

A child's contact with other persons

Introduction

- 5.1 The second term of reference to the inquiry examines the circumstances in which a court should order that children of separated parents have contact with other persons, including their grandparents.
- 5.2 In the first instance the answer to this question is simple and straightforward, that is, when it is in the best interests of the child. However, how this is put into practice is not as straightforward.
- 5.3 'Other persons' are usually taken to mean extended family members (including grandparents) and other persons concerned with the care, welfare or development of the child.
- 5.4 There are some particular considerations for indigenous people. The Aboriginal Legal Service of Western Australia (ALSWA) pointed out that:
... even more so than the Australian community generally, many Aboriginal people have a cultural responsibility to raise, or assist in raising, children who are not their own.¹
The National Network of Indigenous Women's Legal Services Inc also stressed that:
It is a traditional practice and role of Grandparents or Aunties and Uncles to also care for and raise children ...²
- 5.5 Indigenous families may have four generations living in a single residence or community as the norm. In contrast, often non-indigenous family

1 Aboriginal Legal Service of Western Australia Inc, sub 1141, p 6.

2 National Network of Indigenous Women's Legal Services Inc, sub 1144, p 5.

breakdown results in three generations living in the one household when a child moves home with their child, a situation that may be far more difficult than two generations living together.³

- 5.6 This means looking beyond the nuclear family of the parent-child relationship to a wider range of relationships in the extended family which may be significant and sometimes critical to children.
- 5.7 From the outset it is important to stress that the focus is on what is in the best interest of the child, not what parents want, or what grandparents or extended family members want.
- 5.8 It is clear that:
- Parents are not the only ones whose relationships with their children can suffer after a marriage breaks down ...
- ...
- Divorce leaves its mark on the entire kinship system as relatives, particularly grandparents, adjust to the changes incurred by parents leading separate lives ...⁴
- 5.9 Given the prominent role of grandparents, their strong voice in the community and their specific identification in the inquiry terms of reference, they have more focus in this chapter than other people significant to the child's welfare, however, the principles in this discussion apply to other extended family members.

Role of grandparents

- 5.10 With the greater incidence of divorce in Australia and with greater longevity of the population, potentially more grandparents are faced with possible contact difficulties.
- 5.11 Research in the United Kingdom and the United States has indicated that the issue of grandparents is significant because grandparents are an important resource in childcare and the continuing provision of education and support for children. In the United Kingdom grandparent pressure groups and lobby groups continue to argue for greater legal recognition for grandparents and promote the visibility of grandparents.⁵

3 KinKare, transcript Robina, 4/9/03, pp 26-27; National Network of Indigenous Women's Legal Services Inc, sub 1144, p 5.

4 Weston R, Families after marriage breakdown, *Family Matters*, no 32, Aug 1992, p 41.

5 Douglas G & Ferguson N, The role of grandparents in divorced families, *International Journal of Law, Policy and the Family*, 17, (2003), pp 42-43; Kaganas F & Piper C, Grandparents and the limits of the law, *International Journal of Law and the Family*, 4, (1990), pp 27-28; Kaganas F &

- 5.12 In evidence to this committee a number of grandparents and their representative groups raised issues concerning the care of their grandchildren both pre- and post- parental separation. KinKare pointed out that it is important to recognise that often grandparents, or an extended family member, will become the carer for the children especially in cases where the parents are involved with drug addiction or are suffering from a mental illness.⁶ Statistics on the number of grandparents in this situation are not available.⁷
- 5.13 This is usually an issue of residence, however, in keeping with the inquiry terms of reference, emphasis in this chapter is on contact issues.
- 5.14 The role grandparents play in their grandchild's life varies. Both evidence to the committee and research indicates that the role is usually positive but can be negative.
- 5.15 In their research on the role of grandparents in divorced families in the United Kingdom, Douglas and Ferguson reported that 'The value of a grandparents' relationship with their grandchildren, and in particular the value of contact, must turn to a significant extent on the *content* of that relationship ...'⁸ They go on to say that the things grandparents do with their grandchildren include activities, confiding, support, provision of childcare, and support of parents through the legal process of divorce.⁹
- 5.16 They state that the most significant finding is that '...the nature and style of grandparenting in a given family seemed to be established *before* the parents divorced ...'¹⁰
- 5.17 In evidence to this committee grandparents pointed to similar roles. For example:
In speaking about their 3.5 year old grandson two paternal grandparents said:

Piper C, Grandparents and contact: 'Rights v welfare' revisited, *International Journal of Law, Policy and the Family*, 15, (2001), pp 250-255.

6 KinKare, transcript Robina, 4/9/30, pp 22-25; see also Name withheld, sub 81, 2p.

7 KinKare, transcript Robina, 4/9/30, p 25; See also: *Grandparents raising grandchildren: A report of the project commissioned by the Hon Larry Anthony MP, Minister for Children & Youth Affairs and carried out by COTA National Seniors*, July 2003, 61p, viewed 23/11/03, [http://www.facs.gov.au/internet/facsinternet.nsf/VIA/grandparents/\\$File/GrandparentsRaisingGrandchildrenReport.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/grandparents/$File/GrandparentsRaisingGrandchildrenReport.pdf)

8 Douglas G & Ferguson N, p 50.

9 Douglas G & Ferguson N, pp 50-55.

10 Douglas G & Ferguson N, p 61.

... we can contribute to his upbringing, training and what the child learns through life. Having another family there to care for him and love him is very important to the child ...¹¹

Another paternal grandmother said:

Grandparents have a major role in a child's life, especially if they have been the child's carer while the parents work ...¹²

And another paternal grandmother commented that if contact doesn't occur it:

... deprives the children of an important part of their normal development and forming of relationships.¹³

Other paternal grandparents said:

... Whilst the children will not necessarily accept all that they learn from the Grandparent due to the age difference at that time, they will still retain the knowledge imparted and use it when required ...¹⁴

KinKare stated:

So many times the grandparents are the ones the children confide in. They are often the best source of knowledge about the emotional state of the children ...¹⁵

- 5.18 Despite difficulties with the child's father, one resident mother spoke of the great role model that the paternal grandfather provided for her son and of Pop being her son's greatest mate.

Some views of grandchildren

- 5.19 The views of grandchildren on grandparents were suggested through the two forums the committee held with children and young adults. The comments from the younger children ranged from: one child saying he and his mother lived with maternal grandparents; to others saying they did not see their grandparents because they lived too far away; and to another commenting that 'grandparents understand kids better', whereas parents are 'power mad'.
- 5.20 The young adults also described a range of relationships with grandparents: one said she and her siblings did not have a good

11 Witness 2&3, transcript, 5/9/03, p 11.

12 Witness 2, transcript Wollongong, 1/9/03, p 12.

13 Wendy, transcript, 29/8/03, p 40.

14 Name withheld, sub 1372, p 4.

15 KinKare, sub 949, p 3.

relationship with dad, and his parents supported him, so the relationship with the paternal grandparents was not good; another said that if you saw each parent enough, you are able to see grandparents when with them; another young adult commented that he saw maternal grandparents and did not want to, but wanted to see paternal grandparents and could not; another saw their maternal grandfather as a good male role model because their father wasn't around as much; and another described a good relationship with both sets of grandparents but they lived a distance away.

Legislative framework

- 5.21 It has always been possible under the *Family Law Act 1975* (FLA) for grandparents or 'any other person concerned with the care, welfare or development of the child' to make an application to the court for the residence of, or contact with, the child involved. However, the committee recognises from the inquiry evidence that this is not well known or publicised.
- 5.22 In 1995 the legal position of grandparents was strengthened by amendments to the FLA by specific reference to grandparents, along with the parents of the child and the child themselves, as a person who may apply for a parenting order (section 65C).
- 5.23 Grandparents and any other person concerned with the care, welfare or development of the child also are specifically listed in the Act as persons who may apply for: a child maintenance order (section 66F), a location order (section 67K), a recovery order (section 67T) and may institute proceedings (section 69C).
- 5.24 However, in determining contact and residence orders (section 68F(2) (b) (c)), there is no specific reference to grandparents, they are only included as one of 'other persons'.
- 5.25 Some, such as the Australian Institute of Family Studies (AIFS), have suggested that:
- By elevating the status of grandparents in this way, it could be argued that the legislature is acknowledging the (potentially) pivotal role that grandparents can play in children's lives.¹⁶
- 5.26 What the legislature seems to be saying is that a grandparent could be a significant figure in a child's life and recognises that he or she can make a particular contribution to the child's well-being.
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16 Australian Institute of Family Studies, sub 1055, p 26.

- 5.27 Similar legislation to that in Australia exists in the USA where all 50 states have legislation providing for grandparent visiting. In 1998 Germany introduced specific rights of grandparent's access subject to the welfare of the child. In contrast, in the United Kingdom the *Children Act 1989* removed the express legal recognition of grandparents and treated them in the same way as most other non-parents seeking legal recognition of their relationship with a child. They are required to seek the leave of the court before they can apply for orders thus enabling the court to prevent unnecessary litigation and disruption to the child.¹⁷ Since that change, grandparents groups have been lobbying to change the legislation to give greater recognition to grandparents.¹⁸
- 5.28 It is also important to recognise that in the majority of cases the relationship between grandparents, parents and grandchildren are worked out informally without resorting to the law. The FLA, however, does provide the framework within which these decisions are made.

Contact between children and grandparents and extended family

- 5.29 The AIFS pointed out that there is limited Australian research on grandparent-grandchild contact post divorce.¹⁹
- 5.30 The main work that has been done was undertaken by Weston in 1992.²⁰ Despite the time gap, Weston's main findings and conclusions generally appear to be consistent with evidence taken by the committee during this inquiry. A recent small survey by Douglas and Ferguson in the United Kingdom revealed similar results.²¹
- 5.31 Weston's most relevant findings were that :
- more than 80% of both resident and non-resident parents (measured separately) reported that their children had contact with at least one set of grandparents at least weekly or monthly;
 - the amount of contact with maternal or paternal grandparents is shaped by the living arrangements of the children, that is, children living with their mother were much more likely to have frequent (that is, weekly or

17 Douglas G & Ferguson N, pp 42-43.

18 See Douglas G & Ferguson N, p 43; Kaganas F & Piper C, 2001, pp 250-275.

19 Australian Institute of Family Studies, sub 1055, p 26.

20 Weston R, pp 41-45.

21 Douglas G & Ferguson N, pp 41-67.

- monthly) contact with their maternal grandparents than with their paternal grandparents and vice versa;
- paternal grandparent contact mirrored paternal contact;
 - non-resident parents play an important role in the maintenance of contact between their parents and their own children;
 - in the view of both resident and non-resident parents surveyed the damaging effects of divorce were more likely to be perceived for relationships with grandparents on the non-resident parent's side; and
 - living arrangements strongly influence which set of extended family is important, for example, where children live with their mothers the pre-existing bias towards maternal relatives continues and may be strengthened and vice versa.²²
- 5.32 A considerable number of grandparents who provided evidence said that the resident parent had denied them contact with their grandchild or that contact was precarious. Perhaps the most disturbing cases were those where grandparents said they had no explanation for why this happened or did not know where their grandchild was located.²³
- 5.33 Reasons given by resident parents for denying access to grandparents related to claims of emotional intimidation of a grandchild as a way of getting back at the resident parent.
- 5.34 What Weston's findings suggest, as does evidence to the committee, is that as paternal grandparents' contact with their grandchild tends to lessen after their own child's divorce, contact issues become particularly important to this group of grandparents and therefore to the children.
- 5.35 A number of grandparents reported that they see their grandchild when the child is visiting the non-resident parent and that this is an easier solution to contact.²⁴ Unfortunately, one set of grandparents said that they have to do this without the resident parent's knowledge for fear of getting that parent off-side with the non-resident parent.²⁵ Others have said that

22 Weston R, pp 43-45.

23 Name withheld, sub 1102, p 1; Name withheld, sub 1290, p 1; Name withheld, sub 1291, p 2; Name withheld, sub 1372, p 1; Butler F&Z, sub 1399, p 1; Olsson G, sub 999, p 6; Name withheld, sub 147, p 1; Name withheld, sub 148, p 2; Name withheld, sub 1479, p 2; Name withheld, sub 696, p 1; Armstrong J, sub 24, p 1; Name withheld, sub 688, p 3; Name withheld, sub 168, p 1; Witness 2&3, transcript, 5/9/03, pp 10, 11; Wally, transcript, 26/10/03/, pp 60-61; Rosemary, transcript, 26/10/03, p 68; Maria, transcript, 29/8/03, p 41; Witness 2, transcript Wollongong, 1/9/03, p 11.

24 Aboriginal Legal Service of Western Australia, sub 1141, p 6; Gray L, sub 1485, p 3; Hannan H, sub 1491, p 3; Name withheld, sub 881, p 1; Jan, transcript, 25/9/03, p 46.

25 Witness 2&3, transcript, 5/9/03, pp 10, 11.

the non-resident parent has so little time with the child that they do not want to reduce that, so they minimise their time with the grandchild or miss out.²⁶

5.36 In discussing their indigenous clients the ALSWA said:

In many cases, and ideally, children get to spend time with grandparents and other significant people within the time they spend in the care of one or other parent, making specific orders unnecessary. However, in many cases this does not happen, and so ALSWA regularly represents grandparents and other family members in obtaining orders in respect of children.²⁷

Awareness of legal status

5.37 Given the status of grandparents and other persons under the FLA previously outlined, the committee is concerned that a number of grandparents, other persons and related lobby groups appear unaware of grandparents' current status at law, or at least the detail of that status.²⁸ For example, one set of paternal grandparents said:

... We have not been to the court, but we have asked the solicitors that my son has been using, and they have never given us any indication that there was a group that could help grandparents or of whether or not we had any rights whatsoever ...²⁹

5.38 This is perhaps not surprising given the committee's findings on the limited knowledge in the community of parents' legal status. The National Council of Single Mothers and their Children Inc suggested a public education campaign to redress this situation with grandparents.³⁰

26 Name withheld, sub 697, p 2; Staggard D, sub 845, p 1; Name withheld, sub 1427, p 1.

27 Aboriginal Legal Service of Western Australia, sub 1141, p 6.

28 Name withheld, sub 184, p 3; KinKare, sub 949, pp 2, 3, 5 and transcript Robina, 4/9/03, p 25; National Council of Single Mothers and their Children Inc, sub 1311, p 10; Witness 2&3, transcript, 5/9/03, pp 12-13; Maree, transcript, 25/9/03, p 45; Witness 2, transcript Wollongong, 1/9/03, pp 13-14; Witness 2, transcript Blacktown, 1/9/03, p 34.

29 Witness 2&3, transcript, 5/9/03, p 13.

30 National Council of Single Mothers and their Children Inc, sub 1311, p 10.

Accessing legal avenues

- 5.39 Factors reported in evidence to the committee that hinder grandparents and others in pursuing legal avenues for contact were an unwillingness to make matters worse, the cost of court cases and the system. Research supports similar findings.³¹
- 5.40 In evidence some parents of the non-resident parent said they were unwilling to antagonise the resident parent in case the matter became worse for the non-resident parent. Other grandparents did not act because of a belief that they should not interfere in their own children's lives. In cases where the parent was subject to abuse or domestic violence, no action was taken by grandparents out of fear of exacerbating that situation. Some grandparents reported having AVOs (or worse, allegations of sexual abuse) taken out against them by the resident parent which was a significant deterrent to further action. And in other cases the stereotypes of problematic relationships between mothers-in-law and daughters-in-law came into play.³²
- 5.41 High legal costs, as previously discussed in relation to court cases, are also a significant deterrent with grandparents. Grandparents often have retired and may be on fixed incomes and so do not have the funds to meet court costs. A number of grandparents reported they had used substantial portions of their savings to assist their children during the divorce and/or in pursuing their contact claims, and just did not have money left to consider pursuing their own case.³³
- 5.42 KinKare advised that there is no legal aid for grandparents as the eligibility criteria do not allow for older people who are asset rich to access such services. As well, they said it is often a choice between legal aid paying for the child's solicitor or the grandparents' solicitor and the grandparents often give way.³⁴

31 For example see Douglas G & Ferguson N, p 48.

32 Witness 2&3, transcript, 5/9/03, p 14; KinKare, transcript Robina, 4/9/03, p 25; Grandparents in Distress, sub 1658, p 1 and transcript Coffs Harbour, 27/10/03, p 63; Wally, transcript, 26/10/03, pp 60-61; Rosemary, transcript, 26/10/03, p 68; Chantel, transcript, 24/9/03, p 85; Pauline, transcript, 24/9/03, p 89.

33 Name withheld, sub 1089, p2; Name withheld, sub 1199, p 1; Name withheld, sub 1372, p 2; Witness 2&3, transcript, 5/9/03, p 13; Wally, transcript, 26/10/03, p 60; Rhonda, transcript Blacktown, 1/9/03, p 55.

34 KinKare, sub 949, p 4.

- 5.43 KinKare also suggested that ‘More and more the Family Court is being asked to rule on cases involving grandparents, and is ill equipped to do so.’³⁵
- 5.44 Another consideration is what messages lawyers are giving to grandparents who may seek their advice on whether to pursue contact. In evidence one paternal grandmother reported:
- When my late husband and I consulted with a lawyer with the intention of applying for access, he advised us not to proceed. This was because our son had encountered so many difficulties within the system and it would cause us too much distress and cost a lot of money.³⁶
- 5.45 KinKare also noted that older people may be physically less able to pursue a case.³⁷

Court orders

- 5.46 The ALSWA reported that despite the 1995 reforms to the FLA, such orders are generally not made by the court unless they are specifically sought by the grandparent/other family member.³⁸
- 5.47 As judges act on the application of a party, the court cannot make orders that bind people who are not party to the proceedings. Therefore, if a grandparent wants to pursue contact in court proceedings, they have to make an application themselves.³⁹
- 5.48 The ALSWA also submitted that if evidence about the pros and cons of making such an order is not presented to the court and because it is not a specified factor in section 68F(2) the court is not proactive in seeking it.⁴⁰ This is another consequence of the adversarial model.
- 5.49 In making a decision on contact the judge will consider the child’s best interest under subsection 68F(2)(b) and (c). Factors that will be applicable in relation to grandparents include the nature of the relationship with the child and likely effect of any change in the child’s circumstances,

35 KinKare, sub 949, p 2.

36 Wendy, transcript, 29/8/03, p 41.

37 KinKare, transcript Robina, 4/9/03, p 27.

38 Aboriginal Legal Service Western Australia Inc, sub 1141, p 7.

39 For example see Allen D&J, sub 1680, p 1.

40 Aboriginal Legal Service Western Australia Inc, sub 1141, p 7.

including the likely effect on the child of any separation from the grandparent with whom he or she has been living.

- 5.50 The Family Law Section of the Law Council of Australia, pointed to the unreported case of *Michalos and Theakos*⁴¹ where, despite the wishes of the father, the judge awarded in the grandparents' favour to see their grandchild.⁴²

Enhanced legal status for grandparents?

- 5.51 Opinion varies on the adequacy of the current legislation for facilitating contact between grandparents and their grandchildren. Diverse groups such as the Family Law Section of the Law Council of Australia and the National Council of Single Mothers and their Children Inc, see no need for legislative change.⁴³ Others who fear intimidation and harassment from former partners and their family urge no change.
- 5.52 On the other hand, grandparents groups such as KinKare seek specific mention of grandparents in factors for determining contact (section 68F) rather than being included with 'significant others' and grandparents having more legal standing than any non-related party.⁴⁴ The ALSWA also supports such a change but seeks to include '... a person who is not a parent, including but not limited to a grandparent or other member of the child's extended family'.⁴⁵
- 5.53 The impact of subsection 68F(2) is that the family dynamics need to be supportive of extended family involvement and intergenerational conflict can interfere with this.
- 5.54 Additional legal recognition for grandparents would assist in changing social attitudes so that further involvement is more readily acceptable. If they were added specifically to subsection 68F(2) and there was an explicit onus on the courts to consider grandparents, they may be able to avoid the costs and difficulties of undertaking court action.
- 5.55 Against this is the argument put by Kaganas and Piper's research which suggests that several people competing for a child's time and attention

41 *Michalos and Theakos* Appeal No.EA113 of 2002, see Family Law Section of the Law Council of Australia, sub 1021, p 18.

42 Family Law Section of the Law Council of Australia, sub 1021, p 18.

43 National Council of Single Mothers and their Children Inc, sub 1311, p 10; Family Law Section of the Law Council of Australia, sub 1021, p 17.

44 KinKare, sub 949, p 4 and transcript Robina, 4/9/03, p 25.

45 Aboriginal Legal Service of Western Australia, sub 1141, p 7.

could become unmanageable even if legislation is restricted to grandparents. The problem could be accentuated by parents and grandparents divorcing and perhaps remarrying. This would bring in several sets of grandparents.⁴⁶ It could also mean more lawyers.

Grandparent's and extended family members involvement in mediation and family counselling

5.56 The Government response to the Pathways Report placed considerable emphasis on early intervention in possible areas of conflict with families. This issue has been discussed in some detail in Chapter 3. KinKare requested that:

... the definition of "family" be extended to include grandparents as too often they are left to pick up the pieces for the sake of the children.

We believe that the inclusion of grandparents in the resolution of family conflict would have a positive effect in maintaining civility and improve the plight of the children.⁴⁷

5.57 The success of a wider family conferencing model already has been demonstrated through the Aboriginal and Torres Strait Islander Family Consultant program run by the Family Court of Australia in the Northern Territory and North Queensland. More detail on this program has also been presented in Chapter 3. Incorporating wider family members into all dispute resolution processes may deliver more family oriented solutions to post separating parenting. The Aboriginal and Torres Strait Islander experience in the Family Court of Australia has shown the positive effect this can have, with respect to maintaining relationships between children and grandparents and others without the need for court proceedings.

Conclusion

5.58 The committee accepts that grandparents can and do play a significant, and often critical, role in many grandchildren's lives.

5.59 This role is already explicitly set out in several sections of the FLA and is implied in subsection 68F(2) and, when relevant, considered by judges in

46 Kaganas F & Piper C, 1990, p 33.

47 KinKare, sub 949, p 4.

making decisions on the best interest of the child. Including grandparents explicitly in subsection 68F(2)(b)(c) will reinforce the message that specific consideration should be given to grandparents.

- 5.60 Given the lack of awareness of grandparents' current status in the FLA, the inclusion of this information as part of a wider long term public education campaign on the FLA should assist.
- 5.61 The earlier recommendations that the committee has made about shared parenting should have a flow-on effect for grandparents, because children will spend more time with both parents and extended family.
- 5.62 The part grandparents and extended family members should play in the children's lives should be specifically addressed in parenting plans.
- 5.63 Similarly, the recommendations made about including grandparents and extended family in mediation and family conferencing should also have positive benefits.
- 5.64 All of these conclusions apply to the indigenous community, but even more so, given Aboriginal people have a cultural responsibility to raise, or assist in raising, children who are not their own.

Recommendation 23

- 5.65 **The committee recommends that the Commonwealth Government amend subsections 68F(2)(b) and (c) of the *Family Law Act 1975* to explicitly refer to grandparents.**

Recommendation 24

- 5.66 **The committee recommends that the Commonwealth Government:**
- **include information on grandparents' status in a wider public education campaign on the *Family Law Act 1975*;**
 - **ensure contact with grandparents and extended family members are considered by parents when developing their parenting plan, and if in the best interest of the child, make specific plans for contact with those individuals in the parenting plan; and**
 - **develop a range of strategies to ensure that grandparents, and extended family members, are included in mediation and**

family counselling activities when it is in the best interest of the child, in particular the development of a wider family conferencing model.