her parents and her grandparents.

### Primary dispute resolution

If there is a family dispute and grandparents are denied contact, they can seek help from their solicitor, the Family Court or one of the community counselling or mediation services such as Unifam, Centacare, Relationships Australia or other member organisations of Family Services Australia. The *Family Law Act* encourages people to use counselling, mediation, arbitration or other means of conciliation or reconciliation as the primary methods of dispute resolution in family law matters. Counselling and mediation facilities are readily available in most areas.

The starting point is direct negotiation. The person seeking contact should approach the day to day carer of the child

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and try to negotiate for contact to take place. Sometimes a 'go between' may be necessary. It can start for short periods or on a trial basis, with the hours of contact being extended gradually.

Mediation is an excellent means of trying to settle these family disputes. The mediator is a neutral facilitator who will try to get all of the relevant adults to meet and discuss the issues and try to reach a settlement which satisfies as many of the needs of each of the people present as is possible. Mediation is about identifying the needs of the family members in dispute by allowing each person to have their say. The mediator tries to identify matters which may be blocking the negotiation process. What has caused distrust in the past? Is there a hidden agenda? Often time is spent in clarifying miscommunication and misunderstandings about what has happened in the past and reaching agreement on how to ensure that these problems do not recur in the future. The mediation may require several sessions over weeks or months. Sometimes contact proposals can be trialled between mediation sessions and adjustments to the parenting orders can be negotiated at the next session. With younger children, their needs will change from year to year and the contact arrangements need to be reviewed every year or two. Once people become familiar and comfortable with mediation, it is easier to get all the people to come back again to review prior agreements.

If direct negotiation fails, then an approach can be made to the Family Court counselling service or to one of the community counselling services. They will normally contact the other parties and try to arrange an appointment for counselling so that the parents of the child and grandparents can go to counselling to try to resolve the impasse. If that fails, they can attempt mediation through the Court or by using one of the community mediation agencies or private mediators.

Alternatively, or at the same time, they can approach

lawyers to conduct negotiations on their behalf and if all fails, make an application to the Court.

Applications for contact or other parenting orders can be made to the Family Court, the Local Court or the Federal Magistrate's Court. If the parties have not attended counselling or mediation prior to the first court appearance, they will be directed to attend confidential counselling — which leads to a high proportion of these cases being settled without the parties having to incur the costs of filing lengthy affidavits and going to a hearing. Some free legal advice can sometimes be obtained from Legal Aid or a Chamber magistrate at the Local Court. It is best to engage a lawyer if you have to go to court.

If the parties can reach agreement, it can be turned into parenting orders by consent, or can be recorded as a registered parenting plan.

### Conclusion

The opportunities for grandparents to have contact with or seek a residence order in respect of their grandchildren are now clearly established. In determining whether it is in the best interests of children to have regular contact with their grandparents, judgments of the Family Court show that the law has accepted what psychologists, sociologists, human experience and common sense have proven — that families benefit from calling on the resources and assistance of the extended family and taking full advantage of the wisdom, spare time, patience and love which grandparents are normally more than willing to bestow upon their grandchildren. ●

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