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## **Around the World: Examining Australia's Two-Tiered Standard for Best Interests of a Child**

*By: Caitlin Cipri*

The United States has a history of balancing the constitutional rights of the child against the constitutional rights of the parents when determining if it is in the child's best interests for the state to remove a child from his or her family. However, in the international context, this is not the only standard used to determine if the state should intervene. Australia, in particular, relies on a two-tiered system with two primary considerations and supplementary secondary considerations. Although Australia experienced problems with the traditional best interest standard in the past, the relatively recent development of the two-tiered system signals a step in the right direction.

Over thirty-five years ago, the Australian government was removing Aboriginal and Torres Strait Islander children based solely on the children's Aboriginal or Torres Strait Island descent. Australia's motivations underlying the removal are conflicted. Some reports claim that Australia feared a mixing of the races, while others vaguely claimed that it was done in the best interests of the child. The removal of a child from his or her family, which resulted in emotional and sometimes physical harm to the child, for the sake of the child's "best interests," led to Australia's government passing legislation that presented a more concrete definition of exactly what "best interests of the child" meant. Additionally, in 1990, Australia became one of the first nations to ratify the United Nations Convention on the Rights of the Child. This ensured Australia's compliance with every article of the Convention, including the proclamation that laws and actions affecting children should put a child's best interests first so that it benefit them in the best possible way. Australia has since developed, through legislation, its current system of determining the best interests of the child.

The factors, both primary and secondary, were incorporated into the Family Law Amendment Act in 2006, along with the presumption of equal shared parental responsibility. Under the

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presumption of equal shared parental responsibility, both parents are assumed to have equal and shared parental responsibility over their child unless a court determines, using the primary considerations which are supplemented by the secondary considerations, that equal shared parental responsibility is not in the child's best interests.

In Australia, when a court is deciding whether a parent, legal guardian, or the state should have custody of the child, the Family Law Act ("Act") requires the court to regard the best interests of the child as the most important consideration.

Under Australia's tiered system, the two primary considerations for determining the best interests of a child are: 1) the benefit to children of meaningful relationships with both parents; and 2) the need to protect children from physical or psychological harm, including being subjected or exposed to abuse, neglect, or family violence.

The first consideration is fairly ambiguous. The phrase "meaningful relationship" is not an absolute, defined concept, however, Australian case law has provided some guidance as to the term's meaning. In *Godfrey & Sanders*, Family Court of Australia, Justice Kay concluded that Australia's legislators aspired "to promote . . . a meaningful relationship, not an optimal one." A meaningful relationship, under this rationale, could potentially mean that a child may have significantly limited contact with one parent, if that limited contact is enough to establish a meaningful relationship. Regardless of the existence of a meaningful relationship, it is still possible for other best interest factors to prevail over this primary consideration.

The court's role in assessing the second consideration, the need to protect children from psychological and physical harm, is often confused with the role of investigation. However, the court's role is strictly to assess the evidence presented as to the credibility of the allegations of violence against children. This is often a difficult task for the court because the evidence presented tends to be one person's word against another's. Furthermore, in Australia, "family violence," is defined more broadly than "domestic violence," its analogous term, in the United States. The Family Law Amendment Act Section 4, defines family violence as "conduct, whether actual or

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threatened, by a person towards, or towards the property of, a member of that person's family that causes that or any other member of the person's family to reasonably fear for, or be reasonably apprehensive about, his or her personal wellbeing or safety." This broad definition leads to the assumption that courts may determine that children must be protected from psychological harms, such as control and intimidation.

In addition, the Act does not distinguish conduct between a party and a child, from conduct between a party and another third party, witnessed by a child. In *Lawrence v. Abel*, the Federal Magistrates Court held that the father's violence toward the child's mother in front of the child constituted psychological harm, and reasoned that the emotional consequences of witnessing violent behavior presented a threat to a child's emotional development.

There are many secondary considerations that the court takes into account when determining what is in the child's best interests, including, but not limited to: 1) the child's views and factors that might affect those views; 2) the child's relationship with each parent and other individuals, including grandparents; 3) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent; 4) the likely effect on the child of changed circumstances; 5) the practical difficulty and expense of a child spending time and communicating with a parent; 6) each parent's ability to provide for the child's needs; 7) the maturity, sex, lifestyle, and background of the child and either parent; 8) the attitude of each parent to the child and to the responsibilities of parenthood; 9) any family violence involving the child or a member of the child's family; and 10) any other fact or circumstance that the court thinks is relevant.

Utilizing the primary and secondary considerations, Australian courts use evidence presented by the parties at trial to make a case-by-case determination as to what solution or placement would be in the best interests of the child. Similar to the United States, Australia focuses on ensuring a child's psychological and physical well-being. What makes these two systems different is Australia's noticeable lack of consideration of the constitutional

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rights of the parents and child. Australia's constitution does not mention the rights of a parent, and instead leaves the best interests and rights of the parent and child to be dealt with through federal legislation and on a state-by-state basis. Unlike the United States, Australia's two-tiered system focuses on whether it is in the child's best interests to maintain a meaningful relationship with his or her parents. The addition of secondary considerations, to supplement this determination on a case-by-case basis, make Australia's definition of "the best interests of a child" an amorphous term, individually tailored to every child. Australia's case-by-case and unstructured system may seem uncertain when determining the best interests of the child, however, these new developments are a major improvement over Australia's previous system.

**Sources:**

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

*Family Law Act 1975* pt. VII (Austl.).

*Godfrey v Sanders* [2007] FamCA 102 (Austl.).

*Lawrence v Abel* [2013] FCR 28 (Austl.).

*Parenting Cases – The Best Interests of the Child*, FAM. L. COURTS,

<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Family+Law+Principles/Parenting+cases+-+the+best+interests+of+the+child/> (last visited Mar. 22, 2013).

The Honourable John Faulks, Deputy Chief Justice, Family Court of Austl., In the Best Interests of the Children: A Perspective of the 2006 Amendments to the Family Law Act, Speech at the Shared Parental Responsibility in Australian Family Law and the Impact on Children Seminar (Apr. 13, 2008), *available at* [http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Speeches/FCOA\\_Best\\_Interests\\_Children](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Speeches/FCOA_Best_Interests_Children).