

Grandparents' rights in CHILD CUSTODY

The rights of a grandparent under the Family Law Act are more extensive than many people realise, writes Dan Bottrell, partner of Jones Mitchell Lawyers.

Although not widely known, grandparents have standing under the Family Law Act to seek parenting orders in respect of their grandchildren.

The need for grandparents to take action often arises when:

A. There is a falling out between a child's parents (the parents) and their parents (the grandparents) in relation to a child (the grandchild), such that the parents seek to terminate the parent-grandparent relationship and subsequently the grandchild-grandparent relationship. This often occurs as a result of different styles of parenting, disapproval around 'lifestyle' issues, differing views as to how the needs of the grandchild are to be met, or a personality clash with one or both parents.

B. The grandchild's parents separate, and the parent who the grandchild is to live with in future is not supportive of the grandchild-grandparent relationship continuing.

Despite these situations, grandparents often argue that they have something positive to offer their grandchild in terms of love, emotional and financial support and a 'safe haven' in times of need. In seeking to establish, or continue, a meaningful relationship with their grandchild, they also purport to offer guidance and stability; cultural information; and a sense of belonging that comes with knowing a wider family.

Often the reasons for the family breakdown are not clearly understood, with grandparents being left devastated and bewildered as to why, after making an investment in the family, they are suddenly alienated from their grandchildren.

The task of a court when determining an application by grandparents to spend regular time and communicate with a grandchild is no

different from any other parenting case (i.e. to make an order which achieves the grandchild's best interests).

COMMON MISCONCEPTIONS

A common misconception is that parents have the right to determine whether or not a grandchild will spend time and communicate with grandparents. The Family Courts have determined that being a biological parent does not of itself 'trump' an application by grandparents. Rather, it falls to the court to determine what is in the best interests of that grandchild when parties cannot agree, and even where parents oppose a grandchild spending time and communicating with grandparents. An outcome of this kind can be ordered if it is in the grandchild's best interests.

In considering the best interests of the grandchild, the court examines:

A. Whether there is anything meaningful for the grandchild in having a relationship with the grandparents or either of them, including the importance for the child of having a sense of being a part of, and knowing, their wider family.

B. Whether there is a need to protect the grandchild from physical or psychological harm as a result of being subjected to or exposed to abuse, neglect or family violence.

C. Any wishes expressed by the grandchild as to their having a relationship with their grandparents.

D. The nature of the relationship between the grandchild and the grandparents, in particular, whether that relationship is established and appropriate, and whether the grandchild will be anxious, or whether there will be any other adverse impact for the grandchild, if separated from the parents.



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E. The extent to which the grandparents have historically taken the opportunity to spend time and communicate with the grandchild.

F. Whether the grandparents can provide for the needs of the grandchild, including emotional and intellectual needs.

Accordingly, just as parents are not higher on any hierarchy of applicants simply by being 'the parents', grandparents cannot automatically expect that the court will order time and communication with a grandchild simply because they are related. Rather, they will be required to demonstrate the following:

- That their grandchild is safe, emotionally and physically, when in their care.
- That despite family conflict, they can put the interests of their grandchild first.
- That they have real insight into, and can prioritise, the needs of that grandchild in all respects.
- That ultimately there is something positive for their grandchild in having an ongoing relationship with them.

Grandparents can often expect that if the continuation of an existing grandchild-grandparent relationship is determined by a court to be in the best interests of the grandchild, that time and communication will occur on weekends, school holidays and special occasions. Where it is found that the relationship should be initiated, orders are often crafted in 'steps', from reintroduction, to short periods of time together, through to regular time together.

CONSIDER ALTERNATIVES

Cases of this nature are hard on families, in particular the grandchild, but also for grandparents, especially where time and communication with the grandchild has been suspended for some time, and for parents, who often feel that while there is time and communication between the grandchild and grandparents, those factors which the parents have identified as being of concern continue to impact on the grandchild. Going to court is not the only resolution pathway to such situations, and consideration of lower impact dispute resolution options should always be given (by parents and grandparents) before commencing court proceedings, including:

A. Instructing an experienced or specialist family lawyer to open a dialogue with all family members in order to set out the position of each party (in

the case of grandparents, why the grandchild-grandparent relationship is important to them), the detailed proposal as to resolution of the situation and the supporting reasons as to why this achieves the best interests of the subject grandchild.

B. Engaging a private counsellor to identify the issues at large for each party, and assist the family to come to a solution which neutralises those issues for all concerned, and that the family as a whole can work with.

C. Engaging in a collaborative law process, where the parties agree not to go to court (given the potential damage that can do to family relationships, and the pressure it can place on the grandchild), and to instead, with the help of collaboratively trained lawyers and neutral child experts, co-operate in a series of meetings with the common objective of isolating the interests of each party, and working towards a solution which balances those interests.

Even for those who cannot resolve their disputes by one of these means, before commencing court proceedings, it will be compulsory (absent the presence of an exclusionary factor, such as family violence) for the parents and grandparents to participate in Family Dispute Resolution, a form of counselling designed to examine the outcomes sought by each party, and assist in the development of a common solution.

For those grandparents, or parents, who have no option but to approach the court for a resolution, they can do so in the knowledge that the focus will be on achieving the best interests of the grandchild, rather than the interests of those involved in the adult dispute which brought them there. For many grandparents, there can be real hope that a family falling out will not be the end to their relationship with their grandchild. A specialist family lawyer can outline the options which can see a positive outcome achieved for all involved. **TGM**

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