

# Responsibilities for Children

*Especially When Parents Part*

The Laws About  
**Guardianship, Custody and Access**

Discussion Paper

Ministry of Justice  
*Te Manatū Ture*

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## *Foreword*

# **A Review of the Laws About Guardianship, Custody and Access**

This paper is designed to promote discussion about the welfare of our children and the basic rules our society has made about rights and responsibilities in family relationships.

New Zealand's law relating to guardianship, custody and access is over thirty years old. Patterns of family life, and our values regarding family relationships, have changed significantly since then. The Government has decided it is time to review this area of the law.

This paper is a first step in reviewing the Guardianship Act 1968. We want to encourage thinking about the law and how the Family Court works, when responsibilities for children cannot be sorted out in families, so that our children are protected and parents and others concerned for children have a fair and understandable system to deal with.

If things go well in a family, family members never need to know about these legal structures. If parents can agree on the important decisions about how children should be cared for, and if parents stay together, or can reach agreement about the care of children if they do separate, then the laws and structures discussed in this paper are irrelevant. And the good news is that that is the situation for most families.

But when problems do occur things are not always that clear and smooth for our children. Most of us have some experience, whether it is in our own lives or in those of our extended family/whānau, of situations that do not work out that well.

Parents do separate, and they cannot always agree on arrangements for the care of their children when they part. Sometimes parents are violent toward their children, and there have to be rules about their future access to the children. Sometimes there are arguments about other important issues affecting children and someone has to make decisions.

This discussion paper begins the review process by explaining the Government's goals for family policy and asks questions about what we want from our law in this area. It then describes the current legal framework and raises some important issues and seeks your responses. The paper then focuses on the processes of the Family Court, and includes an appendix about some of the approaches in overseas countries and our relevant international obligations.

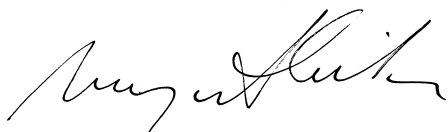
We are keen to hear views from as many people as possible. The submissions will be carefully read, and provide the basis for a report which will help inform us as we proceed with a review of the law surrounding guardianship, custody, and access.

Please note that any submission you make may be the subject of a request under the Official

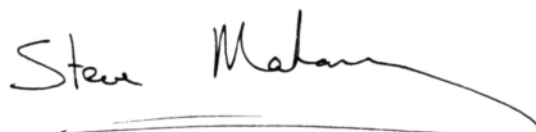
Information Act 1982. The withholding of particular submissions on the grounds of privacy, or for any other reason, will be determined in accordance with that Act. If you feel there is any part of your submission which you consider could be properly withheld under that Act (eg, for reasons of privacy), please indicate this clearly in your submission. The numbered questions are only posed as suggestions. Please feel free to comment on any other issues you think are raised in this area of the law. Your submissions are very important to the Government as they will provide the basis upon which to develop effective social policy and legislation. Submissions can be sent to:

Ministry of Justice  
PO Box 180  
Wellington  
(or you can e-mail it to: [guardianship@justice.govt.nz](mailto:guardianship@justice.govt.nz))

Submissions close on **30 November 2000**.



Hon Margaret Wilson  
Associate Minister of Justice



Hon Steve Maharey  
Minister of Social Services and  
Employment

# 1 The Family Policy Framework

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Children and young people in New Zealand grow up in a diverse range of family relationships, which increasingly undergo changes to their original structure. Extended family and significant other caregivers often play a central role in the raising of children. There is, however, little recognition or legal protection for different family arrangements and the important roles played by wider family members in the lives of children and young people. Nor does the current law adequately reflect the importance to Māori and to Pacific people of their cultural values and approaches to raising their children which impact on the welfare of their children.

Family relationships are also a very important factor in children and young people's wellbeing, socialisation and development. It is through family relationships that cultural values, attitudes and practices are most effectively transmitted. It is therefore important to develop strong relationships between children and their parents, and amongst those who care for children and young people. This can be encouraged through promoting positive parenting, and increasing parenting skills and relationship support. Legal frameworks are also important because they set out the rules and processes to help families deal with problems when relationships break-down.

Under our law the welfare of children and young people is of paramount importance. The rights, interests and responsibilities of children and young people, their parents and other family members, are defined, and given effect to, in different ways in the different cultures that make up New Zealand society. The differences, particularly for Māori and Pacific peoples, need to be recognised.

The Treaty of Waitangi must be a fundamental reference point for the development of family policy in New Zealand.

New Zealand also has international obligations and commitments that need to be recognised in the context of child and family policy. The principles of the United Nations Convention on the Rights of the Child (UNCROC) ensure that the best interests of the child are of primary consideration (see Appendix 2).

The Government's goals for child and family policy therefore include:

- enhancing the wellbeing of children and young people, maximising their opportunities, recognising their rights and interests;
- supporting parents and others in carrying out their responsibilities to their children;
- providing a policy and legal framework which allows for the diversity of family types and cultural beliefs and practices; and
- providing a policy and legal framework which facilitates the range of ways in which parents and others carry out their responsibilities to their children.

The review of the Guardianship Act is part of this overall child and family policy to increase opportunities for all children, and to strengthen relationships within families. There are also other initiatives in progress, for instance, the Law Commission is presently conducting a review

of adoption laws and is expected to provide a final report in August/September of this year. A select committee review is to be undertaken, with the Law Commission's final report as its primary focus.

# 2 What Do We Want From the Law?

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## Objectives

The Guardianship Act 1968 sets the legal rules for guardianship, custody, and access in respect of children and young people. It is now more than 30 years old. Many people believe that it is out of date and that we need to reform the law to reflect the changes in our beliefs and behaviour in this crucial area.

But if we are to review the legal framework, we need to be clear about the objectives – what are we trying to achieve?

Some suggestions for the objectives for the law regarding guardianship and custody of and access to, children and young people, are:

- to ensure that children and young people receive adequate and proper parenting to help them achieve their full potential
- to ensure that parents fulfil their responsibilities concerning the care, welfare and development of their children
- to recognise and maintain the important relationships within their wider family/whānau which children and young people have established.

2.1 What do you think should be the basic goals of our laws about guardianship, custody and access to children and young people?
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# 3 What is the Current Law?

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Before considering whether any changes to the law are necessary, it is important to be clear about the current legal framework. The legal rules for guardianship, custody, and access in respect of children and young people are set out in The Guardianship Act 1968. (In this paper, we will sometimes refer to it as ‘the Act’.)<sup>1</sup>

## The overriding principle: Welfare of the child

Under the Act the welfare of the child must always be the first and the paramount consideration in guardianship, custody and access matters.

## What is ‘Guardianship’?

- Under the Act, guardianship means:
  - the custody of a child or young person; and
  - the right of control over the upbringing of the child or young person. “Upbringing” is defined to include education and religion. It also includes such things as change of name and major health decisions.
- Guardianship and custody of children and young people generally go together unless the parents separate and cannot reach an agreement about shared parenting. The Court then may grant a custody order in favour of one of the parents. Where that happens, however, the non-custodial parent still retains the other rights and responsibilities of guardianship.
- The mother and father are automatically guardians of their children if they are living together at the time of the baby’s birth. This is true whether or not they are legally married.
- If, however, the father is not married to the child’s mother, and is not living with her at the time of the baby’s birth, then the father will have to apply to the Family Court to be appointed a guardian.
- The Family Court can appoint other people to be guardians, for example, to cement a new family relationship where the child or young person may not be related to the caregiver.
- If at any time guardians are unable to agree on any matter concerning the exercise of guardianship, they may apply to the Court for an order about the matter in dispute.
- The father or mother may leave instructions to appoint someone to be their child’s guardian if they die. The person appointed to take over the guardianship responsibilities of that parent is called the testamentary guardian. The testamentary guardian will not necessarily have custody.
- A child or young person can be placed under the guardianship of the Family Court (commonly known as being a ward of the Court) if it is judged to be necessary in order to protect the child or young person’s interests. The Court can appoint a named person to be a guardian either

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<sup>1</sup> Rules about children in need of care and protection are separate and are contained in the Children, Young Persons, and Their Families Act 1989. If a Court finds that a child or young person is in need of care and protection, it can make a guardianship or custody order under that Act. The rules about children and young persons in need of care and protection are not part of this review.

for all purposes connected with the care of a child or young person, or for a specific purpose. An example of the appointment of a guardian for a specific purpose is where a child or young person is in urgent need of medical treatment but the parents do not consent.

- Guardianship begins when the child is born and ends on his or her 20th birthday, unless the child marries before that age.

### What is 'Custody'?

Under the Act, custody is defined as the right to possession and care of a child. In practical terms, this means the day-to-day care of the child.

- Both parents usually have custody rights, but if they separate the Family Court can grant a custody order in favour of just one of them if necessary. The Court can also decide to make a joint custody order in favour of both parents.
- A parent, step-parent or guardian may apply to be granted custody. Other people need the permission of the Court before they can apply for custody.
- Once a young person reaches 16, custody orders no longer apply, unless there are special circumstances.

### Access

In the context of the Guardianship Act, the term 'access' is only relevant where custody has been given to one parent.

- Access in these situations refers to the arrangements for a child or young person to spend time with their non-custodial parent.
- The parent who does not have custody may apply to the Court for an 'access order' so that the arrangements have legal weight.
- The rights of other relatives such as grandparents or aunts/uncles to be granted access are limited to situations where one parent has died or has been refused access or is not exercising access to the child.

### Situations involving domestic violence

If the Family Court accepts that a parent has been violent against anyone in the immediate family, it cannot give the violent parent custody of or unsupervised access to the child or young person unless it is satisfied that they will be safe with the violent parent.

### Wishes of the Child

The Court must find out the wishes of the child or young person, if they are able to express them, and take them into account to such an extent, bearing in mind the age and maturity of the child or young person. The Court may use counsel appointed to represent the child for this purpose. Sometimes the Judge will speak to the child in chambers.

### Conduct of parent

The only time the Court can take a parent's conduct into account in custody and access proceedings is when it is relevant to the child or young person's welfare.

## **No presumption in favour of one parent over another**

When the Family Court is deciding who should have custody of a child or young person, there is no presumption in favour of one parent over another. In fact, the Act specifically says that there is no presumption that the sex of a person who wants to have custody is relevant when deciding on what will best serve the welfare of the child. It is also important to note that there is no presumption that the children in a family should remain together when their parents separate.

## **Medical Treatment**

There are explicit provisions in the Act for dealing with the questions surrounding medical treatment for children and young people. They include providing that those who are the child or young person's guardians have the power to consent to the administration of medical care for those who are younger than 16. If guardians refuse to consent to urgently required medical treatment, the Court can assume guardianship of the child or young person for that purpose or appoint someone else to be guardian for that purpose.

# 4 Issues About the Current Law

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Most of the concerns about the current law fall into four categories:

- *Modernising language and key concepts. The Act uses terms which are outdated and invite a combative rather than conciliatory approach to resolving custody and access issues.*
- *Children and young people's rights. Should there be an even greater or a different emphasis to ensure children and young persons welfare is paramount?*
- *Rights and responsibilities of parents. Should there be a greater focus on the rights and responsibilities of parents for the upbringing of their children?*
- *Recognition of the wider family/whānau and of cultural diversity.*

## Modernising language and key concepts

The language in the current law sounds a lot like property law. Custody is defined as “the right to possession and care” of a child. Guardianship is defined to include “the right of control” over the child’s upbringing. Access to the child is referred to as a “right” that vests in the parent. These are not the sorts of terms used when parents are living together. This is not the language of parenting. On separation people refer to one parent being awarded custody and the other parent obtaining access rights. This structure and language encourages notions of “winning”, “losing” and “ownership” of children, and many people think that this is unhelpful when parents are separating and trying to sort out these very difficult issues.

A change in terminology could help to emphasise the child or young person’s rights and interests and the parent’s responsibilities. It may also help change the focus from dispute to consensus. Some other countries have moved away from using the terms “guardianship”, “custody” and “access” (see Appendix 1).

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| <p>4.1 How could the law better reflect a more consensual approach to custody and access?</p> <p>4.2 What sort of terms and key concepts would do this?</p> <p>4.3 Should “guardianship”, “custody” and “access” be replaced in the law by a broader range of options for the Courts to consider? What might these include?</p> |
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## Children and young people’s rights

In making decisions about custody and access there is the potential for conflict between the interests of the child and the interests of a parent.

The Act clearly states that the welfare of the child must be the first and paramount consideration whenever there are proceedings under the Act. However, most of the Act focuses on the custody and access rights of the parents. Concerns have been raised that rather than focussing on the rights of the parents, the Act should focus on the rights of the child. What do you think?

- 4.4 Do the provisions of the Act ensure that the best interests of children and young people are the prime focus? If not, what changes need to be made to ensure this happens?
- 4.5 Can we do more to comply with the UNCROC principles (see Appendix 2), which focus on ways the State can advance a child's welfare?
- 4.6 Is there a need to better ensure that children and young people are fully informed, that their views on custody and access are sought and taken into account and that they are participating to the fullest extent appropriate? If so, how could this be done?
- 4.7 One possibility is that the law could include guidelines to help the Court determine which course of action would best promote a child or young person's welfare. These could include the child or young person's wishes and the need for real and ongoing parental contact (where appropriate). What do you think of these? Any other suggestions?

### Parental rights and responsibilities

In law, both parents normally retain legal responsibility for major decisions affecting their children, when they separate. However, the children will usually live with one parent for most of the time. How to enable both parents to contribute in an ongoing way to fulfilling their parental responsibilities can be a difficult issue.

As already discussed, the current language of the Act focuses on parental rights rather than responsibilities. It may be that more emphasis on parents' responsibilities towards their children would be a better focus for resolving issues when parents separate.

- 4.8 What are the key issues or concerns about the rights and responsibilities of parents? What ideas do you have for resolving these?
- 4.9 Do you think there should be a greater emphasis in the law on the responsibilities of parents, instead of their rights regarding their children?
- 4.10 Should the law encourage an emphasis on ongoing responsibilities of both parents? How could it do this?
- 4.11 How else can parents be encouraged to take greater responsibility for their children? For example, some have suggested the use of "parenting plans" which would be based on agreement between the parties and be sanctioned by the Court. Do you have any views on this idea?

### Recognition of wider family/whānau and cultural diversity

The current law is mainly focussed on the parents and the child or young person. It has very little recognition of the role which wider family members/whānau might have in bringing up a child, yet it is quite common in New Zealand for a broader group of adults to help raise a child, with grandparents and aunts and uncles often being very important in the nurturing of a child.

The Act, for instance, has only very limited provision for access rights to be given to members of the wider family/whānau.

This is an issue for many New Zealanders, and is of particular concern to Māori and Pacific families because of Māori and Pacific families' cultural values and approach. In Māori and Pacific families the wider family/whānau is very often central to a child or young person's life.

Step-parents and others who may be seen as part of the child's "social family", although not related, can also have relationships with the child or young person which it may be important for the child or young person to have preserved.

- 4.12 Should a wider group of adults be considered when thinking about the care of children or young people when parents part? If so, who?
- 4.13 How could the values and aspirations of Māori be incorporated in the Act?
- 4.14 Should the law especially recognise the role which is played by the wider family/whānau in the raising of Māori and Pacific children? Would including this matter in guidelines to the Family Court be helpful? Have you suggestions for other ways to make sure our law supports the family structures of all New Zealand's people?
- 4.15 Should members of the wider family/whānau, such as grandparents, have the right to apply to the Court for the ability to have ongoing contact?
- 4.16 Should others, such as step-parents, who have had a role in the upbringing of the child or young person, have the ability to apply to the Court for ongoing contact?
- 4.17 What would be the best way to obtain the input of wider family/whānau members in relation to custody and access matters?

# 5 Procedures in the Family Court

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So far, this discussion paper has talked only about rights and responsibilities – issues of substance. The vast majority of parents settle their custody and access disputes without recourse to the Family Court. However, where agreement has not been reached, the processes which are used for resolving disputes between parents and enforcing the Family Court’s custody and access orders are important. There have been issues raised about these processes which need looking into.

Generally, guardianship, custody, and access matters are dealt with in the Family Court, although appeals to the High Court can be made about any orders made under the Act. The procedures that will be used for resolving disputes are set out in the Family Proceedings Act 1980 and the Guardianship Act.

When one parent applies for custody or access, both the parents’ lawyers and the Court must look at the possibility of reconciliation first, and then at conciliation. The Court can order parents to go to counselling, or the parents themselves can request it. Counselling is the main non-judicial means of resolving disputes. The Judge will generally convene mediation conferences, at which both parties can discuss disputed issues with the Judge. The Judge chairs the conference and makes sure both parties have an opportunity to express their views. The parents may request a mediation conference. Both parents can have legal representation at mediation conferences and the child or young person’s counsel can also attend where appointed. If the mediation conference succeeds in helping the parents to sort out an agreement about custody and access issues, or if the parents reach an agreement by themselves, the Judge can make an order to enforce it.

Children and young people are not generally entitled to counselling or entitled to attend mediation conferences as of right.

Family Court Co-ordinators are available at many Family Courts to give information or help. The Family Court Co-ordinator provides information on the free counselling services available through the Family Court and arranges referrals to local counsellors and agencies. The Family Court Co-ordinator may meet with potential applicants before arranging counselling.

- 5.1 Are the Courts the best agencies, or the only agencies appropriate to offer dispute resolution services for custody and access matters?
- 5.2 Should the Court proceedings be more in the form of an inquiry rather than a contest between parties?
- 5.3 Should the Judge and the lawyers who appear before the Family Court always have a duty to promote reconciliation?
- 5.4 Is counselling the best way to try and resolve custody and access disputes?
- 5.5 Should children and young people be entitled to counselling services and to attend mediation conferences as of right?

- 5.6 Should provision be made for the participation of wider family / whānau in counselling or mediation conferences? How could this be achieved?
- 5.7 Is mediation which is led by the Judge the best way of working for agreements in disputes over custody and access?
- 5.8 Are there other forms of alternative dispute resolution not involving the Court which should be available? What might some options be?

### **Court appointed specialists and counsel for the child**

The Family Court has scope to seek additional help. The Court can order a report by a social worker, and can also ask for a medical, psychiatric or psychological report on the child or young person. It can appoint counsel to represent any child or young person who is involved in the proceedings (counsel for the child).

Sometimes parents may disagree with the contents of the specialist reports. Sometimes parents feel that the counsel for the child favours one of the parents over the other. There are issues about the best way to deal with concerns a parent may have about the professional standards of those appointed by the Court.

- 5.9 Is there a need for more information to be given to parents about the purpose of the social worker or psychological reports?
- 5.10 How can the views of children and young people best be represented in the Family Court? Are lawyers the most appropriate people to do this? Who else should be involved?
- 5.11 What sort of information on custody and access should be provided to children and young people? Who should provide this information?
- 5.12 Do parents need more information about the role of counsel for the child?
- 5.13 Are there other services that should be provided by the Family Court (for example, social work services, mediation services provided by trained mediators)?
- 5.14 What else could be done to address issues in this area?

### **Private proceedings**

Custody and access proceedings are not open to the public. No report on the proceedings can be published except with leave of the Court. The reason is that the proceedings are essentially private family matters involving children and young people and there does not seem to be any wider public interest in the dispute.

Concerns have been expressed that secrecy prevents the public from gaining an understanding of important social issues and approaches taken to address them by the Family Court.

- 5.15 Should the proceedings be more open?
- 5.16 How do we balance the need for openness with the essentially private nature of these proceedings and the need to protect the interests of the children and young people involved?
- 5.17 Does the Family Court have a role in promoting a better understanding of its services and the way it operates? How can this be achieved?
- 5.18 Should the Family Court provide information sessions to potential participants? Who should facilitate such sessions? What information should be provided to participants?

### Delays, costs, and repeat applications

Concerns are often expressed about delays in getting disputes over custody and access resolved by the courts. There are also concerns about the costs of court proceedings.

A related issue is that in some cases, parents return again and again to the courts in order to contest custody and access matters. These applications use up Family Court time, creating delays and increasing costs, but the Court has little power to stop these repeat applications.

- 5.19 Do you have any ideas that might help to make sure that disputes are handled more quickly and cheaply? For example, should the Family Court provide “do-it-yourself kits” to potential parties to proceedings? How should these kits be publicised?
- 5.20 Should the Court have greater powers to stop people from making repeat applications for custody and access?

### Enforcement of Court Orders

The Family Court may make decisions and order that certain things take place, but people do not always comply with Court orders so there have to be mechanisms for enforcing the decisions if necessary.

Some have concerns that the enforcement mechanisms are rarely used and are of limited practical use. In particular, in relation to access, if one parent does not co-operate it can be difficult for the other parent to have their rights enforced. The Court does have a number of enforcement powers:

- The Court may issue a warrant authorising the police or a social worker to pick up and deliver a child to the party who is entitled to access or custody (unless this would be contrary to the wishes of a child over 18).
- The Court can issue warrants directing the police or a social worker to take the child and place it in the care of a suitable person (pending a further Court order) where it believes that any person

is about to take a child out of New Zealand to defeat one party's custody or access rights. Tickets and passports can be taken from the child and the parent concerned.

As with other decisions in this area, the Court's powers will only be used when it is clear that it will be in the best interests of the child or young person to do so.

5.21 How could the enforcement mechanisms be strengthened in a way that promotes the welfare of the child or young person?

5.22 How can families or communities be helped to support Court Orders? How can we ensure children and young persons' views over time are acknowledged and influence enforcement, or changes, to Court orders?

- There is also provision for New Zealand custody and access orders to be registered and recognised in overseas countries and for the orders of overseas countries to be registered and recognised in New Zealand (this is currently only in operation between New Zealand and Australia).
- The Guardianship Amendment Act 1991 implements in New Zealand the Hague Convention on the Civil Aspects of International Child Abduction. The Convention provides mechanisms for the return of children who have been taken to another country in breach of one parent's custody rights so that issues of custody and access can be decided in the child's country of residence.

5.23 Are there any problems with the way these provisions are working?

### Supervised access

At present the Court **must** order that access be supervised for a parent who the Court accepts has been violent against anyone in the immediate family (unless it is satisfied the child or young person will be safe). This is because there is a need to protect children and young people from direct violence and from the harm that results in witnessing violence.

5.24 Is supervised access, where the access parent has been violent, the best way to ensure the child's safety? Are there other ways that the child can have safe access to a parent who has been violent?

5.25 Should the violent parent be required to pay for the cost of supervision when they seek to exercise access rights?

5.26 Is the purpose of the supervised access position generally understood?

## APPENDIX 1:

# Some Overseas Examples of Laws for Guardianship, Custody, and Access

These are difficult issues which laws all over the world have tried to grapple with. The overseas examples below may provide some good ideas and some warnings for New Zealand. None of them is perfect even at home, and none has a perfect model for New Zealand.

### United Kingdom

In the United Kingdom the Children Act 1989 has replaced their legal concepts of “guardianship”, “custody”, and “access”, which were very similar to our own. They now have “residence”, “contact”, “prohibited steps”, and “specific issue” orders. The terms are designed to be practical and to avoid the idea that anyone has “possession” of a child.

Unlike the old custody orders, the new law does not remove parental authority from one parent or confer sole power on the other. The law is designed so that the Court can make orders to settle particular matters, and having done that, neither parent may then upset the arrangements. But overall, they are more flexible. They allow the Court to make whatever arrangements seem best in the particular case, doing so by dealing with practical questions rather than abstract rights.

Some have commented that the law changes may have lowered the emotional tension in UK family law matters. But recent research has raised concerns that there is now an almost irrefutable presumption that all contact is good for children and shared parenting is always the best option. There are concerns that this is replacing the primary criterion of ‘the best interests of the child.’

### Australia

Australia followed a very similar approach to that in the UK in 1995, amending their Family Law Act 1975 to replace notions of “guardianship”, “custody” and “access” with the all-embracing notion of “parental responsibility,” and the Court’s orders are now for parenting, residence, or contact. The law specifically encourages parents to reach agreement rather than seek a Court order. The parents’ agreement can be in the form of a ‘parenting plan’ which can be registered.

Under the new approach, both parents have parental responsibility – and this is not affected by separation, marriage, or remarriage. The focus has moved away from the idea that parents have rights over children, toward the basic notion of parents having responsibilities toward their children.

There has not been much research yet on the effects of the changes. One limited study raised concerns such as that the system may be becoming more tilted against women, and that there may be a downgrading of the child’s point of view. Another study found that there was a shift to the ‘contact’ parent having more time with their children and being able to exercise more responsibility, more fathers seeking more regular contact with their children, and a shift in the disputes from “who gets custody” to “how do we arrange contact so it’s in the child’s best

interest". On the other hand, the same study found it was more difficult for women to oppose contact on the grounds of domestic violence, that there has been an increase in litigated disputes, and that shared parenting responsibility often just did not work out.

## United States

Family law in the United States is different in each state, but there are three general approaches: joint custody, primary care-taker, and parenting plans.

In the US, joint custody generally means that both parents share responsibility and authority for the major decisions concerning the child's upbringing, although one parent may have the responsibility for the child's living arrangements and day-to-day care. If the parent who does not physically look after the child on a day-to-day basis loses custody, he or she has no right to have any say in the child's life. The best that parent can hope for is visitation rights. It is thus not surprising that the law in many states has a bias toward joint custody.

Research on the US's approach to joint custody shows that it can work, but only if both parents agree on it. Because the law often really pushes people in this direction, the 'agreement' may not work well in practice. And because the costs of not having joint custody can be so high, parents sometimes forego their claims to support and property if they are worried they may lose custody of their children or that the Court may order custodial arrangements which are harmful to them.

The primary care-taker approach means the judge has to make decisions based on who they think was the parent who spent the most time carrying out the day-to-day child care tasks before separation. In the main, there are only two ways this criteria can be challenged: the child's preference, and showing the parent is unfit to have custody. This approach arose out of concern that judges had too much leeway, and that in some states there was too strong a presumption in favour of joint custody. However, it leads to a focus on the care-taking and moral fitness of parents, rather than the needs of a child. It has led to court action focusing on parental behaviour.

Finally, parenting plans are agreements between parents about arrangements for the children. Generally, if the parents cannot decide on a parenting plan the Court can impose one. There is some evidence that parenting plans have reduced acrimony between parents, because the focus has shifted from ownership of the child to the practical tasks of parenting. But the process can be long and sometimes litigious.

## APPENDIX 2:

# Our International Obligations

New Zealand signed and ratified the United Nations Convention on the Rights of the Child (UNCROC) in 1993. This means New Zealand is committed to implementing UNCROC's principles in our own law. The principles relevant to custody of and access to children have a children's rights/ parental responsibility focus.

**Article 3.1** says that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.

**Article 9.1** says that State parties shall ensure that a child is not separated from their parents against their will, except when competent authorities determine that the separation is necessary for the best interests of the child. The article notes that this may be necessary where the parents are living separately and a decision must be made as to the child's place of residence.

**Article 9.2** requires all interested parties to be given the opportunity to participate in proceedings under article 9.1 and to make their views known.

**Article 9.3** says that State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis except if it is contrary to the child's best interests.

**Article 12.1** says that State parties shall assure that a child who is capable of forming their own views has the right to express those views freely in all matters affecting them, with the child's views being given due weight in accordance with their age and maturity.

**Article 12.2** says that, in complying with Article 12.1, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or indirectly, or through a representative in a manner consistent with the procedural rules of national law.

**Article 16.1** says that children shall not be subject to arbitrary or unlawful interference with their privacy, family, home, or correspondence.

**Article 18.1** says that State parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.