

FAMILY LAW ISSUES AND SCHOOLS: GUIDANCE FOR AUSTRALIAN EDUCATORS

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A substantial number of Australian children are now living in separated families, with many moving between their parents' homes. This has led to educators being confronted with an increasing number of family law issues. This article discusses the key aspects of family law that involve children. It highlights the need for schools to be aware of all family law orders that relate to children in their care, including family court, domestic violence and child protection orders. It also provides guidance in relation to how schools can adopt child focused approaches in some common scenarios, where parents are in dispute. In particular, we will recommend that educators take a child-focused approach, consistent with the principal provision of the Family Law Act 1975 (Cth) that 'the best interests of the child' be the paramount consideration. We will highlight how this contrasts starkly with what can be described as a 'parental rights' interpretation, which has unfortunately been taken by some since the 2006 amendments to the Family Law Act, and is, in our view, directly at odds with the intention of the legislation.

I INTRODUCTION

In Australia today 20.8 per cent of families are one-parent families¹ and children with one parent residing elsewhere make up just over one million (21 per cent) of the five million children living in Australia.² The significant number of children now living in separated families and moving between their parents' homes has meant that educators are dealing with an increasing number of family law issues.

This article will provide a practical overview of some key aspects of family law that impact on educators. These can be divided into three distinct sections. First, there are issues concerning arrangements for children after parents have separated, the time children will spend with parents and significant others and how decision-making will be shared. This area falls under the federal *Family Law Act 1975* (Cth)³ and, where parents cannot reach agreement, these types of issues are determined by family courts.⁴ They may concern school staff when disputes arise between parents in relation to enrolment, the collection of children by parents and in the sharing of information, such as via school reports.

Second there are issues relating to domestic violence, including protection orders,⁵ taken out to ensure the safety of victims of violence. These fall under State and Territory law and are made by Magistrates Courts, also known in some jurisdictions as Local or County Courts. These orders are particularly relevant in some jurisdictions, where children may be included as 'named persons' and protected under such orders.⁶ Finally, there are child protection orders, which are

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made in the context of serious concerns about abuse or neglect of children. These orders involve the intervention of States or Territories in families, where the welfare of children is in issue.⁷ Orders may prevent a parent from having contact with children or provide that such contact be supervised. They contain essential information for school staff to ensure the safety of children in their care.

In this article we will explain some of the main legal concepts underpinning the relevant pieces of legislation regulating these areas of family law. The importance for schools ensuring that they have information about all relevant family law orders that relate to children in their care, including family court parenting orders and State or Territory based domestic violence orders and child protection orders, will be highlighted.

In the context of parenting arrangements for children, we will examine how family courts make decisions in children's cases, working through the relevant sections of the *Family Law Act 1975* (Cth). We will also touch on some of the recent amendments to this Act that aim to enable both the courts and the family law system to respond more effectively to parenting cases involving issues of child abuse and family violence.⁸

In the final section of this article we will present some scenarios that arise on a regular basis for educators, where family law intersects with daily school life. In this context we will provide guidance and set out what we consider to be best-practice approaches. We will deal with common dilemmas, such as the action to take if an 'absent' parent attends at a school demanding the removal of a child and issues that teachers should be aware of if they are subpoenaed to give evidence in family courts.

In particular, we will recommend that educators take a child-focused approach, consistent with the principal provision of the *Family Law Act 1975* (Cth) that 'the best interests of the child' be the paramount consideration.⁹ We will highlight how this contrasts starkly with what can be described as a 'parental rights' interpretation, which has unfortunately been taken by some since the 2006 amendments to the *Family Law Act*, and is, in our view, directly at odds with the intention of the legislation.¹⁰

II HOW FAMILY COURTS MAKE DECISIONS IN PARENTING CASES

When parents cannot agree about arrangements for their children they are usually required to attend family dispute resolution (a form of mediation) before taking their case to court.¹¹ The aim is to reach agreement about arrangements for children, with the assistance of an independent person, known as a 'family dispute resolution practitioner'.¹² In exceptional cases, such as where there has been violence, allegations of child abuse or urgency, parents may be permitted to take their case straight to court and bypass the mediation process.¹³

The recent amendments to the *Family Law Act* should make it easier for parents to gain exemptions from the requirement to attend mediation. This is because the definitions of 'abuse' and 'family violence' have been significantly widened. For example, 'abuse' now includes 'causing the child to suffer serious psychological harm' and 'serious neglect'.¹⁴ The definition of 'family violence' has also been greatly expanded upon and now includes a very wide range of conduct including 'repeated derogatory taunts' and 'unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child'.¹⁵

If parents are unable to reach agreement at mediation they may be forced to place decisions about parenting arrangements in the hands of family courts. The *Family Law Act* directs judicial officers to 'regard the best interests of children as the paramount consideration'.¹⁶ Pursuant to the

amendments, legal advisors must also focus their clients on this overriding principle.¹⁷ In arriving at orders to promote children's best interests, courts must work through a list of factors, called the 'primary' and 'additional' considerations.

The primary considerations are contained in s 60CC(2) and are:

the benefit to the child of having a meaningful relationship with both of the child's parents;

and

the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

In the past there was no guidance in the *Family Law Act* as to how judicial officers should weigh these two primary considerations against each other. The recent amendments direct that the court must give greater weight to the second primary consideration, the need to protect children from harm and abuse.¹⁸

The additional considerations are contained in s 60CC(3) and include:

- Any views expressed by the child and any factors (such as the child's maturity and level of understanding) that the court thinks are relevant to the weight that it should give to the child's views;
- The nature of the child's relationship with parents and significant others in their immediate and extended family;
- The attitude of both parents to the child and to the responsibilities of parenthood;
- Any family violence issues and any orders;
- The likely effect of any change of circumstances, including separation of the child from either parent or another significant person;
- The practical difficulties and expense of the child spending time and communicating with a parent;
- The capacity of each parent to provide for the child's needs, including emotional and intellectual;
- The maturity, gender, lifestyle and background of the child, including culture and traditions (the culture and traditions of Aboriginal and Torres Strait Islander children are specifically highlighted);
- The extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child; to spend time with the child; and to communicate with the child; and
- The extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.

A previous requirement to examine the willingness of each parent to facilitate and encourage time with the other parent has been deleted in the recent amendments.¹⁹ This was because it was seen to discourage parents with genuine concerns about the safety of children in the other parent's care from raising these issues. Further, the requirement for State or Territory domestic violence orders to be final orders, before they can be taken into account, has also been removed so that courts are able to take full account of issues of violence, including any interim violence orders, when making decisions about children.²⁰

When working through the primary and additional considerations, family courts are required to consider, weigh and assess the evidence on each of the relevant considerations and indicate the relative weight that they have attached to each one, and how they balance out against each other.²¹ At this point, judicial officers are then required to determine whether the presumption of ‘equal shared parental responsibility’ applies, does not apply or is rebutted.²² If both parents are awarded ‘equal shared parental responsibility’, they should jointly make long-term decisions about their children.²³ Courts must decide whether it will be in the children’s best interests and appropriate in the circumstances for parents to be required to consult each other about such decisions. We will discuss this concept of ‘parental responsibility’ in more detail in the next section of this article.

Under the *Family Law Act*, the circumstances in which courts can decide that the presumption of ‘equal shared parental responsibility’ does not apply include where there are ‘reasonable grounds to believe’ that a parent has engaged in abuse of the child or another child in the parent’s family or in family violence.²⁴ The wider definitions of ‘family violence’ and ‘abuse’ mentioned above will mean that courts may make less orders for equal shared parental responsibility in the future. The presumption can be rebutted where evidence has been presented that satisfies the court that it is not in the best interests of the child for both parents to have equal shared parental responsibility.²⁵

If the court determines that the presumption of equal shared parental responsibility applies, judicial officers then have obligations in s 65DAA of the *Family Law Act* to consider specific time arrangements and must work through the following steps:

1. Whether the children spending equal time with each parent will be in their best interests and reasonably practicable?²⁶ The types of issues relevant to these considerations include the distance that parents live from each other, their capacity to communicate and be child-focused and the potential impact of such an arrangement on the children.²⁷
2. If equal time is not appropriate, the court must then consider whether spending substantial and significant time with each parent will be in the children’s best interests and reasonably practicable?²⁸ ‘Substantial and significant time’ includes both time that falls on week days, weekends and holidays and enables parents to be involved with their children’s daily routine and significant occasions, such as school events.²⁹

These obligations set out in s 65DAA can be described as ‘time-triggers’ in that they obligate courts to consider specific time arrangements in certain circumstances.

If the court decides against an order for ‘equal shared parental responsibility’ it can then consider any time arrangements that would be suitable for the family in question.³⁰ Situations where courts have granted ‘sole parental responsibility’ to one parent include where a father had been violent prior to separation, was considered unreliable, failed to cooperate regarding the children and undermined the children’s relationship with their mother.³¹ Another example was where a mother abused alcohol and drugs and the court held that ‘it would simply be dangerous for the child for the mother to be left in charge’.³² An extreme instance of where the court has ordered ‘sole parental responsibility’ was where the father was seeking that his seven-year-old son visit him in prison, the father having been incarcerated for sexually abusing his daughters from a previous relationship.³³

It should be noted that, prior to the recent amendments to the *Family Law Act*, there were amendments made in 2006 that significantly impacted on the court’s approach to parenting decisions.³⁴ Recent research has revealed that some of the terminology that was inserted into the legislation in 2006 has been misinterpreted in the general community. The most common

misconception has been to assume that there is a presumption of equal time in the Act.³⁵ As we have seen above, when we described the multiple steps that the court must work through, the presumption is actually of ‘equal shared parental responsibility’, it relates to how parents share decision-making and only applies if in children’s best interests and appropriate in the circumstances. If the presumption applies, courts are then required to consider s 65DAA and its resultant ‘time triggers’.

We will now go on to discuss the concept of ‘parental responsibility’ in more detail as it is relevant to educators in a number of different practical contexts.

III THE CONCEPT OF PARENTAL RESPONSIBILITY

The term ‘parental responsibility’ is defined in s 61B of the *Family Law Act* as ‘all the duties, powers, responsibilities and authority which, by law, that parents have in relation to their children’. The case law has explained this concept more clearly in the context of ‘decision-making’ by parents, covering both:

1. Day to day decision-making: such as what children will eat, what they will wear, the amount of time they spend on homework and what time they will go to bed; and
2. Long-term decision-making: such as what school children should attend, what religion, if any, they should be brought up in, what surname they are known by and medical and related decisions, such as whether they should have orthodontic treatment or elective surgery.³⁶

There are two different scenarios that schools may commonly encounter. The first is where there are no family court orders in place and the second is where there are court orders that expressly provide for the allocation of parental responsibility between parents.

A Parental Responsibility: Where There Are Court Orders

Where there are family court orders they will generally expressly set out what the situation is regarding ‘parental responsibility’. In most cases parents will have ‘equal shared parental responsibility’ and will be entitled to all forms of information from schools and to access school reports, school newsletters, photograph order forms, excursion notes and invitations to functions and to parent-teacher interviews.³⁷

For long-term decision-making, there are specific obligations on parents with orders for equal shared parental responsibility to consult each other and make a ‘genuine effort’ to reach agreement.³⁸ An example of a long-term decision that parents are required to consult about is in relation to what school children their children will attend. However, for practical purposes, the parent caring for the children at the time is permitted to make what are termed ‘day to day decisions’, such as what children will eat, what clothes they will wear and how they spend their time.

An example of court orders in relation to parental responsibility is as follows:

That except as otherwise stated, the Father and the Mother are to have equal shared parental responsibility for the major long term issues of the children.

That the parents are to consult with each other about decisions to be made in the exercise of their equal shared parental responsibility and shall make a genuine effort to come to a joint decision. They are not, however, required to consult with each other about the daily care of the children. The types of decisions about which parents are required to

inform and consult include but are not limited to changing the name of a child; relocating the residence of the child so that existing parenting arrangement become impracticable; changing the school of a child and a significant medical intervention for a child.

That the parents authorise the schools or day care centres attended by the children to give each parent information about the children's educational progress and other related activities and supply them with copies of reports, photographs, certificates and awards obtained by the children (at that parent's cost).

In some limited cases courts will order that one parent have 'sole parental responsibility'. As we outlined above, such an order is only made when a family court has real concerns about the ability of parents to communicate and as to the safety and welfare of children. In such cases only the parent with 'sole parental responsibility' is entitled to receive information from the school and to make educational decisions, unless there are specific provisions in the order that provide otherwise.

B Parental Responsibility: Where There Are No Court Orders

In many separated families there will not be any family court orders. This will usually be because parents have been able to reach their own oral agreements about arrangements for their children.

In such circumstances, under s 61C of the *Family Law Act*, both parents are considered to have 'parental responsibility' in relation to their children. This means that both parents are entitled to make decisions about their children, both day-to-day and long-term. For day-to-day decisions, the parent with the children will make the necessary decisions as they arise. Both parents are entitled to information and correspondence from the school and to make decisions about the education facilities that their children attend.³⁹

However, in practice this can be a difficult area. In some cases one parent will not have maintained contact with children and, of their own volition, will not be participating in their lives. In these instances, the parent with the children will, in practice, be solely responsible for decision-making.

In other families, one parent's attempts to spend time with children may have been intentionally thwarted by the other parent. The parent with primary care of the children may not allow the other parent input into decision-making, although under the *Family Law Act* both parents are entitled to participate. In this type of situation the parent seeking input into decision-making can take the case to court either to make an initial application or to enforce existing orders, if they are being breached.⁴⁰

It is important for schools to obtain copies of formal orders or agreements that record parenting arrangements. There are formal orders made by Family Courts or Federal Magistrates Courts and there are two types of agreements, Consent Orders and Parenting Plans, and in the next section we will explain the differences between these agreements.

IV WHEN PARENTS REACH AGREEMENT: PARENTING PLANS AND CONSENT ORDERS

When parents are able to make amicable arrangements, there is no need for them to express them in writing or to seek court orders, their agreement can remain as an oral agreement. However, many parents may wish to obtain a written record of their agreement and this can be contained in

the form of a Parenting Plan or Consent Order. If parents are in dispute and file court proceedings but then come to an agreement, they can also at this stage enter into a Consent Order.

A Parenting Plan is a written record of the agreement and a copy is kept by each parent. However, a Parenting Plan is not filed in a family court.⁴¹ The Plan is therefore not legally enforceable, however, judicial officers can have regard to its terms, if arrangements break down in the future and court proceedings are instigated.⁴² Generally Parenting Plans are entered into by parents on good terms wanting to maintain a written record of their arrangements.

In contrast, a Consent Order is a written record of an agreement that is filed in court. Once approved it issues from the court as a formal court order and is legally enforceable.⁴³ An approved Consent Order will have the court seal stamped on it. If a parent breaches the terms of a Consent Order, the other parent can take the matter back to court.

Having explained some of the key concepts in relation to parenting arrangements and agreements we will now go on to look at the social science and other evidence that family courts can consider when making decisions relating to children.

V FAMILY REPORTS, CHILDREN'S VIEWS AND INDEPENDENT CHILDREN'S LAWYERS

Family reports are common forms of social science evidence used by family courts in parenting cases. The report is prepared by a family consultant, who will generally be a social worker or psychologist. The family report assists the court by providing information, independent of the parties, and relevant to the primary and additional considerations in s 60CC of the *Family Law Act* and the issues in dispute, to assist in making orders that promote the best interests of children.

In Australia the way in which children's views are put before the court is generally via a family report.⁴⁴ The family report writer will ascertain the children's views, if possible. However, children cannot be forced to express views where they do not wish to do so.⁴⁵ In some cases it will be inappropriate for a family report writer to seek a child's views, for example, where a child is very young or where the child does not wish to take sides in the parental dispute.

Where an independent children's lawyer (ICL) has been appointed, being a lawyer to represent the children's interests, he or she will generally seek an order for a family report. An ICL does not act directly on children's instructions; he or she gathers all relevant information to assist the court.⁴⁶ The practice of ICLs varies around Australia. In some jurisdictions they meet with children, in others some ICLs do not and rely on the family report writer to have direct contact with the children.

Other types of evidence that the ICL may gather include educational evidence, such as information from teachers (we will provide some guidance for educators who have been subpoenaed to give evidence in the last section of this article) and evidence from any other relevant experts, such as psychologists, counsellors and speech or occupational therapists who have treated the child. Where a child has been subjected to abuse or where there are allegations of violence or neglect, such expert evidence will be vital to the court making a fully informed decision.

Issues of violence and child abuse are unfortunately prevalent in family court disputes between parents. In the next sections of this article we will turn to briefly examine the State and Territory based law in relation to domestic violence and child protection.

VI DOMESTIC VIOLENCE ORDERS

Unfortunately domestic violence is an issue for a growing number of Australian families. In 2009 the Australian Institute of Family Studies (AIFS) reported on data from a longitudinal survey of separated families that showed that nearly two-thirds of the mothers and just over half of the fathers surveyed reported that their partners had either emotionally abused or physically hurt them. Mothers were more likely than fathers to report that their partner had physically injured them.⁴⁷ Violence may also be inflicted on children and the recent amendments to the *Family Law Act*, referred to above, now guide judicial officers to prioritise protection from harm and abuse when making decisions in parenting cases.⁴⁸

Family violence is an important issue that can be taken into account when courts are making decisions in parenting cases.⁴⁹ It is also a separate issue that can be dealt with in State or Territory courts and in this context is often referred to as ‘domestic violence’.⁵⁰ The Queensland domestic violence legislation has recently been significantly amended to afford better protection to victims of domestic violence and their children.⁵¹ When violence occurs within either intact or separated families, the aggrieved person can apply for what in Queensland is termed a ‘protection order’.⁵² Other States use different terminology, for example, in New South Wales it is termed an ‘apprehended domestic violence order’.⁵³ In Queensland, if the violence has been perpetrated on a child or young person, he or she can apply for a protection order against a parent and visa versa, a parent can apply for an order against a young person.⁵⁴ Police can also take out orders for an aggrieved person, for example, where they have been called to the home to assist the victim when violence has occurred. The order is a civil, not a criminal order, but if it is breached and the court is satisfied that the breach occurred, it becomes a criminal matter and the penalty imposed can include imprisonment.⁵⁵

In some jurisdictions such as in Queensland, a child may also be a ‘Named Person’ and included in a Protection Order.⁵⁶ This can occur when the victim or Police applied for the child to be included on the order as he or she had been harmed, threatened with harm or exposed to risk. The recent amendments also require the court to consider if this is necessary where it is hearing an application for domestic violence.⁵⁷ Under the legislation, ‘domestic violence’ has a very wide meaning including being physically or sexually abusive, emotionally or psychologically abusive or threatening behaviour.⁵⁸

When children are included in orders as ‘Named Persons’ the court will order the respondent must be of good behaviour towards the child, not commit domestic violence against the child and must not expose the child to domestic violence.⁵⁹ Domestic violence orders can provide that they are subject to family court parenting orders. This means that, if parents are seeking to negotiate about parenting arrangements, they can enter into arrangements for the aggrieved person to spend time with the child, provided that the child will be safe. In some cases the aggrieved may only be permitted to spend time with a child if that time is adequately supervised. In extreme cases, the court may also impose further conditions in the domestic violence order, such as that the respondent is not to come within a certain distance from the child.⁶⁰ In these cases the aggrieved would not be able to, for example, visit the child at school, unless the domestic violence order is amended by a court or overridden by a subsequent family court order.

Schools should request that parents supply them with copies of any domestic violence orders. The terms of such orders should be strictly complied with, in particular, where there is a risk of harm or intimidation to the child. In jurisdictions where children can be ‘Named Persons’, the State Police and the aggrieved parent should be called immediately in the event that the terms of an order are breached and the child is perceived to be at risk.

It is advisable that the management of domestic violence orders affecting children is raised during school staff meetings so that all staff are made aware of the circumstances and can manage both the playground and classroom environments in ways consistent with the terms of the Orders.

VII CHILD PROTECTION ORDERS

Educators need to be aware that some children at their schools may be the subject of orders made under the relevant child protection legislation for their respective State or Territory. Terminology differs around Australia and, to provide examples, we will discuss the current situation in Queensland. Orders are made by Children's Courts under the *Child Protection Act 1999* (Qld) and they place children under the supervision or care of the Department of Communities, Child Safety and Disability Services (Child Safety Services) ['the Department'].⁶¹ Such orders are designed to protect a child from 'harm' which is described as 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'. Such harm can be caused by 'physical, psychological or emotional abuse or neglect' or 'sexual abuse or exploitation'.⁶²

Where a child is placed under the supervision of the Department, in Queensland the court order is known as an 'Intervention with Parental Agreement Order'.⁶³ Such an order means that a child remains in the care of his or her parents, but under the supervision of the Department. Parents work with the Department on certain issues that need to be addressed, such as the child's regular attendance at school, supervision of the child at home or attending to the child's particular health needs.

A child is placed in the care of the Department when the court assesses that there is no parent ready, willing and able to care for the child. In such a case the child will be placed with a foster family or, if there is a relative who is approved of by the Department, then in that relative's care (this person is referred to as a 'relative carer'). Instances where this may occur include where one or both parents have ongoing drug issues or severe mental illness. Another example is where a child has been physically or sexually abused in the home environment and is assessed to be 'at risk' if he or she remains in the care of a parent or parents.

When the Department takes over the care of a child the court may make one of the following orders:

- A custody order which authorises the Department to make day to day decisions for the child. The parents retain the right to make guardianship decisions (for example, what school the will child attend and whether he or she will undergo certain medical treatment). Custody orders can be made for any period of time up to a maximum of two years; or
- A guardianship order which authorises the Department to make all decisions concerning the child. Guardianship orders run until the child reaches eighteen years of age.⁶⁴

In both of these cases the child leaves the parents' home and lives with a foster carer.

The details of any child protection orders for children should be kept on their school records. Educators need to understand the implications of such orders. For example, the order could stipulate the amount of contact that a parent is permitted to have with a child. In some instances, an order will require that a parent or parents can only have supervised contact with a child. In such cases, if a parent attends at the school and requests to see the child, the appropriate staff member at the relevant government department should be contacted immediately. The school should not allow the parent to have contact with the child at the school grounds if the child

protection order provides for only supervised time or for contact time between a child and parent to occur at another location.

It is important that child protection orders are strictly adhered to so that the safety of children is not compromised. We would recommend that school authorities be proactive in this area and request that the relevant Government Department in their State or Territory provide them with copies of all relevant child protection orders for children attending their school.

VIII BEST PRACTICE APPROACHES TO COMMON SCENARIOS THAT ARISE

In the final section of this article we will highlight some issues that arise in practice in schools. We will provide guidance as to what we regard are best-practice approaches which, in our view, will promote the underlying premise of the *Family Law Act*, that decisions should be made in the best interests of children.

A *What Issues to Consider About Court Orders*

Schools often find themselves having to read and interpret court orders. The most important point to note is that, when in doubt, contact the lawyers outlined on the order. They can assist you with the correct interpretation of the terms of orders and how they should operate in practice.

When looking at court orders the following are some questions that educators may want to determine:

- What court have the orders been made in, for example, a family court such as the Family Court of Australia or the Federal Magistrates Court of Australia. Or have the orders been made in a State Court, such as in a Magistrates Court, Children's Court or Local or County Court?
- Have the orders been approved by the court, that is, do they have the court seal on them? If they do, they will be stamped by the relevant court. If the order has not been stamped and the parent in question is of the view that the order is an official court order, the parent should be asked to obtain a stamped 'sealed copy' of the order from the court.
- Is there an order for parental responsibility? If so, is the order for 'equal shared parental responsibility' or for 'sole parental responsibility'? If the order is for sole parental responsibility, which parent has 'sole parental responsibility'? If the order is silent in relation to parental responsibility, this may mean that it is assumed that parents will have equal shared parental responsibility, however, the school would have to check this with the relevant legal practitioners.
- What does the order provide for in relation to the children's living arrangements and the time that they will spend with parents and any significant others, such as grandparents?
- Is the changeover between parents going to happen at the school? If so, do any arrangements need to be put in place and what staff need to know about these details, for example, relevant teachers?
- Does one parent have to authorise the school to do anything, for example, to send newsletters and school reports to the other parent?
- What staff at the school need to know about the contents of these orders?

B *Guidance When Subpoenaed to Give Evidence in a Family Court*

Family lawyers only subpoena educators and Department of Education documents when it is considered absolutely necessary. Such evidence will be relevant in assisting the court to consider the primary and additional considerations and to arrive at a decision in the child's best interests. In a court system where judicial officers are often faced with starkly contrasting factual accounts from parents, teachers can often provide valuable independent evidence about children. Their evidence is particularly important where there are issues concerning the learning needs of children and concerns about child abuse, neglect or family violence.

The types of issues that educational evidence can assist the court with include:

- Whether the court should permit a parent to move a child to another location to live:
 - How the child would cope with change, for example, a change of primary carer, a change to another location and a different school; and
 - Whether the child has any particular educational needs and whether the current school has specific programs to address with these particular needs and whether any proposed school will have such programs available;
- Information relating to the capacity of parents to care for children and whether educators have any knowledge of parents leaving children unsupervised, or not caring for children in an adequate manner:
 - Where there are allegations of parental drug use; and
 - Where there are allegations of psychiatric problems.
- The safety of children in a parent's care and whether they are being sent to school, whether they arrive on time and whether there is any evidence of neglect or physical or sexual abuse:
 - Whether the child is being sent to school;
 - Whether there is any evidence that the child is being neglected by a parent; and
 - Whether there is any evidence that the child is at risk of physical or sexual abuse.

The types of information that may be relevant and that can be obtained from subpoenaing files and/or subpoenaing the attendance of educators, such as teachers, to give evidence in court, include details of children's:

- enrolment applications and associated information;
- school records cards, including discipline records;
- rolls and attendance records at school, periods of attendance, whether there have been any explained and unexplained absences and what they have been due to, for example, illness, suspension from school or periods of time-out;
- copies of notes to and from parents, including emails and file notes of telephone calls to and from parents;
- health and whether children have suffered from any illnesses and if so, relevant details;
- file notes, including teacher observations and assessment notes;
- progress reports and work samples;
- particular learning problems, if relevant, including copies of school reports and copies of the results of any other specific testing, eg, literacy and numeracy results;

- physical presentation, general demeanour and behaviour whilst at school and whether there have been any concerns, or children have exhibited any unusual behaviour;
- relationship to their peers;
- counselling records;
- use of specialist assistance or the school guidance officer and if so, details of such assistance and the reason/s for referral;
- parents and any dealings the school may have had with them, interaction between parents and teachers, details of parental involvement at school and in the classroom;
- financial data (eg, payment of fees, excursions etc);
- previous court orders that may be on the child's file; and
- teacher's perceptions of the likely effect of a change of school on the child.⁶⁵

When giving evidence in court the most important consideration for educators appearing as witnesses is that they should only report on what they were able to directly observe themselves in relation to the case. Otherwise the evidence may be considered 'hearsay' and not admissible in the court proceedings.⁶⁶ This means that teachers can report on what they have directly observed or what they themselves have recorded. For example, if they have directly observed the appearance of children, whether they arrived at school on time and how they performed in the classroom. Speculation as to why events may have occurred, for example, why a child was repeatedly late for school, are not matters which fall within the teacher's direct knowledge, unless he or she has had specific conversations with the child or parent about the particular issue.

C Where One Parent Comes to the School to Collect a Child Unexpectedly

Perhaps the most commonly asked question by educators is about the approach that should be adopted where parents are separated and one parent comes to the school to collect the child on a day or time that is out of the ordinary. This is particularly concerning where the teacher has only ever met one parent but, on the particular day in question, the 'absent' parent arrives at the school demanding to collect the child.

In such a scenario, strictly speaking, and where there are no court orders in place, both parents have parental responsibility rights and are entitled to make decisions for their child. However, if a child is settled at school it could be a major upheaval to be removed by an 'absent parent', particularly if then transported to another location and enrolled at a different school.

Our recommended approach would be for the school to first check whether there are any court orders that authorise the parent's collection of the child from the school. If there are no such court orders, he or she should be asked to leave the school grounds and to obtain permission for the removal from the other parent, or if that is not forthcoming, legal permission for such action. We would also recommend that the school should contact the other parent immediately to advise of what is happening.

If the absent parent is seeking to remove the child from the other parent's care due to concerns about the safety or wellbeing of the child, he or she should be able to seek legal assistance to obtain court orders authorising the child's living arrangements to be changed.

Another type of scenario is where both parents are regularly spending time with a child but one parent arrives on a day or time that is unusual and out of the ordinary. Our recommended

course of action in this case would be to contact the other parent to clarify whether he or she consents to the child leaving with the parent in question. If such permission is not obtained, we would suggest that the parent in question not be permitted to remove the child.

D *Shared Care Arrangements Where One Parent Is Not Supporting the Care Arrangement*

An unfortunate result of the ‘time-triggers’ inserted into the *Family Law Act* has been that some children have been placed in shared parenting arrangements where they are not appropriate for the particular family situation, for example, where children are very young, where there is high conflict between parents or issues of child abuse or family violence.⁶⁷ Some families have also been ordered into shared parenting arrangements by courts where one or both parents do not support the arrangement. This can lead to unfortunate situations arising for children in relation to their schooling.

The types of examples that we have encountered with our clients include a child leaving his or her homework, school books or items of clothing (such as swimmers to participate in a swimming carnival) at one parent’s house. The parent in question then refuses to return these items, even though the child needs them, as the request comes in the week that the child is residing with the other parent. In such situations educators may want to highlight to parents the negative impact that their behaviour may have on their child (particularly if the child cannot participate in school events) and how it may affect his or her enjoyment of and performance at school.

Whilst educators cannot themselves be responsible for the flow of communication between parents, they should remain mindful that children in shared parenting households may live in two distinct households. It can assist, where both parents are responsible for decisions relating to their children, if important information is addressed to the attention of both households.

E *Where One Parent Wants to Volunteer at the School but Other Parent Objects*

Another issue we have encountered is where one parent is seeking to volunteer at the school on a weekly or otherwise regular basis, however, the other parent objects to them being at the school during ‘their weeks’. In our view this is an example of a ‘parental rights’ interpretation of a parenting order and is not the way in which it was envisaged that the provisions of the *Family Law Act* should be construed. Provided parents are using their time at school for the right reasons, for example, volunteering to assist with reading, coaching a sport or working in the tuckshop, we see no reason for them to be prevented from attending on a weekly basis, even though they may be in a week-about parenting arrangement.

Children inevitably benefit from the support of both parents in their schooling. If parental participation at the child’s school is a positive and rewarding experience for the child, then it inevitably addresses the best interests test enunciated in the *Family Law Act*.

F *Where a Parent Enrols the Child at a School Without the Other Parent’s Consent*

Since the 2006 amendments to the *Family Law Act*, parents have a fundamental obligation to consult with each other in respect of significant issues pertaining to their children where there is an order for equal shared parental responsibility.

One such issue that often arises in practice is in relation to children’s enrolment in schooling as parenting orders may or may not provide for a child to attend a specific school. In the absence

of any specific provision, parents should be guided by the ‘consultation’ requirement in the *Family Law Act*.

A change in schooling, without both parents’ consent, can often have a significant impact on the ongoing care arrangements for children. This is particularly the case where a new school is a significant distance away from where the other parent resides. Where the parenting order or parenting plan provides that children spend equal or significant and substantial time with their parents, relocation to another school can seriously compromise the ongoing workability of the order or agreement.

Schools are often not privy to many issues in dispute between separating parents. When faced with one parent seeking to enrol a child in a school, it is recommended that a cautious approach be adopted. Both parents should be contacted to confirm the enrolment, if possible. The school should also request any relevant documents setting out the care arrangements for the child. School administrators should remain mindful that, in the event of a parenting dispute, the interactions between a school and the parent or parents may be brought up in the course of court proceedings.

IX CONCLUSION

As we have seen, an increasing number of Australian children are living in circumstances where family law issues may arise. Consequently it is important that educators have an awareness of the areas of family law that can impact on children in their care and of the particular areas where children may be at risk. Schools need to have clear policies in place so that all staff are aware of orders and agreements concerning children in their care, including family court parenting orders and State and Territory based domestic violence and child protection orders, and of the best approach to take should issues arise. We would encourage schools to take a proactive approach to ensure that they are in possession of all relevant family law information in relation to their children. We would also encourage them to take a child-focused approach to ensure that children’s best interests are promoted, even in the face of parents in high conflict. When in doubt, educators should consult family lawyers about how to correctly interpret court orders or how they should operate in practice. This is clearly an area where educators and family lawyers can work together to ensure the safety and wellbeing of children in our community.

Keywords: family law; parenting law; schools and family law; educators and family law.

ENDNOTES

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- 1 Being lone parent families (lone mother 17.8%, lone father 3%) with children under the age of fifteen: Australian Bureau of Statistics, Australian Social Trends, *Family and Community, National Trends* (December 2011) <<http://www.abs.gov.au/>>.
- 2 Children aged from 0-17 years of age: Australian Social Trends, March Quarter 2012, *Love me do* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30March+Quarter+2012>>.
- 3 Recently amended by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).
- 4 The Family Court of Australia or Federal Magistrates Court of Australia.

- 5 Also known as ‘apprehended domestic violence orders’ (NSW), ‘family violence intervention orders (Victoria) and ‘violence restraining orders’ (WA). For information about the terminology and legislation across Australia see A Harland, D Cooper, Z Rathus and R Alexander, *Family Law Principles* (Lawbook Co, 2011), ch 6 ‘Violence in the Family’: Key Aspects of State-Based Protection Orders’ (107–121).
- 6 In this article terminology used in the Queensland legislation, the *Domestic and Family Violence Protection Act 2012* (Qld) will be used, however the terminology and the protection afforded by the relevant legislation varies around Australia.
- 7 In this article the terminology used in the *Child Protection Act 1999* (Qld) will be used but again the terminology and protection afforded by the relevant legislation varies around Australia.
- 8 The relevant amendments are contained in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), and commenced on 7 June 2012. They apply to all cases in family courts.
- 9 *Family Law Act 1975* (Cth) s 60CA.
- 10 The 2006 amendments were contained in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
- 11 *Family Law Act 1975* (Cth) s 60I.
- 12 ‘Family Dispute Resolution Practitioner’ is defined in *Family Law Act 1975*(Cth), s 10G.
- 13 *Family Law Act 1975* (Cth) s 60(9).
- 14 *Ibid* s 4.
- 15 *Ibid* s 4AB.
- 16 *Ibid* s 60CA. The court must consider this provision in light of the s 60B objects and principles which include ensuring that children have the benefit of a meaningful relationship with both parents and protecting children from physical and psychological harm.
- 17 *Ibid* s 60D.
- 18 *Ibid* s 60CC(2A).
- 19 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 18 amended s 60CC(3)(c).
- 20 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 19 amended s 60CC(3)(k).
- 21 *Collu and Rinaldo* [2010] FamCA 53, [345], referring to *Smith and Smith* [1994] FLC 92–488. See also Patrick Parkinson, *Australian Family Law in Context — Commentary and Materials* (Lawbook Co, 5th ed, 2012), Ch 23, 811, citing *In the Marriage of Smith*.
- 22 *Family Law Act 1975* (Cth) s 61DA; *Goode and Goode* (2006) FLC 93–286.
- 23 *Ibid* s 65DAC.
- 24 *Ibid* s 61DA(2).
- 25 *Ibid* s 61DA(4).
- 26 *Ibid* s 65DAA(1). In *MRR and GR* [2010] HCA 4 the High Court made clear that the court had to consider both best interests and reasonable practicability and that the court had no power to make an equal time order unless such an order was found to be reasonably practicable. See R Chisholm and P Parkinson, ‘Reasonable Practicability as a Requirement: The High Court’s Decision in *MRR v GR*’ (2010) 24 *Australian Journal of Family Law* 255.
- 27 *Family Law Act* s 65DAA(5).
- 28 *Ibid* s 65DAA(2).
- 29 *Ibid* s 65DAA(3).
- 30 *Goode and Goode* (2006) FLC 93–286.
- 31 *N and M* [2006] FamCA 958 (Rose J).
- 32 *Mashman and Lockwood* [2009] FMCAfam 117(Roberts FM).
- 33 *G and C* [2006] FamCA 994.
- 34 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
- 35 Australian Government, Australian Institute of Family Studies, R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (December 2009), Summary Report, 3.8, 13 <<http://www.aifs.gov.au/institute/pubs/fle/>>.

- 36 *Goode and Goode* (2006) FLC 93–286 following statements made in *B and B: Family Law Reform Act 1995* (1997) FLC 92–755.
- 37 Karen Conte-Mills, ‘Family Law Issues and The School: Views From the School and Court’ (Paper Presented at 2010 ANZELA Conference, Sydney, October 2010).
- 38 *Family Law Act* s 65DAC.
- 39 Conte-Mills, above n 37.
- 40 *Family Law Act 1975* (Cth), Part VII, Division 13A.
- 41 *Ibid* ss 63A–H.
- 42 *Ibid* s 63C.
- 43 *Ibid* s 60CC(5), *Family Law Rules 2004* (Cth) r 10.15.
- 44 Pursuant to *Family Law Act 1975*(Cth) s60CD(c), judicial officers may meet with children, as they are permitted to use any means they consider appropriate to ascertain children’s views, however, in Australia only a small minority of judicial officers have adopted this practice.
- 45 *Family Law Act* s 62G(3A)
- 46 *Ibid* s 68LA.
- 47 Australian Government, Australian Institute of Family Studies, R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms*, above n 35, ch 2 ‘Characteristics of Separated Parents: Challenges and Issues for Family Relationships and Wellbeing’ at 26: 26% of mothers and 16.8% of fathers reported being physically hurt by their former partner.
- 48 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 17 inserted a new s 60CC(2A) into the *Family Law Act*.
- 49 See, eg, *Family Law Act* ss 60B, 60CC(2), (2A), 60CC(3)(j)–(k), 60CG, 60CH, 60CI, 67Z–ZC.
- 50 In Queensland the relevant Act is the *Domestic and Family Violence Protection Act 2012* (Qld). This Act commences on 17 September 2012 and replaces the *Domestic and Family Violence Protection Act 1989* (Qld).
- 51 *Domestic and Family Violence Protection Bill 2011* (Qld).
- 52 *Domestic and Family Violence Protection Act 2012* (Qld) s 32.
- 53 Other terms that are used are ‘family violence intervention order’ (Victoria) and ‘violence restraining order’ (WA). For information about the terminology and legislation across Australia see Harland et al, above n 5, ch 6 ‘Violence in the Family’: Key Aspects of State-Based Protection Orders’ (107–121).
- 54 *Domestic and Family Violence Protection Act 2012* (Qld) s 22.
- 55 *Ibid* s 177.
- 56 *Ibid* s 24.
- 57 *Ibid* ss 53, 54.
- 58 *Ibid* s 8.
- 59 *Ibid* s 62.
- 60 *Ibid* s 62.
- 61 In New South Wales, the relevant government department is the Department of Communities and in Victoria, the Department of Human Services.
- 62 *Child Protection Act 1999* (Qld) s 9(1).
- 63 *Ibid* Part 3B.
- 64 *Ibid* ss 59, 61, 62.
- 65 Information from Harland et al, above n 5, ch 11 ‘The Role of Social Science and Other Disciplines in Family Law’ at 243, and Conte-Mills, above n 37.
- 66 *Evidence Act 1995* (Cth) s 59.
- 67 Harland et al, above n 5, ch 11, provides an overview of the relevant social science research and relevant reports. See, eg, J McIntosh, B Smyth, M Kelaher, Y Wells and C Long, *Post-separation Parenting Arrangements and Developmental Outcomes for Infants and Children — Collected Reports* (Family Transitions, 2010); Cashmore et al, Social Policy Research Centre, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General’s Department* (SPRC, UNSW, 2010); J McIntosh and R Chisholm, ‘Shared Care and Children’s Best Interests in Conflicted Separation: A Cautionary Tale from Current Research’ (2007) 20(1) *Australian Family Lawyer* 3.