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18 October 2000

Ministry of Justice
P.O. Box 180
WELLINGTON

# REVIEW OF THE LAWS ABOUT GUARDIANSHIP, CUSTODY AND ACCESS

A Submission from the Grandparents Raising Grandchildren Trust ("GRG").

## 1. Background to GRG

The Grandparents Raising Grandchildren Trust was borne from local needs identified in the North Shore City. A group of grand-parents whose role had become that of primary *care-giver* to their grand-children found that their situation was unique and stressful. A public meeting was called and many interested grand-parents attended.

Further investigation throughout the city and beyond revealed that issues facing grand-parents in the North Shore City area were widespread and being faced by grand-parents on a nation-wide scale in New Zealand. The group formed an organisation known as "Parenting Second Time Around" to help facilitate support, action and research in this area.

In August 2000 the group identified a need to distinguish itself from parents in reconstituted families (e.g. step-parent situations); and adopted the name "Grandparents Raising Grandchildren Trust."

### *The GRG's aims and objectives are:*

1. To provide support to grand-parents who are the primary care-givers.
2. To provide opportunities for the grand-children to meet others in the same situation.
3. To raise awareness as to the role of the grand-parents in the primary care-giving role.
4. To undertake research to establish the depth of grand-parents in the primary care-giver role in New Zealand and respond accordingly.
5. To facilitate change in the legal and child custody systems.

The GRG has identified significant numbers of grand-parents raising their grand-children as primary care-giver. The need to take on this responsibility has stemmed from the severe social, emotional and psychological problems experienced by their own adult children or partners, which have placed their grand-children at risk.

These problems include:

- Mental illness
- Substance abuse
- Domestic violence
- Neglect or abandonment

Because of these problems the parenting role faced by the grandparent is more difficult and complex than is usually the case.

Many of the children are traumatised, physically, sexually and/or psychologically and consequently are behaviourally disturbed. Many have special learning disabilities and needs or need counselling and/or psychiatric support themselves.

Often the birth parents are themselves disturbed or mentally unstable. Relationships between the adult children (parents) and grand-parents are frequently antagonistic and sometimes violent. Some grand-parents live in fear of attack and abuse.

These grand-parents take on the role as primary care-giver out of love and concern for the two generations of children concerned. Many of them have found themselves either in retirement or looking forward to retirement, (with plans and dreams of travel, financial security and time to enjoy their latter years in life) suddenly being thrust back into the role of primary care-giver often with little recognition, understanding, financial support or awareness of their plight in today's society.

The role of grandparent as care-giver in these situations has particular stresses and responsibilities which desperately needs greater recognition and support from government, the courts and support agencies in order to ensure that the children who rely on them for security, love and a safe haven have their welfare needs met.

## 2. Outline of Submissions

The GRG wish to make the following submissions on the review of the Guardianship Act 1968 ("the Act") based on their unique perspective of:

(a) the issues that face children and their care-givers;

(b) how the current law and it's operation fails to adequately support the principle that the 'welfare of the child is paramount' and decisions that are made must be "in the best interests of the child."

**Section 3:- Objectives for reform of the Guardianship Act**

**Section 4:- Nomenclature / Definitions**

**Section 5:- Dispute Resolution**

**Section 6:- Counselling / Support Programmes**

**Section 7:- Violence**

**Section 8:- Related issues - Mental Health / Privacy / Financial Support**

# 3. Objectives for reform of the Guardianship Act

3.1 The GRG agrees with the objectives set out in the Ministry of Justice's Discussion Paper on "Responsibilities for Children - Especially when parents part" ("Discussion Paper") to:

(a) Ensure that children and young people receive adequate and proper parenting to help them achieve their full potential;

(b) Ensure that parents fulfil their responsibilities concerning the care, welfare and development of their children;

(c) Recognise and maintain the important relationships within their wider family/whanau which children and young people have established.

3.2 In addition to the above objectives the GRG believes the legislation must better provide for the rights of children set out in the *UN Convention on the Rights of the Child* and in particular to:

(d) Ensure that children are protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of their parents, legal guardians or care-givers.

(e) Ensure that children themselves receive where appropriate effective counselling and/or therapy following the trauma of separation and/or domestic violence and/or mental illness;

(f) Ensure that parents and/or care-givers receive where appropriate effective counselling, therapy and/or support programmes to assist them in the parenting role as primary and secondary care-givers to children;

(g) Ensure that where appropriate children are able to effectively express their wishes or views either directly or indirectly through an advocate or representative in dispute resolution forums.

# 4. Nomenclature / Definitions

4.1 The GRG believes that the key definitions in the Act affecting the child (e.g. "custody", "access" and "guardianship") are out-dated and ill conceived when considered in the context of the principle contained in section 23 of the Act that the *"welfare of the child is the first and paramount consideration."*

4.2 It is submitted that the language used in the legislation will always affect the attitudes of the parties involved in making decisions over children's welfare and it is important that changes are made to the legislation that will generate a response from parents and care-givers that will be in keeping with the principle in section 23.

4.3 Accordingly the GRG submits that the language used in the Act needs to be modernised and redefined to better protect the child and ensure that the objectives contained in the legislation are met.

## Custody

4.4 In particular the GRG submits that the word "custody" defined and provided for in section 11 of the Act creates by definition the parent or care-giver's view that to have "custody" of a

child is to have *possession* and *control* of the child as if they are *owned* by that parent and that they have exclusive rights of care and authority over the child. The word custody should by definition connote "care", "charge", "trusteeship" and "supervision" but this is unfortunately rarely considered in disputes between competing parents and/or care-givers and the parent or care-givers rights are more predominant.

## Access

4.5 Similarly the word "access" and the manner in which it is provided for in section 15 of the Act has the unfortunate effect of making the "access parent" feel as though they are "borrowing" the child for limited periods, but without the same obligations and responsibilities to the child as the custodial parent.

4.6 Accordingly the GRG submits that it is necessary to redefine "custody" and "access" in disputes over care of children. The preference put forward by the GRG is to eliminate the words "custody" and "access" from the legislation and redefine the parents' or primary care-givers' "guardianship" roles as having **responsibilities**, **obligations** and **duties** to their children.

## Proposed New Definitions

4.7 The legislation could therefore define the roles of the parents or primary care-givers as:

- ***"Primary care-giver";*** *being defined as the parent or care-giver who has the day to day care of the child and with whom the child ordinarily resides; and*

- ***"Secondary care-giver"*** *being defined as the parent or care-giver who has contact and care of the child for regular periods at regular intervals.*

- ***"Care-giver"*** *being defined as either a parent of the child or other person who has the care of a child in accordance with a court order.*

## Duties, Responsibilities and Obligations

4.8 It is also submitted that there needs to be a provision in the legislation that provides that:

*"Every care-giver has a duty, responsibility and obligation to ensure that while the child is in his or her care the child is adequately provided with all the child's welfare and developmental needs including adequate food, shelter, clothing, education, medical treatment, protection from physical, sexual and psychological harm, neglect, maltreatment, injury or abuse."*

4.9 It is submitted that the above clause would be more aligned with the principles set out in the articles of the United Nations Convention on the Rights of the Child ("UNCROC") which has been ratified by New Zealand.

## Guardianship - exercise of

4.10 In essence the GRG accepts that the concept that the parents (or mother only if not living together at the time of birth) are "guardians" of the child is sound. However the definition of guardianship is frequently misunderstood and sometimes abused by parents.

4.11 It is submitted that the "right" to have authority in decisions affecting children should be preserved and recognised for both parents in the legislation but that there needs to be some provision made spelling out the obligation that parents or care-givers have (in addition to the duties, responsibilities and obligations set out above) to consult with one another on significant guardianship issues that affect children such as:

(a) Education

(b) Religion

(c) Medical treatment (other than day to day issues)

(d) Location of residence - particularly in cases where one parent or *care-giver* wants to relocate to another town, city or country.

4.12 However it is submitted that there also needs to be a provision in the legislation that enables a parent or *care-giver* to seek a declaration or order that a parent or *care-giver* have their

guardianship rights removed when there is evidence which satisfies the court that such an order would be in the child's best interests.

4.13 The GRG have identified growing numbers of cases where the children's long term welfare and development has been severely and adversely affected as a result of repetitive or protracted litigation between parties. It is submitted that in these cases it is difficult to see how the parties can be upholding their duty to act in the best interests of their child or children.

4.14 Along these lines it is therefore submitted that there needs to be provision in the Act for an embargo placed on repetitive litigation when it is in the opinion of the court that a child is settled with one party and it is not in the child's best interests for the matter to be brought back to court. There needs to be a greater emphasis placed on achieving a sense of permanency and security for these children.

## Rights of the Child

4.15 It is submitted that the right of the child to maintain relationships with secondary care-givers or other significant members of their family or whanau should be the "right of the child" and not the right of the *care-giver* or family member.

4.16 There needs to be a redressing of the legislation and perceptions held by adults in child disputes away from the popularly held view and legal right (contained in section 15) that "access" parents have the right to see and have contact with their child. By changing the nomenclature and definitions in the legislation as proposed in section 4.8 above it is submitted that there would correspondingly be a greater emphasis placed on making decisions that reflect the view of what **is in the best interests of the child.** Provided it is **not detrimental to the child to have contact** with a secondary *care-giver* then it should be the right of the child to have that contact and that parent or *care-giver* has a corresponding **responsibility** to the child to maintain contact and uphold the responsibilities set out section 4.8 above.

4.17 In some cases it is submitted that the Courts have gone too far in making orders that provide for the non-custodial parent to have access with the child without adequately considering the

clearly expressed views of the child. The basic premise that Courts adopt is that it is in the best interests of the child to have contact with their non custodial parent unless there is sufficient evidence to the contrary.

4.18 It is submitted that the premise from which the Courts should be starting is:-

*"what evidence is there to satisfy the Court that for this child to have contact with their care-giver or other family or whanau member is in their best interests and will promote their welfare and development?"*

# 5. Dispute Resolution

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## Family Meetings and Parenting Plans

5.1 What happens when there is evidence that one or both parents or care-givers are not meeting their duties, responsibilities, and obligations set out above or where there are competing claims between parents or care-givers? How can these disputes and issues be resolved?

5.2 Although the Children Young Persons and Their Families Act 1989 ("CYPFA") provides principles setting out the needs of children and a mechanism in the Family Group Conference process for addressing a situation where a child is declared to be in need of "care and protection" it is submitted that the Guardianship Act 1968 does not go far enough to safeguard the children and young people who fall within it's jurisdiction.

5.3 Furthermore it is increasingly difficult to get appropriate and timely action from social workers in the Child Youth and Family Services. They are under-resourced and the service is groaning under the strain of it's current caseload. Where a "care and protection" issue is addressed or identified by the Court in a Guardianship Act case the Judge may make a referral under section 19 of the CYPFA to a social worker. However the time delay in getting action in these cases is often too long and the problem facing the child gets swallowed up in a system that is unable to provide timely and effective solutions.

5.4 It is also submitted that too much emphasis is placed on the adversarial approach to dispute resolution in the Family Court and many parties are prejudiced by a lack of financial resources, lack of legal representation and a limited understanding of the court processes. Furthermore the time delays involved in seeking an effective resolution are unacceptable.

5.5 It is therefore submitted that there needs to be a system adopted that is similar to the approach provided for in the CYPFA for a Family Group Conference type meeting to be held in the first instance and for families to work towards a "parenting plan" for the children including addressing issues such as:

(a) the need for counselling or therapy for the parties and/or the children;

(b) drug and alcohol issues;

(c) domestic violence;

(d) contact between children and other significant family members

5.6 It is submitted that it is not appropriate to completely adopt the nomenclature and procedure set out in the CYPFA and call these meetings Family Group Conferences. This is because there is an increasing sense that FGC's are a waste of time, are poorly run and managed and there is too much of a "them" and "us" attitude between the family and the social workers. In addition the CYPFA and it's jurisdiction is specific to those children in need of care and protection and parties involved in the process feel involved in "the system" to the extent that a shirking of the parental responsibility is common. It is therefore submitted that such meetings be referred to as "Family Meetings" and clear objectives and participants be identified in the legislation for these meetings.

5.7 It is also submitted that if families reach an agreement and develop a "parenting plan" that is considered by the court to reflect a plan that is in the best interests of the child there be the jurisdiction to sanction those plans as orders of the court.

5.8 It is accepted that in some instances (especially in cases of domestic violence) that it won't always be appropriate for family meetings to be held between all the relevant parties. However it is submitted that the requirement (except in certain circumstances) for a family meeting to be held will in many cases:

(a) Reduce the number of cases proceeding further through the family court system;

(b) Enable the parties to work towards a constructive resolution of issues within the family;

(c) Provide the children with a greater sense of certainty - within a shorter space of time following the breakdown of the parents relationship;

(d) Empower the parents and family members with a sense of control over the decision making for the children.

5.7 It is submitted that there will be a need for some specialist involvement in these meetings between the family members in order to assist families to come to decisions that are in the best interests of the children rather than focused on the adults needs. It will also be necessary to ensure that all parties are able to express their views without fear of intimidation.

5.8 It is therefore submitted that experienced counsellors/mediators and in some cases experienced family court lawyers who are experienced in dealing with disputes regarding children and who have mediation experience or training could be contracted by the Family Court to conduct these meetings. In some cases it may be appropriate for other child specialists to be involved including social workers.

5.9 It is also submitted that the Family Court needs to move away from the adversarial system which supports the presentation of evidence by the parties to a more enquiry based system. At present it is often the case that the evidence provided by the parties themselves is contrived and fails to reveal the true picture of what is happening for the child.

5.10 Only where Counsel for Child is appointed or where specialist reports are obtained is there better information provided for the Court to make judgments. However the system still lacks sufficient safeguards for many children, particularly in the case of violence. It has been the experience of many grand-parents that parents frequently play down the level of violence or perjure themselves in Court for their own protection even when there is ongoing domestic violence and police involvement. The Court often readily accepts such evidence and it is submitted by the GRG that the Court should have greater powers of inquiry to seek information directly from the police, community welfare organisations, doctors etc.

### Standing of parties other than parents

5.11 Furthermore the current Act precludes parties (other than the parents) from automatically having any standing before the court and it is first necessary for leave to be granted to make an application. Generally leave is only granted where the court is satisfied that either one or both parents are failing to exercise their custodial or access rights. As a result there are many children who find themselves unable to maintain effective relationships with grand-parents or other significant family members following separation.

5.12 It is submitted that all children (not just Maori and Pacific Islanders) can benefit from the ongoing contact and support from their wider family group following the breakdown of a relationship between their parents. Accordingly it is submitted that parties (other than the parents themselves) should be permitted by the legislation to make a claim for primary or secondary care whether or not their parents are exercising their rights. The check and balance to that provision could be for the Court to have the right to exercise it's discretion not to allow such an application to proceed if there is insufficient evidence provided to show why such an application would be in the best interests of the children.

## 6. Counselling / Support Programmes

6.1 It is submitted that because of the increasing numbers of children being directly affected by the trauma of separation, exposure to domestic violence, drug and alcohol abuse and mental health problems there needs to be greater resources made available for these children to have counselling or therapy to deal with the problems and heal.

6.2 Additionally the care-givers involved often haven't experienced the kinds of behavioural problems exhibited by these traumatised children and find it difficult to manage.

6.3 It is submitted that the legislation needs to provide for state-funded programmes of counselling or support programmes for children and care-givers - whether they be the parents themselves, grand-parents or other family members taking on the role of *care-giver*.

6.4 It is also submitted that this should not be limited to the primary care-giver but should be made available to all parties who are directly involved in the parenting of the children on a day to day basis.

# 7. Violence

7.1 It is submitted that the protection and safeguards for children contained in section 16B of the Act should be maintained.

7.2 However there needs to be greater resources provided for the establishment of more supervised access facilities and trained supervisors.

# 8. Related Issues

## 8.1 Mental Health / Privacy Issues

8.11 The GRG have found that there are many cases where grand-parents are raising children who are born of parent(s) suffering from mental illnesses (brought on by drug and alcohol abuse or otherwise). There is significant and ongoing stress for grand-parents in these situations as they are often having to face intimidation and violence from the parents as well as dealing with behavioural problems being exhibited by the traumatised children of these relationships. Often this is happening at a time in their lives when because of their age and stage in life they are physically and mentally vulnerable in terms of their own health and well being.

8.12 Compounding this problem is the fact that many grand-parents are not privy to information from mental health specialists regarding the mentally ill parents and

their lack of awareness of the severity of the parent's condition often compromises their safety and especially the safety of the children in their care.

8.13 It submitted that there desperately needs to be some redress in this area of the law to support the efforts being made to protect children and their care-givers so that care-givers in these situations are not excluded from disclosure of crucial information about the mental health of a parent because of the current privacy laws.

## 8.2 Financial Support

8.22 Many grand-parents find that in their latter years in life they are taking on the financial and emotional responsibility for the day to day care of their grand-children when they would otherwise be looking forward to retirement, a settled and relaxed lifestyle and the pursuit of many long held dreams of travel or other hobbies.

8.23 Many of these people do so at a time when they are retired or on limited incomes. Some have financial security in the form of their home and small superannuations. Involvement in costly litigation to protect their grand-children means that they are spending their hard-earned savings to pay for costly legal bills. Many grand-parents are not eligible for legal aid because they have financial resources saved for their retirement.

8.24 In addition to this burden often grand-parents are receiving no financial support from the parents or the state (in the form of un-supported child allowance) because of their fear of intimidation and violence from the parents who are in receipt of domestic purposes benefits in respect of those children and defrauding the state at the same time.

8.25 Even in cases where children with special needs (being the product of abusive homes and subjected to violence by the parents) the grand-parents are not financially supported in the same way as foster-parents or care-givers appointed by the Child Youth and Family Agency. The "board payments" that foster-parents and CYFA

care-givers receive for caring for children is significantly greater than the unsupported child allowance available through Work and Income New Zealand.

8.26 The rationale for this being that the children in the care of the grand-parents are more often than not no longer classified as in need of "care and protection" as defined under the Children Young Persons and Their Families Act 1989. There needs to be equity between foster parents (receiving board payments) and grand-parents or other care-givers - receiving only unsupported child allowances. If they are supporting children who cannot be supported by their parents then they should be receiving the same level of financial assistance.

8.27 It is submitted that this inequity between care-givers is discriminatory and not fair to the children. Many children who are in the care of their grand-parents are not able to get the services, counselling and treatment that they need simply because the grand-parents caring for them are unable to afford them.

8.28 It is therefore submitted that the State has a responsibility to uphold it's obligations under the UNCROC and legislate to ensure that children being supported by care-givers other than foster parents or CYFA care-givers are not discriminated against in terms of their financial support and the services that they need for their well-being and development.