

## Family Law as at 2011

Past,  
Present and  
Back to the Future?

*Dettmann Longworth, Lawyers*

## Topics

- Parenting Orders  
*(35 years and counting)*
- The 'Parties'  
*(It's your party but I'll come if I want to).*

## Parenting Orders

*1975 to 2011*

*35 years and counting*

## 1975 to 1995

- **CUSTODY**

- Live with
- Daily decisions

- **ACCESS**

- See
- Spend time with
- Talk to

- **GUARDIANSHIP**

- Long term decisions

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## 1995 to 2006

- **RESIDENCE**

- Live with

- **CONTACT**

- See
- Spend time with
- Talk to

- **SPECIFIC ISSUES**

- Long term decisions
- Daily decisions

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## 2006 to ????

- Equal Shared Parental Responsibility

### E.S.P.R.

- 'Live With' arrangements
- 'Time With' arrangements

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## Parental Responsibility

- 'Authority' to Each Parent

- Make decisions
- Enrol in school
- Authorise surgery

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## E.S.P.R.

- 'Equal' - not 'Sole' Responsibility

- Obligations to Consult about Major Long Term Decisions

- Health
- Education
- Religion
- Where they live
- Name change

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## If Presumption Applies (ESPR)

- Court MUST consider Equal time

..... If not appropriate

- Court MUST consider Substantial & Significant time

..... If not appropriate

- Court MUST make an Order consistent with the best interests of the child(ren) - s.60CA; s.60CC.

- s.60CC Primary & Additional Considerations

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## 1975 to now

• **1975 to 1995**

- Custody; Access; Guardianship
- 'Welfare of the Child 'Paramount' – s.64

• **1995 to 2006**

- Residence; Contact; Specific Interests
- 'Best Interests of the child paramount' (s.65E; s68F)

• **2006 to now**

- Presumption of ESPR
- Not Rebutted, - Equal time?? - Substantial/Significant?? - Best Interests
- Rebutted - Best Interests paramount (s.60CA; s60CC)
- Live With; Time With; allocation of Parental Responsibility

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## *It's your party but I'll come if I want to*

- Grand-parents
- Step-parents
- Psychological-parents
- Social-parents
- Partners
- Relatives
- Friends

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## 1975 – Section 39

- *“...a person may institute a matrimonial cause under this Act....in the Family Court...”*

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## 1995 - Section 65C

- A parenting order in relation to a child may be applied for by:
  - (a) either or both of the child's parents; or
  - (b) the child; or
  - {2006} (ba) a grandparent of the child; or
  - (c) any other person concerned with the care, welfare or development of the child.

## Definitions

- S.4 – 147 words/phrases defined
- “*Child*” – Incl ‘adopted’ & ‘stillborn’
- “*Parent*” – Incl ‘adoptive’ parent
- “*Father*” - Nil
- “*Mother*” – Nil
- “*Family*” - Nil

## STRANGERS?

- Storie & Storie 1949
- Powell & Anderson 1977
- In the Marriage of E (No. 2) 1978
- Stevens and Lee 1991
- Hodak & Newman 1993
- Potts & Binns 1998
- Church & Overton 2008
- Mulvaney & Lane 2009
- Keaton & Aldridge 2009

## STORIE & STORIE (1949)

- Prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a **stranger** can also provide as good a home is in the circumstances an element of only slight, if any weight.

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## Powell & Anderson (1977)

- When the welfare of a child is under consideration, being brought up by its **natural parents** within its own family group must be regarded as a powerful, almost dominant consideration, not to be overridden except by considerations which demonstrate in the clearest fashion that its welfare demands otherwise.

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## In the Marriage of E (1978) #1

- Prima facie, the welfare of a young child demands that **a parent** who is in a position, not only to exercise parental rights but also to perform parental duties, should have the custody of the child as **against any stranger**.
- *{Pawley SJ & Strauss J}*

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## In the Marriage of E (1978) #2

- **The view that a parent is to be preferred to a stranger** should be treated, not as a prima facie assumption, but rather as a **consideration** to be weighed on the fulcrum of the child's welfare.
- (Asche SJ)

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## Stevens & Lee (1991) #1

- .....where a child has a **long and well-established relationship with a person other than the parent**. This can be a grandparent; it can be a cousin; it can be a godparent; it can be the next door neighbour; it can be the babysitter; or it can be a step-parent. In those cases, if the Court is satisfied that the relationship **is of significance to the child**, that a bond exists and that the child will suffer detriment if the bond is severed, the **degree of suffering** then has to be weighed against the **degree of hostility** which exists in the custodial parent.

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## Stevens & Lee (1991) #2

- ....if the court is satisfied that the welfare of the child will be **best served** by continuing the association the child has with the person the parent does not desire the child to associate with any longer, the Court will not hesitate but to continue the relationship. However, it starts from a different premise than it does with non-custodial parents, **that is, when it starts dealing with people who are not the natural parents the Court does not necessarily commence from the assumption that access is going to be good for the child.**

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## Hodak & Newman (1993)

- **Parenthood is an important and significant factor** in deciding whether to make a parenting order in favour of a parent or a non-parent.....
- Such fact **does not, however, establish a presumption** in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the court commences its decision making process in the adjudication of custody disputes

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## Church & Overton (2008)

- The Act supports the generally regarded view in the Australian community that children should be entitled to have a relationship with their grandparents, provided it is in the child's best interests. **However, any determination of the best interests of a child or children should be informed by the family dynamics** between the children's parent/s and grandparent/s. In that regard, the views of the parents are significant but not necessarily determinative.

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## Mulvaney & Lane (2009)

- ...the term "parent" refers to a **biological** parent or an **adoptive** parent but **does not include a person who simply stands in loco parentis to a child**, even if he or she has acquired parental responsibilities for the child under the *Family Law Act, 1975*.

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## Aldridge & Keaton (2009) #1

- A two step approach is appropriate in dealing with **an application for parenting orders brought by a person other than a parent**, a child, or a grandparent. In other words is the applicant a person **concerned** with the care, welfare or development of the child (step 1) and if so, what order should be made in the best interests of the child. This consideration may lead to an order for parental responsibility, an order a child live with, spend time and or communicate with the person, or that no such order be made (step 2);

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## Aldridge & Keaton (2009) #2

- *Gronow v Gronow* [1979] HCA 63 recognised societal "norms" in rejecting the notion of a presumption in favour, or any preferred role, of a mother to have custody of a child, particularly of a female child, the Act in its present form enables a court dealing with a parenting application the flexibility **to recognise and accommodate "new" forms of family**, including families with same-sex parents, when making orders which are in the best interests of a child who is part of such a family.

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