Speech by

Mr L. SPRINGBORG

MEMBER FOR WARWICK

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SUCCESSION AND OTHER ACTS AMENDMENT BILL

Mr SPRINGBORG (Warwick—NPA) (Deputy Leader of the Opposition) (11.26 p.m.): The Opposition supports this Bill, but it is another telling indictment of the incompetence of this Government that we are debating retrospective legislation designed to remedy the unwitting abolition of statutory guardianship provisions effected by the passage of the Child Protection Act.

The essential principles enshrined in this Bill are designed to maintain the legal status quo as it existed prior to 23 March this year. While there are some marginal changes to the law, it is patently obvious that this is no exercise in law reform but another example of this Government fixing up a botched legislative program.

Queensland has had legislation allowing and facilitating parents to appoint guardians to look after their children in the event of their demise since 1891. In that year, this Parliament passed the Guardianship and Custody of Infants Act, which legislation remained in force until the Children's Services Act became operative in 1965. Part 9 of the Children's Services Act dealt at some length with the guardianship and custody of infants. The many sections in Part 9 were amended on a regular basis and it is clear that they were used often by Queensland parents and without major problems.

It is a measure of the inherent soundness of the drafting and policy of Part 9 that it remained substantially unaltered until the passing of the Child Protection Act. Not once in the Minister's introductory speech did he point out that this Bill was a catch-up exercise designed to preserve existing rights. He made out as if this was another piece of proactive law reform rather than a rushed exercise designed to overcome the legislative incompetence of this Government.

I do not wish to be unduly critical of this Bill as far as it goes, but I am very critical of the fact that we have now to debate retrospective legislation. If this Minister were up to scratch, he would have introduced this Bill simultaneously with the Child Protection Bill or at least have secured its passage and proclamation to coincide with the commencement of the Child Protection Act on 23 March this year.

There seems to be a trend with this Government of presenting to Parliament retrospective legislation which is needed to paper over administrative failings, failings that seem to be symptomatic of a lazy and inattentive administration. I hope that we do not have to debate many more retrospective Bills during this Parliament because it is bad practice and sends out all the wrong signals to the wider community.

Mr Lucas: How is it retrospective? It applies to all wills.

Mr SPRINGBORG: If the member listened, he would understand.

In addition, I am concerned that since 23 March this year the parents of Queensland children have been deprived of the legislative underpinnings to appoint testamentary guardians for their children in their wills. We have had the quite unbelievable situation that, for the first time in more than a century, this basic statutory right has been taken away. Instead, there has been a legislative vacuum. At the end of the day, the public will pass judgment on Governments of whatever political persuasion on the basis of whether they can deliver the basics—not the glitz and glamour, just the bread and butter issues for the workers and other people of this State. This is yet another straw in the wind of how this Government has dropped the ball and displays that, when it comes to the crunch, it just simply does not deliver. Again, we are seeing catch-up public administration and this is not good enough.

The Minister could at least have explained why this unsatisfactory state of affairs came about, but as usual this Parliament was given no explanation. If the Minister thinks that ignoring the issue and hoping that it will go away without scrutiny will work, I hope that this is a salutary example of how that sort of approach only makes the situation worse.

I will turn to the substance of the Bill. It goes without saying that it is very important that there be a simple, cheap, non-litigious and effective legislative means for parents to appoint testamentary guardians for their children. In the absence of such a power, an application would have to be made to the Childrens Court for a care and protection order, or to the Family Court, rather than leave this matter in the hands of a third party, and only after potentially traumatic and expensive legal proceedings have been instituted. It is obviously far better to leave the nomination to the persons who have the ultimate day-to-day care of the infants in question—namely, their parents.

Any adult who has children knows only too well the importance of having in place appropriate testamentary provisions for their children's care and protection. There are few things more important to a parent than the knowledge that their children will be looked after financially, emotionally and physically if a tragedy occurs and they predecease them. The question of who should look after a child in the event of the death of the parent who is the primary caregiver should lie with that parent.

A parent who is in that position should be allowed a private right, facilitated by clear and fair provisions passed by this Parliament, to make clear by whom and how their children or child will be raised. As I see it, the fundamental principle underpinning this Bill is one which would be supported by all thinking adults. It is a principle which has been the law of this State for over a century.

The first issue I raise concerns the preservation by the Bill of the appointment of any person to act as guardian of a child through the execution of a deed, if that deed was in force prior to 23 March 2000. I note that the Minister said in his speech—

> "While it is not the policy of this Government to authorise the appointment of a guardian by deed, it is important that no children be disadvantaged by the repeal of that Act."

I have no quibble with the protection of deeds of appointments made prior to 23 March, but I do question why it is the policy of this Government to prevent persons appointing guardians by deed and limiting such appointments to wills.

The ability of parents to appoint guardians by deed is recognised under the Children's Services Act 1965 and has been the law of both Queensland and the United Kingdom for many years. I draw the attention of the House to the following comments in Volume 21 of the 3rd Edition of Halsbury's Laws of England, which was published in 1957. It states—

> "Both the father and the mother have power, if under age, by deed, and if of full age, by deed or will, to appoint persons to act as guardians of an infant after their respective deaths, if the child is then an infant. Where the appointment is made by deed, it is of a testamentary nature and is revocable by a subsequent will making a different appointment."

There is quite a deal more on that matter, but the point I want to make is that the power to appoint a guardian by deed seems to have worked fairly well for quite some time.

Mr Lucas interjected.

Mr SPRINGBORG: If not, presumably the Minister would not be going out of his way to uphold such appointments made prior to 23 March. The honourable member for Lytton, no doubt, professes or pretends to be learned in the law. He will have his opportunity as the debate goes on to outline his particular contentions in relation to what I am advocating in Parliament.

Obviously the preferable means of appointment of guardian is by will, and most people refer to guardians as testamentary guardians in recognition of that fact. However, I would like the Minister to explain why the Government is opposed to appointments by deed. I would like to know what problems have arisen and why this option is being taken away from Queensland parents. There may be a perfectly legitimate reason which the Minister would like to advance. There may well be sound policy reasons based either on changes in the law or specific problems that have arisen.

However, these were not spelt out by the Minister and I think it is only fair that, if we are changing the law by limiting options for Queensland parents, we are told why. As I said, I am not arguing the point, but I would suggest to the Minister that some clarification is warranted.

Another aspect of the Bill deserving comment is the extended definition of the term "parent" to include persons who, under Aboriginal or Torres Strait Islander custom, would be regarded as parents of the child. Fortunately, we have come quite a long way over the past few decades in recognising the importance of indigenous customs in the administration of the law in all of its facets.

In 1986, the Australian Law Reform Commission recommended that Governments and indigenous people should work together to decide on methods by which Aboriginal customary law could

be recognised. Nevertheless, the ALRC itself pointed out that there were limits on how far this recognition could go, particularly in the areas of marriage and criminal law.

However, there is some scope for the legislatures of the various Parliaments in Australia to integrate indigenous customary law into the statute law of our nation. This is not just because it has been recognised by various law reform bodies as desirable and just, but basically if our system of law is to have relevance and be able to operate in a practical and sensible way, it must recognise the reality of what occurs in our indigenous communities. It is pleasing to be able to contribute to the debate on this aspect of the Bill in a bipartisan fashion.

I draw the attention of the House to the following comments which appear in the second edition of a book entitled Indigenous Legal Issues which was published in 1997. The authors make this point—

> "Extended kin, especially grandparents and aunts, are regarded as primary caregivers with status equal to that of the biological parents. It is a common and accepted practice for mothers to leave young children with their grandparents for extended periods of time. Such a mother would be seen by non-aboriginal people as 'no good' or 'unworthy' but in fact she is acting in a culturally acceptable way given the rights and obligations that aboriginal families share."

The authors quote from a 1984 study of urban Aborigines in south-west Western Australia, which states—

> "Most Noongar families add cousins or grandparents to the household as a matter of form. It is common for grandparents to become social parents to a child who calls them 'dad' and 'mum'. Birdsall relates how child-rearing in a Noongar household is a communal enterprise from the very first, with children learning to be looked after by their grandmothers and aunties, in particular, and other relations from time to time. Such flexibility of filiation extends to aunts and cousins, in particular. A Noongar child is taught to regard an aunt as a mother, and her cousins as her sisters and her brothers. The classificatory kinship system apparent in more traditional communities is still strongly apparent among the Noongar today. 'Granny', for example, refers to any adult of either sex of one's grandparent's generation, who has the status and respected position of a grandparent ... this communalised method of child rearing is the very core of Noongar social structure and organisation. It is by this means that an individual forms close and lasting associations that will be of major importance through life."

There are a number of indigenous communities in Queensland that have their own traditional and accepted means of dealing with the rights and responsibilities of children and the wider family unit, including quite detailed and socially accepted procedures about the reallocation of care. This Bill touches only at the margins of this complex matter but insofar as it approaches it from an inclusive and understanding perspective, it is to be supported. Whether a child is indigenous or non-indigenous, the same principle governing their welfare should be upheld, namely, what is in the child's best interests. Nevertheless, it is right in certain contexts in assessing the best interests of an indigenous child to have regard to their Aboriginal background and to Aboriginal child-rearing practices.

I state specifically that it should be given appropriate weight because, as the Minister would be aware, there are numerous Family Court cases dealing with the guardianship rights of children of mixed race relationships. In these cases, the Family Court has held that a number of factors have to be considered in determining what is in the best interests of the child. As the Family Court has emphasised, it is critical not to favour one culture over another. We should not replace the mistakes of the past with new mistakes and we must be ever vigilant to ensure that the focus always remains on the best interests of the children.

This Bill simply recognises the relevance of Aboriginal culture in certain limited circumstances and is a positive move that deserves support. As I mentioned earlier, without legislation facilitating parents having guardianship provisions in their wills, the common law would prevail and recourse would have to be made to the courts. Nevertheless, there will continue to be a need for the courts to have a supervisory jurisdiction and to be able to step in when the need arises.

Proposed section 61J ensures that the power of a Supreme Court is not limited by this Bill. The Supreme Court has the inherent jurisdiction to exercise parental power and can make orders that it considers are in the best interests of the child. The current Governor-General, when he was a High Court judge, made the following comments in 1992 about the inherent powers of courts such as the Queensland Supreme Court—

> "The authority of parents with respect to a young person of less than eighteen years is limited, controlled and varying. It is limited to what is in the best interests of the welfare of the young person. That being so, it can, at least as regards really serious matters, be validly exercised only after due inquiry about, and adequate consideration of, what truly represents the welfare of the child. It is controlled in that, if it is exceeded or if it is exercised other than for the

benefit and welfare of the child, a court invested with the welfare jurisdiction of the old Chancery Court has jurisdiction to intervene and prevent excess, abuse or neglect of authority. Such a court can, when its jurisdiction is invoked, make an order directed to ensuring what should, within the limits imposed by financial and other practical considerations, be done or not done in the interests of the welfare of an infant is done or not done."

So it is important to ensure that, while the Succession Act should contain provisions enabling the appointment of testamentary guardians, the general welfare supervisory jurisdiction of the Supreme Court is in no way diminished.

The Minister noted in his second-reading speech that the provisions dealing with the appointment of testamentary guardians would now be found in the Succession Act. I agree with this move. It really does not make much sense to spread provisions dealing with the will-making powers of persons throughout the statute law of this State. All provisions dealing with testamentary powers, responsibilities and ancillary matters should be located in the statute dealing with wills. I can readily understand that a case existed in the past, with the ability of parents to make non-testamentary deeds appointing guardians, for these provisions to be located in the general law governing the welfare of infants. But now that the Government is dispensing with non-testamentary guardian provisions, no such rationale can be made. I recommend to the Minister that officers of his department should engage in a thorough review of other statutes to see whether similar rationalisation can occur. Surely one of the objectives of the plain English legal strategy is to ensure that the law is not only more accessible in terms of drafting but also more accessible in terms of location.

The Minister also pointed out that, under the Bill, unless the will shows a contrary intention, a testamentary guardian will exercise powers only after the death of the child's last surviving parent. However, if the will does have a contrary intention, then the guardianship will be activated on the death of the testator or testatrix. However, in such a case the guardian is limited to joint involvement in making decisions about the welfare of the child.

I would like the Minister to deal in his reply with a few queries that I have about the operation of the Bill. First, proposed section 61B provides that the power to appoint a testamentary guardian is not limited to a parent but also applies to a guardian of the child. In other words, as I read it, if a person is appointed as a guardian of a child under a will, then that person can, in turn, appoint another guardian under the person's will. Obviously, allowing a parent to appoint a testamentary guardian is essential, but has it always been the case that the power to appoint a testamentary guardian can be transferred down the line, so to speak?

There appear to be no guidelines or safeguards spelt out in the Bill in this regard. I wonder whether the Minister could explain the philosophy underpinning this provision. As I said earlier, the court has, and under this Bill continues to have, a general supervisory jurisdiction and I would have thought that, in the event of the death of a testamentary guardian, it had inherent powers to make guardianship orders. I just wonder whether allowing a guardian to appoint another guardian without any supervisory tick-off from the court is leaving the matter too open ended. I am not opposed to this provision but I can see some scope for problems to arise and I would appreciate the Minister dealing with it in his response.

The second issue that I would like to raise is the extent to which the law is being changed by the Bill so far as the authority of testamentary guardians compared with that of a surviving parent. As members of this House would be well aware, for a number of reasons, not the least being the high incidence of marriage break-ups, a very high proportion of families are headed by one parent. Under section 89 of the Children's Services Act, when one parent died and provided in their will for a testamentary guardian, then that guardian acted jointly with the surviving parent in looking after the interests of the child or children. As I read section 89, the law as it stood up until last year ensured that the guardian automatically shared responsibility with the surviving parent. Nevertheless, under this Bill, that will occur only if—and I now quote from subsection (3) of proposed section 61D—"the will shows that the appointor intended the appointment to take effect on the appointor's death, the appointment takes effect on the appointor's death."

The first question I have for the Minister is what does that part of subsection (3) mean in practice? I presume that the mere nomination of a person to be a testamentary guardian on the death of a parent will not result in that person actually having any role to play if a parent remains alive, even if that parent played no role in the parenting of the child or children. If the fact of nomination is not enough, then does this section require that a parent must actually state in clear words that the guardian will share responsibility for the rearing of the child or children on the death of the will maker? Should that be the effect of this Bill, then it will be of utmost importance that this fact be made clear to the Queensland public. It would be a travesty of justice if a parent's heartfelt wish so far as the bringing up of their children is concerned was diluted by a change in the law which was not made clear to Queensland parents.

The second question relates to why the law has been changed. I would have thought that there was now a far greater case than there was in 1965 for ensuring that a guardian appointed by one parent was automatically entitled to be a joint guardian with the surviving parent, unless the will provided otherwise. As I said, with the rate of divorce now much higher than it was 35 years ago and with the number of de facto marriages continuing to rise, providing that a surviving parent has sole guardianship rights, even though a deceased parent has appointed a person other than the surviving parent as the guardian of a child, seems a little strange to me. It is all too often the case in the event of a break-up in a relationship that a parent may nominate one of their brothers or sisters or their parents to be the guardian of their children.

Mr Schwarten interjected.

Mr SPRINGBORG: Pardon?

Mr Schwarten: I was talking to them.

Ms Bligh: They are more interested. We are not saying anything.

Mr SPRINGBORG: I am sure the Minister for Families is not interested in these issues.

Mr Schwarten: How long are you going to be?

Mr SPRINGBORG: I will be about another five minutes. After the problems the Minister had this morning, there may be some lessons in this for tomorrow morning.

Under this Bill, unless very clear and precise language is used the clear intention of a parent could be ignored, which would be very unfortunate. I fully realise that the Supreme Court has its supervisory powers and functions, but from my own experiences I know full well that it is critical that a child or children in these circumstances not be the subject of a tug of war, especially when it could involve a traumatic court case.

Moreover, I fail to see why this apparent change is being made, because section 61E(2) makes clear that the testamentary guardian will, in any event, only have daily care authority of the child if the child has no remaining parent. In other words, in the event of a dispute it will be the child's remaining parent who will have the day-to-day responsibility for the child. However, the testamentary guardian will have the general right to supervise the way that the child is being brought up and looked after. In other words, the testamentary guardian will not have responsibility for a child's daily care, but will have the legal right and ability to maintain a watching brief.

I ask the Attorney-General if my assumption about the change in the law is correct and, if it is, what was the policy underpinning it. I raise these questions because proposed sections 61G and 61I set out what occurs if a testamentary guardian whose appointment is not automatic wants it to be the case or in the event that a surviving parent does not want a testamentary guardian having any role.

These proposed sections give to the Supreme Court the power either to automatically commence the powers of a testamentary guardian, even though the will is silent, or to revoke or suspend the role of the testamentary guardian. My reading of the Bill is that the law is being changed, but in the event that a testamentary guardian wants his or her appointment to commence immediately that person can apply to the Supreme Court.

I also ask the Minister what his department will be doing about educating the broader Queensland community about the law governing testamentary guardians. People do not think about the issue of guardianship until a tragedy occurs, and I can indicate from my own experience that there are a lot of misconceptions in the community about how the law operates. It would be helpful if some effort was made to produce pamphlets in plain English so that people making wills or people wanting to know what the law was could have access to a brief but authoritative explanation of what the Succession Act provides. Maybe the Attorney's department does something like that, but I am not aware of it.

Finally, I support the proposed amendments to the Commonwealth Powers (Family Law—Children) Act. It is important that the provisions relating to testamentary guardians be excluded from general referral by the State to the Commonwealth of legislative powers relating to children. The law governing testamentary guardianship is inextricably interconnected with the law governing succession and rightly belongs under State law and within the general supervisory jurisdiction of the Supreme Court.

In conclusion, I note that the Attorney-General referred to the work of the Law Society succession law committee and in particular its chairman, Dr John De Groote. Dr John De Groote and Tony Lee, who is the author of numerous succession and trust text books for many years, have been regarded as the pre-eminent experts on succession law in this State, if not throughout Australia. When the Minister mentioned that John De Groote had been involved in this legislative exercise I was very pleased because I am sure any advice that he and his committee proffered would have been practical, expert and well intentioned.

I join with the Minister in thanking the Law Society for its assistance because since the enactment of the Succession Act 1981 Queensland has had the most progressive and best drafted code of succession law in Australia.