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## **GRANDPARENTS AND GRANDCHILDREN RIGHTS AND RESPONSIBILITY: A NEW ZEALAND PERSPECTIVE**

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*"Every generation revolts against its fathers and makes friends with its grandparents."*<sup>1</sup>

*"Families are the thread that holds the human race together. Through our families we are connected to our distant past – the distant times and places of our ancestors – to the future – the hope of our children's children".*<sup>2</sup>

### **INTRODUCTION**

New Zealand is a small multicultural South Pacific nation of four million people. The population is made up of approximately 15% Maori<sup>3</sup>, the indigenous Polynesian population who settled New Zealand or "Aotearoa" more than a 1000 years ago, a largely British group of colonists of Caucasian origins who first arrived in the early 1800s of approximately 76% ('Pakeha'), and Polynesian neighbours, who immigrated in the mid 1900s of approximately 5%, whose family and kinship patterns are aligned closely with that of Maori. There is intermarriage between the races.

This paper examines the role of grandparents, historically and jurisprudentially within the main cultures, and compares briefly other 'common law' jurisdictions. Contemporary New Zealand society requires a legislative direction which recognises its unique multicultural composition, diverse belief systems, and varied social experience. It is argued that New Zealand grandparents, while enjoying the benefits of longer, healthier life, also

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<sup>1</sup> Mumford, L, *The Brown Decades* (1931) p3.

<sup>2</sup> Garbarino J, *Children and Families in the Social Environment*, Aldine Publishing Company, 1982

<sup>3</sup> Defined by Te Ture Whenua Maori Act 1993 'a person of the Maori race of New Zealand' and includes the descendant of such a person.

struggle to cope with less frequent and meaningful contact with their grandchildren. At a stage in their lives when they could potentially offer more meaningful support, mentoring and life skills expertise to their grandchildren, the increasing rate of relationship breakdown results in many grandparents being more separated from their grandchildren than ever before.

## HISTORY

Maori and other Polynesian family groups are based on a strong family or 'whanua'<sup>4</sup>. Within Maori society there is strong emphasis on the importance also of the 'hapu' and 'iwi', or tribal relationships, authority and decision making. Genealogy or 'whakapapa' or customary Maori lines of descent are revered and the role of the ancestors central to value systems.

Grandchildren or 'mokopuna' are 'taonga' or treasures, belonging to the whole iwi. Maori children can become 'whangai', 'atawhai' or 'taurima', cared for or adopted informally by family members<sup>5</sup>, while retaining links and relationships with their family. Different types of kinship care arrangements have been judicially recognised<sup>6</sup>. It is suggested that 'tamaiti awhi' and 'atawhai' arrangements are similar to a Pakeha concept of adoption, while 'whangai' arrangements are closer to Pakeha foster care<sup>7</sup>.

Pakeha New Zealanders retain close ties to the British family tradition and jurisprudence. The role of the child has evolved since New Zealand's independence from Britain (1840) from being seen:

- as a chattel; 1840 - 1899,
- as social capital; 1900 - 1944,
- as a psychological being; 1945 - 1969,
- as a citizen, 1970 - 1989,
- and as a member of a family, whanau, hapu, iwi, and family group 1989 - present<sup>8</sup>.

## CHANGING FACE OF NEW ZEALAND SOCIETY

In 2001, 1.05 million families were recorded in New Zealand. It is estimated that this figure will rise by 22 per cent to 1.28 million in 2021<sup>9</sup>. A family is taken to refer to 'a couple, with or without child(ren), or one parent with child(ren), usually living together in a household'<sup>10</sup>. Households were projected to rise from 1.44 million in 2001 to 1.82 million in 2021<sup>11</sup>. Households were said to consist of 'either one person usually living

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<sup>4</sup> Maori terms are used throughout. Pacific Island terminology may differ.

<sup>5</sup> Dyhrberg, M, 'Inter-country Adoptions – Pacific Rim Adoption: The Impact of European Law on Customary adoptive practices in Aotearoa', presented at International Bar Association Conference, South Africa, 2002.

<sup>6</sup> Re: Walker 9 Dec 2002, 22 FRNZ 11, also reported as *Keelan v Peach* [2002] NZLR 481.

<sup>7</sup> Law Commission's paper, 'Adoption: Options for Reform', NZLC, October 1999, paras 317-325.

<sup>8</sup> *Trapski's Family Law*, Vol 1, NT 1.01-1.07.

<sup>9</sup> 2001 Base Family and Household Projections, Statistics New Zealand, cited by Brian Pink, Government Statistician in Media Release, 30 June 2003.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

alone, or two or more people usually living together and sharing facilities, in a private dwelling<sup>12</sup>.

Although no figures were available from Statistics New Zealand for numbers of grandchild(ren) living with grandparent(s), or numbers of grandparent(s) living with grandchild(ren), anecdotal evidence suggests that the practice is prevalent in New Zealand. Figures available from the Ministry of Social Development in New Zealand state that some 4,000 grandparents have taken on the role of parents in looking after children, through legal guardianship<sup>13</sup>. Although these figures appear large, they do not include the wide variety of such arrangements that are not formalised legally or even recognised by law<sup>14</sup>.

In the Courts arena, in 1990, over 5,000 applications for custody were filed with the Family Court<sup>15</sup>. Of these applications, only one to two per cent awarded custody to someone other than the parent.

The prevalence of this arrangement is reflected in the fact that Work and Income New Zealand (a Service of the Ministry of Social Development), and Child, Youth and Family, and 'Grandparents Raising Grandchildren' (a Trust) have collaborated to produce a guide booklet: 'Help for Kinship Carers: A Guide for People who are Raising Someone Else's Child'<sup>16</sup>. The guide advises on what financial assistance is available for a person raising someone else's child and giving them a home. Work and Income have two benefits available to people raising a child in such a situation – the Unsupported Childs Benefit, and the Orphans Benefit. The Unsupported Childs Benefit can help support the child if their parents can't support the child, due to a family breakdown. The Orphans Benefit aims to help support the child when their parents have died or can't be found, or when they can't look after the child because they have a long-term illness. To obtain the Unsupported Childs Benefit, the applicant also must apply for Child Support from the child's parent(s) to help cover the Government contribution. In addition, if the applicant has not previously attended a Family Group Conference, the applicant will be required to attend a Family Meeting to confirm the family breakdown and confirm that the applicant will be the main caregiver for the next twelve months<sup>17</sup>.

While this information sounds useful on the face of it, the reality may be that the grandparent has no realistic hope of support from the parent(s), let alone financial assistance. Putting these formal obstacles in their path forces many grandparents simply resort to their own means to fund these children's care. For some grandparents who are financially secure, the emotional benefits of full-time access to and care of their grandchild(ren) far outweigh the financial burden. However, for those grandparents who are not financially secure (perhaps still requiring a regular income), the added burden of

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<sup>12</sup> Ibid.

<sup>13</sup> 'New Zealand Families Today', Ministry of Social Development, document prepared for Families Commission. See: [www.msd.govt.nz/documents/msd/nz-families-today.pdf](http://www.msd.govt.nz/documents/msd/nz-families-today.pdf).

<sup>14</sup> Ibid.

<sup>15</sup> In reply to a Question in the New Zealand Parliament, the Hon. D.A.M. Graham, then Minister for Courts, provided information on custody and access. He referred to pp. 16-18 of Hall, G & Lee, A (Dec 1994), 'Family Court Custody and Access Research', Report 8: Discussion Paper, Department of Justice, New Zealand.

<sup>16</sup> Available from Grandparents Raising Grandchildren Trust, [www.raisinggrandchildren.org.nz](http://www.raisinggrandchildren.org.nz) or call 09-480 6530 or email: [parenting2@xtra.co.nz](mailto:parenting2@xtra.co.nz).

<sup>17</sup> Unsupported Childs Benefit from 1 April 2005: <5 yrs \$110.56 (currently \$94.77); 5 – 9 yrs \$129.85 (\$111.88); 10 – 13 yrs \$144.30 (\$120.43); 14+ \$158.66 (\$128.97).

supporting a grandchild (or grandchildren) is not so easily borne. Add to this the difficulties associated with pre-school, before/after-school care, school holiday care, sporting and after-school activities, and these 'second time around' parents have a heavy emotional and financial burden to bear.

A number of informal support groups have been set up by and for grandparents, some specifically aimed at grandparents who have care responsibilities for their grandchildren. 'Grandparents Caring for Grandchildren' is a group which originated on Auckland's North Shore, initiated by grandparents whose role is the primary caregiver for their grandchildren<sup>18</sup>.

In Australia, although there is no reliable data available, it has been suggested in research by the Tasmanian Government's Standing Committee on Community Development that seven per cent of primary carers of children in that state are grandparents<sup>19</sup>.

In the United States of America, there has been a similar significant increase in numbers of grandparents raising grandchildren<sup>20</sup>. It has been stated that five per cent of American families are grandparent/grandchild families<sup>21</sup>. In addition, four million children in America live in households headed by grandparents<sup>22</sup>. This Group also states that ten per cent of all grandparents are raising grandchildren<sup>23</sup>.

## **GRANDPARENTS' ROLES**

Grandparents have many and varied roles in the lives of their grandchildren. Especially in times of distress, relationship breakdown, divorce, or death of a parent, grandparents often provide a much needed oasis of calm and understanding. Grandparents are often the first port of call in a time of family crisis. They may act as role models, playmates for the children, mentors, family historians, and much more. Often they are the sole source of security in confusing and distressful situations. Research has indicated that adults who have had strong relationships with grandparents tend to be much more positive to the value and importance of older citizens<sup>24</sup>.

## **THE GUARDIANSHIP ACT 1968**

In 1970 the Act came into force 'to define and regulate the authority of parents as guardians of their children, their power to appoint guardians, and the powers of the Courts in relation to the custody and guardianship of children'<sup>25</sup>.

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<sup>18</sup> Age Concern information. See [www.agewell.org.nz/grandparents.htm](http://www.agewell.org.nz/grandparents.htm).

<sup>19</sup> Cited in 'Bringing up Grandbaby', in The Age, 27 January 2004. See [www.theage.com.au/articles/2004/01/26/1075087953975.html](http://www.theage.com.au/articles/2004/01/26/1075087953975.html).

<sup>20</sup> Child Welfare League of America holds statistics on grandchildren being raised by grandparents. See: [www.cwla.org](http://www.cwla.org).

<sup>21</sup> See 'Grandparents as Parents', NW Washington Support Group: [www.home1.gte.net](http://www.home1.gte.net).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Downs and Walz, 1981, cited in Atkinson, J, 'Grandparent Access to Their Grandchildren: A Contemporary Issue'.

<sup>25</sup> Long title, Guardianship Act 1968.

By definition (s.2) a 'near relative' includes inter alia grandparent<sup>26</sup>. It provides that the High Court (since amended to confer a similar power on the Family Court) may 'upon application order that any...child is placed under the guardianship of the Court and...appoints any person agent of the Court...'<sup>27</sup> An application can be made by a near relative<sup>28</sup>. This is a codification of the ancient inherent jurisdiction of the role of the court as "parens patriae" in its wardship jurisdiction.

Custody applications may be made by a step-parent but not a grandparent, except with the leave of the Court as 'any other person'<sup>29</sup>. All custody orders may be made subject to such conditions as the court thinks fit. While a step-parent may make an application for access pursuant to s.15<sup>30</sup>, a grandparent has limited rights of access and may only make an application 'if the parent of a child has died, or has been refused access to the child, or if a parent who has access to a child is making no attempt to exercise access to the child'<sup>31</sup>. The Act makes no distinction between non-Maori and Maori New Zealanders.

Various methods have been used to circumvent these provisions by grandparents and Courts:

- Wardship<sup>32</sup>;
- Custody orders with the condition that some other person have access<sup>33</sup>;
- Guardianship rights;
- Access order under s.16 where the parent was choosing not to exercise access<sup>34</sup>;
- CYP Act 1989, where applicant must have genuine and serious concerns about the child's health and welfare.

The influence of Treaty of Waitangi, New Zealand's founding document, 1840, jurisprudence has led to a number of attempts to gain access to Maori children by whanau members and to introduce the principles into guardianship, custody, and access disputes<sup>35</sup>.

## **GUARDIANSHIP ACT 1968 AND NEW ZEALAND BILL OF RIGHTS ACT 1990**

The New Zealand Bill of Rights Act has been utilised as the basis of a challenge to decisions made regarding children by a grandfather. In *M v M [guardianship]*<sup>36</sup>, a grandfather challenged a court order for interim custody awarded to the mother, where he (the maternal grandfather) was denied access to the child. The grandfather challenged the court order on the basis that it was a breach of s27 of the New Zealand

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<sup>26</sup> s.2, definition, Guardianship Act 1968.

<sup>27</sup> s.9, *ibid*.

<sup>28</sup> s.9(2), *ibid*.

<sup>29</sup> s.11(b), *ibid*.

<sup>30</sup> s.15(3), as amended in 1973, *ibid*.

<sup>31</sup> s.16, *ibid*.

<sup>32</sup> *P v P*, (1985) 1 FRNZ 684.

<sup>33</sup> *Tito v Tito*, [1980] 2 NZLR 257.

<sup>34</sup> *H v H*, (2001) 21 FRNZ 470.

<sup>35</sup> See *Keelan v Peach*, *supra*.

<sup>36</sup> *M v M [guardianship]* (1996) 14 FRNZ 102; [1996] NZFLR 319.

Bill of Rights Act 1990, as he was not notified about the custody order. The Court held that the Guardianship Act dealt with disputes between parents and/or guardians affecting children. It was stated that grandparents' rights are not recognised by the Act and that they have no automatic right of audience in custody and/or access disputes<sup>37</sup>.

## **GUARDIANSHIP ACT 1968 AND TREATY OF WAITANGI**

In *K and H v. S and others*<sup>38</sup>, the court was faced with the difficult decision of whether to change the custody of the fourteen year old twins from their step-mother to adoptive paternal grandmother and aunt. The natural mother had lost contact with them when they were six months old. The natural father was in prison for raping these twin daughters. The Judge was reluctant to remove the twins against their wishes to Grandmother and aunt. Yet there were factors in the step-mother's case that were against the psychological needs of the twins. The twins were placed under the guardianship of the Family Court and Counsel for the Children was appointed the Court's agent. Custody remained with the stepmother with strict conditions as to their care. The orders allowed the Court to retain ultimate control and responsibility.

This case is also noted for the Judge's views on the Treaty of Waitangi and the extensive evidence about Whanau and Maori culture of the children involved and the relevance and importance of their Maori culture and spirituality. The Court was provided with a report on the history of Maori culture and with information on Whakapapa and the concepts Whanau and mana (status). Some of the material is discussed in the judgement. The twins and paternal relations were Maori.

In *B v DGSW*<sup>39</sup>, a Maori grandmother applied for custody and guardianship of her grandchild, in opposition to an application by the child's mother for a closed adoption arrangement. The grandmother claimed she wished to protect the child's indigenous rights to be raised by her whanau, hapu and iwi. She wished to protest that the prospective adoptive parents, though Maori, were from a different iwi to the child. The grandmother's counsel made reference to the United Nations Declaration on the Rights of Indigenous Peoples 1993.

In the High Court, it was accepted that the Treaty of Waitangi must influence all matters to which it had relevance, both public and private. It held that it did not matter that the statute did not refer specifically to the Treaty. The Court said that the welfare of child should be considered in broad manner, to include the cultural background of the child, and that the view of the whanau should also be considered, where appropriate.

In this case, the Court held that the child was likely to have bonded already with the prospective adoptive parents (she had spent five or six months living with them) and declined the appeal on the grounds that there was a danger that placing the child in her

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<sup>37</sup> Brookers' Child Law GAIIntro.34 New Zealand Bill of Rights Act 1990 and the Guardianship Act 1968.

<sup>38</sup> *K & H v S & Others*, District Court Henderson, FP No. 00/94, 2 March 1994 (Judge Doogue).

<sup>39</sup> *B v DGSW* (1997) 5 FRNZ 501; [1997] NZFLR 642. Also reported as *Barton-Prescott v DGSW* [1997] 3 NZLR 179.

grandmother's custody now would risk further major disruption for the child. There has been criticism of this view from a Maori perspective<sup>40</sup>.

## **THE CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1989**

This Act is enacted 'to reform the law relating to children and young persons who are in need of care and attention and, in particular;

- (a) To advance the wellbeing of families and the wellbeing of children and young persons as members of families, whanau, hapu, iwi, and family groups;
- (b) To make provision for families, whanau, hapu, iwi, and family groups to receive assistance in caring for their children and young persons;
- (c) To make provision for matters relating to children and young persons who are in need of care or protection or who have offended against the law to be resolved, wherever possible, by their own family, whanau, hapu, iwi, or family group.<sup>41</sup>

In care and protection, the focus is on the rights of the children and the responsibilities of adult family members to children:

- The welfare of the child is seen as tied to the welfare of the family<sup>42</sup>;
- Children have a right to receive care and be protected from harm<sup>43</sup>;
- The primary responsibility for care and protection rests with the family<sup>44</sup>.

Family responsibility in caring for and protecting children extends beyond parents to include wider family, whanau, hapu, iwi, and family group.

The responsibilities of the state include:

- To advance the wellbeing of children and their families by ensuring accessible and culturally appropriate services are available.
- To assist parents to meet their responsibilities;
- To assist and protect children in order to prevent them suffering from harm, ill treatment, abuse, neglect, and deprivation.

Concepts underlying these responsibilities include;

- The significance of family<sup>45</sup>;
- The significance of culture<sup>46</sup>.

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<sup>40</sup> Lloyd, T, 'Maori Customary Rights of Whanau, Hapu, and Iwi to Consent to and Sanction an Adoption', (1998) 39 Youth Law Review 18.

<sup>41</sup> Children, Young Persons and Their Families Act 1989.

<sup>42</sup> See Objects (s.4), General Principles (s.5), and Duties of the Director General (s.7), *ibid*.

<sup>43</sup> See ss.13-14, *ibid*.

<sup>44</sup> s.139(b), *ibid*.

<sup>45</sup> The Family Group Conference, Placement Options, s.14, *ibid*.

Advances flowing from the Act include:

- A framework potentially positive for family development;
- Care and protection decision making involving families;
- Children in care maintain contact;
- Emphasis on the extended family having more knowledge and opportunity to find appropriate answers;
- Process gives more cognisance to different family cultures<sup>47</sup>.

The Act has the potential to achieve a balance of rights and responsibilities between the family, the community and the state. However a number of tensions and restraints exist, which can impinge on that ideal:

- Tension between a child's right to protection of their welfare and restrictions on parental rights and family autonomy;
- Restraints of lack of information, denial, lack of cooperation, economic restraints, rigid systems and beliefs, and lack of options.

Families have a time-honoured tradition in most cultures to care for children when their parents cannot. The wisdom of this includes the premise that it is less traumatic, and less disruptive of family, community and cultural ties.

## **THE FUTURE FOR GRANDPARENT ACCESS TO GRANDCHILDREN IN NEW ZEALAND**

### **CARE OF CHILDREN BILL 2003 (Bills Digest No. 978)**

The Care of Children Bill is currently before Parliament in New Zealand and it is intended to replace the Guardianship Act 1968, as well as amend both the Family Proceedings Act 1980 and the Status of Children Act 1969. The Bill was introduced to Parliament on 10<sup>th</sup> June 2003 and has been reviewed by Select Committee, with numerous submissions being considered, leading to a number of amendments.

### **PURPOSE OF CARE OF CHILDREN BILL 2003**

This Bill aims to modernise the law relating to guardianship, care of children, Family Court's procedures, and parental status<sup>48</sup>.

The Care of Children Bill has the following purpose (as per Clause 3):

“(3) Purpose of this Act

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<sup>46</sup> s.79(c), s.13 (g), *ibid*.

<sup>47</sup> Angus, 'Grey Rights and Responsibilities', *IYFS* October 1994.

<sup>48</sup> McSoriley, J, Legislative Analyst, Parliamentary Library, Parliament Buildings, Wellington, New Zealand.



- (1) The Purpose of this Act is to promote children’s welfare and best interests, and to facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care.
- (2) To that end, this Act-
  - (a) defines and regulates-
    - (i) parents’ duties, powers, rights, and responsibilities as guardians of their children:
    - (ii) parents’ powers to appoint guardians:
    - (iii) Courts’ powers in relation to the guardianship and care of children:
  - (b) acknowledges the role that other family members may have in the care of children:
  - (c) respects children’s views and, in certain cases, recognises the sufficiency of their consent to medical procedures:
  - (d) encourages agreed arrangements for, and provides for the resolution of disputes about, the care of children:
  - (e) makes provision for enforcing orders internationally:
  - (f) implements in New Zealand the Hague Convention (on international child abduction)<sup>49</sup>.

The Bill is intended to address the increasingly divergent family and ethnic demographics of New Zealand society. As a modern piece of legislation, it will aim to reflect the family arrangements existing in contemporary New Zealand society, whilst also attempting to consider the multi-cultural diversity of New Zealand. Another important consideration will be attempting to meet New Zealand’s many obligations as party and signatory to international conventions relating to children’s needs and interests. For example, The United Nations Convention on the Rights of the Child (UNCROC) includes obligations which need to be reflected in the legislation governing guardianship and care of children.

### **COMPARING THE SITUATION UNDER THE GUARDIANSHIP ACT 1968 TO THE CARE OF CHILDREN BILL 2003**

The Guardianship Act’s terminology has been criticised as being outdated and old-fashioned. The Care of Children Bill reflects an attempt to update the terminology and bring it into line with international trends. The United Kingdom and Australia have moved towards the use of ‘parental responsibility’, with parenting orders, residence orders and contact orders. The terms “parental responsibility”, “custody” and “access” continue to be used in the Hague Convention on Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996)<sup>50</sup>. The Care of Children Bill retains the term “guardianship”, but no longer utilises the terms “custody” and “access”. Once the Bill becomes law, applications will be made for a “parenting order determining day to day care”, or a “parenting order determining contact”<sup>51</sup>.

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<sup>49</sup> Cl. 3, Care of Children Bill 2003.

<sup>50</sup> Brookers’ Child Law, GAIntro.02.

<sup>51</sup> GAIntro.02 (6), *ibid*.

“Guardianship” in the Guardianship Act refers to the rights, powers and duties of a guardian, with little consideration of the child’s perspective. A guardian has the right to “custody” of the child, with “custody” defined in the Act as the “right to possession and care of a child”. Guardianship is deemed to include the right to decide about the child’s education, medical treatment, behaviour, and religion. The Care of Children Bill acknowledges the rights of the child in all matters concerning their upbringing. It particularly acknowledges the need to respect children’s views, and re-emphasises the need to promote the child’s best interests and welfare.

Although the Care of Children Bill is seen by some as a move in the right direction as regards improving the situation of children, especially those in situations of disturbed relationships, it is argued that the Bill falls short of what it ideally should permit. For our purposes, the grandparents in New Zealand who face an uphill struggle to obtain and maintain contact or guardianship of their children will not be in a greatly improved position by virtue of the new Act.

## **THE CURRENT SITUATION**

Section 15 of the Guardianship Act does not specifically allow grandparents to obtain access to a child. This section only permits access in favour of a parent or step-parent of the child. Under Section 16 (1) a rather narrow class of people are permitted to apply for a Court order to allow access to a child, excluding some of the very same people who, it might be thought could provide beneficial contact, such as siblings, former carers, other relatives, whanau members, and grandparents. Section 16 only allows siblings, grandparents, aunts and uncles to apply for access when the parent (through whom they claim a relationship with the child) has died, or if that parent has no active contact and access with the child<sup>52</sup>. This is in direct opposition to the widely held belief that maintaining contact with close relatives and those who have played a major role in their lives is highly beneficial to children. As previously outlined, in Maori and Pacific Island cultures, members of the child’s wider family group often play an important role in the child’s upbringing and in their cultural education. Research has suggested that the benefit to the child from access to other relatives is likely to depend on personal and cultural factors<sup>53</sup>.

Section 15 (b) of the Guardianship Act empowers the Court to make access orders in respect of grandparents (as well as uncles, aunts, and siblings of the child).

## **MAIN PROVISIONS OF CARE OF CHILDREN BILL 2003 WHICH IMPACT ON GRANDPARENTS CARING FOR GRANDCHILDREN**

### **GUARDIANSHIP AND CARE OF CHILDREN**

Grandparents can be appointed as guardians for their grandchildren. ‘Guardianship’ is defined in the Bill as meaning that the person (or persons) have all the duties, powers, rights and responsibilities as a parent of the child has, regarding the entire process of the upbringing of the child. This includes all the day-to-day activities of the child.

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<sup>52</sup> GA15.09, *ibid*.

<sup>53</sup> Crook, H, ‘Grandparent Visitation Rights in the United States Supreme Court’ (2001), 12 CFLQ 101.

The guardian has additional powers such as being involved in the child's intellectual, emotional, physical, social and cultural development. The guardian decides (or assists the child to decide for themselves) on matters such as where the child lives, and with whom it lives, medical treatment, education, and religion.

Guardianship will normally be vested in the parents (or parent if one is deceased). The Bill provides for the guardian (in the case of only one guardian) or guardians (all of them) of a child to appoint an additional guardian under certain conditions<sup>54</sup>. This provides an avenue for grandparents to be appointed as additional guardians, either as testamentary guardians, or with the consent of the parents.

Grandparents may also make an application to the (Family or High) Court (as an 'eligible person') for an order placing a grandchild under the guardianship of the Court, and seeking that a named person be appointed as the agent of the Court (generally or for a particular purpose).

## **PARENTING ORDERS**

Under the Bill, grandparents may apply for a parenting order. In determining the application, the Court will decide who has the role of providing day-to-day care of the child, as well as who may have contact with the child.

The Select Committee reporting on the Bill has noted that the Bill provides wider eligibility to apply for parenting orders for near relatives. Although the Bill does not address the practice of whangai (Maori traditional practice akin to adoption), the Committee reported that if matua whangai require legal guardianship status, they, together with the parents, should apply to have the matua whangai appointed as additional guardians by consent order in the Family Court<sup>55</sup>.

## **WILL THE CARE OF CHILDREN BILL HELP GRANDPARENTS?**

Depending on the Courts' interpretation of the Act (in what is likely to be a further amended version), the Care of Children Act had the potential for improving the situation for grandparents seeking greater contact with their grandchildren. Unfortunately for the many grandparents affected, it probably doesn't go far enough. Although the Act does not yet specifically address grandparent contact with grandchildren, the Act does specify that acknowledgement should be made of the role of other family members in the care of children<sup>56</sup>, that children's wishes should be respected<sup>57</sup>, and "encourages agreed arrangements for, and provides resolution of disputes about, the care of children"<sup>58</sup>. To this end, this provides encouragement that if contact can be shown to have occurred successfully in the past or to be (potentially) beneficial for the child, then this should at least be considered by the Court in making an order for this purpose. As most grandparents experiencing difficulty gaining access to their grandchildren have usually exhausted every available avenue already, it is unfortunate that the new Act still places a

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<sup>54</sup> Clauses 21 – 24, Part2, Subpart 1, Care of Children Bill 2003.

<sup>55</sup> Report of Select Committee on Care of Children Bill 2003, p.16.

<sup>56</sup> Cl. 3(2) (b), Care of Children Bill 2003.

<sup>57</sup> Cl. 3(2) (c), *ibid.*

<sup>58</sup> Cl. 3(2) (d), *ibid.*

burden on the parties to at least attempt to resolve their differences prior to seeking an order. However, grandparents now have a further means of achieving a legally binding order to enforce their wishes to have a meaningful role in the lives of their grandchildren.

## **GRANDPARENTS - DO WE NEED THEM?**

History shows that the role of grandparents in New Zealand, as in the rest of the common law jurisdiction has received scant regard. The Law in 1970 was premised on society's monocultural 'nuclear family' model. Parental rights were to the fore with the presumption that the parents have the right to control the contact their children have to the wider family including grandparents.

Why then is there a growing grandparents' rights movement?

- This generation of Grandparents are "baby boomers" - they have grown up asserting their rights;
- They are healthier, live longer and are family orientated;
- They are more vocal and more involved;
- They have grown up aware of and understanding the psychological needs of children;
- They are the second or third generation to have experienced family breakdown and its effects on children, and family relationships.

Grandparents have assumed greater roles in some family systems, recognising the diversity of family arrangements.

## **CONCLUSION**

After the progress made in the Children, Young Persons and Their Families Act 1989, it is disappointing to find the Care of Children Bill retrenches from the progress made in that Act. The Bill is still largely modelled on Western style nuclear family. While the present Bill has, to an extent, addressed the difficulties, making it easier for a grandparent to obtain an access order, it is questioned why it is not more straightforward, given the preponderance of data concerning the importance of wider family ties to the welfare and best interests of the child.

The CYPF Act 1989 introduced a multicultural approach which anecdotally has much to offer. It introduced the "family group conference", a mechanism to encourage decision making about the child or young person by their "family group"<sup>59</sup>, including an extended family, where at least one adult member with a biological or legal relationship with the child or young person<sup>60</sup>, or someone to whom the child or young person has a significant psychological attachment<sup>61</sup> may attend.

These laudable innovations are, of course, only available in the course of proceedings involving children in need of care and protection or who have offended against the law and thus have a need for State intervention. The Care of Children Bill could have

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<sup>59</sup> s.2 Definitions, Children, Young Persons and Their Families Act 1989.

<sup>60</sup> s.2 (a), *ibid.*

<sup>61</sup> s.2 (b), *ibid.*

benefited from both these Acts, to allow the children of New Zealand to enjoy the wisdom of their wider family - including all their grandparents - in decisions involving their welfare and best interests.

Where better to air access difficulties for children with grandparents than in a meeting properly convened, involving all of the people who share familial and psychological ties with the child and who have the best interests of the child at heart?

The experiences in New Zealand under the CYPF Act 1989 of the family group conference have indicated that the collective wisdom of seemingly dysfunctional families arriving at sound solutions for their children and young people deserves the incorporation into the Bill. This may go some way in addressing the difficulties of grandparent access to their grandchildren. Given the growing organisation and support group network for grandparents in New Zealand, it is to be hoped that the collective voice of disenfranchised grandparents will rise to a level which demands substantive improvements in the Care of Children Bill, giving them the access and facilities they so richly deserve.