



Children's issues in the context of family breakdown

Justine Woods

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Children's cases

- How are children's cases decided?
- What are the laws and processes for the resolution of controversial or high conflict children's cases?
- Particular focus in this seminar on relocation, allegations of abuse, and medical procedures for children.

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Legislative framework

- Family Law Act (federal legislation).
- Family Law Rules, Family Court Rules and Federal Magistrates Court Rules.
- Domestic Violence and Family Protection Act (Queensland legislation) – protection order applications are heard in the Magistrates Court.

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Case law

- Family Court of Australia and Federal Magistrates Court of Australia - cumulatively, 'Family Law Courts'.
- Appeals are heard by the Full Court then, if leave (special permission) is granted to appeal again, by the High Court.
- Appeal decisions form precedents that bind trial judges.

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Family law case processes

- Compulsory pre-court mediation in many cases
- Docket system / case management
- Mediation within court process
- Family reports, psychiatric/psychological reports
- Magellan list
- Less adversarial trials

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Difficult decisions

- Controversial or high conflict children's cases may involve:
 - Domestic violence
 - Disputes as to discipline
 - Substance abuse
 - Mental illness
 - Disputes as to religion
 - Entrenched family conflict

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Let's get started

- Relocation
- Child abuse
- Medical procedures

RELOCATION

- There is no section of the Family Law Act dealing specifically with relocation. It is just a type of children's case.
- Approaches to relocation decisions differ depending on how long ago separation occurred. The more settled the care arrangements at the time, the more likely it is that the Court will permit a relocation.

Relocation cont.

- However, the Court must balance the competing claims of a parent's right to move forward with his or her life and the right of a child to have a meaningful relationship with both parents.
- This exercise is undertaken within the context of the best interests test, which the Court applies in all children's matters.

Test for children's matters

- Section 60CA FLA – In deciding whether to make a particular parenting order, the Court must regard the best interests of the child as the paramount (but not sole) consideration.
- The Court analyses section 60CC to determine what is in the child's best interests.

Section 60CC

- Primary considerations:
 - the benefit to the child of having a meaningful relationship with both parents;
 - the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Section 60CC cont.

- Additional considerations include:
 - the child's views and factors that might affect those views (eg. child's maturity)
 - the child's relationship with each parent and others including grandparents
 - the willingness and ability of each parent to facilitate and encourage a close and continuing relationship

Section 60CC cont.

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- Additional considerations include:
 - the practical difficulty and expense of a child spending time with and communicating with a parent
 - each parent's ability to provide for the child's needs
 - each parent's attitude to the child and to the responsibilities of parenthood
 - any family violence involving the child or a member of the child's family

Section 60CC cont.

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- The Court considers the extent to which each parent has or has not met their parental responsibilities.
- Has each parent taken the opportunity to participate in decision-making about major long-term issues and spend time and communicate with the child?
- Has each parent met their obligations to maintain the child?

Relocation cont.

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- It is the child's right to know both parents that informs the best interests consideration - not a parent's need to know and love the child.
- The Court looks for a child focus in parents, which requires parents to at least contemplate putting their own needs and wishes second to their children's.

Relocation cont.

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- A typical situation is where the primary carer has re-partnered and has children with a new partner, who then has to relocate for employment. This adds in the extra complication of step-siblings (but this is a common complication).
- Other common situations are where the primary carer is promoted or seeks employment elsewhere, or wants to re-access a family support network.

Relocation cont.

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- Until 2006, in many cases the non-primary carer had alternating weekends and half holidays, and the impact of relocation was considered to be largely offset by substantial holiday time.
- The Court now considers relocation cases in light of a legislative regime that promotes equal time or significant and substantial time orders.

Section 65DAA

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- If the parents are to have equal shared parental responsibility, the Court must:
 - consider whether the child spending equal time with each parent would be in the best interests of the child, *and* reasonably practicable; and
 - if so, consider making an order for the child to spend equal time with each parent.

Relocation cont.

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- The High Court has recently granted special permission to appeal to a mother who was not permitted to relocate from a mining community when her relationship broke down.
- The high cost of housing is a significant issue for non-business spouses in mining or rural locations. Lack of family support is another.

Relocation case

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- The Court has indicated that it will review the principles of relocation cases when considering this application.
- We will discuss this case in detail at our breakfast seminar on Tuesday 1 December.

ALLEGATIONS OF CHILD ABUSE

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- Allegations may include physical, sexual and/or psychological abuse of children.
- Allegations made by one parent against the other may be founded on clear disclosures, reasonably held suspicion, reflective of the parent's own issues or may be strategic.

Physical abuse

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- Physical abuse allegations typically relate to forms of discipline with one parent interviewed by the police / DOCS for administering what the other parent considers to be severe discipline.
- Other examples –failure to administer medication or obtain medical attention.

Sexual abuse

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- This allegation arises particularly with young children while children still need help with bathing and toileting.

Mud sticks

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- These allegations are not easy to defend – it is difficult to prove that it did not happen.
- It is difficult to prove that it did happen - investigations are limited by children's age and capacity to articulate concerns.
- A major concern of the wrongfully accused tends to be that 'mud sticks'.

Psychological abuse

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- The nature of psychological abuse is subject to wide and sometimes misleading interpretation.
- Many parents have very different approaches to parenting - one parent's abuse is another's focus, dedication or encouragement.

Psychological abuse cont.

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- Some typical examples – denigration of other parent/family/partner, lack of supervision, exposure to mental illness of parent or partner, performance pressure, rejection of diagnosis/child's limitations

Notice of Risk – abuse or violence

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- The Court introduced a Notice of Risk many years ago but there was no consistent pattern of use. Some litigants were criticised if they raised allegations long after the date of the alleged event(s) and had not filed a Notice.
- Section 67Z now requires a Notice to be filed if a party alleges abuse or risk of abuse.

Notification – s67Z

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- The Registry Manager of the Court must notify DOCS if a Notice of Risk is filed.
- If a Registrar, court counsellor, family consultant, family dispute resolution practitioner or independent children's lawyer has a reasonable suspicion of abuse or risk of abuse, he or she must report it to DOCS (if it has not already been notified).

'Abuse' under the *Family Law Act*

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- Abuse means an illegal assault (including sexual), or involving a child in a sexual activity in which the child is used as a sexual object (whether directly or indirectly), where there is unequal power in the relationship between the child and the alleged abuser.

'Family Violence' under the *FLA*

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- Family violence means conduct, actual or threatened, by a perpetrator towards a family member or a family member's property, which causes the family member or another family member to reasonably fear for or be apprehensive about his or her personal wellbeing or safety.
- Fear or apprehension is reasonable if a reasonable person in those circumstances would have fear or apprehension.

False allegations of abuse

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- Costs sanctions apply if the Court is satisfied that a party knowingly made a false allegation or statement in the proceedings.
- Under section 117AB, the Court must make a costs order against that party. It may not be a substantial one, depending on the significance the allegation had in the case and that party's financial circumstances.

MEDICAL PROCEDURES

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- Under the Family Law Rules, 'medical procedure' means a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease.
- Surgical gender reassignment, bone marrow donation, hormone treatment and termination of pregnancy require the Court's permission – parental consent is not enough.

Less controversial medical decisions

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- For more routine / less controversial procedures such as tonsillectomies, joint parental/guardian consent is enough. The Court does not need to be involved.
- Unilateral decisions are not permitted if the parents have equal shared parental responsibility. Only a parent who has sole parental responsibility may consent alone.

Common medical orders

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- Identity of doctor, dentist etc
- Treatment and therapies one parent may consent to, and those that are prohibited
- Parental exchange of information - prescriptions, administration instructions, notification of emergencies
- Parental access to children's medical information and records

Major medical procedures - legislation

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- Under the Family Law Act, medical procedure applications are just another type of children's case - the Court must be satisfied that the procedure is in the best interests of the child.
- Applications for medical procedures require specific evidence to be presented to the Court.

Medical procedures - Rules

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- Under the Family Law Rules, evidence must be given by an expert witness (usually medical or psychological) establishing:
 - exact nature and purpose of procedure, and the condition requiring the procedure
 - likely long-term physical, social and psychological effects
 - nature and degree of risk if the procedure is and is not carried out

Medical procedures – Rules cont.

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- Expert evidence cont.
 - if alternative and less invasive treatment is available, why the procedure is still recommended
 - that the procedure is necessary for the child's welfare
 - whether the parents or carer agree
 - whether the child agrees (if capable of making an informed decision)

Medical procedures – Rules cont.

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- Expert evidence cont.
 - if the child is incapable of making an informed decision - that the child:
 - (a) is currently incapable of making an informed decision; and
 - (b) is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future.

Marion's case

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- *Re Marion* - landmark medical procedure case decided by the High Court in 1992.
- The parents applied for sterilisation of their intellectually disabled teenage daughter to resolve hormone-related psychological and behavioural problems and to prevent menstruation.
- Marion did not understand the nature or implications of the operation, sexuality, pregnancy or motherhood. She was unlikely to in the future.

Re Marion - appeal decisions

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- Full Court - 2/1 decision that the parents, as joint guardians, could authorise the procedure without a court order – parental responsibility was seen as sufficiently wide.
- High Court - the parents could not lawfully authorise the procedure without a court order. It was the major and invasive nature of the procedure that warranted Court intervention.

Consent by minors

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- The 'mature minor' rule allows a child under 18 with sufficient capacity to exercise powers of consent. 'The tension between the law's recognition of the gradual transition from the disability of infancy to the full capacity of adulthood must be resolved by the rejection of the extreme view that parental authority persists unabated until a child attains full adulthood' (Deane J).

Let's talk

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- Questions?
- Comments?



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Thank You

Justine Woods
T 61 7 3231 2497
E justine.woods@cgw.com.au