



Grandparents Rights Under the *Family Law Act*

There has been a recent surge in applications for parenting orders by grandparents, being persons with a significant interest in a child's welfare

INTRODUCTION

Grandparents play a significant role in a child's life and may be the child's primary caregiver. The *Family Law Act* 1975 (Cth) (the "Act") facilitates granting rights to grandparents in relation to their grandchildren.

Under the Act, a grandparent is the parent of a child's mother or father. A child usually has four biological grandparents (whether living or deceased) but may also have non-biological grandparents.

RIGHTS OF GRANDPARENTS

Sometimes when parents separate or divorce, or when parents are affected by substance abuse, grandparents can be cut out of their grandchildren's lives or it can be made much more difficult for grandparents to spend time with their grandchildren. A healthy relationship between a grandparent and grandchild can provide support to a child at times of family stress and breakdown.

The Act, under section 60B(2)(b), recognises that children have a right to maintain regular communication with those who are considered important to their welfare, care, and development. It specifically refers to grandparents as being included in that category of people. A grandparent, however, does not have an automatic right to see, or care for, their grandchild, but does have a right to apply to the Court.

PRIMARY CAREGIVERS AND ACCESS

A grandparent is entitled, under section 65C(ba) of the Act, to make an application for a parenting order if they want access or primary care of their grandchild or grandchildren. The court will only grant an order when they consider it to be in the best interests of the child.

It may be necessary or desirable for grandparents to apply for primary care or significant contact time with a grandchild where the parent: is unwilling to care for the child; is unable to care for the child; or lacks the capacity to care for the child.



The court will need to be satisfied that the parent falls within one of these categories and cannot meet the needs of the child or children.

Where there is evidence of abuse, neglect or substance abuse the court is more likely to grant an order in favour of the grandparent. The order can either give the grandparent primary care giver of the child or to the parent.

THE CHILD'S BEST INTERESTS

In deciding whether contact time (including primary care) is in the best interests of a child (here grandchild), the court will refer to a number of different factors under section 60CC of the Act, including: the need to protect the child's psychological or physical safety; the benefit of having a relationship with their parents and grandparents that is meaningful; the kind of relationship the child has with the parents and grandparents; whether the child is financially supported; the likely effect of change on the child; whether there is evidence of any family violence; and any views of the child if they are old enough and mature enough to convey relevant views.

Additionally, under section 60CC(3)(f)(ii) of the Act, the court will consider the capacity of the grandparent to provide for the needs of the child, including emotional and intellectual needs.

Further, in the case of *Marsden v Winch* [2009] FamCAFC 152, the Court held that when considering what is the best interests of a child, a court must assess the following factors: 1) the past circumstances, including the reasons for the decision and the evidence upon which it was based; 2) whether there is a likelihood of orders being varied in a significant way, as a result of a new hearing; 3) If there is such a likelihood, the nature of the likely changes must be weighed against the potential detriment to the child or children caused by the litigation itself.

Only when the court finds that it is not in the child's best interests to remain with the parent can it make an order for primary care giver in favour of the grandparent.

PARENTAL RESPONSIBILITY

If the court determines that granting primary care to the grandparent is in the child's best interests they may confer on the grandparent parental responsibility for that child. This means that the grandparent will have all the legal authority, power, duty, and responsibility a parent usually has in relation to a child.

Being granted parental responsibility allows the grandparent to make long-term decisions for the child without necessarily consulting the parents. The grandparent can make decisions relating to the child's care, welfare and development such as the child's schooling, health, living arrangements, and religion.



PARENTING ORDERS BY CONSENT

Under the Act, grandparents do not have automatic parental rights over a grandchild. If the child, however, has been living with the grandparent pursuant to an informal arrangement with the parent, it may be beneficial for the agreement to be formalised by making a parenting order by consent.

A parenting order by consent can be done by drafting an agreement where both the parents and grandparent consent to the living arrangements. Once an agreement has been written, an application must be made to the court to approve the parenting order by consent.

If you have any concerns about your grandchild's welfare, you should contact the police and/or the relevant child protection agency in your state.

ASSISTANCE FOR CAREGIVERS

Grandparents who have primary care of grandchildren can make an application to Centrelink for financial payments to help provide care for that child, including: Grandparent Child Care Benefit; Family Tax Benefit; Double Orphan Pension; Child Maintenance; and Child Support.

If the child has a disability or medical condition, the grandparent may also make an application to Centrelink for: Carer Payments; Carer Supplement; Child Disability Assistance Payment; and Carer Adjustment Payment.

In addition to financial assistance, there are government and community support services that can assist grandparent caregivers. The Australian Government's Department of Human Services should be able to assist in locating support organisations in your area.

PROCESS OF APPLYING TO THE COURT

The Act requires that families first attend family dispute resolution, or mediation, before going to court, unless an exemption (e.g. urgent circumstances, past violence between the parties) applies.

The court will typically require a certificate from an accredited dispute resolution practitioner to show that the parties attempted mediation before bringing the matter to the court.



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In cases where there is strong parental opposition to Court orders sought by grandparents, a Court-appointed Family Consultant may be required to prepare a family report for submission to the court, to assist the court in deciding whether to grant a parenting order for the grandparent.