Alex Finemore
Barrister

A CHILD'S NIGHTMARE – WHAT HAPPENS WHEN A PARENT DIES AFTER SEPARATION?

CPD PRESENTATION FOR THE GEELONG LAW ASSOCIATION

BY ALEX FINEMORE

INTRODUCTION

This paper explores the devastating situation where a parent dies after separation and the intersection between the relevant state and federal laws. The paper addresses four separate scenarios relating to the death of a parent following separation and provides advice about how to manage a situation where your client or the other party is terminally ill or has recently died.

1. The first scenario is where there have been **no parenting orders** made and there are no parenting proceedings on foot at the time of death.
2. The second scenario is where the deceased parent has appointed a **testamentary guardian** in their Will pursuant to state legislation.
3. The third scenario is where there are **parenting proceedings on foot** that have not been finalised.
4. The fourth scenario is where there are **parenting orders in place at the time of death**.

Scenario 1: No parenting orders and no proceedings

The first scenario where there are no parenting orders or proceedings on foot should be fairly straightforward for the surviving parent to manage.

Pursuant to section 61C(1) of the Family Law Act 1975, each of a child's parents, of a child under 18, has parental responsibility for the child concerned. Pursuant to section 61B, parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

This means that the surviving parent will continue to have parental responsibility for the child unless another person makes a successful application in the Family Court or the Federal Circuit Court for parenting orders.

Scenario 2: Deceased parent has appointed a testamentary guardian

The second scenario is where the deceased has appointed a testamentary guardian in their Will who is not the other parent.

In Victoria, section 135 of the *Marriage Act* 1958 provides for the rights of a surviving parent as to guardianship:

1) *On the death of the father of a minor the mother, if surviving, shall, subject to the provisions of this Part, be guardian of the minor, either alone or jointly with any guardian appointed by the father.*
2) *On the death of the mother of a minor the father, if surviving, shall, subject to the provisions of this Part, be guardian of the minor, either alone or jointly with any guardian appointed by the mother.*
3) ***The father of a minor may by deed or will appoint any person to be guardian of the minor after his death.***

4) ***The mother of a minor may by deed or will appoint any person to be guardian of the minor after her death***.
5) *Any guardian so appointed by the father or the mother shall act jointly with the mother or father, as the case may be, of the minor so long as the mother or father remains alive unless the mother or father objects to his so acting.*
6) ***Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly*.**

Other states and territories have similar legislation relating to guardianship of a child following the death of a parent. For example, in NSW there is the relevant legislation is the *Guardianship of Infants Act* 1916 and in South Australia, its called the *Guardian of Infants Act* 1940 (SA).

Section 13 of the *Guardian of Infants Act* 1940 (SA) provides as follows:

1) *The father of an infant may by deed or will appoint any person to be guardian of the infant after his death.*
2) *The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death.*
3) *Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting.*
4) *If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.*
   The powers conferred on the court by this subsection, in cases where the appointed guardian is to be the sole guardian of an infant to the exclusion of its mother or father, may be exercised at any time and shall include power to vary or discharge any order previously made in virtue of those powers.
5) *Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.*
6) *If under the preceding section a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent*.

Clearly this state legislation long predates the *Family Law Act* and was passed in a vastly different social context. The Family Court and the Federal Circuit Court are vested with the judicial power of the Commonwealth of Australia pursuant to Chapter 3 of The Constitution. In lay and general terms, it exercises judicial power for laws made by the Federal Government of which the Family Law Act 1975 (Cth) ("the Act") is one such piece of legislation.

As such, the Family Court and the Federal Circuit Court has no jurisdiction to apply legislation made by any state parliament. If a state law is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail. In short, Part VII of the Family Law Act, being Federal legislation, overrides the provisions of the state legislation dealing with guardianship.

Nevertheless, the appointment of a testamentary guardian may be very useful for a family to determine the temporary care arrangements for children immediately following a parent's death and the appointment may also be relevant to the Court's determination of whether an applicant is a person "concerned with the care, welfare or development of a child".

Scenario 3: Parenting proceedings on foot between the parents

In circumstances where the parents are parties to a dispute about the living arrangements for the children at the time of one parent's death, the case law clearly indicates that the proceedings will come to an end. The cases recognise that there is a doctrine of abatement in what was once called matrimonial causes and now called Family Law cases. The provisions of the Judiciary Act 1903 (Cth) clearly indicate, in particular by section 80, that the provisions of common law continue to apply to jurisdictions such as the Family Court of Australia.

The doctrine was recognised in the High Court of Australia decision of *Vitzdamm-Jones v Vitzdamm-Jones* (1981) FLC 91-012. In that case, the mother and father were previously married for some years and had one son together. They subsequently divorced and made opposing applications for sole custody of the child (as it was then known). They ultimately resolved the matter and entered into consent orders providing for joint custody.

The father then married the applicant, who became Wendy Vitzdamm-Jones. Later the father died when the child had been in the care of the mother. Wendy then applied to the Family Court for, amongst other things, an order giving to her the custody of the child. On the hearing of that application, Wendy made an oral application seeking leave to intervene in the previous proceedings between the mother and father.

The mother objected on the basis that the Family Court did not have jurisdiction to make the orders sought and a case was stated for the opinion of a Full Court of the Family Court as to the relevant jurisdiction of that court. Thereafter, the case stated in the Family Court was removed into the High Court.

At page 76,161 of that case His Honour Gibbs J (as he then was) said:

"*I return to the particular cases before the Court in the matter of Vitzdamm-Jones v Vitzdamm-Jones, the proceedings in which the applicant seeks to obtain custody of and access to a child of the marriage are brought by a stranger to the relevant marriage against the surviving party to the marriage. It follows from what I have said that* ***the Family Court had jurisdiction to entertain the proceedings. However, Wendy's application to intervene in the proceedings that were formerly pending between Bronwen and Alfred must be refused. Those proceedings abated on Alfred's death***."

The distinct majority of the High Court of Australia (being Barwick CJ, Gibbs, Stephen, Mason, Aickin and Wilson JJ) expressed the clear opinion that the proceedings abated on the death of the father.

I refer to the matter of *Feranti & Connor* [2010] FamCA 71 (5 February 2010) where the proceedings involved bitterly contested applications for parenting orders by the mother and the father. There had been numerous Applications in a Case filed, contravention proceedings, and procedural and interim orders had been made and matters heard on appeal. The mother sadly died during the proceedings and Justice Dawe of the Adelaide Registry subsequently made orders dismissing the parenting proceedings upon the filing of a certified copy of the death certificate. His Honour cited the High Court decision of *Vitzdamm-Jones.*

Scenario 4: Parenting orders in place at the time of death

The fourth scenario is where orders have been made for the children to live with one parent and that parent subsequently dies. In those circumstances, s 65K of the Family Law Act applies if:

a) *a parenting order that is or includes a residence order is in force determining that a child is to live with one of the child's parents; and*
b) *that parent dies; and*
c) ***the parenting order does not provide for what is to happen on that parent's death***.

In those circumstances, s 65K provides:

2) *The surviving parent cannot require the child to live with him or her.*
3) *The surviving parent, or another person (subject to section 65C)*, may apply for the making of a residence order in relation to the child.*
4) *In an application under subsection (3) by a person who does not, at the time of the application, have any parental responsibility for the child,* ***any person who, at that time, has any parental responsibility for the child is entitled to be a party to the proceedings****.*

*I note that section 65C of the Family Law Act provides that 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

(ba) a grandparent of the child; or

(c) any other person concerned with the care, welfare or development of the child.

Application made by a stranger

In all four scenarios, a person who is not the surviving parent can make an application in the Family Court or the Federal Circuit Court for parenting orders if they have standing as a person "concerned with the care, welfare or development of the child" (s 65C of the Act).

A parenting order is an order which deals with issues including the persons with whom a child should live; spend time and communicate with; and the persons, who should have responsibility for making decisions, both significant and otherwise, about a child and the degree of consultation necessary to implement those decisions (section 64B(2)). Pursuant to section 64B parental responsibility can be allocated to two or more persons.

When it comes to determining a parenting dispute between a surviving parent and another person, the court must regard the best interests of the child concerned as the paramount consideration (section 60CA of the Act).

The objects and principles underlying Part VII of the Act do emphasise the authority of parents in respect of children. In particular, section 60B(1) of the Act provides the following principles to be applied by the court to ensure that a child's best interests are met:

a) *ensuring that children have the benefit of* ***both of their parents*** *having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*

b) *protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*
c) *ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
d) *ensuring that **parents fulfil their duties**, and meet their responsibilities, concerning the care, welfare and development of their children*.

The principles, which underpin these objects, are set out in section 60B(2) and are as follows:

a) *children have the right to know and be cared for by both **their parents**, regardless of whether their parents are married, separated, have never married or have never lived together; and*
b) *children have a right to spend time on a regular basis with, and communicate on a regular basis with, **both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives**); and*
c) ***parents jointly share duties** and responsibilities concerning the care, welfare and development of their children; and*
d) *parents should agree about the future parenting of their children; and*
e) *children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture)*.

Accordingly, it is parents who have duties in respect of their children rather than other relatives specifically under the Act. However the legislation does recognise the obligation of parents to fulfil their duties and meet their obligations towards their children and by necessary implication individuals other than parents can be authorised to fulfil such duties in the event of parental failure.

The Act also recognises the right of children to maintain relations with relatives who are significant to them and to share the cultural orientation of their relatives.

Issues to do with the children's best interests are to be determined by reference to the criteria listed in section 60CC of the Act. The section creates two classes of considerations which are relevant – primary considerations and a longer list of additional considerations.

Generally speaking, the court should give greater weight to the primary considerations, which closely tie in with the overall objects and principles of the Act set out in section 60B. Protective concerns are to be given priority [section 60CC(2A)].

There are two primary considerations, which are as follows:

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*.

Case Law & Principles

The common-law principles relating to applications by non-parents are also instructive.

The prevailing view in disputes between a parent and a non-parent as to where the child is to live is that expressed by the Full Court in *Rice v Miller* (1993) FLC ¶92-415 where Ellis, Lindenmayer and Bell JJ said at p 80,240 that *"**the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the court commences its decision making process**"*.

While the court was of the view that the fact of parenthood is to be regarded as an important and significant factor in considering which proposal best advances the welfare of the child, it

went on to say that each case "*must be determined according to its own facts, the paramount consideration always being the welfare of the child whose custody is in question*" (p 80,240).

The preference for a natural parent is not a matter of legal principle. As Selby J put it quite succinctly in Zoneff v Zoneff (1969) 12 FLR 415 at p 419:

"As I see it, there is no difference in principle between a contest between parents for the custody of a child and a contest between a parent and a stranger. In either case, the interests of the child are the paramount consideration. The difference lies in the application of that principle, for in a contest between a parent and a stranger it is assumed that prima facie the interests of the child will be better served in the custody of its parent. This is not a matter of principle. It is not a rule of law. It is a consideration based on common sense, on general experience of mankind, on the pattern on which our society is designed."

Similarly, in *Allen and Allen (deceased)* (1984) FLC 91-531 it was found that parenthood is a relevant and significant factor. When the husband and wife separated in 1979, the wife went to live with a de facto husband. The wife had the custody (as it was then known) of the one child of the marriage until her death in 1983. After her death, the child remained with the de facto husband. The husband (ie the child's father) and the de facto husband both applied for sole guardianship and custody of the child. The court granted sole guardianship and custody to the husband. **The court said that there is no preferred role of a parent vis-a-vis a "stranger" in a custody case between a parent and a "stranger". However, the fact of parenthood is a relevant and significant factor in considering which competing proposal better advances a child's welfare.**

Gelber & Halliday [2020] FCCA 1860 (8 July 2020)

In July this year, Judge Brown of the Federal Circuit Court determined a dispute between the father of two children aged 13 and 11 and the children's half-sister, Ms Halliday, who was 29 years old.

The mother had been previously married and her first marriage produced three children including Ms Halliday, the children's half-sister. After the mother and father separated in 2015, there was an emotionally charged dispute about property and parenting matters which resulted in the parties consenting to orders providing that one child would spend alternate weekends and half of the school holiday with the father and that the other child should be able to elect if she wished to attend. The orders also provided the parents with equal shared parental responsibility for the children.

The children's mother was subsequently diagnosed with cancer and Ms Halliday took over the responsibility of caring for the children whilst also caring for her terminally ill mother. During this difficult period, the mother appointed her daughter, Ms Halliday as the testamentary guardian of the children pursuant to the provisions of the *Guardianship of Infants Act* 1940 (SA). The will also appointed a trust, which was established to benefit the children. The trustees appointed by the will were friends of the mother.

Initially, Ms Halliday's position was that she continue to provide the vast majority of care for the children, each of whom was apprehensive about interacting with their father. The Family Report writer recommended that the children should continue to live with Ms Halliday and spend time with their father. Notwithstanding the contents of the family report and the obvious on-going disharmony between them, the parties agreed that the children would transition into their father's care over the 2019/2020 end of year school holiday. It was agreed that the children would spend time with their half-sister on alternate weeks; for half of each school holiday period; and on a variety of special occasions.

At trial, the issue to be determined was who would have parental responsibility for the children.

An order which provides for shared parental responsibility requires the parties to it to consult with one another and make a genuine effort to come to a joint decision about major long-term issues to do with the child or children concerned [section 65DAC]. Major long-term issues is defined in section 4 of the Act and includes issues to do with a child's education; religious and cultural upbringing; the child's health; the child's name; and changes to the child's living arrangements that would make it significantly more difficult for the child concerned to spend time with a parent.

It was Ms Halliday's case that given the death of the children's mother and in deference to her dying wishes, it would be appropriate that she be conferred with some level of parental responsibility (or guardianship) for the children to ensure that they maintained a sense of connection to their maternal family of origin. The father's position was that he should have sole parental responsibility for the children because of the difficulties he and Ms Halliday had in discussing issues together and their disparate views and values.

In terms of Ms Halliday's standing, Judge Brown made the following finding:

117. In this case, I accept that Ms Halliday is a person who is concerned with the care, welfare or development of X and Y. I further accept that Ms Halliday's concern, in this regard, arises through her status as the children's oldest adult half sibling; her love for the children; the fact that she provided for their care for a significant period following their mother's death; and because of the provisions of the late Ms B's will.

…

His Honour went on to say:

121. Section 65K and the related provisions of Part VII, being Federal legislation, supplant the provisions of the Guardianship of Infants Act. Ms B was not able to bequeath any form of parental responsibility, for X and Y, to Ms Halliday, pursuant to the provisions of her will. The issue falls to be adjudicated pursuant to the provisions of the Family Law Act

122. Accordingly, Ms Halliday has status to bring her application for conferral of some form of parental responsibility upon her notwithstanding the fact that she is not a parent of either child. Whether this should occur depends on whether, firstly, in all the circumstances of the case it would be proper to do so, in the sense that there is a state of affairs fit or amenable to do so; and secondly, it is an outcome calculated to be in the children's best interest.

123. Whether it is proper to confer some form of parental responsibility, on two individuals, must turn on how easily the individuals can share that responsibility and, if necessary compromise their views and reach a position based on consensus, particularly in respect of an issue of major long term importance to the child concerned.

Judge Brown ultimately made an order for the father to have sole parental responsibility for the children but that he consult the Respondent prior to making any decisions concerning a major long term issue affecting the children.

In coming to this decision, His Honour noted:

144. The sad reality is that the parties are more likely than not to be unable to reach any joint decision about any major long term issue to do with the children's care, welfare and development and this will mean their return to the court system, with all the adverse consequences entailed with that, particularly cost, delay and uncertainty of arrangements.

His Honour concluded:

148. *One individual has to have the final say and that person should be Mr Gelber, the children's surviving parent and the person who provides their predominant home and who interacts more efficiently with their financial trustees. It would not be in the children's best interests to potentially provide Ms Halliday with a de facto veto in respect of the exercise of this power*.

Practical considerations

What should your client do if they are terminally ill and they do not support the other parent caring for the children?

Section 65K clearly envisages parenting orders that provide for what happens after the death of a parent. It may therefore be worthwhile to consider whether that type of order should be sought during proceedings or included in an application for consent orders in circumstances where one parent is terminally ill. An order of that nature could avoid future litigation in the Family Court or the Federal Circuit Court by other family members or testamentary guardians seeking time with the children or parental responsibility.

Interestingly, the father in the matter of S & W [2002] FMCAfam 152 sought an order that the children reside with him in the event of the mother's death. In that case, the parties' three year old child had some medical issues but the mother was actually alive and well. At paragraph 48 of the judgment, Federal Magistrate Scarlett of the Paramatta Registry held:

48. The father, in his submission, now seeks an order that in the event that the mother dies or becomes ill, the children should reside with him. Whilst section 65K of the Family Law Act contemplates a parenting order being made that provides for what is to happen on the death of a parent, I am not satisfied that I should make such an order at this time. There has been no evidence led on this point, and no chance for the mother to put any submission. The evidence is that the mother is aged 39 years. There is no evidence that she is in other than good health or that she is any more likely to die before the younger child attains the age of 18, in June 2017, than any other woman of her age, place of residence or state of health. Should the mother meet an untimely death or become so incapacitated by an illness that she cannot care for the children over the next fifteen years, than an application may be made to this court.

In my view, if proceedings have not been finalised and the primary carer is dying, the ill parent should encourage their preferred carer to intervene in the proceedings by filing an Application in a Case and an Affidavit in support. The ill parent can then support the interveners position rather than making their own application to join them as a third party. That way, the proceedings *should* continue between the surviving parent and the intervener upon the death of the other parent.

Tip: ensure clients understand the limitations of a testamentary guardian when drafting Wills

Alex Finemore of Counsel

1103 Owen Dixon Chambers East

alex.finemore@vicbar.com.au

Ph. 0438 305 762

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