

Family law and the school

This paper explores through case studies some practical problems and the related legal issues encountered by teachers, child carers and school/preschool or kindergarten administrators when dealing with the children of parents who have separated (or never married/cohabited).

Family law is a Commonwealth responsibility in Australia so the information contained in this paper is broadly relevant in all Australian states and territories.¹ Family law intersects with other areas of law including privacy, child welfare and educational laws.

The types of issues which arise include:

- What do Court orders mean?
- Do they bind the organization/educational institution?
- Should you have a copy?

- Consent to enrolment;
- Consent to excursions, medical treatment, activities, religious instruction, educational assessment, counselling.

- Should staff (teaching or non-teaching) swear affidavits
- What obligations are imposed by a subpoena?

- Who is liable to meet fees?

These topics are explored below via relevant case studies.

Court orders

Not all parents who are separated, divorced or who have never lived together have court orders which govern the arrangements for their child or children. It is not mandatory for parties to formalise arrangements for children.

Effect of no orders

The relevant law: in Australia the *Family Law Act 1975 (Cth)* does not speak in terms of parents' rights, but rather, parents' responsibilities. As discussed below where no order exists each parent has all the duties and responsibilities of parenthood which may be exercised unilaterally or in consultation with one another. The effect of this is that in cases where there are no orders the educational institution may rely on the consent of one parent in matters where

¹ While the system and procedure in Western Australia are a state as opposed to Commonwealth responsibility the law in parenting matters is the same.

parental consent is required. Of course prudence and public relations may dictate that the consent of both parties is to be preferred even in this type of situation.

The making of orders and agreements

Parents may choose to enter into orders by agreement (“Consent Orders”) or complete a formal agreement called a Parenting Plan. Orders must be approved by the Court before they are binding.

If parents cannot agree on the content of orders or a parenting plan then either may approach the Family Court of Australia/Western Australia, the Federal Magistrates Court of Australia (or in some cases a Local Court) after first attempting mediation at an approved provider.

If a Court makes orders they will do so after a contested hearing in which both parents will present evidence.

The language of orders

Parenting orders in Australian Courts made after 1 July 2006 usually deal with the following concepts:

- Where will the children live? (“a live with order”)²
- How much time will the children spend with the person with whom they do not live? (“a spend time with order”)³
- Who will make important decisions about the children? (“a parental responsibility order”)⁴

You may also be provided with orders (made between 1996 and 2006) which talk of:

- “Residence” (where/with whom a child will live)
- “Contact” (when a child will spend time with the parent with whom they do not live)

And in rare case, that is in respect of orders made before 1996:

- “Custody” (with whom a child will live)

² Prior to the *Family Law (Reform) Act 1995* (Cth) an order governing where children were to live was referred to as a “custody order”. Prior to the 1 July 2006 an order governing where children were to live was referred to as a “residence order”.

³ Prior to the *Family Law (Reform) Act 1995* (Cth) an order governing the time children were to spend with the other parent was referred to as an “access order”. Prior to the 1 July 2006 an order governing time children were to spend with the other parent was referred to as a “contact order”.

⁴ Prior to the *Family Law (Reform) Act 1995* (Cth) an order governing decision making was referred to as a “guardianship order”. Prior to the 1 July 2006 an order governing decision making was referred to as a “parental responsibility order” (although it differed somewhat from the current provisions on parental responsibility).

- “Access” (the time a child will spend with the parent with whom they do not live)
- “Guardianship” (decision making responsibility)

The language allows for the making of orders which provide that a child is to live with both parents. For example:

That during the school term the child Emily Jane Fox born 21 March 2002 live with the mother and father in a week about arrangement with changeover to occur on Fridays after school. The first week to be with the mother and the second with the father and alternating thereafter

OR

That during the school term the child Emily Jane Fox born 21 March 2002 (“Emily”) live with the mother in a two week pattern as follows:

(a) in week one from after school Thursday to before school the following Monday;

(b) in week two from after school Thursday to before school the following Friday;

That otherwise during the school term Emily live with the father.

In some cases the orders may refer to the time spent with one parent being supervised or monitored. This usually means that another adult has to be present at all times.

The Court may also make an order which provides that there is to be no time spent with one or both parents.

Orders may be silent as to time to be spent. In that case there is no positive obligation for a parent to provide time.

- If a child is subject to a state welfare law order the language is slightly different.

What is parental responsibility?

While in the past⁵ decision making responsibility rested largely with the parent with whom the children predominantly lived after separation (“guardianship”) there has now long been a recognition of the appropriateness of decision making responsibility for children resting with both parents after separation unless the best interests of the children in question require that it be reserved to one parent (or reserved to one parent in respect of an issue or issues).

⁵ Prior to the passing of the Family Law (Reform) Act 1995 (Cth) in 1996 the parent who had a “custody order” usually had a “guardianship order” as well.

The Family Law Act (“the Act”) defines parental responsibility in section 61B: *In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*

Decision making responsibility falls into two (2) categories: day to day and long term. The day to day responsibility is rarely controversial in cases where both parents are spending face to face time with the children. Long term decision making responsibility is more problematic.

The types of decisions which are usually regarded as being those which are long term are: education (eg which school a child will attend); religion (will a child attend scripture class at school, be baptized, convert, attend a church temple, mosque or other place of worship); and health (should the child take Ritalin, have an operation, attend a psychologist). Other areas in which parental responsibility is often raised include: extra-curricular activities, haircuts, the issue of passports.

Section 4 of the FLA now defines major long term issues:

In relation to a child, means issues about the care welfare and development of a child of a long-term nature and includes (but is not limited to) issues of that nature about:

(a) the child’s education (both current and future); and

(b) the child’s religious and cultural upbringing; and

(c) the child’s health; and

(d) the child’s name; and

(e) changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent.

The usual arrangement would be an order which deals with all aspects of parental responsibility. However, in some cases one or both parents may seek an order that he or she be given sole parental responsibility in respect of a specific issue (education, religion, medical issues). This can occur in a variety of circumstances including where parents are incapable of communication and consultation, where one parent’s capacity is limited or where expert evidence suggests that the child would be assisted by having one parent designated as the decision maker on some or all issues.

The *Family Law Act 1975 (Cth)* provides that both parents have parental responsibility by operation of law: section 61C.

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Therefore, for parents who do not have Court orders, there is nonetheless a legal recognition of their parental responsibility. There is nothing in the wording of the legislation to indicate that this provision applies only to separated parents.

The consequence of this statement of law is that a parent who wishes to exercise his or her parental responsibility without any regard to the views of the other parent should obtain, but is not required to obtain, an order of the Court. The most obvious example of this becoming relevant is for parents who without orders have cared for children since separation without any assistance from the other parent and often without knowing the contact details for the other parent; and then wish to take an overseas vacation with the children who do not have passports. That parent must make an application either for sole parental responsibility or for specific parental responsibility in respect of the question of the issue of a passport.

The parental responsibility which exists at law pursuant to section 61C is expressed differently from the parental responsibility in section 61DA.

The Full Court in *Goode and Goode* (2006) 32 Fam LR 422; [2006] FamCA 1346:

39. We therefore consider it clear that there is a difference between parental responsibility which exists as a result of s 61C and an order for shared parental responsibility, which has the effect set out in s 65DAC. In the former, the parties may still be together or separated. Here will be no court order in effect and the parties will exercise responsibility either independently or jointly. Once the Court has made an order allocating parental responsibility between two or more people, including an order for shared parental responsibility, the major decisions for the long-term care and welfare of the children must be made jointly, unless the Court otherwise provides.

What is equal shared parental responsibility?

Amendments to the Act which became law on 1 July 2006 introduced a new concept of **equal shared** parental responsibility.

Section 61DA provides:

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or

(b) family violence.

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

The term **equal** suggests that neither parent ought be thought to have a greater say in the exercise of parental responsibility than the other.

This is interesting because it occurs against a history, as briefly outlined above, where the parent with whom the children predominantly lived as a general rule also made decisions about their long term care. The question of education is a good illustration.

The Court (early in the operation of the Act) dealt with a case about which school a child would attend. Demack SJ held that the custodial parent had the right to determine which school a child would attend: *In the marriage of Newbery* (1977) 2 Fam LR 11652; FLC 90-205. Following the passing of the *Family Law Reform Act 1995 (Cth)* in 1996 *Newbery* was no longer good law. The Full Court came to consider the matter in *Re G: Children's Schooling* (2000) 26 Fam LR 143. The interesting comment which the Court there made on the question of parental responsibility (in this case choice of school) is found at paragraph 92, p166-167:

In terms of practical fulfillment of parenting obligations, it is desirable to enhance the ease with which a parent who assumes the bulk of the day-to-day responsibility can meet the multiple associated demands of children's dependence on a caregiver or transport, participation and security...it is proper to consider evidence as to any greater effect on a resident as distinct from a non-resident parent who will in most cases have greater day-to-day responsibilities in respect of the child and it is, we think, in a child's best interests that the resident parent should not be subject to more irksome and unnecessary additional restraints than such commitments already entail.

Being the "resident" parent or in the new language the parent with whom the child lives does not in and of itself create a presumption or bestow a special status as regards the exercise of parental responsibility but it may raise practical issues which have the result of giving more weight (in a Court setting) to the propositions advanced by that parent. Schools and other educational institutions should be careful not to attach weight to the fact of where the child lives in dealing with issue which related to parental decision making, except, of course, in respect of day-to-day issues.

It should also be remembered that the change to the terminology concerning parental responsibility fits hand in glove with the change to objects section and the introduction of section 65DAA which requires the court to consider an equal time arrangement.

No weight (presumptive or practical) can attach to the parent with whom the child lives if the child is in effect living with both parents.

The second expression is **shared**. Giving the word its plain meaning it is clear that neither party is entitled to unilaterally exercise his or her parental responsibility but must share that responsibility. This suggests joint decision making, consultation and communication. This is at least at part aspirational since despite the importance of communication and consultation many separated couples find it difficult if not impossible.

One of the practical consequences of the way in which parental responsibility is approached in the legislation is that any educational institution should be aware not where a child lives (although this may be important) but rather which person or persons have parental responsibility for the child.

Where children's parents are separated (or have never lived together) it is only desirable to rely on the consent of one parent if you can be satisfied that that parent has sole parental responsibility or sole parental responsibility for educational issues.

Are you bound by the orders?

When Mark was enrolled in kindergarten his mother informed you that she and Mark's father did not live together and there were Court Orders from the

Federal Magistrates Court which provided that Mark lived with her and spent time with his father on alternate weekends and alternate Monday nights. She gave you a copy of the Court order.

Mark's father arrives to collect Mark on a Thursday. What do you do?

Does it make any difference if the orders say that Mark lives with his mother and has no time (or supervised time only) with his father?

In order to be bound by an order of a Court a person must be a party to the proceedings in which the order was made. Generally, that means that the only persons bound by family law orders are parents (or carers).

Recently, the South Australian Equal Opportunity Tribunal heard and determined an application that the South Australian Department for Education and Children's Services (DEC) be dealt with for sex discrimination against a father whose child was enrolled in the South Australian school system.⁶ The parents of the child had been involved in lengthy court proceedings before the Federal Magistrates Court. The applicant, Dr Hudson, alleged that the school had discriminated against him as a man treating him less favourably than they would a woman (or indeed did, in respect of his former spouse). The Tribunal dismissed his complaint finding that there had been no discrimination on the basis of sex. In dismissing the complaint the Tribunal made some useful and interesting observations concerning the obligations of schools to comply with family law orders:

The school is not an enforcement agency for orders of the Federal Magistrates Court...

65. It is the case that the orders of the court are binding on the parties to the dispute in relation to which the orders were made. However, it is the case that others persons, in this case, the relevant agency of the respondent (DECS) and particularly the child's school, must be made aware of the court orders and should refrain from putting obstacles in the way of compliance by the parties with the orders. In addition, it seems that the child's school was bound to facilitate Dr Hudson's access to certain information and material concerning his child, having regard to his right to a copy of documents and other material direct from his child's school, under paragraph 10 of the Federal Magistrates Court order of 30 October 2003.

66. Compliance with the orders is an obligation for the parents, to whom the orders are directed. Even though the school seemed to be obliged to act to facilitate the rights of parents under aspects of the Federal Magistrates Court order or

⁶ *Hudson v State of South Australia* [2008] SAEOT 8 (22 May 2008)

orders, it is not the role of the school to oversee compliance with any order of the Federal Magistrates Court or Family Court, by the parents concerned. DECS, and in particular the school principal, has no authority from either the Federal Magistrates Court or the Family Court to oversee either parent's compliance with the orders, or to enforce the orders.

A separate issue may arise in so much as a parent may argue that having been put on notice in respect of an order the educational institution and its employees should not act other than in accordance with that order.

The Family Law Act contains provisions which allow a non-party to the proceedings to be charged with aiding a contravention of an order. Section 70NAC provides that a person must not intentionally prevent compliance with the order by the person who is bound by it.

It may be that the school has a separate duty of care to do any reasonable thing within its power to ensure that an existing valid Court order is obeyed.

Enrolment

The parents of Lola separate when she was six years old and attending Richmond Preschool. During the long summer holidays Lola's mother moved to Bayswater and her father continued to live in Richmond. Is the consent of both parents required to enrol her in the preschool closest to her mother's home?

Assume there are orders in place which provide for Lola to live with her mother and spend time with her father each alternate weekend from Friday after school to Monday before school and each Wednesday.

Assume there are no orders.

Assume there are orders which provide for Lola to live in a "week about" arrangement with each parent.

Provided there is no order removing parental responsibility (or responsibility for education issues) then both parties are required to consent to enrolment or change of enrolment. This is because the entire system is premised on the concept that parents are to agree about the future parenting of their child/ren (section 60B(2)(d)).

However, when there are no orders then parental responsibility may be exercised severally (as opposed to jointly) and there is no obligation on a school or preschool to ensure that each parent has consented.

The standard application for enrolment in New South Wales public schools seeks information about the existence of family court orders and, where they exist, copies. This is an appropriate approach for all educational institutions. Once in possession of orders the school should determine whether there is:

- (a) no order for parental responsibility;
- (b) an order for equal shared parental responsibility;
- (c) an order for sole parental responsibility (or sole parental responsibility for relevant issues).

Once on notice of the content of the order the educational institution should endeavour whenever possible to make decisions having regard to its content.

Consent to medication

Andrew has been prescribed Ritalin. His father is supportive of the diagnosis and treatment. His mother wishes to obtain a second opinion and in the meantime try non-drug therapies.

Andrew lives predominantly with his father.

His mother writes to the school and asks the school not to administer the medication.

The decision does not belong to the parent with whom the child lives, but is a decision to be made jointly by all persons with parental responsibility for the child.

In this situation the school might appropriately have a concern that any decision they make (to medicate as requested by one parent) or not to medicate (as requested by the other parent) may not be the decision which best meets the needs of the child or in some cases may be a decision which in fact endangers the child. In those circumstances the school should ensure that the parents have embarked on a mechanism to resolve the dispute. If not, it would not be inappropriate to discharge the duty of care by referring the family to the local state welfare authority.

If one parent has an order for sole parental responsibility then he or she has the legal right to make the decision and the consent of the other parent is not relevant. If one parent has an order which reserve to him or her sole responsibility in respect of medical decisions the effect would be the same.

Domestic violence

Schools will routinely encounter families in which one (or sometimes both) parents have orders, referred to in Victoria as Intervention Orders and in New South Wales as Apprehended Violence Orders, which function as injunctions to protect one person from the actions of the other.

On occasion an order will also include children of the relationship.

Sometimes there will be a stand alone order for the protection of the child/ren from one or both parents.

If a child enrolled at the school is protected by an order it may prevent a parent (or other named person) from either approaching the child or approaching the school.

The exact terms of the order are important. Most orders are explicitly subject to any family law order (with the effect that the family law order takes precedence).

It is not the role of the school to police compliance with apprehended violence orders. However, where a school is aware of an order which is for the protection of an enrolled student then the school should contact the state police and/or the Department of Human Services or equivalent welfare agency if the order is breached. The obligation to report to the Department of Human Services arises out of the mandatory reporter status of teachers. The obligation to report to police arises out of the duty of care which one must exercise when acting *in loco parentis*.

Swearing an affidavit

You are the coordinator responsible for two students: twin girls Emma and Charlotte.

In 2008 you are aware that the children's parents separated. You first became aware because of Emma reported witnessing a very violent altercation which sufficiently concerned you to telephone her mother and request an interview. At the interview her mother told you that both girls were anxious, depressed, tearful and sometimes aggressive and she was concerned that this behaviour was a consequence of the recent acrimonious separation between she and her husband. You have not met the children's father.

The children's behaviour has remained poor and their story telling and drawing continues to be disturbed, containing themes of violence, desertion and death.

The children's mother asks you to be a witness in the upcoming proceedings before the Family Court.

This is more a matter of policy than of law.

A witness owes a duty to the Court to give his or her evidence truthfully and impartially. That applies to any written evidence (the affidavit or report) and to

any evidence given orally, including during cross-examination. Notwithstanding that duty a parent is likely to consider a staff member who gives evidence on behalf of one parent to have chosen sides.

Sometimes a lawyer acting in the role of Independent Children's Lawyer (ICL) will approach the educational institution and seek input about the children he or she is representing. That lawyer may also ask the teacher or Principal or coordinator to prepare a report or swear an affidavit or both. This situation is somewhat different from doing so at the request of one parent in so much as the ICL acts only in the interests of the child/ren.

Nonetheless, the consequences of swearing an affidavit, including the potential damage to any ongoing parent/teacher relationship need to be considered.

There is no obligation to prepare a report or swear an affidavit. However, it is open to a party (including the ICL) to issue a subpoena to a staff member to attend and give evidence if a request for an affidavit has been declined and the evidence is deemed necessary to the case.

Subpoenae

There are two types of subpoenae (subpoenas): a subpoena to attend and give evidence and a subpoena to produce documents.

Subpoenae for the production of documents are used frequently in family law proceedings and are generally drafted in words to the following effect:

1. *All documents concerning the child [name], [date of birth] from [date] until the date of receipt of this subpoena including but not limited to:*

- (a) enrolment forms;*
- (b) attendance records;*
- (c) counseling records;*
- (d) reports;*
- (e) disciplinary records;*
- (f) correspondence to or from either parent;*
- (g) file notes made by staff.*

Sometimes specific records will be sought. If you are named in a subpoena the obligation to comply is personal.

A school is not required to create documents in order to answer the subpoena. Either the documents exist in which case originals (or if permitted by the subpoena, copies) should be produced, or they do not exist in which case there is no obligation.

The details of other students should be deleted and the provisions of the *Privacy and Personal Information Protection Act 1998* borne in mind.

The subpoena should be accompanied by “conduct money” (usually a cheque to cover expenses of compliance). If the amount proffered is inadequate a request may be made to the solicitor issuing the subpoena. If agreement about conduct money is not reached a subpoenaed party may approach the Court.

A subpoena should ordinarily be served seven (7) days prior to the date on which compliance is required. In appropriate cases the court may abridge this time, but may require the assurance of the solicitor asking for the subpoena to issue that the subpoenaed party can comply. Subpoenae which require compliance on short notice are usually endorsed with those details on the document itself.

There are some limited circumstances in which a subpoenaed party may object to production of some/all documents. Potentially relevant objections to schools may include: where the subpoena calls for documents which are too voluminous (and may be regarded as oppressive); public interest requires the documents to remain confidential, documents may be the subject of a claim for legal professional privilege.

Child Support

In November 2009 a child’s mother writes to you and says that she and the children’s father have separated and that she has no capacity to meet the fees. She tells you that she is making an application to require the father to pay the fees.

What do you do?

This may be more a question of credit control than a legal matter.

The educational institution’s protection is no greater than its (legal) agreement with one or both of the parents and its preparedness to take action to enforce that agreement.

Some practical/legal matters which may give guidance to policy in this area are as follows:

1. Both parents are entitled to apply to the Child Support Agency (the Agency) for an administrative assessment of child support;
2. Under that administrative assessment the Agency will consider each parent’s income, the child’s age, the level of care as between the parents.

3. Even high income earners will not be assessed to pay child support at a level which would cover (expensive) independent school fees;
4. Parents may agree to depart from the formula;
5. If either parent is unhappy with the result produced by the formula he or she may apply in the first instance to the Agency;
6. Further appeals lie to the Social Security Appeals Tribunal;
7. Parents with another matter before the Family Court or Federal Magistrates Court may apply to change the assessment to either of those Courts;
8. One of the factors that the Agency, Tribunal or Court will consider when determining whether to change the assessment is the fact that *the child is being cared for, educated or trained in the manner that was expected by his or her parents* (section 117(2)(b)(ii) *Child Support (Assessment) Act 1989 (Cth)*);
9. The process of changing an assessment may take up to two (2) years.

Conclusions

- Focus on parental responsibility (as opposed to living arrangements);
- Seek copies of Court orders to be consulted if required;
- Educational institutions are not bound by court orders and not required to enforce them;
- Nonetheless, if provided with court orders educational institutions should act in accordance with same;
- Seek advice if one or both parents raises an educational issue about which agreement cannot be reached between them.

Suzanne Christie
May 2010