

Creating Exceptional Outcomes

COVID-19 and Family Law

The impact of the COVID-19 pandemic on Family Law issues in Australia

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Agenda

The focus of today's presentation will be on COVID-19 related family law issues.

The COVID-19 pandemic is presenting a number of challenges for clients, family lawyers and domestic violence service providers.

- **Topic 1: Vaccination**
 - what happens when parents cannot agree to vaccinate their child?
 - can a parent's time with their child be suspended as a result of that parent being unvaccinated?
- **Topic 2: Parenting Arrangements**
 - what happens if a parent or the children need to isolate?
 - What happens when a parent is unable to comply with parenting orders?
- **Topic 3: DFV and Working From Home**
 - impact on victims of domestic and family violence
 - obligations on employers

Topic 1: Vaccination

- **In Australia, the COVID-19 vaccination is recommended for children aged 5 years and older.**
- **This has created a “hot topic” and a source of conflict among separated parents.**
- **Health directives are to the effect that COVID-19 vaccination is safe and effective for children aged 5 years and older. There are some mild and common side effects.**
- **Separated parents, in particular, find it difficult to agree on whether the COVID-19 vaccination is indeed safe for their child or not. Many parents worry that this vaccine has been rushed to the market and are adamantly opposed to it.**
- **Family lawyers are often faced with scenarios where one parent is fully supportive of their child receiving all recommended vaccinations, whilst the other parent is against vaccinations of any kind, or is opposed to a specific vaccination or immunisation (for example COVID-19 vaccinations).**

Shared Parental Responsibility and Vaccination

- **A common question asked by parents going through a separation is whether they can either individually, or by a court order, have their child immunised or vaccinated without the consent of, or in defiance of, their former partner.**
- **The starting point for this question is the presumption of shared parental responsibility. Unless and until a court varies this, parents are taken to both have parental responsibility for their child. This means that each parent has all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.**
- **Shared parental responsibility obliges the parents to consult with each other and make a genuine effort to come to a joint decision in relation to any ‘major long-term issue’.**
- **‘Major long-term issue’ relates to the care, welfare and development of the child and which are of a long-term nature.**
- **The child’s health is regarded as a ‘major long-term issue’ on which parents are expected to consult with one another and try to reach an agreement. This includes decisions about vaccinations and immunisations.**

Court's Power and Child's Best Interests

- **If parents cannot agree to vaccinate their children, they can ask the court to make that decision for them. The Federal Circuit and Family Court of Australia (FCFCoA) has the power to make an order that a child be vaccinated.**
- **In most cases, the court decides in favour of the parent seeking to have the children vaccinated and usually considers that:**
 - **any potential risks of vaccination are greatly outweighed by the risk of harm from vaccine-preventable diseases**
 - **failure of a parent to vaccinate exposes a child to risk of harm**
 - **indirect benefits of immunisations to the community argues in favour of vaccination**
- **In other cases, evidence can be provided to the court from experts such as the child's treating GP and other medical specialists if it deemed by these experts that taking into account the child's pre-existing medical condition, vaccination is unsafe and potentially harmful to the child.**
- **Ultimately, the court will make the decision regarding vaccination based on the best interests of the child.**

Dacombe & Paddison [2021] FedCFamC1A 103 (23 December 2021)

- **In this case, a father unsuccessfully appealed against an order authorising the mother to vaccinate the parties' child against COVID-19.**
- **Consent orders were made allowing the mother to vaccinate the child with the Novavax vaccine in the event that this particular vaccine was approved by Australian authorities at the time that the child's age group became eligible for vaccination. If Novavax were not approved in Australia, the father was at liberty to select any of the authorised vaccines. If he failed to select a vaccine, the mother was able to choose a vaccine for the child to receive.**
- **On appeal, the father contended that he never gave consent for the order to be made and that the primary judge lacked power to make the order. He referred to s 51(xxiiiA) of the Constitution in arguing that the order imposed a form of "civil conscription" which was unlawful.**
- **It was found that the concept of civil conscription did not fetter the court's power to make orders about children's medical treatment under the *Family Law Act 1975* (Cth). Moreover, the parties had agreed that the child should be vaccinated and the order made only governed the manner in which vaccination should occur.**

Covington & Covington [2021] FamCAFC 52 (16 April 2021)

- While Covington & Covington does not explicitly deal with the COVID-19 vaccine, it provides some guidance as to how the court deals with vaccines generally and may, in the future, deal with the COVID-19 vaccine for children.
- The father wanted the 10 year old child to be vaccinated and the mother disagreed. The child had not received any vaccinations to date.
- During the trial, the parties entered into consent orders which provided for the child to receive all future vaccinations as recommended by the child's doctor or treating medical professional.
- The mother later sought to set the orders aside. Not only did the court dismiss her application, but it went on to amend the orders so that the mother was restrained from attending any medical appointments about the child's vaccination and could not contact any of the child's treating medical professionals insofar as the communications related to vaccines.
- Until the child was vaccinated, the court further ordered that the child live with the father and spend time with the mother to ensure that the mother did not complicate the process and cause the child distress. After the child was vaccinated, the regular parenting arrangements were to resume (being that the child live with the mother and spend time with the father).

Covington & Covington [2021] FamCAFC 52 (16 April 2021) cont.

- **This case highlights and confirms that the court will only make an order if it is in the best interests of the child to do so.**
- **Notably, in this case:**
 - **The mother did not provide any evidence as to why the child remaining unvaccinated was in the child's best interests.**
 - **The father relied on opinions of the child's medical professional and other medical research that basically showed that failure to vaccinate may expose the child to harm. The father's arguments were child-focused and were based on the best interests of the child.**
 - **The court can only make a decision based on the evidence before it, and it will only do so if it is deemed to be in the best interests of the child,**
 - **It was confirmed that the Federal Circuit and Family Court of Australia has the power to order that a child be vaccinated,**
 - **It was further confirmed that once orders are made by the court (including orders made by consent), the orders continue to be valid even if after the fact, one party withdraws their consent.**

Duke-Randall & Randall [2014] FamCA 126

- **Again, this is a case where the parties could not agree on the vaccination of their children.**
- **While the relationship was intact, the parents had agreed to not vaccinate their two children.**
- **After separation, the father became concerned for the children's health and changed his position to support vaccinations.**
- **The mother argued that vaccinations should be classified as a 'special medical procedure' however the court ultimately held that a vaccination is not a special medical procedure but that vaccinations are a common aspect of childhood.**
- **It was ordered by the court for the children to commence a "catch-up" vaccination program which would intimately see them fully vaccinated.**

Kingsford & Kingsford [2012] FamCA 889

- **The father secretly vaccinated the children without the mother's consent.**
- **There were no orders in place at the time of the vaccination and therefore the father was not in breach of a court order by having the children vaccinated.**
- **The mother initiated court proceedings.**
- **Despite concerns around the father's unilateral decision and lack of consultation with the mother and seeking to obtain her consent, the court nevertheless determined that it was in the best interests of the children to be vaccinated.**

Unvaccinated parents

- There has been a recent case in Canada which has drawn international attention.
- In this case, an unvaccinated Canadian father lost “custody” of his three children after a judge ruled he posed a risk to his immunocompromised 10-year-old daughter.
- She also ruled that the children’s mother could have the children vaccinated against COVID-19 despite the father’s objections.
- In making the decision, Justice Nathalie Godbout said in her written decision that she was revoking the father’s access “with a heavy heart” but that the children “must be given their best possible chance at evading infection from COVID-19”.
- “It is no contest – the current science in the face of a highly contagious virus far outweighs the father’s wait-and-see approach.”
- The judge also dismissed the father’s concerns about the safety of the Pfizer vaccine.
- Australian Family Law is very similar with respect to decisions being based on the best interests of the children and a similar outcome (with the same facts) could easily happen in Australia.

Federal Circuit and Family Court of Australia COVID-19 List

- In April 2020, the Family Court of Australia (now the FCFCoA) created a priority COVID-19 list dedicated to dealing exclusively with priority family law disputes that arose as a direct result of the COVID-19 pandemic in the hope it would help ease delays.
- The National COVID-19 List is experiencing a rise in the number of applications involving disputes about vaccination of children.
- The court has also been presented with situations where one parent has stopped the other from seeing the child because they are unvaccinated.
- In 2021, the court experienced a steady rise in the number of applications related to vaccination.

National COVID-19 List Applications

Examples of applications that may be considered suitable for filing in the National COVID-19 list:

- **Family violence:** where there has been an escalation or increase in risk due to family violence associated with the COVID-19 pandemic.
- **Suspension of parenting orders due to a family violence order:** where either parenting orders or a parenting plan have been suspended by an ex parte family violence order made during the COVID-19 pandemic and a party seeks that the court make further parenting orders.
- **Medical:** the parties cannot fulfil the parenting obligations due to a party and/or child testing positive for COVID-19 or medical complications from having contracted COVID-19, or due to concerns about infection or quarantine requirements.
- **Vaccinations:** dispute about a child being vaccinated against COVID-19.
- **Travel arrangements or border restrictions:** the parties live in different states or territories and there are difficulties or anticipated difficulties with the child travelling between the parties' residences, or a party is planning international travel.

National COVID-19 List Applications cont.

- **Urgent or priority financial and maintenance issues:** a party is experiencing financial distress related to the impact of COVID-19 and requires urgent court orders, for example, an application for occupation or sale of a property.
- **Failure to resume time in accordance with parenting orders or a parenting plan:** where parties agreed to suspend parenting orders or a parenting plan due to COVID-19 restrictions, but there has been a failure or refusal to resume compliance with those parenting orders or that parenting plan following the easing of COVID-19 related restrictions.
- **COVID-19 related employment:** a party is a front-line health worker or engaged in other employment connected with COVID-19 that is impacting parenting arrangements or compliance with orders.
- **Supervised contact:** the current parenting arrangements involve supervised contact, and the contact centre is closed or the supervisor is unable to perform their role, and the parties cannot agree on an alternative arrangement.

Topic 2: Parenting Arrangements and COVID-19

- **Parents who cannot cooperatively parent will find their parenting arrangements most impacted by COVID-19.**
- **In the current state of turbulence amidst the COVID-19 pandemic, compliance with parenting orders is becoming more and more difficult.**
- **Parents are understandably concerned for their child's welfare and with fears that children may be at risk of serious illness, both in contracting the virus themselves or transmitting it onto others at risk, one parent may refuse to hand over the child and in doing so, find themselves in contravention of a parenting order.**
- **Contravention of a parenting order occurs where a person has intentionally failed to comply with an order or, made no reasonable attempt to comply with the order.**
- **A breach of parenting orders is considered an extremely serious contravention by the court.**

Santer & Santer [2020] FamCA 445 (27 March 2020)

- **Interim orders were made on 18 September 2018 regarding the parenting arrangements for the children. They included an order that the children are to spend time with the parties for half of each school holiday.**
- **The mother withheld the children from spending time with the father for his half of the holidays on the basis that his profession as a specialist medical practitioner was exposing him to a significant risk of infection and therefore exposing the children to COVID-19.**
- **The court was satisfied the children should spend holiday time with the father and in doing so, noted that the mother did not produce any evidence to suggest the children were at risk in the father's care.**
- **The Judge commented: 'I am not satisfied that there is any reason why the father should be tested for COVID-19, isolate himself or why the children should not be returned to his care.'**

Kardos & Harmon [2020] FamCA 328 (May 2020)

- In the May 2020 decision of *Kardos & Harmon*, the Family Court was asked to decide whether the mother's refusal, due to COVID-19 related concerns, to allow her child to travel by plane from Adelaide to Brisbane to spend time with his father pursuant to final parenting orders, was a contravention of those orders; that is, a breach of the orders without a reasonable excuse.
- When the mother refused to travel with the child to Brisbane to reduce the child's exposure to the COVID-19 virus, the father filed a contravention application. In order for the father's application to be successful, he needed to prove that the mother breached the orders without a reasonable excuse.
- The Court found that the mother had a reasonable excuse for non-compliance with the orders and that her concerns for the health of the child were a reasonable excuse for her not flying the child to Brisbane airport.
- Note: as restrictions start to ease, borders open, vaccinations increase and confirmed COVID-19 cases decline, it is less likely that COVID-19 related health concerns for a child will be considered a 'reasonable excuse' in contravention applications.

Isolation Requirements and Impacts

- Isolation of parents and/or children is a very current issue impacting on family law.
- Presently, if you test positive to COVID-19, there is requirement that you and anyone else in your household isolate for 7 days.
- The number of children and teachers isolating continues to increase now that schooling has returned to normal.
- The rules around isolation and testing requirements continues to change which makes it difficult for high conflict parents to be able to reach an agreement if either they or their children need to isolate.
- Everyone must follow public health guidelines and directives regarding isolation. This often means that parenting orders cannot be complied with and invariably results in one parent missing out on time with the children.
- In most cases, parenting arrangements can continue, even with current restrictions.

Parenting Arrangements and Isolation

- **If you have court orders about parenting, or a parenting plan, you should follow them unless you have a 'reasonable excuse' not to.**
- **A reasonable excuse includes a health professional directing you and the children to go into isolation or quarantine, or travel being banned.**
- **If isolation becomes necessary, and this impacts on a parent's time with the children, how is this managed?**
- **Firstly, where possible, the parents should try to follow the spirit of the orders and work with each other to try to find solutions that are safe and will work for everyone, including the children.**

Parenting Arrangements and Isolation cont.

- **The parent in isolation with the child should:**
 - **inform the other parent as soon as possible of the isolation directive/requirement.**
 - **provide medical advice and copies of any test results to the other parent.**
 - **inform the other parent when the period of self-isolation is expected to end.**
 - **try to be as flexible and reasonable as possible when making new arrangements.**
 - **try to help children maintain contact with their other family members by phone, video or FaceTime chats or email, during any period of self-isolation.**
 - **consider arranging make-up time for when the period of self-isolation is over.**
- **Parents are encouraged to work through any changes with each other and come up with an agreement, if that is safe, and all decisions and arrangements made should remain completely child-focused.**

Parenting Arrangements and Isolation cont.

- **If one parent needs to self-isolate, and the children are with the other parent, the children should remain with the other parent for as long as the self-isolating parent remains in self-isolation.**
- **If disagreements arise, parents are encouraged to try to work things out with help from a family dispute resolution service or counsellor if needed.**
- **If the parents can't reach agreement, or if it is not safe for them to communicate with each other, they can apply to the court to make a decision about arrangements for the children.**
- **The court is bound by the best interests of the child, which means they will not force a child out of isolation to spend time with a parent, nor will they force a parent out of isolation so that they can comply with orders.**

Topic 3: Domestic Violence and COVID-19

- **The impact of COVID-19 on victims of domestic violence has been significant.**
- **Reports continue to show that there has been an alarming increase in violence against women during the COVID-19 pandemic.**
- **The discussion today will focus on the impact of working from home and isolation on victims of domestic violence.**
- **As well as changing how many people work, COVID-19 has led to increased:**
 - **physical isolation**
 - **financial stress**
 - **levels of unemployment**
 - **underemployment**
 - **workload with no extra pay**
 - **alcohol and drug use**
 - **domestic and family violence**

Domestic Violence and Working From Home

- **For many people experiencing family violence, their workplace is the only safe place. It is a space where arrangements can be safely made to leave family violence.**
- **Working from home has now made workplaces unsafe for many workers.**
- **Working from home (and other pressures associated with COVID-19) can change the safety and support needs of people experiencing DFV. With the security, socialisation and routine offered by attending work disrupted, DFV abusers will have increased opportunities for coercive and/or violent behaviours.**
- **The tactics used by abusers, such as coercion, surveillance and isolation, could also include denial of access to outside services (such as health care, increasing dependence on the abuser) or, in work from home scenarios, sabotaging work or creating disruptions that reduce productivity or concentration.**

What Are Your Legal Obligations As An Employer?

- **Domestic violence is a workplace issue.**
- **Employers have a duty to ensure the health and safety of workers, minimise risks and consult with workers when they are working from home.**
- **The vital role of workplaces in preventing and responding to family and domestic violence is just as important when workers are working from home.**
- **Workplaces can assist their remote employees by raising awareness of the increased risk and keeping up regular communications.**
- **It is also important to consider DFV as a risk factor in any work from home safety assessment and to recognise that it may be dangerous or difficult for an employee working from home to tell their employer that they are experiencing or worried about violence or abuse.**
- **DFV specialist services remain the best option for expert advice on safety planning and emergency accommodation. But accessing these services may be more difficult when the abuser is also at home.**

What Are Your Legal Obligations As An Employer?

- **Employees have the right:**
 - to take family and domestic violence leave
 - to take personal/carers leave
 - to request flexible working arrangements if they are experiencing family/domestic violence or caring for someone experiencing family/domestic violence
- **Employers have a legal responsibility to keep information about domestic violence confidential. This is part of keeping an employee experiencing violence safe. The only exception is when an employer must disclose this information to prevent someone from being harmed.**
- **Ensuring a safe work environment is still the employer's duty even when staff are working from home**
- **Employers should aim to have open and secure communication with staff, act in a non-judgemental manner, and ask the staff member what they can do to practically help.**
- **It is important employers let their staff know what their rights are, and how workplaces can help.**

Workers Compensation Nominal Insurer v Hill [2020] NSWCA 54 (31 March 2020)

- **The parties were working together at home. In 2010 Ms Carroll's partner murdered her in their home.**
- **After her death, Ms Carroll's children made a claim under the *Workers Compensation Act 1987* and were ultimately successful.**
- **This case highlighted the question of when employers might be liable for injuries arising from DFV and as a result, many employers have taken steps and implemented programs to ensure their employees are safe while working from home.**

Warning Signs of DFV

- **Warning signs for workplaces and legal advisors to look out for:**
 - They seem afraid of their partner or anxious to please them.
 - They seem anxious or upset when you mention their partner or family situation.
 - They tell you that their partner criticises or embarrasses them in front of other people.
 - They tell you that their partner pressures them into doing things they don't want to.
 - They talk about their partner being jealous, very angry or possessive.
 - They say their partner “doesn't like it when...” or talk about their partner not wanting them to do particular things.
 - They don't seem comfortable making a decision about themselves or their health.
 - They have unexplained physical injuries or give unlikely explanations for these.
 - They say they don't want to leave the children with their partner or ex-partner.
 - They say their partner or ex-partner checks in on them a lot (for example through text messages, calls, checking their social media, etc.).

Warning Signs of DFV

- **Warning signs which are particular to the pandemic are:**
 - They express significant anxiety about being isolated at home with their partner.
 - They mention the safety of their home or talk about being afraid to be at home.

Thank you

