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quarterly

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Issue 13

Grandparents and a Grandchild – The Legal Position



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"Young people need something stable to hang on to – a culture connection, a sense of their own past, a hope for their own future. Most of all they need what Grandparents can give them." – Jay Kessler

It is thought of as a 'right of passage' for parents to evolve into grandparents and get the chance to commune with children without the responsibilities of parenthood. It's an opportunity to play with a child and be their friend and support without consequences.

Sometimes this evolution from parent to grandparent is fractured by a breakdown in relationships with their adult children. The breakdown may be with your own adult child or with their partner. There may be abuse in that relationship which is beyond your ability to repair. Sometimes parents use their children as leverage and to obtain financial gain from their grandparents.

What Happens to Your Grandchildren?

It is a sad reality that children are significant casualties of parental separation. It's hard enough when the separation is amicable. A child's feelings of stability are undermined and the concepts of love and nurture no longer provide protection from external forces. Everything changes.

If the separation of parents is not amicable, and possibly violent, the children suffer the most. Even if the separation is concluded the child's relationship with their grandparents can be disrupted. Parents can relocate or form a new relationship. The opportunity for grandparents to see grandchildren can be severely curtailed or be non-existent.

Changes in Law

The Family Law Amendment (Shared Responsibility) Act 2006 introduced significant changes to the *Family Law Act 1975* ("the Act"). The amendment confirmed and emphasised the importance of the relationship of grandparents and grandchildren.

Grandparents are specifically recognised in the Act. The act sets out the objects and principles of Sect 60B to ensure that the best interest of the children are met by (I am paraphrasing relevant sections of the Act):

- protecting children from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence;
- ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

A court will determine what is in a child's best interests in a primary sense which deals with essential conditions of health, safety and wellbeing and, assuming separation has occurred, having a meaningful relationship with both of the child's parents.

A Grandparent's Legal Right

The additional considerations are most relevant to grandparents and formally recognise the significant role played by grandparents in children's lives.

That is:

- any views 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 views;
- the nature and relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child);
- the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either his or her

parents or any other child or other person (including any grandparent or other relative of the child); and

- 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, including emotional and intellectual needs.

The above summary is selected from relevant parts of the Act namely, Sect.60B and Sect. 60CC.

Sect. 60CA provides the overriding (or paramount) principle. That is, in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

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Each Case is Different

As in all aspects of family law the particular approach should be measured by the unique (almost always) set of circumstances relevant to the situation. The court will apply the principles as set out above with a view to achieving the summarised objectives. Whilst there is no automatic right as a grandparent to see your grandchildren the children do have a right to see you if it is determined that it is in their best interests (and, of course, the grandparent is agreeable).

Utilising the principles set out above, a court has the jurisdiction to consider a

grandparent's role if it must determine what future care and living arrangements would be best for the child.

The Best Approach

It is trite to say that utilising the court process is not a preferred option to seeking arrangements to maintain a relationship with a grandchild. Apart from the cost (significant if you do not have access to public assistance) the acrimony that can simmer between parents and grandparents may create barriers that are difficult to overcome.

Grandparents should always try to discuss options and seek agreement to arrangements. Mutually agreed arrangements usually work without any lingering resentment that sometimes arises from those that are court ordered.

Parenting Plans

Grandparents can instigate mediation and seek assistance from a Family Relationship Centre.

All parties are usually invited to mediate a sensible arrangement that can be documented by way of a parenting plan. These plans are utilised by parents and deal with issues concerning the child's welfare.

A Parenting Plan can include a grandparent or other relative of the child. The plan must be signed by both parents so if there is no agreement the grandparents cannot be included.

A Parenting Plan is not enforceable by a court but can be relied upon as a reflection of the intent of all parties when the plan was agreed.

The courts can consider the content and the intentions of the parties if the matter is litigated.

If All Else Fails

A grandparent is entitled to apply to the court if negotiation and/or mediation fail. The court will only grant an application if, upon consideration of the goals and principles set out above the application is considered to be in the child's best interests.

The circumstances of care for the child may be such that a grandparent may feel it necessary to apply for custody or access. The court must be satisfied that the parent is unable to care for the child or the child is in danger.

If the court is satisfied that access or custody (to the grandparent/s) is in the child's best interests a further order would be considered so as to confer upon the grandparent/s parental responsibility which allows the grandparent to make decisions for the child (schooling, health, living arrangements and religion) without the need to consult with the parents.

Alternatively the grandparent may simply be seeking quality time with his or her grandchild. That is an easier decision for the court to make although it must still be satisfied that the decision is in the best interests of the child.

The Act promotes mediation and discussion as a means to resolve disputes regarding children. Litigation should be regarded as a last resort. Sometimes there is no choice and the Family Court is set up and available to make a decision where only a legally binding resolution can succeed. It is important to note that it is compulsory to attempt to reach agreement by mediation before commencing proceedings.

A certificate must issue from the mediator noting your attempts to mediate and be

made available to the court before any application will be accommodated.

In Summary

It is important to understand the dynamics that the court applies. The court will have regard to and consider arrangements for children on the basis that they have a right to a meaningful relationship with their grandparents. Arrangements that the court may put in place will not be as extensive as that between a parent and his or her child.

In certain circumstances the orders for care of a child by a grandparent/s may be extensive and a subjective approach is always applied taking into account the welfare needs of the child.

Obviously, a grandparent must actively engage with the parents in negotiation, mediation and, if necessary, the court process in order to warrant consideration by the court when determining care arrangements.

Grandparents will invariably be successful in obtaining orders or arrangements for some form of communication and time with their grandchildren.

The child's needs and the availability of the grandparent will determine the extent of the arrangements. In normal circumstances it is expected that grandparents will work with the parents rather than replace them.

Sometimes it may be appropriate for a grandparent to step back and not add to the conflict.

All these variables are 'packaged' so that a determination can be made taking into account the child's interests, the grandparent's availability and the particular circumstances of the case.

Key Takeaway

It is important for grandparents to consider the impact that their involvement will have on all parties including the parents and to make sure that their goal is child focussed and conducive to a child's ongoing welfare.

An important takeaway from this is that a child's right to have a meaningful relationship with his or her grandparents is enshrined in the Act and is not dependant on the whims and fancies of the child's parents.

If you have questions seek the assistance of a family lawyer. Obtain advice as to your options and then attempt to negotiate an appropriate outcome. If all else fails our team of family law specialists can provide appropriate and cost effective guidance to assist you in achieving your goal with regard to your relationship with your grandchild.

Grandparents should always try to discuss options and seek agreement to arrangements.

Mutually agreed arrangements usually work without any lingering resentment that sometimes arises from those that are court ordered.

“No Body, No Parole” – No Escape



There has recently been a review of the Queensland parole legislation.

Specifically, the *Corrective Services Act 2006* has been amended to reflect a ‘No body, No Parole’ policy, which has previously been adopted in other Australian jurisdictions including Victoria, Northern Territory and South Australia.

Under this legislation prisoners who are convicted of either murder or manslaughter, will not be ineligible for parole. That is, unless they cooperate with authorities in order to disclose the location of the victim’s body. This comes with the exception of those prisoners who are already on parole at the time the legislation is passed.

After 80 years of no major reforms The ‘No Body, No Parole’ policy was introduced after a review was conducted into the Queensland Parole System, and in particular, its shortfalls. The purpose of this change was directed at encouraging prisoners to cooperate with the administration of justice, and most importantly, providing families of the deceased with closure. The policy would see prisoners who co-operated gaining the benefit of parole, and those who did not being refused parole, resulting in them serving their entire sentence behind bars.

The recommendation is based on the principle that a punishment is lacking in

retribution if it allows a prisoner to be released into the community on parole without declaring what they did with the victim’s body.

Although this legislative reform imposes obligations on prisoners retrospectively and could be seen as impacting upon ones rights and liberties, the Corrective Services (No Body, No Parole) Amendment Bill 2017 provides that this is not the case.

Rather, that it is not designed to impact ones ability to receive parole, instead it places the responsibility on the parole board to determine whether a prisoner is cooperative in assisting in the location of their victim’s body.

There is of course the question that arises in situations where a prisoner wants to be compliant and cooperative, however, due to various factors is unable to assist in the location of the body of their victim.

Such factors could include where a prisoner maintains their innocence even though they were convicted of the offence. An example of this would be Lindy Chamberlain. Had this law been in force when her matter was before the Court, she would have never been released and would consequently have being remanded in custody for her entire sentence. Notwithstanding the fact, that ultimately she was found to be innocent.

Whether this legislation will prove to be effective or whether it will see prisoners invent untruths in order to appear co-operative, only time will tell.

Wills



Everybody has heard of a will. A lot of people would have had to deal with a will when somebody close to them has died.

But, not everybody has a will. Why? There are plenty of excuses for not making a will, such as *"I have plenty of time to make a will"* or *"They are too expensive."*

Do I Really Need a Will?

The short answer is yes.

A will is used to dispose of all of a person's property after their death. It can be changed at any time (provided the person making the will has testamentary capacity).

The long answer: we recommend that every person has a will. If you make a will, you can ensure that your estate, which includes all of your property, including personal belongings and money, will be given to the person that you would like it to be given to.

If you die without a will, you will die 'intestate' and the intestacy laws, as outlined in the *Succession Act 1981 (the Act)*, will govern how your property is distributed. People who could be entitled to your property include you:

- Spouse (including de facto).
- Children or grandchildren.
- Parent/s.

- Next of kin (i.e. brothers, sisters, grandparents, aunts, uncles and cousins).
- The Crown.

This appears to be a pretty sensible list, but it can result in unintended consequences. Let's take a look at a couple of real life examples that we have seen in the past few months at Quinn & Scattini.

In the first example, there was a 24 year old man who died suddenly. Let's call him John. John did not have a spouse or any children. This means that all of his estate would go to his parents in accordance with the Act. This seems like a reasonable outcome until you find out that John's mother died prior to John (and therefore could not inherit anything) and John had had no contact with his father since he was a toddler.

Because John died without a will, his property including a house, car and his bank accounts, would all go to his father who he did not know. If he had made a will prior to his death, he could have gifted his property to someone who was important to him, for example his sister.

In the second example, a young woman died without a will. Let's call her Jill. Jill had been married, but had separated from her husband for over 10 years. They no longer had any contact but had never divorced. Jill passed away and she did not have any other spouse or any children. In accordance with the Act, Jill's entire estate would go to her husband (even though they had been separated for over 10

years). It is unlikely that Jill would have wanted her husband to get her whole estate.

In just these two examples, it can be seen that although the intestacy laws in the Act are very practical in who should get what if you died without a will, the individual circumstances of a case can mean that less desirable outcomes can be avoided.

A will isn't just important for working out who your property should be gifted to. It can also cover issues such as:

- Who will be the guardian of your children?
- Do you have a preference for being buried or cremated?
- Do you have any other funeral wishes?
- Do you have a spouse, but you don't want everything to go to them?

Should I Update My Will?

One common enquiry at Quinn & Scattini Lawyers is *"Do I need to update my will?"*

We recommend that you consider your will, and whether there are any changes you would like to make, at least once a year or if there are any significant changes in your circumstances.

For example, have you:

- Purchased or sold property?
- Been married or divorced?
- Separated from your partner?
- Had children?
- Had grandchildren who you would like to provide for?

- Disposed of property that you specifically gifted to somebody in your previous will?

You will not always need to update your will if there have been changes in your life. The provisions in your will might be wide enough to include, for example, not only your children who were born at the time you made your will, but also any children who were born after. This will depend on the clauses in your will.

Some common changes that will not require you to change your will include:

- Change of address.
- The death of a named beneficiary if your will already contains alternative provisions.

The cost of a professionally prepared will may ensure that your estate isn't fought over in the future.

People who could be entitled to your property include your:

- **Spouse (including de facto).**
- **Children or grandchildren.**
- **Parent/s.**
- **Next of kin (i.e. brothers, sisters, grandparents, aunts, uncles and cousins).**
- **The Crown.**

When Does Online Bullying Become Defamation?



**Commercial Litigation
Team**

Online bullying has gone viral.

Many experience defamation, but few know their legal position or ways to effectively manage it.

If a photo or statement has been published, whether in print or online, or a nasty email about you has been sent out to your work colleagues, you may feel as though there is nothing you can do.

However, if the published material harms your reputation or causes hatred and ridicule, you may have a right to sue for defamation.

What is Defamation?

With the expanding scope of the internet, and the immediate rate at which information can be shared, online publications and statements are an easy and accessible publishing platform.

But when is the line crossed between freedom of expression and defamation?

Defamation can be defined as imputations that create a negative opinion of a person to whom the defamatory statements can clearly relate.

The *Defamation Act 2005* (Qld) (**the Act**) abolished the distinction between libel and slander, however the general law

determines the circumstances in which a cause of action may exist.

What is Online Bullying?

Bullying is the repeated unfavourable treatment of a person which is unreasonable and inappropriate, usually to torment, tease, humiliate or offend a person. The reliance on and accessibility of technology means that bullying can now occur online, the impact of which is almost immediate.

However, not all instances of online bullying automatically allow an aggrieved person a claim in defamation. A claim for defamation requires the plaintiff (the aggrieved party) to establish that the matter complained of:

- was published to at least one third party;
- specifically related to the plaintiff; and
- was defamatory.

What Practical Steps Should I Take?

If you believe that you are a victim of online bullying, or unfavourable statements have been made about you online, you should contact the site administrator and request that the post/statement be removed.

Alternatively, and if the circumstances allow, you can directly seek that the publisher remove the matter complained of.

What are the Next Steps?

A claim for defamation must be brought within one year from the date of the publication of the matter complained of. However, prior to commencing proceedings for a claim in defamation, the aggrieved party is required to comply with requirements of the Act by issuing a notice, and allow the publisher sufficient time to respond to the notice.

Just as easily as content can be published online, the damage to a person's reputation may have already occurred. Simply removing the publication may be insufficient to redress the damage to reputation.

That is when you should contact us at Quinn & Scattini Lawyers.

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