The courts, family control and disability - aspects of New Zealand's Protection of Personal and Property Rights Act 1988

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New legislation has been passed in New Zealand to provide for adult guardianship and management of property. While the potential scope of the Act is very broad, it will be of particular advantage to the elderly, the psychiatrically ill and those with intellectual handicap. While the Act provides for substitute decision-making, intervention in a person's life is to be on "the least restrictive" basis, encouraging the individual to make decisions wherever possible. This article explores the background to the Act, the principles upon which it is based and the stages through which a particular case may go. Special attention is given to the balance of rights between the individual and the individual's family, and to the issues of sterilisation, abortion and organ donation. The law on these latter issues has not been clarified by the new Act, and has been made even more confused by recent judicial pronouncements.

According to the United Nations Declaration on the Rights of Mentally Retarded Persons, the "mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings".[1] Later in the same Declaration, it is stated that "[w]henever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life". These two provisions highlight a tension between the role and responsibilities of the family and the dignity and independence of persons with intellectual handicap. On the one hand, in order to give the person self-esteem and to enable them to achieve their full potential, it may be necessary to establish systems and regulations under which outside help plays a dominant role. On the other hand, the family may be willing and be in the best position to give the person both a sense of belonging and practical assistance when they most need it. Carney has referred to "the thorny problem of the line of demarcation between the family and the state".[2] He goes on to warn "of the danger that open-ended guardianship laws will be subverted and abused by family members, and others intent on

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1 U.N. General Assembly 26th Session, Resolution 2856, XXVI.

2 "Civil and Social Guardianship for Intellectually Handicapped People" (1982) 8 Monash U.L.R. 199, 226, discussing reform proposals which now have found their way into the Victorian Guardianship and Administration Board Act 1986 (referred to later as the Victorian Act).

advancing their own interests" [3] and suggests that "[r]esistance on the part of family members to any new law should not be underestimated".[4]

New laws regulating the affairs of people under some kind of disability have been passed in numerous jurisdictions and one of the latest is the Protection of Personal and Property Rights Act 1988 of New Zealand, in force from 1 October 1988. This paper is designed to give an introduction to aspects of the New Zealand law, with particular reference to the roles just mentioned of the state, the community and the family. The writer's view is that, while there are deficiencies in the 1988 Act, the balance between family and community is probably set about right.

II. THE PASSAGE OF THE NEW ZEALAND LEGISLATION

The New Zealand Act was a long time in gestation. Its origins lie somewhere in the mid 1970s when it became increasingly apparent that the law dealing with people with intellectual handicap was inadequate and in some respects virtually non-existent. The law dealing with property management was largely found in the dated Aged and Infirm Persons Protection Act 1912, with jurisdiction vested in the High Court. As for other more personal matters, such as health, living arrangements and welfare, the law was quite uncertain for adults. Although children could be brought under the usual rules relating to parents and guardians, the only powers over adults were the residual and (in New Zealand) untested parens patriae authority of the High Court. These points are explored further in the section of this article entitled "The Particular Problems of Sterilisation, Abortion and Organ Donation".

While physical disability had been the subject of major reform with the Accident Compensation Act 1972 (now the Accident Compensation Act 1982) and the Disabled Persons Community Welfare Act 1975, intellectual disability law reform was not significantly debated until the then High Court judge, Mr Justice Beattie, delivered a paper on the topic at the 1976 annual conference of the Society for the Intellectually Handicapped.[5] Subsequently with the involvement particularly of the Advisory Council on the Community Welfare of Disabled Persons and the New Zealand Institute of Mental Retardation[6] the principles upon which a new law might be founded were developed and options explored with the government. Consultation between the government and interested community groups continued throughout the period of preparing draft legislation and the introduction of a Bill into the House.

While community groups part company with certain aspects of the final Act (especially over the failure to deal with issues such as sterilisation), the 1988 Act owes an enormous amount to the process of consultation which preceded the parliamentary

3 Ibid. 227.
4 Ibid. 228.
5 Beattie "Advocacy and Attainment of the Rights of the Intellectually Handicapped" (Gisborne, 1976).
6 The Institute wrote an influential monograph entitled "Guardianship for Mentally Retarded Adults - Submissions to the Minister of Justice" (Wellington, 1982).

phase. This is evident from the Minister's speech on the introduction of the Bill.[7] For instance, the government had originally proposed two Bills, the Incapacitated Persons' Property Bill and the Incapacitated Persons' Welfare Bill. However in response to arguments that this would be complicated and that welfare and property management should be seen as governed by the same underlying principles, it was agreed that one Bill should drafted. Another issue upon which community groups had strong feelings was the use of labels. There was a desire to avoid question-begging references to the aged, the intellectually handicapped, the incapacitated and other such categories. The reason for this was not just cosmetic. It reflected the principle that people with incapacities should be seen as people first and only secondly as possessing some disability. The arguments for avoiding "labelling" were convincing[8] and with odd exceptions (such as Part VIII which deals with reciprocal provisions with other countries), the 1988 Act uses less value-laden but admittedly more cumbersome expressions like "the person in respect of whom the application is made".

Following introduction of the Bill, there were further submissions made by interested parties, this time to the parliamentary select committee, the Justice and Law Reform Committee. While there was general support given to the overall need and purpose of the legislation, there was strong criticism of certain aspects. There were no special rules about sterilisation, abortion and transplants nor was there an office of public advocate with the capacity to promote the purposes of the Bill and to co-ordinate the activities of persons and organisations interested in assisting people with handicaps. The select committee made a number of changes to the Bill, notably increasing the involvement of non-profit organisations, clarifying the rules relating to review and inserting a completely new Part on enduring powers of attorney. However the idea of a public advocate was not adopted, possibly for cost reasons, and the areas of sterilisation, abortion and transplants were not addressed at all, presumably because they were considered by the politicians to be too controversial to handle. How this leaves the law on these matters will be examined later on in this paper. The Bill was finally passed by the House without dissent, representing the work over several years of both the political parties which have been in government in recent years.

III. SCOPE AND PRINCIPLES OF THE LEGISLATION

The 1988 Act replaces the Aged and Infirm Persons Protection Act 1912 and Part VII of the Mental Health Act 1969 (which brought the property of committed psychiatric patients automatically under the management of the Public Trustee). This in itself

7 N.Z. Parliamentary Debates Vol. 476, 1986 : 5973 et seq, Hon J. Hunt introducing on behalf of the Minister of Justice.

8 The Minister's speech quotes extensively from the submissions made on the departmental draft bills by a working party established by the Society for the Intellectually Handicapped, the Institute of Mental Retardation and the Trust for Intellectually Handicapped People. See also McLaughlin *Guardianship of the Person* (Downsville, Ont., National Institute on Mental Retardation, 1979) 50-53 and Kopelman and Moskop *Ethics and Retardation* (Dordrecht, D.Reidel Publishing, 1984) 65-123.

indicates something of the scope of the new Act. While much of the impetus for its passage came from organisations representing those with intellectual handicaps, the effect is and was always understood to be much wider. The elderly, the psychiatrically ill, the alcoholic, the drug addicted, stroke victims and so forth may all potentially be within the reach of the Act. In accordance with the philosophy of the Act, anyone at all who, wholly or partially, lacks the competence or capacity[9] to look after themselves may become subject to the Act. This reform measure may therefore affect a very wide range of persons within the community.

According to the Title to the Act, the main aim of the legislation is "to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs." The Act establishes a means by which decisions can be made on behalf of the person concerned. The decision-maker may be the court (jurisdiction is given to the Family Court), a court-appointed agent or an agent chosen by the person. It is important to note that the Act brings together two areas of decision-making: first the administration of property, which is the subject of the repealed legislation, and secondly personal care and welfare, which for adults has not been the subject of legislation before. In property matters, the court is most likely to appoint a "manager" but there is also provision for a trustee corporation to take management upon itself without the intervention of the courts on the request of the person concerned or, for smaller estates, after application by other people.[10] A person who can anticipate the onset of incapacity can sort out the management of their affairs in advance by using the new enduring powers of attorney provisions. Unlike ordinary powers of attorney, enduring powers continue in force despite the loss of mental capacity by the donor.[11]

In personal matters, the court can make orders directly about such things as employment, education, health, living arrangements and legal affairs,[12] but the power which may come to be associated most in the public mind with the Act is the appointment of a "welfare guardian" with control over the person's life as determined by the court. A novel feature of the new law on enduring powers of attorney is that such a power may be granted not only with respect to property decisions but also with respect to welfare or personal decisions.

At one level, the Act may appear potentially draconian.[13] Its reach is extremely broad and the powers of the court and agents appointed by the court are enormous. Is

9 The tests for determining the jurisdiction of the court vary in terminology. For welfare matters, the Act refers to a lack of capacity (s.6 of the Protection of Personal and Property Rights Act 1988; subsequent section references are to this Act unless otherwise indicated) while for property matters, the test is a lack of competence (s.25(2)). It is submitted that little should turn on the different usages.

10 Sections 32 and 33.

11 For a fuller discussion, see Atkin "Enduring Powers of Attorney in New Zealand" [1988] N.Z.L.J. 368.

12 Section 10.

13 The point has been made by the Mental Health Foundation when its legal officer was reported as saying that the Act "could prove to be a two-edged sword" : *Evening Post*, Wellington, 1 July 1988.

there not a risk that a person's liberty and arguably the place of the person's family will be seriously undermined? Or is there scope as hinted at by Carney in the quotes at the beginning of this article for the family to manipulate the Act? It is partly for these reasons that the Act has built into it principles which operate as a check on the abuse of its powers. These principles are however enshrined in the Act not merely as safeguards but for very positive reasons in order to advance the wellbeing of persons with disability. Returning to the Title of the Act, it is seen that the Act recognises the "rights" of people and seeks to protect and promote those rights. On the one hand, if people with disability are left without help and guidance, their rights may be ineffective or abused by the unscrupulous. On the other hand, if a good framework is established, the help and guidance may enhance rather than diminish the individual's rights.

The recognition of rights is fleshed out by other important principles:

(1) **The presumption of competence.**[14] Under this principle a person is prima facie taken to be fully competent and capable, unless the opposite is proven. There is thus no leaping to conclusions that just because a person is alcoholic or has some intellectual disability, they must be in need of help. In legislation which by its nature is paternalistic, there is an initial presumption against paternalism. The onus is cast firmly on those who wish to invoke the Act, whereas in the past there was a tendency to make judgments not on an individualised assessment but on assumptions flowing from the generalised category into which the person fell.

(2) **Least restrictive intervention.**[15] If a person comes within the jurisdiction of the court, i.e. the presumption of competence can be rebutted, then the court is not permitted to make an all embracing order, restricting the individual's own decision-making power totally, unless this is the only alternative. The Act is premised on the notion that people have different degrees of disability - the person in a permanent coma is in a rather different position from the person with mild intellectual handicap. The former can do nothing for themselves while the latter may with help be able to function in the community quite successfully most of the time. It will be a requirement in the future for courts to tailor their orders to meet the particular circumstances of the individual so that the infringement of the person's rights is minimal. Although trustee corporations which assume powers without judicial appointment are not covered by the least restrictive intervention object, they must act "only to the extent necessary having regard to the degree of the applicant's lack of competence"[16] and this in effect is a restriction on the corporation's powers . The principle of least restrictive intervention is one of the hallmarks of modern-day law reform in this area[17] and is a significant element in the process of balancing civil rights for people with incapacity.

(3) **The principle of encouragement.**[18] Courts, guardians and managers are required under the Act to encourage a person to exercise the capacities they have and to develop

14 Sections 5 and 24.
15 Sections 8(a) and 28(a).
16 Section 32(3)(c). Cf s. 33(4)(c).
17 Cf s. 4(2)(a) of the Victorian Act.
18 Sections 8(b), 18(3), 18(4)(a), 28(b), and 36(1).

these capacities as much as possible. A specific example of how this can be done is found in section 36(2) which permits a manager to hand control over property back to the individual. This is a power which could be exercised experimentally and flexibly and could be an invaluable way of testing whether the person has gained or regained skills. The principle of encouragement is the corollary of the least restrictive intervention principle. If there is no alternative, even on a least restrictive basis, to substitute decision-making, then that decision-making should be positive towards the individual, enabling self-reliance and self-determination to the greatest extent possible.

(4) **Best interests.**[19] A best interests test, which has clear echoes of the traditional test for children,[20] is a paternalistic principle. It smacks somewhat of others deciding what is best for an individual, rather than the individual's views being determinative. To this extent it may conflict a little with the principles already outlined but without an injunction to act in the person's best interests, there may be the temptation to take other interests too much into account. The best interests standard is found in the Alberta Dependent Adults Act 1976 under which a guardianship order cannot be made unless the court is satisfied that it is in the person's best interests,[21] while, for a different comparison, the Victorian legislation elevates the promotion of the person's best interests to the "objects section" of the Act.[22] In the New Zealand Act, the best interests test plays a far less prominent role - it relates essentially to the choice of a person to be a guardian or a manager and to the way in which a guardian or manager is to carry out the statutory functions. The court must be satisfied that the prospective appointee will act in the person's best interests and after appointment, the appointee must promote and protect the person's best interests (the guardian must also promote and protect the person's "welfare" but it is submitted that the addition of this word ought not to alter the sense of the obligation of either appointee).

The paternalistic side to the best interests principle can be reduced to some extent by taking into account the wishes of the person concerned. Section 4(2)(c) of the Victorian Act (the "objects section") states as Parliament's intention that "the wishes of a person with a disability are wherever possible [to be] given effect to". The New Zealand Act gives a low express rating to the wishes of the person. While those wishes are relevant in the choice of manager or guardian, they merely have to be ascertained by the court "so far as is practicable in the circumstances".[23] Managers and guardians have duties to consult with the person they are representing[24] but only by implication (bearing in mind principles such as the encouragement principle) do they have to find out the person's wishes and then adopt them wherever possible.

19 Sections 12(5)(b), 18(3), 31(5)(b), 32(3)(b), 33(4)(b) and 36(1).
20 In New Zealand, cf s.23 of the Guardianship Act 1968 and s. 4 of the Children and Young Persons Act 1974. The test is currently under attack in New Zealand as being insensitive to the authority which Maori people have historically given to the extended family or tribe.
21 Section 6(2) of the Alberta Act.
22 Section 4(2)(b) of the Victorian Act.
23 Sections 12(7) and 31(7).
24 Sections 18(4)(c)(i) and 43(1)(a).

(5) **Community integration.**[25] The principle that the individual should live as normal a life as possible and where necessary be cared for within the community is a development on the principle of encouragement. The principle of encouragement does not however necessarily require community integration, even though that might be the ultimate aim for those people who may be able to cope in the community. Facilitating integration is a duty placed upon welfare guardians but on nobody else under the Act. Thus it is not part of the manager's role nor of the court's except in so far as this might be subsumed within the principle of the least restrictive intervention. Community care is an approach which has become fashionable in recent years particularly for psychiatric patients but also for those who have intellectual handicaps. The number of people in institutions has been dropping as they have been released from psychiatric and psychopaedic hospitals (especially) and, often with the help of support organisations, introduced into the rest of society. This approach is not given strong articulation in the Protection of Personal and Property Rights Act but in the Mental Health Bill 1987, which is still being considered by Parliament, a radical change to the law on compulsory treatment or committal would allow the courts to make an "out-patient" order on the understanding that the patient will not be hospitalised but will be treated in the community.

(6) **Procedural rights and safeguards.** Carney and Singer[26] outline several different models for guardianship legislation. In broad terms the choice is between a system under which decisions are left largely in the hands of the experts, social workers and others who are in a position to act on behalf of the person's welfare and a system which is much more legalistic, emphasising that guardianship and management involve a loss of civil liberties and should occur only after due legal process. Compared to the previous legal provision, the New Zealand Act represents a dramatic switch in favour of a legalistic model.[27] The new Act has rules which require that the person who is the subject of an application be legally represented, that they normally be present during the court proceedings, that notice of proceedings be given to a wide range of people and that all orders either have a built-in termination date or are regularly reviewed.

On the other hand, there are provisions in the Act which might be thought to lessen the strength of the procedural safeguards just mentioned. The court is given power to hold pre-hearing conferences, much like the "mediation conferences" that the Family Court is used to conducting in marriage break-up cases. The usual adversary techniques are put to one side during such conferences in an attempt to obtain agreement between the parties and a consent order from the judge. However a consent order cannot be made in this way unless the person "understands the nature and foresees the consequences of the order and consents to the order".[28] Another weakening of due process is in the

25 Section18(4)(b).

26 *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (Human Rights Commission Monograph No 2, Australian Government Publishing Service, Canberra, 1986).

27 For further analysis of the models in relation to the New Zealand law, see Atkin "More Work for the Family Court - The Protection of Personal and Property Rights Bill" (1987) 1 Family Law Bulletin 109.

28 Section 70(2).

ability of a trustee corporation to accept property management without a court order. As a check to abuse of this procedure, two medical certificates (including that of an independent psychiatrist) are necessary and if trustee corporation management is being sought by someone other than the person concerned, then that person must have received independent legal advice. Furthermore, trustee corporation management must be reviewed by the court within three years and can be very easily terminated by the person's giving the corporation seven days notice in writing to that effect.[29] Whether these checks are sufficient to safeguard the civil rights of the people who may come under the trustee corporation regime is a matter of some debate. Clearly, a balance must be maintained between procedural protections and the need for cheap and speedy ways of helping people under disability to manage their property.

IV. FAMILIES IN RELATION TO THE PRINCIPLES

How do families fare in the light of the principles outlined above?

At no point in any of the fundamental principles of the legislation is the role of the parents and family given any prominence. The nearest that families come is in the principle of community integration. This principle however does not automatically mean that the individual will be integrated into the family. While this is a definite option which might be suitable for a number of people, for many others they might be better off living elsewhere.

The least restrictive intervention principle may run counter to the wishes of the family. The Act may for instance be invoked by family members because they are unable to cope any longer with a person's alcoholism or handicap. When approaching the court, the family may have in mind quite drastic steps, a far cry from intervention which is the least restrictive. The law must of course recognise the enormous difficulties that some families face when they have as a member someone who cannot function independently. Without relief, any care that the family can offer may be substantially impaired. However the new law should ensure that the care of an individual does not lurch from one extreme to another, but that an appropriate solution can be worked out between the court, the family, community agencies and experts who have an interest in the person's condition. Families can often play a significant role in helping the person adjust and grow. On the other hand, they can also be oppressive towards those members who have handicaps or who have outgrown their useful days. It may well be that a person needs to be free of their family's constant attentions in order to develop their potential or maintain some personal worth. If this is so, then the principles of least restrictive intervention and encouragement may lead to the conclusion that solutions not entirely compatible with the family's wishes may need to be adopted.

Families may also consider that the procedural rules in the new Act unduly tip the balance in favour of the person in respect of whom an order is sought. Counsel appointed to represent the person could be an independent voice, sounding against the

29 Sections 33(3)(d), 87(1) and 34.

wishes of the family. The rules about service and hearings may appear to some to be hurdles which are too awkward to get over. The family might be of the view that a quick and efficient disposal of the "problem" is all that is needed and that obstacles have now been put in the way of this approach. Two main points need to be stated in response to this. First, as the appointment of a guardian or manager or the making of other orders under the Act do infringe a person's basic liberties, then this step should be taken only by proper judicial decision and after appropriate testing of the case. There should be no presumption in favour of intervention any more than there is a presumption of guilt in the criminal law. Secondly, as jurisdiction has been given to the Family Court, which in New Zealand is a division of the District Court, access to the court should be relatively easy, the hearings should be conducted in a reasonably relaxed manner and orders should be forthcoming when the case for them is genuinely established.

An aspect of family relations which the Act ignores is the special cultural value placed on the family by Maori and other groups in New Zealand, such as Pacific Islanders. The link to tribe, subtribe and "extended" family - iwi, hapu, and whanau - can be vital for a Maori's self-esteem and sense of identity. The role of traditional ethnic values must be grafted by implication on to the new legislative framework.

V. THE FAMILY AND THE ACT IN OPERATION

It has already been seen that there is a tension between the interests of the family, particularly the parents, and the person who is allegedly lacking capacity. The 1988 Act has not been specifically drafted with the person's family in mind. Instead the Act aims to upgrade the standing of the individual, possibly at the expense of the family. However, the way the Act operates need not necessarily be to the family's detriment. Indeed, if families take on board the spirit of the Act, they may be able to turn the new rules to their advantage as well as to that of the person concerned. An examination of the scheme of the Act and the processes it can set in train will reveal something about the respective positions of the individual, the court, the agent and the family.

A. Invoking the Act.

Relatives are expressly listed as being entitled to initiate proceedings under the Act as of right.[30] Along with others (including social workers, doctors and non-profit organisations), spouses, parents, children siblings, uncles, aunts, nieces and nephews[31] may ask the court to decide whether a person is competent to manage their personal life or their property.

30 Sections 7(b) and 26(b).

31 See the definition of "relative" in s. 2. The definition is very similar in effect to the definition of "nearest relative" in the Victorian Act.

B. Notice.

There is a lengthy list of persons who must be served with notice of proceedings.[32] Each parent is included on this list, so that if proceedings have been commenced by someone else, the parents (although not necessarily the wider family, unless the court specifically orders) will learn of this before the court's jurisdiction has been exercised.[33] The importance of the notice requirements is that those who are served are entitled to appear in the proceedings and to be heard as a party to them. Parents could therefore have an impact if they so desire on the outcome of the case. Where the parents have played an active role in the person's life, this is surely justifiable. But for a number of people this may not be the reality. For example, some people with intellectual handicap have effectively been abandoned by their parents and may be resident in institutions such as psychopaedic hospitals. Although service of proceedings may precipitate a renewed concern, it is doubtful whether these parents ought to have a dominant say in what should happen. To take another example, an older person who has become debilitated with ageing or alcoholism may be a burden to grown up children rather than to even older parents. In this situation the children have a greater interest in the outcome of proceedings and yet unless the court expressly orders, they may not know of the case at all. The detailed notice rules may appear at first glance to be burdensome. But they exist to protect the interests of a variety of people, including the person who is subject to the proceedings. The court will need to be alert to the possibility that there are other people who could also be served.

C. The Stages of a Case.

Once an application has been made to the court, various steps such as the appointment of counsel to represent the person will have to be taken. Consideration will also have to be given to the holding of a pre-trial conference (likely to be the norm in the Family Court environment) and whether to grant ex parte orders to deal with immediate needs. The substantive issue is however whether the person should lose the right to run their own affairs. In broad terms, the answer to this issue turns on the questions of whether the court has any jurisdiction to act, and if so, how precisely the application should be disposed of.

In more detail, the steps which a court will have to follow are:

(i) Applying the standard for intervention.

The jurisdiction of the court depends on whether the person who is subject to the proceedings lacks capacity or competence.[34] This question is vital and must be decided with considerable care. The lack of capacity (total or partial) must relate to the degree of understanding of the nature and consequences of decisions. Unlike the Victorian and

32 Section 63.
33 Except for interim or temporary orders under ss.14 and 30.
34 Sections 6 and 25.

Alberta legislation which refer to the making of "reasonable judgments"[35], the New Zealand standard is one which involves a far less objective test. Section 6(3), with a similar provision in section 25(3) for property applications, states:

> The fact that the person in respect of whom the application is made for the exercise of the Court's jurisdiction has made or is intending to make any decision that a person exercising ordinary prudence would not have made or would not make given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the Court.

This rather convoluted provision allows for eccentricity and for decision-making which may not be objectively "reasonable" and prudent. Unreasonable judgments may perhaps be evidence of an inability to make decisions but without more cannot be decisive. This standard is biased in favour of the individual and may be hard for the family to accept. It may be because the individual has been doing odd things that the family decided that proceedings were necessary, and it may come as a surprise that proof of oddity is not going to be enough. On the other hand, an individual may be unable at make free decisions because of pressures, benevolent or otherwise, by those with whom that person lives and associates. The possibility of undue influence by others is expressly recognised in the standard for determining jurisdiction in property management cases.[36] There is no equivalent for personal care and welfare cases, which may be somewhat anomalous as strong pressure may be exerted at times over important decisions such as sterilisation.

(ii) Choosing the form of the order.

Assuming that the court has jurisdiction, it must then decide whether to make an order. The court is not obliged to make an order and following the principle of least restrictive intervention, it may consider that the person's disability is not serious enough to justify any formal action. In some cases where agreement has been reached perhaps through a pre-hearing conference, a consent order will be possible. Another option in personal cases is simply to make recommendations.[37]

There will however be cases where a person's disability is such that substitute decisions are essential. In property matters, this usually means the appointment of a manager, although for small amounts of property (an item not exceeding $1,000) and for the day to day handling of income (not exceeding $10,000 per year), someone can be appointed to administer the property without the extensive powers nor the obligations of a full scale manager. In personal cases, the appointment of a guardian is not inevitable. The court may make direct orders affecting a particular area of the person's life, ranging from employment, health, legal affairs, accommodation and training to orders requiring

35 Section 22 of the Victorian Act, and s. 6(1)(b)(ii) of the Alberta Act.

36 Section 25(4). The court "may" have regard to undue influence, whereas under the Aged and Infirm Persons Protection Act 1912, undue influence was one of three alternative bases upon which the court could act.

37 Section 13.

parents to make arrangements for the care of the person after their death.[38] This latter provision is an unusual one, with very definite implications for the family. One of the main concerns of parents of people with intellectual handicaps is how their child will survive once they have died. There are numerous possible answers to this worry, including the involvement of younger members of the family, but another method is to set up a trust fund for the person or become part of the Trust for Intellectually Handicapped People, which enables parents to combine their efforts and resources. The experience of the Trust may have been the spur to include the power of the court to order parents to make arrangements for children after their death. Such an order will not be binding unless the parents are parties to the proceedings.

(iii) A second test for guardianship.

The appointment of a welfare guardian can only be made after a further hurdle has been crossed. The person who is subject to the proceedings must be "wholly" incapable of making or communicating decisions about an aspect or aspects of their personal care and welfare and the appointment must be "the only satisfactory way to ensure that appropriate decisions are made " for the person.[39] The latter phrase is largely a restatement of the least restrictive intervention principle, but the earlier use of the word "wholly" may cause some difficulties in a large number of grey area cases. There will be no problem with the person in a coma or for the person whose intellectual handicap is of the most severe kind. But there are many gradations of intellectual handicap and within the spectrum it may often be hard to say that a person "wholly" lacks capacity in the particular respect. Likewise there may be many elderly people gradually losing their faculties or moving in and out of competence who really need assistance but for whom it may not be possible to say that they have at the time of hearing totally lost their ability in relation to the particular aspect.

The New Zealand test is much stricter than the Victorian and Alberta ones,[40] which roughly speaking allow the appointment of a guardian once the initial jurisdictional standard has been satisfied. The New Zealand rule, which if interpreted too strictly could substantially reduce the effectiveness of the Act, may be inconsistent with the obligations imposed on the guardian to encourage the person towards self-determination and to facilitate community integration. How likely is it that a person "wholly" lacking capacity will be able to be encouraged in this way and integrated into the community? Another problem with a rigid interpretation which prevents the appointment of a guardian is that it may be found necessary to return frequently to the court to obtain ad hoc decisions as the need for these arise. The point of a guardian is that they can make such decisions under the overall authority of the court but without constant recourse to the court.

38 Section 10(1).
39 Section 12(2).
40 Section 22 of the Victorian Act and s, 6 of the Alberta Act.

(iv) The choice of guardian or manager.

If it is decided that a manager or a guardian should be appointed, the court has to choose whom to appoint. While it might be expected that the parties will have given some forethought to this, the court cannot automatically rely on the name presented to it. The Victorian legislation states that in determining the suitability of a person to be appointed as a guardian, account must be taken of "the desirability of preserving existing family relationships".[41] No equivalent to this rule is found in the New Zealand Act. There is, however, no reason why a parent or another member of the family should not be appointed if the statutory conditions (e.g. as to age) are met. Indeed this may be highly appropriate on many occasions. However before appointing a member of the family, the court should scrutinise the proposal very carefully. The proposed appointee must have the individual's interests at heart and not those of the family. More significantly, there must be no threat of conflict between the interests of the proposed appointee and those of the individual.[42] Where the nominee is a family member, especially one who has been very closely involved in the life of the individual, the risk of conscious or unconscious bias may be real and not inconsiderable. It is noteworthy that the Victorian Act provides that the mere fact of being a parent or nearest relative does not by itself breach the rule about conflict.[43] Whether the absence of such a provision in the New Zealand Act makes any difference is questionable. There is no reason why a New Zealand court should rule a candidate out just because they happen to be a relative.

(v) Specifying the actual powers.

A further stage in the process of appointing a guardian or manager is for the court to determine the powers with which the appointee will be vested. The principle of least restrictive intervention means that the granting of full powers, either over all property or all personal matters, should be a rare event, unless the person is totally incapacitated. Although the New Zealand Act does not distinguish, as in other jurisdictions, between plenary and limited appointments, this may well be the effect of the rules which expect the court to spell out on an individualised basis the aspects of care and welfare over which the guardian may have authority and the powers and items of property which are within the manager's sphere.[44] A very wide list of positive management powers is contained in the First Schedule to the Act. This list is an expanded version of a similar list which was appended to the Mental Health Act 1969. For guardianship however there

41 Section 23(2)(a) of the Victorian Act

42 Sections 12(5)(c) and 31(6). The latter, which relates to managers, requires the court to take likely conflict into account whereas the provision relating to guardians is stronger in that the court must be satisfied that conflict is unlikely. Whether this will in practice lead to different approaches to the issue of conflict may be doubted. If conflict is apparent, then the appointment should not proceed under either rule. However the form of drafting may mean that there is a greater onus on those proposing a name for a guardian to positively show that conflict is not likely.

43 Sections 23(3) of the Victorian Act. See s.47(3) for a similar provision relating to administrators.

44 Sections 18(2), 29(3), 31(1) and 38(1).

is no such positive list; rather there is a negative list of things which guardians may not have power over : marriage, adoption, life-preserving treatment, electro-convulsive treatment, psychotherapy, and medical experimentation.[45] Whether it can be implied from this list that anything that is not there is within the potential scope of a guardian's powers may be a crucial matter. We shall look at this later in relation to sterilisation.

(vi) Duration of order

No order under the 1988 Act is to be permanent. The court is obliged when making guardianship and management orders to specify a date for review of the order and the maximum time an order can last without such review is three years.[46] For other personal orders, the court has a discretion to set a review date[47] but often by their very nature these orders will be one-off decisions or of short-term operation, thus making review irrelevant. However if no review date has been set, the order will expire when spent or after twelve months.[48]

D. Follow-up and Accountability.

Obviously, once an order has been made, monitoring the operation of that order and in particular the performance of the substitute decision-makers is vital. There are several aspects of this.

The built-in rules for review have already been referred to in the previous section. In addition, there are procedures for review which can be invoked at any time but the rules differ slightly as between personal and property orders. Review of a property order may be sought by the person subject to the order, the manager, a guardian and others including relatives who can initiate original proceedings, whereas review of a personal order may be sought as of right only by the person, a guardian or a manager.[49] Others such as relatives have to first obtain the leave of the court. Review may relate to the very existence of the order or it may be concerned with the terms of the order, e.g. there may be a request for a replacement guardian or manager. The substantive and procedural rules which govern original applications also apply to reviews.

Another aspect of the follow-up of orders is the accountability of those who have been appointed under the Act. For managers the provisions are quite extensive. They may be required to give security for the due performance of their duties, they have to file annual management "statements" in the court, commencing within three months of first being appointed, and may be civilly liable if they have acted negligently or in bad faith.[50] Particular decisions of a manager may be challenged by the person for whom

45 Section 18(1).
46 Sections 12(8) and 31(8).
47 Section10(3).
48 Section 17(1).
49 Sections 87(2) and 86(1).
50 Sections 37, 48, and 49. The Public Trustee has the duty to inspect managers' statements and to report upon them (s.46). Statements and reports are open for

the manager is acting and by anyone else with leave of the court.[51] The court has a wide discretion to deal with this kind of challenge and may impliedly replace the manager's decision with its own. It is submitted that in exercising the discretion the court should be guided by the basic principles of the Act, even though the section refers to what the court thinks reasonable "in all the circumstances". The accountability of guardians is less stringent. They may have their particular decisions challenged and also be liable for negligence and bad faith[52] but are not obliged to file statements of their activities with the court.

From the point of view of the family, review and accountability could be very important. If an appointment has been made with which they were not entirely happy, there are mechanisms to ensure that appointees are kept up to the mark. Likewise, where a family member is the appointee, interested third parties such as voluntary agencies, administrators of old peoples' homes, social workers and so forth can also activate the procedures outlined, so that the safeguards cut both ways. From whichever perspective the matter is looked at, it is the protection of the individual's rights which is uppermost.

VI. THE PARTICULAR PROBLEMS OF STERILISATION, ABORTION AND ORGAN DONATION

Sterilisation of persons with intellectual handicap, along with abortion and donation of tissue, is perhaps the classic example of care and welfare problems. Involuntary sterilisation is a major infringement upon a person's liberties and can arouse heated emotions among those who are involved. Sterilisation may have benefits for some women who would not be able to cope with pregnancy or who cannot cope with ongoing contraception. But the best interests of the woman may often be clouded or suggested by the best interests of the family or those who have care of the woman. The latter may have trouble knowing how to handle the person's sexual activities and see sterilisation as a permanent solution to relieve the strain of wondering whether a pregnancy is going to occur. Pressure from the family can be very great. So, there may be instances where conclusions are leapt to too readily as to what the best interests of the person might be. Normally sterilisation is a non-therapeutic act, taken by people as a means of contraception. This is in reality the position for most sterilisations of people with intellectual handicap as well, although the decision may be dressed up as therapeutically necessary. It is perhaps for this reason that the House of Lords was unhappy with a distinction between therapeutic and non-therapeutic operations and allowing different legal rules to follow.[53]

It is ironic therefore that the New Zealand Act, as mentioned earlier, is silent on sterilisation. Contrast this with Alberta where a guardian may consent to "any health care that is in the best interests of the dependent adult", "health care" being defined to

inspection by leave of the court or court registrar (s. 47). Presumably such leave will be freely given to interested family members.

51 Section 89.

52 Section 20.

53 *Re B (A Minor)(Sterilisation)* [1988] A.C. 199.

include "any procedure undertaken for the purpose of preventing pregnancy"[54] and Victoria, where "major medical procedures" can only be carried out with the consent of the guardian and the Guardianship and Administration Board.[55]

What can be said about the law in New Zealand now, in the absence of clear statutory guidance? Does the 1988 Act nevertheless imply certain authority over these matters? Do the parents have any control over the decision-making? Must the courts be involved?

A. Minors

In considering these questions, the difference between a minor and an adult child has to be borne in mind. Under the Guardianship Act 1968, parents have general rights over the upbringing of their children, including powers to consent to medical treatment. It comes as a surprise to some parents to learn that their rights do not survive into the child's adulthood and indeed following the House of Lords' decision in *Gillick* v. *West Norfolk and Wisbech ARA* [56] they may end or taper off from early adolescence. The *Gillick* rule is unlikely to apply to many young people with intellectual handicap because its application turns on the speed of maturing of the particular child.

On the face of it then, parents have considerable rights over minors, even arguably for purposes of sterilisation. This conclusion is however hardly free from doubt. Wardship procedures can be used to stop a sterilisation.[57] Decisions in Canada and England also raise the questions whether a court can authorise a sterilisation at all and whether a court order is a pre-requisite for a sterilisation. The House of Lords in *Re B (A Minor)* [58] held that it had the power to order a sterilisation as a last resort action in the welfare of the person concerned, but in doing so it refused to follow the Supreme Court of Canada which held that sterilisation should be permitted only for therapeutic purposes and "should never be authorised for non-therapeutic purposes".[59] Arguably, the New Zealand High Court exercising its wardship jurisdiction is at liberty to follow either approach. In *Re B (A Minor)* it was also said by Lord Templeman that sterilisation of a minor should only be carried out with the leave of the court and that without such leave a doctor could be liable in criminal, civil or professional proceedings.[60] If this is correct, then it follows that the parents have no right to decide sterilisation, only a right to be heard by the court.

54 See ss. 1(h)(ii), 9 and 10 of the Alberta Act.
55 Section 37 of the Victorian Act. A major medical procedure is one specified in guidelines laid down by the Board. An earlier version of the Bill referred expressly to sterilisation, termination of pregnancy and removal of non-regenerative body tissue.
56 [1986] A.C. 112. For an argument that this decision applies in New Zealand, see Atkin "Parents and Children , Mrs Gillick in the House of Lords" [1986] N.Z.L.J. 90.
57 *In re D (A Minor)* [1976] Fam. 185.
58 Supra n.55. For a further discussion of the relevance of this case to New Zealand see Atkin "Sterilisation and Intellectual Handicap"(1987) 1 Family Law Bulletin 120.
59 *Re Eve* (1986) 31 D.L.R.(4th) 1, 32.
60 Supra n.53, 214.

Little help can be derived from the 1988 Act as far as minors are concerned. Although property orders can be made with respect to minors, guardianship orders are generally available only for adults. This is a sensible approach given the existing guardianship rules for children. Exceptions are where the minor has no parent or guardian under the Guardianship Act or where they have been abandoned by parents and guardians.[61] Whether the Act impliedly covers sterilisation will be considered in the next section.

B. Adults

1. *By statute*

The 1988 Act empowers the court to make orders "that the person be provided with medical advice or treatment of a kind specified in the order".[62] Can we draw from these words a power to order sterilisation? Whether involuntary sterilisation, not associated with any other medical condition such as cervical cancer, can be included in the phrase "medical...treatment" must be seriously open to question. While sterilisation is a procedure carried out by medically qualified people, it does not follow that it is medical treatment, any more than is experimentation or purely cosmetic surgery. On the other hand, the whole question of sexuality and fertility is today commonly regarded as a medical matter, upon which medical advice can be sought. Arguably for people with intellectual handicaps and greater than average problems in coping with their sexuality, advice from doctors is even more important and any consequent course of action would be medical treatment. Despite this argument however there is still a lingering doubt that sterilisation of such people is really for convenience rather than for genuinely medical reasons. Assuming sterilisation is within the phrase "medical...treatment" and that a case for the sterilisation in the person's best interests has been made out, there remains in the court a discretion to decline to make an order. Given the gravity of sterilisation and the uncertainties of interpretation, a Family Court judge may prefer not to exercise the discretion.

Another approach is to argue that a welfare guardian can possess powers to consent to sterilisation. There is an initial attraction to this proposition, as the nature of guardianship is the ability to make decisions for others in their best interests. Under the Act, as noted above, certain matters are expressly excluded from the guardian's functions and these do not include sterilisation. As guardians "shall have all such powers as may be reasonably required to enable the welfare guardian to make and implement decisions for the person for whom the welfare guardian is acting",[63] could these powers not include consent to sterilisation, if this was an area in the person's life where they lacked capacity?

61 Section 12(3).
62 Section 10(1)(f).
63 Section 18(2).

It would be odd nevertheless for a guardian to have such a major power which the court itself may not have. It is hard to see how compatible the principles of least restrictive intervention and encouragement are with a soft rule that allows guardian's to make one of the most intrusive decisions of all. As sterilisation is such a controversial matter and as it often involves competing interests between the person, the family and the community, is any guardian going to be willing to take the risk of liability and review by making a decision to sterilise without the back-up of a court order? Unless a court has expressly empowered a guardian to consent to sterilisation, it would, it is suggested, be most unwise for a guardian to proceed simply on the basis of a general authority in health matters. Even with express purported authority from the court, the validity of consent to sterilisation must be questionable.

2. *Inherent jurisdiction*

If the effect of the new Act is so dubious, does the High Court have inherent powers to order sterilisation? The existence of inherent powers over the person of an adult and the extent of any powers has been a matter of debate.[64] Without rehearsing all the points here, it should be noted that the inherent powers of the common law courts have been preserved for the New Zealand High Court by section 17 of the Judicature Act 1908 and this was confirmed by the leading Court of Appeal decision *Re R (a protected person)*.[65] It is submitted that despite doubts expressed in Britain about the current existence of powers over adults,[66] there is no reason why a New Zealand court should not follow the Supreme Court of Canada[67] in accepting that a wide protective parens patriae jurisdiction exists. The exercise of this jurisdiction would be governed by the principle of the best interests of the person who is the subject of the court's powers and sterilisation should not be permitted except after the most rigorous enquiry into what those best interests are.

Although it appears that the High Court does have inherent jurisdiction, this is not an entirely satisfactory way to resolve the problem of sterilisation. As was said by McCarthy P. commenting upon the mental health laws, "[t]he present confluence of the inherent and the statutory powers has resulted in a somewhat murky stream".[68] There is indeed plenty of murkiness left in the law on sterilisation, as the uncertainties of the statutory and inherent powers abound. With jurisdiction now placed by statute with the Family Court for most similar matters, it is odd that the High Court should be looked to for resolution of sterilisation questions. It is less accessible, more expensive and less specialised in its expertise than the Family Court. It is suggested that it would have

64 For two excellent recent discussions of this, see Grubb and Pearl "Sterilisation and the Courts" [1987] Camb. L.J. 439 and Gunn "Treatment and Mental Handicap" (1987) 16 Anglo-American L.R. 242.

65 [1974] 1 N.Z.L.R. 399.

66 *T* v. *T* [1988] 2 W.L.R. 189 and the refusal of the House of Lords in *Re B (A Minor)*, supra n.53 to clarify the issue.

67 *Re Eve*, supra n.59.

68 *Re R (a protected person)*, supra n. 65, 406.

been preferable had the 1988 legislation dealt directly with the matter and laid down the ground rules upon which the Family Court could decide sterilisation applications.

3. *The legality of involuntary sterilisation*

It has generally been assumed that involuntary sterilisation is unlawful, as constituting a battery, unless some express justification (e.g. statutory authority) could be found for it. The basis for this lies in the integrity and inviolability of the person, which is at the root of much of the law of trespass to the person. For children, there was the possibility of substitute consent by parents (see the discussion of this above) but for adults unable to consent, it was assumed that, despite some arguments based on the defence of necessity, the procedure was unlawful. Hence came the recognition in many countries of the need to legislate and establish the basis upon which the necessary substitute consent could be granted.

There is now a question mark over the correctness of the points just made. The long established tort of battery has recently been undergoing a metamorphosis. In *Wilson* v. *Pringle*,[69] it was held that "hostility" is a necessary ingredient of the tort, although the concept of hostility used by the court in that case means that it is very different from the usual connotations of the word. In an earlier decision in *Collins* v. *Wilcock*,[70] it was held that, while any form of physical molestation can be a battery, an "exception has been created to allow for the exigencies of everyday life" and there is "a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life". Examples given of generally acceptable conduct were jostling in a supermarket, underground railway or busy street.

The relevance of these points surfaces in the decision of Wood J. in *T* v. *T*,[71] where a ruling was sought on the legality of an abortion and sterilisation of a severely mentally handicapped adult. The solution turned on the law of battery and his Lordship considered the different approaches of the Court of Appeal in *Wilson* v. *Pringle* and *Collins* v. *Wilcock*, and considered that they led to different outcomes. According to his Lordship, "[t]he incision made by the surgeon's scalpel", even without consent, was "most unlikely to be hostile, but unless a defence or justification is established it must in my judgment fall within the definition of a trespass to the person".[72] This is surely correct because the result is otherwise extraordinarily far reaching for all people who are in the hands of doctors and surgeons - it would mean that surgeons can do whatever they like without any consent so long as it is not "hostile". Wood J. implies that hostility is not an essential element in battery . While *Wilson* v. *Pringle* leads to the conclusion that the abortion would not be a battery, the ramifications of the reasoning go too far for comfort. However the application of the *Collins* v. *Wilcock* test does not help a great deal either. Wood J. thought that operative treatments (e.g. abortion) could not fall

69 [1987] Q.B. 237.
70 [1984] 1 W.L.R. 1172, 1177.
71 Supra n. 66.
72 Ibid. 203.

within the phrases "exigencies of every day life" or "the ordinary conduct of daily life" and this is also surely correct.[73] Sterilisation and abortion have very little in common with being jostled in a supermarket. His Lordship's preliminary conclusion was thus that the proposed abortion and sterilisation were prima facie acts of trespass. However, he then went on to find a novel exception geared very much to the circumstances of the case:[74]

> I am content to rely upon the principle that in these exceptional circumstances where there is no provision in law for consent to be given and therefore there is no one who can give the consent, and where the patient is suffering from such mental abnormality as never to be able to give such consent, a medical adviser is justified in taking such steps as good medical practice "demands" in the sense that I have set it out above and on that basis it is that I have made the declaration sought.

While the desire to find a solution to the problem before the court is readily appreciated, it is hard to see what the legal basis for the conclusion is. His Lordship had already rejected all other possible formulae, such as the defence of necessity, and appears to have conjured up a new rule for convenience.

It is suggested that the result sits most uncomfortably with the orthodox understanding of the tort of battery. Gunn has been highly critical of the decision, stating that:[75]

> It fails adequately to consider the central question of when, and if, forms of medical treatment, including sterilization, are in the best interests of a person and when, and if, medical practice truly demands such forms of treatment. It presumes that the interests of a person's health are the only ones that it is appropriate to take into account.

The implication of *T* v. *T* is that, if the decision is correct, the very important questions of sterilisation and abortion of persons who cannot consent because of the degree of their intellectual handicap are left solely to the judgment of doctors. There is no necessary role for the courts, nor for the parents and family. One might even wonder why the rule should be limited to those who cannot consent. Is the next step not to allow doctors to overrule the unwillingness of a mildly or slightly retarded person to consent? It is suggested that from the points of view of both law and policy these implications are outrageous. With *T* v. *T* on one hand, *Re Eve* [76] on the other and *Re B (A Minor)* [77] in the middle, the New Zealand courts and the medical profession are faced with a very befuddled situation. This is further reason to rue the absence of statutory clarification in the Protection of Personal and Property Rights Act 1988.

73 Ibid. 202.
74 Ibid. 204.
75 Supra n.64, 263.
76 Supra n. 59.
77 Supra n. 53.

VII. CONCLUSION

The Protection of Personal and Property Rights Act 1988 is a significant piece of social law reform. It modernises and expands the law governing a vulnerable section of the community. Its main aim is to uphold the dignity and rights of the people who fall within that section. In so doing it sets in place new procedures, new principles and new functionaries. There is a part to play under the Act for lawyers, voluntary agencies and families, even the wider family and tribal network of the Maori, although whanau, hapu and iwi are not expressly mentioned. The overall emphasis is on the individual, on appropriate means for managing property, and (with serious reservations about the legality of sterilisation, abortion and donation of body tissue) on ways of handling personal care and welfare.

LEPER MAN APPEAL

FORM OF BEQUEST:

"I give and bequeath to the Leprosy Trust Board, whose registered office is at 115 Sherborne Street, Christchurch, N.Z., the sum of $_____ upon Trust to apply for the general purposes of the Board and I declare that the acknowledgement in writing by the Secretary for the time being of the said Leprosy Trust Board shall be sufficient discharge of the Legacy".

OR

If leaving a share in the residue of the estate, the wording is as follows:

"I give the residue of my estate as follows, As to a one/ share for the Leprosy Trust Board whose registered office is at 115 Sherborne Street, Christchurch, New Zealand upon Trust, to apply for the general purposes of the Board and I declare that the acknowledgement in writing by the Secretary for the time being of the said Leprosy Trust Board shall be sufficient discharge of the Legacy, and as to a one/ share (give details of other residuary beneficiaries)".

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