



## FORUM REPORT - Grandparents and the Law

### BACKGROUND

COTA NSW is a politically unaligned consumer group representing the interests of all people over 50 in our state. We seek to promote, improve and protect the circumstances and wellbeing of older people in Australia. COTA NSW is one of the principle advocates on behalf of grandparent carers in NSW. In 2012 we held two forums in State Parliament House to highlight the issues faced by grandparent carers. 'Grandchildren with a Second Chance' provided grandchildren, grandparents and their advocates with an opportunity to publicise their situation.

'Grandparents and the Law' was held on 17 May 2012 and provided grandparents (and other kinship carers) with a chance to learn more about the laws that they may need to navigate in their capacity as carers. The forum brought together speakers with expertise in legal matters addressed by the Family Court of Australia and the Children's Court of NSW, as well as staff from the NSW Department of Family and Community Services.

Many of those who attended the forum have requested a transcript of the presentation delivered by Alice Finn (Solicitor, Family Litigation, Legal Aid NSW), which is available in full below.

## **Presentation by Ms Finn:**

### **Which Court?**

If there are no orders in place relating to your grandchildren, only Community Services can start proceedings in the Children's Court. However, grandparents can start family law proceedings in the Family Court or Federal Magistrates Court.

### **Difference between Children's Court and Family Court path**

These two paths are different in terms of the way the law works. If Community Services has removed a grandchild from their parents, the Children's Court looks at whether there is a realistic possibility of the children being restored to the care of their parents or either of them.

In the Children's Court, the first question is: Are the children in need of care and protection? If the Court determines that they are, then the case proceeds, and the Court then considers what arrangements should be made for the children in the future. In terms of who children live with, it is not a competition between parents and other family members in relation to who can provide the best care for the children. The question for the Court is whether the parents can provide "good enough" parenting – whether there is a realistic possibility of the children being restored to the care of a parent. If the Court determines that restoration to the parents should not occur, then the Court determines who would be the most suitable person to care for the children.

In contrast, courts making family law orders consider who is the best person to care for the children, depending on which parties in the proceedings are seeking to care for the children. If the Court determines that a grandparent can provide better care for the children than the parent, then even if a parent could provide "good enough" parenting, orders may be made for children to live with their grandparent/s.

If grandparents have concerns about the safety of their grandchild in the care of a parent and have reported that concern to Community Services but feel that the caseworker is not responding, then a grandparent can start family law proceedings. If Community Services encourages a grandparent to try to obtain family law orders, then it is a recommendation that should be pursued.

### **Children's Court**

Proceedings in the Children's Court are usually initiated by Community Services. The only way someone other than Community Services can start proceedings in the Children's Court is if there are already Children's Court orders in force in relation to a child, and someone wants to apply for those orders to be changed.

If children are removed from parents by Community Services, the first thing Community Services will want to explore is whether there is an appropriate family member to care for the children while Court proceedings are taking place (and possibly long term).

Grandparents of children who have been removed from their parents can request to meet with a Community Services caseworker to be assessed as a carer for the children or to discuss having contact with the children.

If a grandparent does not agree with decisions of Community Services about placement or contact arrangements, they can seek permission to become a party to the Children's Court proceedings. A grandparent should seek legal advice from Legal Aid before taking that step.

Children's Court proceedings move much more quickly than family law proceedings, and most cases in the Children's Court are finished in 6-9 months.

When a Children's Court order is in force, the general rule is that a Family Court order cannot be made. In order to change Children's Court orders, grandparents need to commence proceedings in the Children's Court.

When grandparents are seeking orders in the Children's Court or are considering a proposal by Community Services that will involve a grandparent caring for the children long term, it is important to consider what sort of responsibility Community Services will have to provide financial assistance to the grandparent under various proposals or orders. If a grandparent is going to be allocated parental responsibility for a child, it is important to consider whether there are any aspects of responsibility – such as responsibility for organising contact between children and their parents – that the grandparent might like to leave in the hands of Community Services. This will depend on a grandparent's relationship with the parents and the risk issues involved in the particular case.

### **Family Court**

Grandparents can start family law proceedings in the Family Court or Federal Magistrates Court to obtain parenting orders. Grandparents do not have to seek special permission to be a party in family law proceedings as they do in the Children's Court. The *Family Law Act 1975* (Cth) specifically states that grandparents can be parties to family law proceedings.

Grandparents may elect to be represented by a lawyer or represent themselves in family law proceedings. Grandparents who intend to represent themselves should seek legal advice from Legal Aid before filing their Court documents. Lots of people represent themselves in family law proceedings as a result of not being able to afford legal representation. If you represent yourself, the Court makes an effort to make sure you understand the legal process; however the Federal Magistrate or Judge cannot give you legal advice.

In family law proceedings, the Court is guided by specific considerations set out in the Family Law Act (section 60CC) when determining what arrangements are in a child's best interests. The primary considerations are a) the benefit to the child of having a meaningful relationship with both of the child's parents; and b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. The Family Law Act directs the Court to give greater weight to the second of these two considerations. The list of secondary considerations is long, and includes the nature of the relationship of the child with each of the child's parents; and other persons, "including any grandparent or other relative of the child".

In the family law jurisdiction, a grandparent can seek to have contact with grandchildren or have children live with them. If there are concerns about a parent's ability to care for children, the Court may find that the grandparent is the more capable carer. A great range of orders can be made in the Family Law Courts, including orders restraining certain actions by parents in order to deal with risk concerns, and communication orders such as orders for telephone calls with grandparents or orders for parents to hand gifts and cards received from grandparents to the grandchild without being opened.

Remember - If you have serious concerns about risk issues if your grandchildren remain with their parents or either of them and you say that you as the grandparent are the most stable person to look after your grandchildren, you should seriously consider seeking orders through the Family Law Courts.

The first requirement before initiating family law proceedings is to organise mediation with the parents of your grandchildren, unless there are urgent or serious concerns or where mediation is inappropriate for reasons such as family violence. The purpose of requiring mediation in most cases is to encourage to the family to seriously try to work out what is best for children before commencing legal proceedings. If parties reach an agreement at mediation, they can apply to the Court to formalise that agreement into Court orders without going to Court. An informal agreement can also be made, however Court orders are useful if a grandparent is uncertain about whether the parents may change their mind or is worried that the parents might not act according to the agreement.

If an agreement is reached for children to live with grandparents, the benefit in obtaining orders is that the orders document can then be provided to places involved with the children such as their school, or shown to the Police if a conflict arises about who is responsible for the children. Family law orders are enforceable.

If parents refuse to participate in mediation, then a grandparent will obtain a certificate indicating that there have been attempts to organise mediation but the other parties have refused to participate. A grandparent may then apply for a court order. Depending on the urgency of the issues in a parenting case, the time it will take before the Court makes an interim order will vary. In some urgent cases, orders may be made within days. In other matters, it can be months before interim orders are made. It is always a long time before final orders are made. It is rare for a family law matter requiring a determination by the Court to be finished in less than a year, and it often takes much longer than that.

If a family law order has already been made, a person can apply to change the orders, but must first demonstrate to the Court that there has been a significant change in circumstances since the original orders were made. Whether something represents a significant change will vary from case to case, and it is a good idea to seek some legal advice through Legal Aid before making an application to change any existing orders.

### **Information about Legal Aid services**

Anyone can attend a free 20-minute advice session at Legal Aid. At Legal Aid's head office in the city, the advice clinic is a walk in clinic (no bookings) run every week day from 9am to 4pm. In order to obtain a grant of Legal Aid for representation at a mediation or in Court proceedings, a grandparent must satisfy a means test, and in most cases, a merits test (whether there is a reasonable prospect of success in achieving the orders sought). If Legal Aid is already representing one party to the proceeding, other parties may still apply and

receive legal aid, but only one legal representative can be working for Legal Aid. Consequently, a private solicitor will represent grandparent rather than a Legal Aid lawyer if there is more than one person obtaining legal aid in the same case, and Legal Aid will pay that private solicitor.

If unsuccessful in obtaining Legal Aid, a grandparent can apply for Pro Bono services through the NSW Law Society by showing them the Legal Aid refusal letter. If unsuccessful in obtaining both Legal Aid and pro bono assistance, a grandparent can represent themselves in the court proceedings or pay a private solicitor to represent them. As noted above, many people in the Family Law Courts represent themselves, so the inability to secure a solicitor, should not discourage a grandparent from taking action if they believe it is in a child's best interests that the child either live with their grandparent or spend time with their grandparent.