

Our Ref: RJB:MAP:Family 2003
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27 October 2003

House of Representatives Standing Committee on Family and Community Affairs	
Supp	Submission No: 1670
	Date Received: 3-11-03
	Secretary:

The Committee Secretary
House of Representatives
Standing Committee on
Family & Community Affairs
Parliament House
CANBERRA ACT 2600

03 NOV 2003

Dear Sir/Madam,

Re: Inquiry into Child Custody Arrangements in the event of Family Separation

Further to our submission of 29 August 2003, the Law Society of New South Wales' Family Law Committee does not consider that there needs to be any change to the law as it presently stands.

However, if the Standing Committee determines change is necessary, the majority of our Committee consider that there are two areas which may assist in accommodating the concerns of both the resident and non-resident parent.

- (a) Joint Guardianship
(refer copy attached s 61C *Family Law Act* as to **several** parental responsibility)

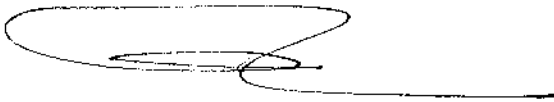
Under the present law, parents are **severally** responsible for their child/children. Once parties separate it is then necessary for one party or the other to seek specific issues orders under section 64B (6) of the *Family Law Act*. In many overseas jurisdictions, what is referred to as "joint custody" in fact means what we know as "joint guardianship". One option is to provide that parents are jointly responsible for the long-term decisions about the care, welfare and development of their child/children. This would mean that, if a separated parent wanted to make a major decision about their child/children, it would be presumed they would as a default, need the consent of the other or an order of the Court. Any such change would have to be carefully drafted to enable parents to make

decisions about urgent surgical procedures or other urgent parenting responsibilities.

- (b) Amendment of s 68F (copy attached) of the *Family Law Act* to require Courts to consider whether joint parenting would be a viable option when the issues of parenting come before the Court.

This avoids the creation of a rebuttable presumption and would put in place a sensible option which would be available to some parents if it served the best interests of the child or children. Although this may place additional burden on Courts, it would certainly make joint parenting one of the primary considerations in determining a child's best interest.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Robert Benjamin', with a long horizontal line extending to the right.

Robert Benjamin
President

Encl



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FAMILY LAW ACT 1975- SECT 61C

Each parent has parental responsibility (subject to court orders)

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child.
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

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FAMILY LAW ACT 1975- SECT 68F

How a court determines what is in a child's best interests

- (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
- (2) The court must consider:
 - (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
 - (b) the nature of the relationship of the child with each of the child's parents and with other persons;
 - (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
 - (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
 - (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
 - (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
 - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
 - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (i) any family violence involving the child or a member of the child's family;
 - (j) any family violence order that applies to the child or a member of the child's family;
 - (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
 - (l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

"Aboriginal peoples" means the peoples of the Aboriginal race of Australia.

"Torres Strait Islanders" means the descendants of the indigenous inhabitants of the Torres Strait Islands.

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