

School Law Series

Family Law: Effectively Navigating the Period Between Separation and the Establishment of Parenting Arrangements or Court Orders

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Introduction

Familial separation is now a part of life in Australia and a significant number of children are now living in separated or blended families. As a result, an increasing number of educators are being required to navigate the complex terrain of family law. This paper will provide an overview of a number of specific areas with which educators are required to grapple, providing practical advice for schools to follow.

Family Law – The Basics

Broadly speaking, when called on to make decisions about children, the Family Court must make orders in respect of two different matters.

The first of these is known as 'Parental Responsibility'. This has nothing to do with the time a child is to spend with the respective parents. Rather, it deals with the right of parents or caregivers to make decisions affecting the long-term care, welfare or development of the child. This includes such matters as where the child is to live, where they attend school, their religion, name and medical needs. Absent an order to the contrary, parents are presumed to have equal shared parental responsibility. This means that those kinds of decisions must be made jointly.

The alternative is known as sole parental responsibility. This requires an order of the Court, granting a party the right to make decisions about a child's long-term needs independent of the other parent or, in cases such as where the child becomes a ward of the Department of Communities, both parents. An order of this nature is usually restricted to matters where it is impractical for the parties to communicate about these issues (because, for instance, the relationship is too acrimonious or one parent lives overseas), where there is a history of family violence or where someone presents a risk to the welfare of the child.

The second issue that the Court is required to determine is the child's living arrangements. In making this determination, the Court is required to consider what is in the child's best interest in all the circumstances. The *Family Law Act 1975* (Cth) ("the Act") provides that the Court must have regard to the following matters when determining what arrangements/orders are in the best interests of a child:

1. the benefit to the child of having a meaningful relationship with both of the child's parents;
2. the need to protect the child from physical or psychological harm or from being subjected to, or exposed to, abuse, neglect or family violence;
3. the views expressed by the child;
4. the nature of the child's relationship with each of the child's parents and any other significant person (such as the child's grandparents);
5. the extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child, spend time with the child and to communicate with the child;
6. the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;
7. the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either of his or her parents or any other child, or other person, with whom he or she has been living;
8. the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
9. the capacity of each of the child's parents and any other person to provide for the needs of the child, including the child's emotional and intellectual needs;
10. 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;

11. if the child is an Aboriginal child or a Torres Strait Islander child, the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture;
12. the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
13. any family violence involving the child or a member of the child's family;
14. if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:
 - (a) the nature of the order;
 - (b) the circumstances in which the order was made;
 - (c) any evidence admitted in proceedings for the order;
 - (d) any findings made by the court in, or in proceedings for, the order; or
 - (e) any other relevant matter;
15. whether it would be preferable to make an order that would be least likely to lead to the institution of further proceedings in relation to the child; and
16. any other fact or circumstance that the Court thinks is relevant.

Having considered all the above, the Court will make a determination regarding with whom a child is to live and how much time they should spend with the other parent.

It should be noted that, while this paper speaks of contact arrangements between parents and children, it does so for ease of expression. Keep in mind that orders can be made for a third party, such as a grandparent, to be the primary caregiver for the child and for the parents to have only limited or supervised contact with the child.

Stages in the Separation Process

Pre Orders

The period post-separation, but prior to the implementation of any orders or arrangements, is often one of the most difficult. Essentially, this time can become a 'free for all', with parents warring over contact with their children.

In the absence of orders, there are no formal obligations on schools to make any changes to normal practice. Each parent has the right to deliver and collect the children from school and each parent is equally entitled to information about the children. As already noted, absent an order to the contrary, both parents have equal shared parental responsibility, meaning that both parents have the right to be involved in decisions about the child's education.

However, there are certain practical matters that can be addressed, namely:

1. Avoid, at the outset, being drawn into the conflict. It is not unusual for a school to have had more interaction with one parent prior to separation. Those parents will occasionally, consciously or unconsciously, seek to ensure that teachers are aligned to his or her view of the situation. A parent may offer confidences or overshare. They may also fail to include the other parent in school related events or activities. It is best for the school to try and ensure that both parents remain informed of what is going on at school and avoid organising meetings with one parent without informing the other or, ideally, inviting both to attend.
2. As a corollary of this, ensure there are up-to-date records regarding the contact details for both parents.
3. Enquire as to who is meant to be collecting the children from school and whether there is any agreement in place.
4. If one parent is seeking to enrol a child in school, make sure both parents provide their consent. If this does not occur, ensure that both parents are, at least, notified of the enrolment.

Parenting Plan

Some parents may elect to put in place a parenting plan, as opposed to Court Orders. A parenting plan reflects the negotiated outcome between parents about what is to occur going forward.

Parenting plans, just like orders, can take many forms. They can be designed to cover a short period of time, or continue indefinitely. This will usually be evident on the face of the document. For example, the parenting plan will specify that it is only to apply from one date to another, or for a period of six months, after which time the parties will attend mediation and review the terms and operation of the existing parenting plan.

The most significant difference between Orders and a parenting plan is that a parenting plan is **not** legally enforceable. It is more appropriately described as a 'guide' to how the process of parenting post-separation is to be conducted.

There is, therefore, no obligation upon a school to comply with terms of the plan. That is not to say that the terms of a parenting plan should be disregarded lightly. To do so is to invite conflict into an already difficult situation. Rather, schools should, to the best of their ability, comply with the terms of a parenting plan. The obvious exception to this, however, is if there are concerns about one parent presenting a risk to the child.

There is one small caveat on the non-enforceability of a parenting plan, which is the 'registered parenting plan.' Prior to the 2003 amendments to the Act, parties were able to register a parenting plan with the Court. These plans are currently enforceable only to the extent that they relate to the parents of the children. For instance, a parenting plan (notwithstanding that the same had been registered prior to 2003) is not binding if it provides for a child to live with his or her grandparents.

The Act no longer provides for the registration of parenting plans, so most children who were the subject of parenting plans should be very shortly (if they have not already) aged out of the agreement.

Interim Orders vs Final Orders.

In the event the matter goes to Court, orders will at some point be made. These can either be interim orders, meaning they are intended to function only for a period, or final orders, which reflect the ultimate care arrangements for a child. It is usually possible to tell an order is an interim order because it will be phrased 'until further order.' By contrast, final orders will not say 'until further order.' Final orders will also usually include a paragraph (normally the first paragraph) dismissing all previous orders.

Almost invariably, orders (whether interim or final) will contain provisions about the children's living arrangements and handovers. There may also be a number of orders which will impact upon the school. Some of the commonly used orders are as follows:

1. Both parties ensure that the children attend school unless excused by a valid medical certificate, whilst the children are in their respective care.
2. Both parties be restrained by injunction and an injunction be granted restraining the parties from removing the child from the school grounds during school time without reasonable excuse, such as medical or other emergency.

3. Both parties be restrained by an injunction and an injunction be granted restraining the parties from changing the child's enrolment at the current school unless with prior written consent of the other party or an order of the Court.
4. Both parties be at liberty to liaise with the school in relation to the children.
5. Both parties are to ensure that the other parent is listed as a next of kin for the child on whatsoever documents require this information.
6. Both parties do all acts and things and sign all documents necessary to instruct and authorise the school at which the child attends to provide the parties with copies of school reports and access to any portfolio work of the child, reports on behavioural issues, school circulars or notices concerning functions, parent/teacher nights and other school activities to which parents are invited.
7. Both parties be at liberty to attend school events attended by the child.

Most of these orders, as is appropriate, place the onus of compliance on the parents. It is not the obligation of the school to ensure that orders are complied with. However, there are some steps that the school could take to eliminate conflict.

For instance, as a matter of course when an order is received, a school should:

1. Check whether the parties have equal shared parental responsibility or sole parental responsibility. If one party has sole parental responsibility, make sure it is clear on the school's records.
2. Check where handover is to occur – is it at the commencement of the school day or the conclusion of a school day? Are certain people required to conduct handovers or prohibited from conducting handovers?
3. Establish a record regarding who is to collect a child on what day. This is important not just for collection from school, but in the event the child gets sick during the day and needs to be collected. The school needs to know which parent to contact first.
4. Check to see if information is to be provided to both parents and amend the school's records to reflect this.
5. Check if both parties are to be recorded as next of kin or emergency contacts and, if necessary, amend the school's records to reflect this.

6. Make sure that the school has both parents' contact information.

Challenges for Schools

The preceding section explored the ways in which arrangements regarding children's care can be organised post-separation and the steps schools and educators can take to assist in that process.

However, there are a number of specific matters which can present difficulties, even if the above steps are religiously followed. These issues tend to arise in the period post-separation but before resolution, or immediately post the making of final orders, when tensions remain high.

This section considers some of those complexities.

The Non-Compliant Parent

Notwithstanding the existence of orders, there are parents who will frequently and flagrantly refuse to comply. This can be the case even when orders have been entered into by consent.

Some parents will attempt to circumvent the Court Orders by attending at the school during the day to spend additional time with the child, for instance by having lunch with them. As a general proposition, schools should not encourage or facilitate this behaviour. Firstly, school is not the appropriate place for a child to be spending time with a parent – rather, it is a time for the child to be educated and socialise with his or her peers. Secondly, when Court Orders are in place, it should always be borne in mind that a judicial officer has adjudicated upon the issue of how much time a parent should be spending with a child. Schools should not facilitate parties spending more time than has already been deemed to be in the child's best interests by the Court.

Other parents will keep a child home from school on handover day or will remove them from school early to prevent the other parent collecting the child. Schools should monitor a child's absences carefully and if they observe a pattern to be forming, inform the parents of the consequences that can follow from a child's non-attendance at school.

These breaches are not always in relation to orders relating to contact between the parent and the child, but rather of the ancillary orders which attempt to assist the parties to manage their co-parenting relationship. One commonly reoccurring issue is that the child will be sent

to school on handover day without items they require, such as sports uniforms, pencil cases, school hats or lunchboxes.

From the perspective of educators, there is nothing that can be done to address these kinds of issues. All that can be done is to monitor and record the situation, and be sensitive to the distress the situation can cause the child.

Authenticity of Orders

In the past, cases have arisen where schools have been provided with Court Orders which have been amended by one party or one party has provided the school with a 'minute', rather than orders. A minute reflects the orders that a parent is seeking be made. It is not an official direction of the Court.

The best indicator that orders have been made by the Court is that they will have on each page a red Court seal. If an educator is provided with an order that does not have a visible seal, ask the parents to provide a 'sealed' copy.

A Child's Name

Circumstances will occasionally arise where one parent begins to refer to the child by a different name. This can be because that party has reverted to using their maiden name or remarried.

A child's name, however, cannot be legally amended by one parent. Either, both parents need to agree upon the child's change of name, or the Court will need to adjudicate upon the issue.

Schools should ensure that the name under which a student is enrolled is the same as that on their birth certificate, or in accordance with an order of the Court. If a birth certificate cannot be produced, some other form of official identification, such as a passport, should be requested.

Violence Restraining Orders

Violence Restraining Orders are known by a myriad of names, depending upon the state. They are sometimes called Apprehended Violence Orders ("AVOs"), Family Violence Restraining Orders or Orders of Protection. Irrespective of the name, the function of all of these is to prevent the person bound by the order from coming in contact with the protected

person. It is also common for the orders to contain specific prohibitions, such as the person bound is not to:

1. be in possession of a firearm or firearm license;
2. cause or attempt to damage property of the protected person;
3. communicate or attempt to communicate with the protected person;
4. enter or remain on property where the protected person lives or works;
5. approach within a certain distance of the protected person;
6. distribute or publish, or threaten to distribute or publish, any intimate personal image of the protected person;
7. monitor the movement or communication of the protected person; or
8. cause or allow anyone else to engage in any of the above conduct.

The protected person does not have to be the other parent; it can extend to the child. In Western Australia, the Magistrates Court, the Children's Court and the Family Court all have jurisdiction to grant restraining orders to protect a child.

However, section 68Q of the Act provides as follows:

- (1) To the extent to which:
 - (a) an order or injunction mentioned in paragraph 68P(1)(a) is made or granted that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; and
 - (b) the order or injunction is inconsistent with an existing family violence order;

the family violence order is invalid.

This means that, if a Family Court order exists, it will override a Violence Restraining Order to the extent that the two are inconsistent. For instance, if the child is to spend time with a parent, that order will override the Violence Restraining Order, even if the child is among the class of protected persons. Likewise, if a Family Court Order provides that both parties are

to attend school events, such as assemblies, the person the subject of the Violence Restraining Order will not be in breach for attending that event.

If a Family Court order is to override a Violence Restraining Order, there will usually be the following paragraph contained within the orders:

This is an order to which section 68Q of the Family Law Act 1975 applies and to the extent that this order is inconsistent with the Family Violence Order made in the case between the parties on [Date] in the Magistrates Court at Perth being complaint number [number], the aforesaid parenting order shall prevail and the Family Violence Order is invalid to the extent of the inconsistency.

This is an area in which schools need to exercise caution, as it is not unheard of for one party to 'set up' the other with respect to breaches of the Violence Restraining Order on school grounds. For instance, there have been cases in which the orders provide that the bound person is to collect the child from school on a particular day, only for the other parent to arrive at collection time for an unrelated event, such as a teacher meeting or to deliver a forgotten item. Schools should take care to request copies of current Violence Restraining Orders and should endeavour to ensure that the parents do not have a reason to be on campus at the same time, unless otherwise provided by a Court order. If a parent attends the school campus at a time he or she is not entitled to, or expected to, be there, they should be asked to leave.

A parenting plan, provided the same is in writing and signed by both parties, can also override a violence restraining order. The parenting plan will also usually indicate that it is designed to override the Violence Restraining Order.

For school administrators, best policy to consider when it comes to Violence Restraining Orders would be as follows:

1. Ask if there is a Violence Restraining Order in place, particularly in circumstances where the school is aware of a relationship breakdown. This step is not usually necessary, as it is rare for parties to be reticent about informing people of the existence of Violence Restraining Orders, but should nonetheless be done.
2. If question one is answered in the affirmative, ask for a copy of same.

3. Once a copy is obtained, check who is listed as the protected person – is it the child or an adult. If it is the child, ensure that the child's teachers are aware of the terms.
4. Check if the Violence Restraining Order is interim or final.
 - (a) If it is an interim Violence Restraining Order, ask that you be notified of any further or final orders made. An interim order, just like in Family Court proceedings, is only designed to be in place for a short period of time. It may be that the Violence Restraining Order will be dismissed, dealt with by way of mutual conduct agreements (where both parties essentially agree to leave each other alone), or made final. Either way, the school will need to be informed of the eventual outcome.
 - (b) If the Violence Restraining Order is final, note the date on which the order finishes. Violence Restraining Orders are rarely made indefinitely. Usually, the order will remain in place for a period of two years.
5. In the event a bound person attends the school, make sure the protected person is notified and the incident is properly documented.

School Activities

School activities, such as assemblies and sports days can provide an excellent battleground for parents at war. However, unless there is an order specifically prohibiting a parent from attending such events, both parents are entitled to do so.

Of course, if parents are disruptive or difficult, it remains the prerogative of the school to prevent them from attending such events or removing them from the same.

Section 121

Section 121 of the Act prohibits the publication or dissemination of information or documents arising as a result of Family Court proceedings.

The section reads as follows:

A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

- (a) a party to the proceedings;
- (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
- (c) a witness in the proceedings;

commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

It is not unheard of, particularly in contentious matters, for parties to provide schools with copies of affidavit material or other documents filed in the course of proceedings. In particular, parties tend to share reports prepared by Single Experts, being individuals charged with assisting the Court in determining what is in the child's best interest. If a party (or a parties' lawyer) provides to the school any such documents, the correct response is to refuse to accept them or, if provided other than in person, do not read them and return them.

Schools should also be cautious about Facebook pages or other social media pages controlled by the school. There are examples of parties discussing details of ongoing litigation with other parents on such forums. Not only can this be a breach of section 121, it aggravates the situation by alienating the other parent from the school. The risk for schools is that, if they control the social media platforms, they are technically the publishers of the material that appears on those sites. Consequently, such social media sites should be carefully moderated.

Having said the above, it is generally considered that there is a grey area in respect of Court Orders. Technically, a party needs the Court's permission before providing a copy of an order to a school, and if this is granted there will be an order to that effect. However, it is generally understood that schools need to be made aware of arrangements and orders which have been made by the Court.

There are, however, no restrictions upon the provision to schools of Parenting Plans.

Independent Children's Lawyers ("ICL")

The ICL is a lawyer who represents the child. This does not mean that they take instructions from the child (although some do speak with the child if they consider it to be appropriate). ICL's are charged to act in the best interests of the child. They are appointed usually in cases of high conflict or where there are risk issues.

In some cases, the ICL will make contact with the school to obtain general information about the child, such as how they are progressing. If the ICL does this, he or she becomes an asset the school can, and should, make use of. If there are concerns about the behaviour of the parents or the child, the ICL is the person to inform. More importantly, schools should request that the ICL ensures that orders are provided to them, so that the school's records remain current. This is particularly important having regard to section 121.

Subpoenas

It is not uncommon, particularly in high conflict scenarios, for the Department of Education to be subpoenaed to produce all documents in respect of the child. This will usually encompass school reports, attendance records, behavioural reports and assessments and enrolment forms. They can also (and usually do) request minutes from meetings or telephone conversations, email correspondence and interschool reports. Accordingly, ensure notes are clear, concise and accurate. All concerning incidents should be documented.

Individual teachers can also be subpoenaed to give evidence. This will require the subpoenaed teacher to attend at Court on a date advised to give evidence. Such subpoenas are more unusual than subpoenas to produce documents, but are not unheard of.

An educator called to give evidence should give evidence based upon what he or she has directly observed or recorded. The types of matters an educator might be asked about would include:

1. the physical appearance and demeanour of the child;
2. the child's preparedness for school. For instance, is the child's homework regularly completed, do they come to school with lunch and in the correct and complete school uniform;
3. the child's relationships with his or her classmates and other members of staff;
4. any learning or emotional difficulties experienced by the child; and
5. the level of parental engagement in the classroom and the child's educational needs.

If a subpoena is issued, educators should comply with its directions.

Sometimes, however, educators are asked by one of the parties to provide a statement or to give evidence in his or her family law matter. In the absence of a subpoena, the issue of whether to assist is up to the individual or school policy.

Recovery Orders and Location Orders

Recovery orders are granted in circumstances where the Court has determined, usually on an interim and urgent basis, that a child should be removed from the care of one parent and placed in the care of another. The orders are then sent to the Western Australia Police for execution and the police may attend the school to remove the child.

Never release a child to one parent until a sealed copy of the recovery order has been sighted. There have been cases where a parent has attended at a child's school, informed the principal that a recovery order had issued and removed the child from the school grounds in circumstances where no recovery order had been granted.

If the police attend, make sure that the identity of the police officer is confirmed and his or her details are recorded. Again, make sure the recovery order is sighted. Educators should then assist the police to execute the order. Obviously, being collected from school by police can be very distressing for a child, so educators should try to manage this process as calmly as possible.

Location orders, on the other hand, are requests for information in relation to the location of a child. Usually, these are orders which direct the government to assist in locating the child, in which case the Government will often reach out to the Department of Education for information. The result of a location order is usually that a request for the relevant information will be made to an individual school by the Department of Education. These requests should promptly be complied with.

New Partners

New partners can sometimes throw a spanner into an already tricky situation. It may be that one parent dislikes the new partner, or objects to that person collecting the child from school.

From the perspective of educators, these arguments are best ignored. If it is one parent's time with the child, that person is entitled to decide who collects and delivers the children. It is not the prerogative of the other parent (even if they maintain primary care) to object unless the person poses a real threat to the child.

Conclusion

Ultimately, the role of educators is to educate children; it is not to become embroiled in family conflict. Realistically, however, schools will need to engage with parents and children in the midst of these events and the point of this paper is to offer a practical guide as to how this difficult process can best be mediated.

Above all else, some practical steps to remember are:

1. Tell parents that they must keep educators informed of any changes to their circumstances which will impact upon the children.
2. If a family is going through a separation, make sure these reminders are more frequent.
3. Avoid being drawn into conflicts between the parents about topics such as extra-curricular activities, a child's developmental needs or new partners. Don't be drawn in by one parent's agenda.
4. Keep up to date records, including contact details for both parties and a copy of the parenting plan or orders.
5. If there are orders in place, make sure they've been carefully read. Make sure those that need to know are clear on the arrangements.
6. If there are interim orders, continue to request final ones.

Above all else, however, remember that if you are in doubt about the meaning or impact of orders, you can always seek legal advice.