

## CRITICAL FAMILY LAW ISSUES FOR SCHOOLS // COMPETING INTERESTS

*By Julie Redman, Lawyer and Mediator at Alderman Redman Lawyers (November 2016)*

It is inevitable that schools will become involved with family law disputes and issues that impact on their students, teachers, the principal and the school environment generally, on a regular basis. Everyone agrees that the school is not the appropriate place for disputes to be resolved nor is it appropriate for the school staff to resolve such issues. However it is important that school staff have a basic understanding of family law issues and their role in them. The safety and welfare of the children and the staff is the paramount consideration.

You are all aware of your own legal services unit advice which is made available to your school on a case by case basis.

I was surprised to find a limited amount of guidelines and policies for school assistance in writing. The overwhelming policy however seems to be:

1. Do not get involved;
2. Parents must get their own independent legal advice;
3. It is not the school that should act as mediator or broker of any disputes; and
4. Seek your legal services unit advice on a case by case basis.

What I propose to do today is provide you with a basic outline of relevant family law and family and domestic violence legislation and practice in South Australia.

I hope this will be a very interactive session. I invite you to ask questions and for us to discuss issues as they come to mind.

Let me introduce you to the **SMITH** family the subject of our focus today **Schedule 1**.

### ***FAMILY LAW ACT 1975 (CTH)***

So what is the law in Australia in relation to children who find themselves in the midst of their parents' separating? The paramount consideration is always – what is in the child's best interests. The *Family Law Act* is now 40 years old and there has been numerous changes in that time to the way we assist families to resolve disputes. Not least of these has been the legislation and promotion of the ideal of shared care by the father.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* brought about significant changes to the way in which Courts with jurisdiction under the *Family Law Act 1975 (as amended)* ('the Act') determined disputes relating to children.

This Amendment was designed to “*support and promote shared parenting and encourage people to reach agreement about parenting of children after separation*”.

The Amendment advanced the Government’s long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non-adversarial manner.

The initiatives in the Amendment represent a generational change in family law. They aimed to bring about a cultural shift in how family separation is managed; away from litigation and towards cooperative parenting.

In 2011, the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* aimed to provide better protection for children and families at risk of violence and abuse. These amendments commenced on 7 June 2012.

*“The Family Violence Bill retains the substance of the shared parenting laws introduced in the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) and continues to promote a child’s right to a meaningful relationship with both parents where this is safe for the child”* – Explanatory Memorandum

**Our case study family Jane and John would be encouraged to have at least one appointment with a legal advisor to assist them in understanding the key family law issues, the concept of the child’s best interests and what their options are in relation to agreeing their ongoing care of Anna. This should occur before mediation.**

## **CHILD’S BEST INTERESTS //**

**So what are the principles that need to guide the Smith family in what is in Anna’s best interests?**

The objects and principles underlying the Act in relation to ensuring the best interests of the children are met are-

- ensuring that children have the benefit of both their parents having a meaningful involvement in their lives, to the extent consistent with the best interests of the child; and
- protecting the child from physical or psychological harm from being subjected, or exposed to, abuse, neglect or family violence; and
- ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- ensuring that parents fulfil their duties and meet their responsibilities, concerning the care, welfare and development of their children.

The principles are focused on children spending regular time with both of their parents and other people significant to their care.

These principles contained in the Act are:

- children have a right to know and be cared for by both their parents; and
- children have a right to spend time on a regular basis with and communicate on a regular basis with both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);
- parents jointly share duties and responsibilities concerning the care, welfare and development of their children;
- parents should agree about the future parenting of their children;
- children have a right to enjoy their culture.

Section 60CC of the Act outlines the mandatory criteria to be considered in determining what is in the child's best interests and it is divided into *primary* and *additional* considerations.

The **primary considerations** are:

- the benefit of the child having a meaningful relationship with both parents; and
- the need to protect the child from physical or psychological harm from exposure to abuse, neglect or family violence.

If there is any inconsistency with respect to the above two primary considerations, then the right of the child to be protected from harm is given *greater weight* over the right of the child to have a meaningful relationship with each parent.

The Court will also consider the following **additional considerations**:-

- any views expressed by the child, depending on the maturity and level of understanding of the child;
- the child's relationship with each parent and other people, including grandparents and other relatives;
- the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent;
- the likely effect on the child of changed circumstances, including separation from a parent or person with whom the child has been living, including a grandparent or other relatives;
- the practical difficulty and expense of a child spending time with and communicating with a parent;
- each parent's ability (and that of any other person) to provide for the child's needs;
- the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- the right of an Aboriginal child or a Torres Strait Islander child to enjoy his or her cultural and the impact a proposed parenting order may have on that right.

- the attitude of each parent to the child and to the responsibilities of parenthood;
- any family violence involving the child or a member of the child's family;
- any family violence order that applies to the child or a member of the child's family;
- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; and
- any other fact or circumstance that the court thinks is relevant.

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* did not change the presumption of 'equal shared parental responsibility' nor the legislative pathway that mandates consideration of 'equal shared care'.

## **EQUAL SHARED PARENTAL RESPONSIBILITY //**

**Jane and John Smith now have an understanding that they must focus on what is in the best interests of Anna and we are assuming there are no family violence issues at this stage.**

**Parental Responsibility** is defined in the Act to mean

*“all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”*

The notion of parental responsibility was introduced in the Act to take away notions such as 'parental rights' over a child. It is not the *right* of a parent to spend time with their child but it is the *right* of a child to have a meaningful relationship with their parent. Children are not possessions and the fundamental need is for children to have a meaningful relationship with both parents wherever possible.

The ordinary rules of parental responsibility operate immediately upon the birth of a child and continue until either an agreement between the parties to change it or a Court Order determines otherwise.

Parental responsibility is not affected by parties separating, marrying or re-marrying. Unless there have been incidents of child abuse or family violence, the Court must proceed on the basis of a presumption that it is in the best interests of the child for their parents to have equal shared parental responsibility.

Where the presumption of equal shared parental responsibility applies, the Court must then consider whether or not it is in the child's best interests, and **reasonably practicable**, for the child to spend equal amounts of time with each of their parents.

Parental responsibility ceases in its entirety upon a child attaining the age of eighteen (18) or if a child married below the age of eighteen (18).

It ordinarily also ceases upon a child being adopted with the exception if a spouse of de facto partner of a child adopts that child.

In addition, particular powers, such as the right to make significant medical decisions, cease upon the child attaining sufficient maturity and understanding to make a decision on particular matters themselves (*Re Jamie 2013 FLC 93-547*).

Ordinary parental responsibility can be altered or terminated either by the parties themselves through a Parenting Plan or by a Court Order.

An easy way to think of parental responsibility is to think of the old term of 'guardianship issues' in relation to children.

### **MAJOR LONG TERM ISSUES (previously guardianship issues)**

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

- the child's education (both current and future); and
- the child's religious and cultural upbringing; an
- the child's health; and
- the child's name; and
- changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

**This impacts on schools in that education is a major long term issue.** The onus is on the parties to cooperate when making decisions about long term issues. However, it does not require any other person including schools to establish that any decision was made jointly before acting on it.

For example, a school principal accepting the enrolment of a child on the basis of an application by one parent need not be satisfied that both parents have jointly made the decision for the child to attend that school before accepting the application.

However, a Court will certainly not be impressed by any parent who makes unilateral decisions affecting a child's long term welfare unless they have a Court Order for sole parental responsibility.

## Health Issues

You will note that major long term issues also include health and both parents have shared parental responsibility in relation to major health issues in relation to a child.

*Does that mean that a school has an obligation to consult with both parents in relation to health issues on a day to day basis?*

No. Health issues as they are defined here are considered to be major issues not day to day colds and coughs. An accident at school requiring hospitalisation would be a major long term health issue.

## Religious and Cultural Issues

Schools may sometimes find themselves involved in religious or cultural disputes which may on occasion also be considered major long term issues. Certainly, the Family Court has been asked to make decisions about which school a child should attend based on the competing interests of the child either of a religious or cultural nature or due to their different expectations of education for their children.

Clearly, a school would not become embroiled in these disputes on a day to day basis.

## Child's Name

Another major long term issue is a child's name. It is settled law that a child should be enrolled under their legal name, as appears on their birth certificate or as changed on a deed poll certificate or Court order for change of name. For all official school documents the name should be the child's legal name. Sometimes however, schools are asked to allow a child to use a different surname or a different first name due to particular circumstances. If the identity of the child is not in dispute and the legal name is recorded, some schools allow this to occur. Legal advice should be sought by the school in relation to this.

**After an initial legal appointment to better understand the legal issues, John and Jane are encouraged to attend a Family Mediation session.**

South Australia has government funded Family Relationship Centres and the agencies - Relationship Australia, Centacare and Uniting Communities in Adelaide are funded for mediation services. They provide free or low cost Mediation and parenting advice to assist parties to reach agreement.

There has been a dramatic change in the way these disputes are resolved in Australia. The Act specifically makes it compulsorily for parties to attend Mediation before they consider using the Family Court system to resolve disputes. Exemptions are available, such as where there is family violence or urgency. Mediators provide a certificate to say that it is not appropriate for the parties to mediate.

It is possible to appoint a private mediator instead of using the Family Relationships Centres and some families choose to do this as there is no limit to the ongoing involvement of the chosen mediator. A private mediator is often also a psychologist and may be able to provide ongoing family support. We have an excellent referral list of psychologists and social workers who are providing these services to families outside of the Government funded services.

**What can a family such as the Smiths expect from a mediation service?**

**The service will assist them to prepare a Parenting Plan.**

### **PARENTING PLANS AND COURT ORDERS (PARENTING ORDERS)**

**Parenting Plans** have taken on new significance and they reflect the Government's very clear preference that parenting disputes be resolved by non-adversarial means and enshrined in Parenting Plans rather than Court Orders.

**Parenting Plans are NOT Court Orders.** They are an agreement that must be signed and dated by the parties. The format is not specific. A Plan can cover where the child/children live, who they spend time with, their schooling and other specific issues such as holidays, medical and religious matters.

Some agencies provide kits and handout booklets on assisting parents to develop their own Parenting Plan. In my mediation with parties, if they ask that I prepare a Parenting Plan, a typical one would look something like the sample that I am providing to you as **Schedule 2** of this paper.

The benefits of a Parenting Plan are that they are easily revoked or varied with the assistance of a further mediation process and with both parties signed agreement. Plans should be flexible to cover the changing needs of the child or children.

The big disadvantage of a Parenting Plan is that it is not legally enforceable in the same way a Court Order is.

**So the school has a copy of the Parenting Plan of the Smith family and you see that there is an agreement in relation to where Anna will live on a week to week basis and this includes a handover to occur at the school.**

The school should be aware that the Parenting Plan is NOT enforceable by the parents in a Court. However if the parenting plan is signed and dated the school should assume that this is the ongoing arrangements for the child unless they are provided with a signed and dated variation to a parenting plan.

Where there is ongoing conflict in relation to the care arrangements of a child, the parents should be encouraged to seek legal advice to have their Parenting Plan turned into a Parenting Order. This provides the school with greater certainty of the arrangements in place for the child's care.

## Court Orders & Consent Orders

Parents who reach agreement with respect to children matters who then wish to formalise this by way of Court Order, must file particular documents in the Family Court, which are signed by both parties. Lawyers are generally asked to prepare this as it involves careful legal drafting.

There is also a form that must be completed to detail any allegations of family violence. The Court has a duty to consider whether or not the parties have properly considered the family violence issues in reaching the consent Court Orders they seek. The Court has the right to refuse to make the Orders if they do not consider the family violence issues have been properly considered.

It is very important that parents obtain independent legal advice before filing Orders by consent with the Court as the consequences of obtaining a Final Order for children without the appreciation of how final they are can be quite devastating.

It is very difficult to change a parenting Court Order. There are precedents in a series of cases that make it clear that the re-opening of a Final Order can only be done in very limited circumstances.

The benefit of a Court Order is that there is enforceability and more accountability for compliance.

A Court Order can include any of the following:-

- Allocation of parental responsibility;
- The person or people with whom the child will live;
- The time the child is to spend with the other parent or others;
- How the child will communicate with the other parent or persons;
- Child maintenance (if not covered for child support);
- The steps to be taken before an application is made to the Court to change the order;
- The process for resolving disputes about the terms or operation of the order; and
- Any aspect of the care, welfare and development of the child or any aspect of parental responsibility for a child.

An example of a Court Order for the Smith family can be found in **Schedule 3** of this paper.

We also attach the form that must be completed by parents in relation to family violence issues in **Schedule 4** of this paper.

A Court Order can be varied by a Parenting Plan. It is important to recognise that if parties agree to change Court Orders by *consent*, either by some unwritten agreement or email exchange, they are in effect creating a Parenting Plan which can have the effect of varying their existing Court Order.

**What you as school staff need to be aware of is the difference between the two documents if parents present them to you.**

**Jane and John in this Order have clearly set out the major long term issues and that they are continuing to have equal shared parental responsibility for Anna.**

Sometimes you will see these Orders say, for example, the mother has sole parental responsibility for Anna's education but the remainder of the issues remain equal and shared. This will provide a school with certainty that *only* that parent is to be consulted in relation to Anna's education issues that are of a significant issue.

The day to day education issues may still remain with the father, John, having some involvement and a clause within the Order often defines what that other parent's involvement in the school may be.

Let us look at **paragraph 9** of the Parenting Order.

**It has been ordered that the parties are permitted to attend Anna's school for any activities in which family involvement is usually encouraged, including classroom activities, sports and extra-curricular activities, presentations and functions.**

That does sometimes present difficulties and the school may need to define more clearly its own interaction with the parties on their school property, such as ensuring that they attend separate parent teacher interviews or separate activities if there are ongoing difficulties.

This Court Order has a broad clause relating to engagement with the school and the school may like to negotiate what that may look like in practice if difficulties arise.

In *Hudson & State of South Australia (2008)*, the South Australian Equal Opportunity Tribunal was asked to hear a complaint which alleged that there was discrimination of the father of the child on the grounds of sex. The father claimed he was prevented from being fully involved in decisions involving his child at a particular school when the relevant Court Orders stated that the parties were to be involved jointly in educational issues. He alleged that the school treated the mother more favourably than him. The school had discussed issues involving the child with the mother prior to discussing them with him, from enrolling the child in courses and from allowing teachers in the school to swear affidavits regarding the responsibility for and the care of the child.

The mother had become a volunteer of the school, in excess of the stipulated times she was to attend the school under the Court Orders.

The Tribunal found that the father had NOT suffered discrimination on the grounds of sex at the hands of the school or the Principal. The Tribunal pointed out that the parents are obligated to make the child's school aware of the Court Orders.

The school must respect the Order and facilitate access to information about the child's education, so far as the Order requires, but it is not the role of the school to oversee compliance with any Court Order.

A similar case was brought by a Mr Viney in 2015 (*Viney v Department for Education and Child Development (2015) SA EOT5*). In that case, Mr Viney was permitted to spend time under Court Order with the children on a Wednesday for the purposes of parental reading or other involvement which was wholly at the discretion of the school.

He was further at liberty to attend at the school at all usual times which any parent ordinarily attends, such as assemblies, sport days, concerts, interviews and the like.

Mr Viney argued that he had been treated unfavourably by the school because of his marital or domestic partnership status. He also submitted that a parent who is listening to children read at the school is an unpaid worker and the school is their employer. The Tribunal found that the conduct of the principal was NOT discriminatory within the meaning of the Act when she attempted to restrict Mr Viney to the Wednesday reading time and not allowing him to extend that time to other days of reading support. However, the Tribunal did note that the Principal had mistakenly interpreted the effect of the Order. Whilst it did not amount to discrimination on this occasion, it is an important reminder that the School understand the extent of its role to respect a Court Order.

## **FAMILY VIOLENCE //**

**But what if there were elements in Jane and John Smith's case of family violence?**

**Jane alleges that John has been physically violent toward her in the presence of Anna and that she is frightened of him. She therefore wants the school's cooperation to ensure that they do not allow John to attend the school other than for the specific terms of the Court Order.**

The Parenting Plan and the Court Order that we are looking at have not in any way considered the issues of violence.

The Family Court now puts greater emphasis on knowing about family violence and ensuring that the parties have considered whether family violence has been taken

into account and whether the child's best interests have been taken into account in reaching agreement or the Court Orders made in relation to the child.

**Family violence** has a broad definition in the Act in section **4B**. It means:-

*“Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.”*

Examples of behaviour that may constitute family violence include (but are not limited to):

- an assault; or
- a sexual assault or other sexually abusive behaviour; or
- stalking; or
- repeated derogatory taunts; or
- intentionally damaging or destroying property; or
- intentionally causing death or injury to an animal; or
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

A child is considered **‘exposed’** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

Examples of this include:

- overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family;
- seeing or hearing an assault of a member of the child's family by another member of the child's family; or
- comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
- cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

**'Abuse'** in relation to a child is defined in the Act at section **4(1)** to mean

- an assault, including a sexual assault, of the child; or  
a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- serious neglect of the child.

The Federal Circuit Court and the Family Court have released a *Family Violence Best Practice Principles (December 2015)* which act as a checklist of matters that judges, court staff, legal professionals and litigants can have regard to at each stage of their matter in disputes relating to children.

<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/family-violence-best-practice-principles-december-2015>)

If parties attend family Mediation, the mediators are expected to ensure that the detail of family violence is clearly known. Many of these matters presenting for Mediation would be declared as inappropriate due to the allegations of family violence.

It is at times necessary for an Application to be made to the Federal Circuit Court of Australia (or Family Court) for the Court to determine what it is in the child's best interests where there are serious family violence issues.

The Court would have available to it the detailed affidavits of both parents as to the violence and they can also seek the input of other agencies or professionals. For example a subpoena of the police records, Families SA records, hospital and doctors records to assist the Court in understanding the severity of family violence.

It is essential that parties exposed to family violence ensure that it is regularly documented by themselves, their doctors and if necessary statements to the police to ensure that the extent of the violence can easily be corroborated by third parties.

There are now many support services available for victims of family violence and these are growing all the time with Commonwealth funding being focused on the

seriousness of family violence and the impact that it has not only on the victim but the children raised in a family where they are exposed to violence.

The Federal Circuit Court or Family Court will not deal with family violence where in fact it amounts to criminal conduct. The Court will await the outcome of criminal proceedings before determining issues of what time a perpetrator should spend with the child, if any.

## INTERVENTION ORDERS

There are also other avenues for parties to take by way of protective orders outside of Family Court Orders.

In South Australia, these are known as Intervention Orders. Within the Act they are known as 'family violence orders'.

The *Intervention Orders (Prevention of Abuse) Act 2009* allows the State Magistrates Court to make Orders protecting people from abuse.

An application for Intervention Order can be made

- by the police; or
- by the person seeking protection or their representative; or
- a child themselves if they are over the age of 14 who may hear, witness or be exposed to abuse. This can be done on behalf of the child by their parent, guardian or representative.

The police called out to a domestic violence incident are now able to issue an **Interim Intervention Order** which takes effect as soon as it is served on the defendant. This Order lasts until the matter goes to Court to be decided.

Interestingly, an Intervention Order can now be taken out to protect a person from technology facilitated stalking or abuse which includes social media.

To make an Intervention Order final it requires either the consent of the defendant or a trial in the Magistrates Court where evidence is presented requiring the victim to give evidence as a witness. Many parties to Intervention Orders do not proceed with the application after the Interim Intervention Order has been in place and instead decide to proceed to the Family Court for Orders which include injunctions of restraint.

If an Intervention Order is in place, it cannot be changed for a period of at least 12 months. When a person does not obey the conditions, it is a contravention. The maximum penalty for this is 2 years imprisonment. Contrary to common belief, if a protected person aids, abets, counsels or procures the defendant to engage in behaviour that contravenes the Intervention Order, the protected person is not committing an offence.

You can see an example of an Intervention Order at **Schedule 5**. This is a typical Intervention Order, but this does not include children. Notwithstanding that, if the Order did include the child, contact would be permitted in accordance with a Court Order or to attend dispute resolution.

If the Smith family attended the Family Court with an application and an Intervention Order in place, the Court must consider the Intervention Order. This will include an interim Order. These cannot be taken as proof of violence. The Court will still have to hear the evidence in relation to family violence.

The Court is required however – to the extent that it is possible – to make orders that are consistent with the best interests of the child and ensure it is consistent with any existing family violence order and does not expose a person to an unacceptable risk of family violence.

It is common to see in Court Orders, where there are confirmed violence issues that the perpetrator is sent to counselling for anger management and psychiatric or psychological support. The victim and the child/children are often referred for individual counselling to determine the impact of the violence and to ensure they have support services. A multi-disciplinary approach to eradication of family violence is occurring.

Finally, the Family Court may seek to use a Family Assessment Report process which involves the assistance of a psychologist or social worker to prepare a Report and present what is in the best interests of the child.

The school's role in relation to Intervention Orders is similar to supporting families with Court Orders. It would be important for an Intervention Order to be kept on the school file and it should be noted clearly if one of the parties is not permitted to approach the school in relation to any of the children. If breached, clearly this becomes a police matter and the police should be called immediately.

Other areas that are less likely to be seen at a school are Orders under the *Children's Protection Act 1993*. Some family relationships can be subject to Orders made under this Act. Usually, these mandate the parties to undertake a supervisory role in relation to the welfare of any children and this is undertaken by Families SA. School staff need to be alert to these circumstances to ensure the safety and wellbeing of any children subject to Orders.

If children are removed and placed in foster care, I am sure the school would be aware.

## **ORDERS & SUBPOENAS & RELEASE OF INFORMATION**

Unfortunately as much as schools may like to remain neutral and stay at arm's length of any family disputes, they are sometimes called upon to provide reports and/or present to Court under a subpoena.

It is very important that legal advice is sought in relation to privacy issues. No information should be supplied to a non-enrolling parent or person without the consent of the enrolling parent unless there is a specific Order of the Court to the contrary.

In summary, the role of school staff is to remain impartial at all times in relation to family disputes if at all possible. The schools primary responsibility is to ensure the wellbeing and safety of the children.

**11 November 2016**

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## **Schedules**

**Schedule 1 – Case Study of the Smith Family**

**Schedule 2 – Parenting Plan example for Smith Family**

**Schedule 3 – Parenting Order example for Smith Family**

**Schedule 4 – Annexure to Parenting Orders (Family Violence)**

**Schedule 5 – Intervention Order examples**