# LEGAL ASPECTS OF PARENTHOOD FOR MENTALLY RETARDED PERSONS

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ABSTRACT

Many mentally retarded people want to marry and have children. However, unsupported assumptions about their fitness for parenthood, and prejudicial attitudes, have caused them to be denied these activities. Research shows that some retarded persons make good parents, particularly with the aid of parent training courses and early stimulation programs for their children. Unfortunately, these supports are not widely available. Equal treatment of mentally handicapped parents under child protection laws will require reforms in law and in practices of children's services agencies. Recommendations are made to ensure that the option of keeping the family together is fully considered.



Over the past decade, the rights of mentally handicapped people to live, work, be educated and otherwise participate in the regular life of the community have begun to be supported by adequate resources. Marriage and parenthood, however, are two aspects of ordinary adult life which have remained inaccessible to many handicapped individuals. Statutory prohibitions against marriage of mentally retarded persons exist in most Canadian jurisdictions (Mecredy-Williams, 1979). These laws, and practices such as early institutionalization and involuntary sterilization, have meant that little attention has been paid to the legal and social policy issues surrounding parenthood.

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The purposes of this article are to examine the ability of mentally handicapped persons to parent and to review their experiences with child neglect proceedings. There is increasing pressure on parents of mentally retarded adults, and on professionals who work with them, to respect the handicapped person's right to have intimate personal relationships, including marriage and parenthood. But most parents and caregivers, believing that retarded people will not function adequately as parents, are willing to allow marriage only if they can be assured no children will be born to the union (Wolfensberger, 1972, Ch. 12; Haavik and Menninger, 1981). The assumption of unfitness for parenthood is often used as a justification for continuing the practice of involuntary sterilization, for making sterilization a precondition to marriage, or for denying the right to marry (MacKay, 1980; Haavik et al., 1981).

Denial of such basic human activities as marriage and child-bearing is a very serious matter. The ability of retarded people to function as parents, and the societal response as expressed through formulation and enforcement of child neglect laws,

should be thoroughly investigated to determine the legitimacy of removing these rights.

There are several fundamental human rights and values competing for consideration in an analysis of this issue: the rights of handicapped people to participate in the regular life of the community, including family life; the right of every child to be born and raised in a safe, healthy environment; preservation of the family unit as a basic societal value; and the interest of the state in ensuring the safety and proper care of its citizens. With respect to the latter issue, the state is interested in protecting society from people with problems frequently attributed to deficient childhoods, such as criminal activity, emotional disturbance, and heavy reliance on public assistance during adult life. The state is also concerned about children at risk of abuse and/or neglect from their families.

Mental retardation is often equated with mental disorder, mental illness, or insanity in statutes and legal writing. Definitional problems are perpetuated by the use of archaic and demeaning terms such as "idiot", "lunatic", "mental defective", "moron", etc. The legal concept of "mental incompetence" encompasses both mental retardation and mental disorder, as can be seen in *The Interpretation Act* (R.S.O. 1980, c. 219, s. 30, para. 17 & 21) and *The Mental Incompetency Act* (R.S.O. 1980, c. 264, s. 1(1) (e)). To avoid becoming enmeshed in the definitional debate, the definition of mental retardation used by the American Association on Mental Deficiency will be adopted for purposes of this paper to distinguish mentally retarded persons from those whose handicap is more emotional and temporary in nature. A mentally retarded person is one who has "significantly sub-average intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested during the developmental period" (Grossman, 1973, p. 11). In defining the group which is the subject of this article, it must also be noted that mental retardation is not a homogeneous condition which affects all persons so labelled in the same manner. Their levels of capability depend to a large extent on opportunities for training and education, particularly early in life (Mecredy-Williams, 1979; Linn and Bowers, 1978).

**Marriage:**

The law regarding marriage of mentally retarded persons has been very competently canvassed by Mecredy-Williams (1979) who points out that seven out of ten Canadian jurisdictions still have statutory prohibitions against marriage. In most cases, the prohibitions are to be enforced by issuers of licences and celebrants at weddings, persons not eminently qualified to make determinations of mental competence (Mecredy-Williams, 1979; Swadron, 1971). These restrictions seem to have little, if any, practical effect on actual marriage rates among handicapped persons (Swadron, 1971), but the policy remains enshrined in legislation. If the effect is indeed negligible, then the indignity of going from one office or minister to another to find a willing officiant, or having to obtain a letter from a medical doctor attesting to legal capacity to marry are humiliating experiences which ought not to be inflicted on handicapped people. In addition, the existence of such prohibitions can act as a powerful inhibitory force for those less assertive individuals who believe it is in their best interests not to break the law as it appears to be.

Reasons cited for the prohibitions have included prevention of procreation, lack of appreciation of the nature and consequences of marriage, unfitness to be spouses or parents, and historical prejudices (Linn et al., 1978; Shaman, 1978). Prohibiting marriage in order to prevent children is a drastic measure. Other contraceptive means can be employed without depriving handicapped persons of the benefits of a close, enduring relationship (Shaman, 1978). On the other hand, lack of appreciation of the nature and consequences of marriage may be a legiti-

mate ground for voiding a marriage where one of the partners seeks to nullify. Putative marriage partners must have "a capacity to understand the nature of the contract and the duties and responsibilities which it creates" (*Durham v. Durham*, 1885; *Chertkow v. Feinstein*, 1930), but the standard of comprehension is quite low (*ibid*). Third parties may also apply for a declaration of nullity (Mecredy-Williams, 1979), which might be a necessary safeguard against exploitation, although it is difficult to imagine situations in which such a protective device would be needed. Common law standards regarding capacity to marry ought to provide a sufficient safeguard where a party legitimately seeks to avoid his/her marriage upon gaining an awareness of unforeseen responsibilities which prove too onerous, or where a third party discovers a marriage forced for some ulterior purpose. Blanket prohibitions are far too severe to achieve the desired end. Nor should handicapped people be required to live up to standards which are not applied to non-handicapped couples (Wolfensberger, 1972, Ch. 12).

Whether marriages by mentally retarded people are feasible has been the subject of several studies (Haavik et al., 1981). The results have been summarized thus:

> Although technically illegal in many states, considerable numbers of developmentally disabled persons marry . . . Studies investigating marital satisfaction or success have shown that many developmentally disabled couples function quite adequately and happily in marriage. However, other couples have not coped successfully with the everyday demands of marriage and independent living . . . [T]he evidence indicated that many couples had financial problems, were more likely to be in trouble with the law, were relatively isolated socially, and most likely required the assistance of a social agency to cope adequately. Virtually all retarded individuals reported that they preferred being married. Investigators who observed the marriages frequently reported that the couple was coping more satisfactorily than either partner would alone. (Haavik et al., p. 60)

It is worth emphasizing the last two points of this summary. If couples cope better together rather than individually, it could be argued that efficiency ends are served at the same time as human needs are being successfully met, as indicated by the personal preferences of the individuals involved.

In conclusion, the rationales for statutory prohibitions against marriage of mentally retarded persons appear to be manageable by other means, as well as ineffective in practice. This analysis supports the recommendation of the Ontario Association for the Mentally Retarded (1978) that section 7 of *The Marriage Act* of Ontario (R.S.O. 1980, c. 256) be amended by deleting the reference to "mentally defective".

## Capacity for Parenthood:

### 1.) Can Mentally Handicapped Persons be Adequate Parents?

There is no societal consensus as to what constitutes adequate parenting. Except in the case of adoption, non-handicapped parents are not subject to screening or evaluation of their parenting skills, although some experts have suggested that parental licensing and/or screening might be a good idea (Haavik et al., 1981; Lafollette, 1980). We know, however, that intellectually normal people do not always make acceptable parents, as child abuse and other forms of neglect are found at all socioeconomic levels and among all ethnic groups, albeit disproportionately (Bakan et al., 1976). Intellectual disability cannot, therefore, be used as an absolute or exclusive indicator of parental incompetence, as has been suggested by one legal writer (Note, *Journal of Family*

*Law,* 1973). Other factors must be taken into account. In assessing the data which are available on mentally handicapped parents, it is essential to keep the following *caveat* in mind:

> . . . once a person is declared incompetent his or her life is subject to a scrutiny that many 'normal' people could not pass. A double standard exists which forces those to whom labels have been applied to meet higher expectations than usual. (Grant, 1980, p. 70)

Some empirical data are available from studies of mentally handicapped parents, but these studies have methodological problems which make them suspect, and the sample groups studied vary so greatly that it is difficult to draw firm conclusions. This point serves as a reminder that we are not dealing with a homogeneous group, but with individuals who have widely divergent abilities and limitations that are not easily categorized. Keeping these qualifiers in mind, a cautious interpretation of those studies which have been done yields the following information.

No relationship has been documented between I.Q. *per se* and ability to provide adequate child care, although some studies have shown that very low intellectual functioning is more frequently linked to poor child care (Haavik et al., 1981; Mickelsen, 1947; Galliher, 1973). Families with fewer children provide better care, and one study showed higher quality of care among families which had harmonious marriages and higher incomes (Mickelsen, 1947). Studies in Britain and Northern Ireland report more dismal results, but they appear to have used middle class standards of child care, and considered any outside help as being indicative of inadequate coping (Haavik et al., 1981). These studies all used subjective ratings of child care by observers.

Studies which have used indicators such as involvement with social service agencies because of neglect showed that the incidence of neglect among developmentally disabled parents was disturbingly high, in the 30% to 40% range. Haavik and Menninger (1981) caution against negative interpretation of these results, citing lack of thorough research and dilemmas of the retarded person in court. The latter problem will be explored in more detail in a subsequent section of this article.

Research results with respect to intellectual development of the children are summarized by Haavik et al. (1981) thus:

> Without exception, the studies reviewed documented that the intelligence of the children as a group surpassed that of their parents, and in some cases substantial increases in I.Q. were noted in the next generation. (p.75)

A few studies used school achievement as an alternative measure to I.Q. scores, and these showed that more children of retarded parents needed special schooling than did their normal counterparts (Haavik et al, 1981, p. 79). It is impossible to present the combined results of all the studies in any more succinct form than the authors themselves have done because of wide variability in sample sizes and methods of measurement. However, it might be pointed out that in only one study was the proportion of children with below-normal I.Q. greater than one-third of the total group studied (Johnson, 1946). The definition of "normal" was not given by Haavik et al. (1981).

Finally, some studies on the effect of parent support services and child stimulation programs are reviewed by Haavik et al. (1981). Three studies involving intensified educational programs for children of handicapped parents reported significant gains in I.Q. levels for experimental groups compared to control groups that received no special instruction. One of those studies focused on mentally retarded adolescents while the other two investigated early infant stimulation programs for non-handicapped children of retarded parents.

The Heber and Garber study in Milwaukee (1975) is probably the most well-known, although it is highly criticized (Page, 1975). Their purpose was to ascertain whether ghetto children at risk for developmental delay (based on low maternal I.Q.) could be helped by pre-school educational programs for the children and training for the mothers. At the age of 5½ years, the experimental group (which had received special help from the age of 3 months) had a mean I.Q. of 122 compared to 91 for the control group. The authors themselves cautioned that this gain might not endure throughout the inner city school experience, and that similar studies have shown the greatest gains in the early stages. These results still confirm that children of handicapped parents can experience normal educational development despite the limitations of their parents.

The special strengths of mentally handicapped parents, and the possibility that they may make better-than-average parents in some ways, are rarely discussed. A common characterization of mentally handicapped people is that they are more affectionate and less inhibited about expressing their feelings than many North American middle class adults. The current emphasis in law and in social scientific literature on the importance of emotional development in childhood might suggest that mentally handicapped persons are strong candidates for parenthood in this respect.

## 2.) Implications for Human Services:

Isolated examples of programs designed to enable retarded parents to become more effective exist in the United States (Madsen, 1979). It has been demonstrated that these types of programs, especially when combined with educational programs for the children, can improve parenting ability. This approach contrasts sharply with the more universally available service of removal, monitoring and supervision provided by child protection agencies. Perhaps the most basic difference is that the training approach expresses confidence and trust in the ability of the retarded parent to learn, change, and achieve his/her potential for competent parenthood, while the latter approach conveys the message that the obviously inadequate parent must be watched and probably replaced by an alternate caregiver.

Most human services for handicapped persons are now organized so as to maximize the opportunities for clients to exercise all their rights and live up to the full responsibilities of adulthood. Knowledge of the powerful effects of self-fulfilling prophecies has prompted social service professionals to design settings and training programs that encourage retarded people to meet normal societal expectations (Wolfensberger, 1972). These same principles should be applied to the delivery of services for mentally handicapped parents in their child-rearing years so that they, too, may have the opportunity of living up to the expectation that they will care adequately for their children.

## 3.) Conclusions:

Research results and experimental programs indicate that, at a minimum, some mentally handicapped people are capable of raising children into adulthood, especially where the children receive extra stimulation in programs inside and outside the home, and where parents are given training before and after the birth. There does not appear to be, then, any socially or scientifically valid reason why children of mentally handicapped parents should be removed from their families at birth, or before the parents have demonstrated an inability to parent even after all possible supports have been brought to bear on the situation. Each case must be considered individually on its merits to determine the actual abilities and weaknesses of the parents, and the costs to the child of breaking up a functioning family unit. Judgments made on the basis of stereotyped notions about mentally handicapped persons will not aid in the delicate

balancing of parents' and children's rights which is demanded here.

Grant (1980) sums up the issue admirably:

> I don't believe children should have to suffer because of parental inadequacy any more than I believe that parents should be blamed for their deficiencies. Any social policy that is concerned only with the rights of mentally retarded persons (in this case parents) and neglects the rights of children is questionable. I believe that society has to ensure that all children of incompetent parents — incompetent for whatever reason — are provided an atmosphere conducive to their growth so that they can maximize their potential. (p. 71)

## Present Treatment of Mentally Handicapped Parents Under Child Welfare Laws:[1]

Mentally handicapped parents come to the attention of the law when an authorized agent[2] believes on reasonable and probable grounds that the child is in need of protection.[3] Statutory criteria which define a child in need of protection are diverse, encompassing some 38 different grounds (Dickens, 1978), including "a child whose parents are unfit, unable or unwilling to care properly for him or who has no proper guardianship" (Saskatchewan *Family Services Act*, s. 15), "a child who is living in an unfit or improper place" (Ontario *Child Welfare Act*, s. 19(b) (iv)), and a child "whose life, health or morals may be endangered by the conduct of the person in whose charge he is" (Ontario *Child Welfare Act*, s. 19(b) (xi)).

The law in this area focuses on the welfare of the child, rather than on the special needs of the parents, but parental rights are not totally ignored. In the modern conception of parental rights, parents may be thought of as "trustees" for their children, with a duty to preserve and prepare them for adult life (Beck, 1977; Dickens, 1981). This is in contrast to the more traditional idea that parents have an inherent right to their children's loyalty and services which is not subject to state monitoring or interference.

The law does not require parents to give their children the best life possible (*Re Brown*, 1975; *Re Warren*, 1974), nor even to actively promote their welfare, but it does require them to protect children from harm, or substantial risk of harm (Dickens, 1981). Parental rights and duties are defined by the negative standard of protecting children from harm, but there is a region of law between this standard and not advancing their welfare where legal intervention may appear to be oppressive of family integrity or autonomy, but where children can be exposed to risk by the exercise of parental rights (Dickens, 1981). This "grey area" is one where special needs and unreasonable fears can work against the best interests of both the parents and the child, assuming the parents are willing to care for their child, and as such, it is of concern to mentally handicapped parents and their advocates. Any disruption of the parent-child relationship is traumatic for the child, although the severity and duration of the effect is probably somewhat related to the seriousness of the disruption, removal being the most extreme rupture of the family tie. When a child is removed from his/her parents without actual harm or neglect having been occasioned by the parents (i.e. on the basis of presumed bad parenting or unfit home conditions), harm is being done by the authorities which is not in the best interests of the child.

There is no question that mentally handicapped people have been and are now treated differently from other parents in child neglect proceedings. In a note on judicial treatment of homosexual, mentally retarded, mentally ill, and incarcerated parents, Payne (1978) indicated that:

> . . . while there is a relatively

> good understanding and tolerance afforded to *victims* of mental illness, there is still widespread fear of allowing the mentally retarded to function as parents to their biological children. (p. 818)

Some of the obstacles which render handicapped parents particularly vulnerable include:

1. Real limitations on parenting skills and household management abilities.
2. Lack of appropriate, helpful services and support systems.
3. Lack of normal childhood experiences and family role models.
4. Unfounded assumptions about inadequate parenting ability, and prejudice.
5. Poverty.
6. High visibility to helping agencies and child protection authorities.
7. Presence of other circumstances which compound their difficulties, such as emotional problems.
8. Lack of access to good legal representation.

(Wald, 1976; Grant, 1980; Note, *Stanford Law Rev.*, 1978-79; Haavik et al., 1981; Herr, 1978; National Council of Welfare, 1979).

The two crucial decisions to be made in child welfare adjudications are the determination of neglect, and the order as to disposition (i.e. supervision, temporary wardship, or permanent custody). The decision as to whether a child is in need of protection is often made by an agency worker or police officer who takes the child out of the home without a warrant being required at the time. Endorsement of the court is required within five days in Ontario (*Child Welfare Act*, s. 27). The initial removal can be the most critical step in a case because the decision to apprehend is usually supported by the court on review and thus a process may have begun which inexorably leads to permanent separation. The court recognizes that every move causes trauma to the child and will attempt to minimize the harm being done by being cautious abut ordering return of the child without reasonable assurance that another move will not be made again in the near future. Also, the longer the child is in a stable, secure foster home, especially when the child is very young at the time of initial separation, the more likely it will be found in the child's best interests to remain in that environment.

The breadth and ambiguity of statutory criteria for determining neglect engender uncertainty about what parental behaviour or home conditions will place a child in need of protection. This vagueness also allows for discriminatory enforcement of protection laws by child welfare agencies and police and, when combined with informality of procedure in the courtroom, for judicial discrimination. While none of the Canadian statutes uses mental incapacity as a ground for neglect in itself, it is still possible for mentally retarded parents to lose their parental rights on the basis of their label in Canada (e.g. *Re W.P.D.W.*, 1979). There are other criteria which are sufficiently broad to cover the assumption that mental handicap is to be equated with poor parenting, as outlined above.

Normally there is a requirement that inadequate parenting be linked to harm (or risk thereof) to the child, but cases where first-born children have been removed at birth, or without any evidence of risk other than the parents' alleged mental disability, are not uncommon (*In re MacDonald*, 1972; *In re Paul*, 1965; Freeman, 1980). In a recent child custody case in British Columbia (*Supt. of Family and Child Service v. M. (B.) and O. (D.)*, 1982) involving a drug-addicted mother and a child born drug-addicted, it was held on appeal that it was possible to find the unborn child in need of protection as having been abused during the gestation period. In a similar case in Ontario involving an alcoholic mother and a child born with fetal alcohol syndrome (*Children's Aid Society of Kenora and L. (J.)*, 1982) the judge remarked, *obiter*, that it might be possible to declare an unborn child

in need of protection based on the mother's refusal to stop drinking. Such developments in case law, if applied to mentally retarded parents could result in a presumption being raised that any child born to a mentally handicapped woman is automatically in need of protection at birth. Needless to say, such a regressive step would cause alarm to prospective handicapped parents and their advocates.

Once a child has been declared in need of protection by a court, disposition becomes the issue. The standard for this decision in some provincial legislation is "the public interest and the interests of the child", as in the Alberta *Child Welfare Act*, s. 15(1) and 16. But the common law principle which is applied is that the disposition is to be made in the best interests of the child (*Re Poppe*, 1972; *Re Pearson*, 1973). This standard emphasizes that the child's interests are to be paramount in relation to the rights of the parents[4] and that the purpose of the hearing is not to determine culpability of the parents' conduct.[5] Nevertheless, it is obvious that the parents' behaviour will be scrutinized carefully in the determination of the child's need for protection and in the subsequent disposition. There is considerable scope for judicial discretion in assigning weight to past and predicted behaviour of the parents. Only the Ontario and New Brunswick statutes actually define what factors are to be taken into account when deciding what is in the child's best interests, and these include questions about the parents' future plans for their child.

After reviewing the operation of child neglect laws in cases involving retarded parents, Hertz (1978-79) and Haavik et al. (1981) have concluded that, in the United States, the courts' treatment has violated constitutional legal standards. Procedural and substantive due process, and equal protection tests demand that parental fitness be determined according to the capabilities of each parent, not conclusive presumptions about a class or group. To the extent that handicapped parents have been shown to vary in their parenting ability, with some retarded parents being quite competent, constitutional standards have been violated by unwarranted separations of children and parents. Haavik et al. (1981) point out that their criticisms of child neglect laws apply equally to all parents. In Canada, it is too early to tell whether constitutionally protected rights to equal treatment and due process under The Charter of Rights and Freedoms in *The Constitution Act, 1982* will produce similar criticisms.

**Proposals for Reform:**

Administrative, legislative, or judicial reform with respect to child welfare laws should be universal, and not specifically addressed to mentally retarded parents or their children. Normalization ideology demands that retarded persons have access to culturally normative lifestyles through culturally normative means (Wolfensberger, 1972). However, normalization does not exclude provision of special supports where they will enable participation in community life, including special legal protections where those are merited and the goal cannot be accomplished in any other way.

Mecredy-Williams (1979) addressed this issue in relation to marriage:

> On the one hand, it appears that to avoid discrimination against the mentally retarded, specific references to them should be removed from statutes, or else such anomalies as found in *The Marriage Act* will perpetuate vestiges of second-class status for these people. On the other hand, to avoid unjustified sterilization and to aid the retarded in living fully in the community, some laws do seem to be necessary to protect them . . . *A delicate balancing of the need to be free from laws and the need for the law's protection is required*. (p.80, emphasis added).

It is submitted that the following proposals for special treatment will help ensure equality of mentally handicapped parents in the eyes of the law without unnecessarily stigmatizing them.

1). **Administrative:** Agencies responsible for child protection should adopt a regulation declaring that

> In detecting, intervening in, and resolving cases of child neglect, agency workers should not consider any mental retardation of a parent except insofar as it affects the nature of the social services to be provided to a family (Hertz, 1978-79, p. 803).

2). **Legislative/Judicial:** The court should not hear evidence concerning I.Q. scores of the parent. This information is not considered in cases involving non-retarded parents, and it is irrelevant to the issue of parental competency (Galliher, 1973). Findings of neglect should be based only on harm to the child (or substantial risk thereof) and demonstrated parental inadequacy to provide for the child's needs, as presently required by statutes and common law.

3.) **Judicial:**

> Where neglect is found to justify coercive intervention, special services should be ordered delivered by the agency if those services are a feasible alternative. Feasibility is not to be gauged by availability of service but by the likelihood of correcting the situation. Where services are not available, the child should be removed until they are provided (Hertz, 1978-79, p. 795 & 804).

The following excerpt from the judgment of Thomson, Prov. Ct. J., in a case involving retarded parents whose 2½-year-old daughter had previously been declared in need of protection, illustrates how the judiciary could approach these issues:[6]

> The fact of low parental intelligence should not be taken as determinative in itself of the child's need for protection. Rather the question should be one of deciding whether, in light of their *individual capabilities*, the parents are able to meet their parental responsibilities. If the answer to this question is no, then the judge should decide whether, *given the proper assistance and intervention*, the parents can be provided with the tools necessary to care adequately for the child. This issue should not be resolved simply by noting the difficulties involved in securing the needed help when a child remains within the home. The actions of the persons involved in this case show that, with a coordinated effort, extensive assistance can be given to parents such as the Reeves. Only if it is felt that the risk to the child is too great, even with outside help should the court remove the child from the home. If such a removal is necessary, it would seem to me that in most cases this would require an order of Crown wardship, at least if the child is young, highly adoptable and not too closely attached to his or her natural family. (*C.A.S. of Kingston v. Reeves and Reeves*, 1975, at 394-5, emphasis added).

## General Reforms in Child Protection Law Relevant to Mentally Handicapped Parents:

Debate rages within the family law-social policy field about the best legal and social methods for supporting families and protecting individuals within those families

(Eekelaar, 1982; Thomson and Barnhorst,1982). The current trend is away from coercive state intervention toward an approach which stresses family autonomy in decision-making. It has been persuasively argued that the "best interests of the child" principle demands as little and as non-intrusive legal intervention in family life as possible (Goldstein, Freud, and Solnit, 1973). Several legal scholars have suggested reforms based on this analysis, while others cite the need to reduce ambiguity of standards and limit discretion as grounds for revision (Wald, 1974, 1976; Areen, 1974-5, Katz, 1978, and Thomson et al., 1982). While several legitimate criticisms of the Goldstein et al. analysis have been advanced (Dembitz, 1974; Dickens, 1981), few commentators advocate a much broader basis for state intervention in the parent-child relationship (Semler, 1979).

The following proposals have been selected for their potential to reduce unfair and arbitrary actions against mentally handicapped parents. Only a short description of the proposals is given here due to space limitations, but model statutes have been drafted by the authors, and their works should be consulted for further details.

1.) Statutory grounds for intervention should be restricted to situations where actual harm or a *substantial* risk of *serious* harm is demonstrated AND the harm suffered is relatable to the parents' actions or lack of action. This would be a two-part test.

2.) Dispositional criteria should be oriented to protection of the child from the specific harm justifying intervention. An investigatory report should be available to the court at the disposition hearing which includes an appraisal of the harm that is anticipated if removal should occur, a description of the services which the parents and the child need, which services have been provided in the past, and a statement of the changes that would be required for the child to be safe in the home. Removal should be ordered only on specific grounds supported by clear and convincing evidence, or some other heavy civil standard of proof.

3.) The least restrictive alternative doctrine should govern intervention when it is necessary. Less drastic solutions should be tried before removal is ordered. As stated above, feasibility of alternatives is to be judged by the possibility of correcting the situation, not availability of resources.

4). Written plans requiring agencies to specify what services will be supplied when and by whom should be required, and parents should have the right to a review of performance if the agency is not living up to its promises. The content of this plan should be specified in the statute or regulations, and should include objective, measurable criteria for conditions that would enable the child to be returned.

5.) Representation for children and parents must be available and accessible in all cases.

Many of these suggestions attempt to structure the court's and the agency's discretion. Those who advocate these steps recognize that this approach has its disadvantages, not the least of which is that statutory criteria have not always been as systematically applied by the courts as had been envisioned by the reformers (Thomson and Barnhorst, 1982). Nevertheless, it is impossible for a judge to apply non-existent guidelines. Another mechanism for controlling discretion would be private remedies against child care workers (Note, *Yale L.J.*, 1981), but these are not yet available.

Effectiveness of these reforms would have to be evaluated and subjected to the ongoing scrutiny of the legal and social service professions.

**Conclusions:**

Mentally handicapped parents are especially vulnerable to losing custody of their children in child welfare adjudications because of prejudicial attitudes, unfounded assumptions about inadequate parenting, lack of appropriate support services, and other problems. Research results show that some retarded parents can provide loving, safe,

and secure home environments for their children, particularly with the support of parent training courses. Special educational programs for the children, especially early in life, can help to compensate for deficiencies in intellectual stimulation at home. Where these services are not effectively provided prior to and immediately following the birth of the child, there is increased likelihood that the child will be permanently removed from the mentally handicapped parents' home.

Reforms are needed in child welfare agencies, in legislation, and at the judicial level to combat erroneous assumptions about inadequate parenting based on I.Q. scores alone and to establish procedural safeguards. Unwarranted removal of children from mentally handicapped parents violates the "best interests of the child" standard because all disruptions in parent-child relationships are traumatic to the child. Maximum effort should be devoted to keeping the family together and protecting the child from specific harms within the home environment through supportive services. Courts should order services to be provided where it is feasible to correct the situation, and human service agencies must take up the challenge of providing services to mentally handicapped parents and their children.


## RESUME

Plusieurs handicapés mentaux désirent se marier et avoir des enfants. Cependant, à cause de postulats non-appuyés concernant leur adéquacité pour jouer le rôle de parents et de certains préjugés, le droit à ces activités ne leur est pas reconnu. Les recherches démontrent que certaines personnes qui souffrent de retard deviennent de bons parents, particulièrement avec le support de cours visant l'apprentissage du rôle de parent et de programmes de stimulation hâtive pour leurs enfants. Malheureusement ces supports ne sont pas disponibles sur une large échelle. Pour en arriver à traiter avec équité les parents handicapés soumis aux lois de protection de l'enfance, il faudra des réformes dans les lois et dans la pratique des agences offrant des services à l'enfance. On fait des recommandations pour s'assurer que l'option de garder la famille ensemble sera pleinement considérée.


## FOOTNOTES

[1] The child welfare statutes in Canada, as of March, 1983 are: (Alberta) *Child Welfare Act*, R.S.A. 1980, c. C-8; (British Columbia) *Family and Child Service Act*, S.B.C. 1980, c. 11; (Manitoba) *Child Welfare Act*, S.M. 1974, c. 30, as am.; (New Brunswick) *Child and Family Relations Act*, S.N.B. 1980, c. C-2.1, as am.; (Newfoundland) *Child Welfare Act*, 1972 (Nfld) No. 37, as am.; (Nova Scotia) *Children's Services Act*, S.N.S. 1976, c. 8, as am.; (Northwest Territories) *Child Welfare Ordinance*, R. Ord. 1974, c. C-3, as am.; (Ontario) *Child Welfare Act*, R.S.O. 1980, c. 66, as am.; (Prince Edward Island) *Family and Child Services Act*, R.S.P.E.I., 1974, c. F-2.01; (Quebec) *Youth Protection Act*, R.S.Q. 1977, c. P-34.1 as am.; (Saskatchewan) *The Family Services Act*, R.S.S. 1978, c. F-7, as am.; (Yukon) *Child Welfare Ordinance*, R. Ord. 1971, c. C-4, as am..

[2] For example, s. 21 of Ontario's *Child Welfare Act* authorizes police officers and other agents to remove a child and take him/her to a place of safety where the agent has reasonable and probable grounds to believe the child is in need of protection.

[3] The terms "abuse" (wilful injury) and "neglect" (inadequate care) as used in the United States are virtually synonymous to the various phrases used in Canadian legislation, such as "in need of protection" (British Columbia, Ontario, Northwest Territories), "in need of protective guardianship" (Manitoba), "in need of protective care" (Saskatchewan), "in danger" (Quebec), etc. Where "abuse" and "neglect" are used in this article, they should be taken to include these statutory terms.

[4] See, for example, *Re Paul F.M.* (Ont. Prov. Ct., Fam. Div., June 27, 1979, unreported), Reasons for Judgment at pp. 16-17:

> . . . it is intended that the return of

> Paul to his mother shall be his last move. Bluntly, this is the end of the road for Mrs. M. It is her last chance to succeed and succeed she must. The conditions of the order must be complied with. His interests are paramount. Any conflict between a parental right to custody and his right to a stable home environment and care and attention to his need can only be decided in his favour.

[5] See *Re Banks Infants*, P.E.I.S.C., Fam. Div., Charlottetown Registry FDS-520, Campbell, J., Dec. 7, 1981 (Aim of protection hearing is not to condemn parents). This decision interpreted s. 13 (1) of the P.E.I. statute, a provision similar to one in most other provincial Acts.

[6] The *Reeves* decision can be contrasted to that of Mr. Justice Hinds in *Re Olson; Public Trustee for B.C. v. Supt. of Child Welfare for B.C.* (1981), 14 F.L.D. 272.

## LIST OF CASES

*Re Brown* (1975), O.R. (2d) 185.
*Chertkow v. Feinstein*, [1929] 3 D.L.R. 339, aff'd without reasons, [1930] S.C.R. 335, [1930] 1 D.L.R. 137 (S.C.C.).
*Re Children's Aid Society of Kenora and L. (J.)* [1982] W.D.F.L. 390.
*Children's Aid Society of Kingston v. Reeves and Reeves* (1975), 23 R.F.L. 391.
*Durham v. Durham* (1885) 10 P.D. 80.
*In re MacDonald* (1972), 201 N.W. 2d. 447.
*Re Olson; Public Trustee for B.C. v. Supt. of Child Welfare for B.C.* (1981), 14 F.L.D. 272.
*In re Paul* (1965), 170 So. 2d. 549.
*Re Pearson* (1973), 10 R.F.L. 234.
*Re Poppe* (1972), 4 R.F.L. 141.
*Supt. of Family and Child Service v. M. (B.) and O. (D.)* (1982), 28 R.F.L. (2d) 278.
*Re Warren* (1974), 13 R.F.L. 51.
*Re W.P.D.W.* (1979), 8 R.F.L. (2d) 374.

## REFERENCES


Areen, J. Intervention between parent and child: A reappraisal of the state's role in child neglect and abuse cases. (1974-75) 63 *Georgetown Law J.* 887-933.

Bakan, D., Eisner, M., and Needham, H.G. *Child Abuse: A Bibliography*. Toronto: Canadian Council on Children and Youth, 1976.

Beck, C.K. et al. The rights of children: A trust model. (1977-78) 46 *Fordham Law Rev.* 669.

Dembitz, N. Beyond any discipline's competence. (1974) 83 *Yale Law J.* 1304.

Dickens, B.M. Legal responses to child abuse. (1978) 1 *Can. J. Fam. Law* 87.

Dickens, B.M. The modern functions and limits of parental rights. (1981) 97 *Law Quarterly Rev.* 462.

Eekelaar, J. *Family Law and Social Policy: An Overview*. Paper presented at the Faculty of Law, University of Toronto Family Law and Social Policy Workshop, October, 1982.

Freeman, M.D.A. Removing babies at birth: A questionable practice. (1980) 10 (5) *Family Law* 131.

Galliher, K. Termination of the parent-child relationship: Should parental I.Q. be an important factor? (1973) 4 *Law and the Social Order* 855-879.

Goldstein, J., Freud, A., and Solnit, A.J. *Beyond the Best Interests of the Child*. New York: The Free Press, 1973.

Grant, C.J. Parents with defined intellectual limitations. In *Sterilization and Mental Handicap: Proceedings of a Symposium*. Toronto: National Institute on Mental Retardation, 1980.

Grossman, H.J., ed. *Manual on Terminology and Classification in Mental Retardation*. Baltimore: Garamond/Pridemark Press, 1973.

Haavik, S.F. and Menninger, K.A. *Sexuality, Law and the Developmentally Disabled Person*. Baltimore, Md.: Brookes Publishing Co., 1981.

Heber, R. and Garber, H. The Milwaukee Project: A study of family intervention to prevent cultural-familial mental retardation, in *Exceptional Infant*, Vol. 3, B.Z. Friedlander, G.M. Sterritt, and G.E. Kirk, eds. (New York: Brunner/Mazel, Inc., 1975).

Heber, R. et al., *Rehabilitation of Families at Risk for Mental Retardation*. Madison, Wis.: University of Wisconsin, 1972.

Herr, S.S. The new clients: Legal services for mentally retarded persons. (1978) 31 *Stanford L.R.* 553-611.

Hertz, R. Note: Retarded parents in neglect proceedings: The erroneous assumption of parental inadequacy. (1978-79) 31 *Stanford L.R.* 785-805.

Johnson, B. Studies of cases discharged from the Laconia State School from July 1, 1924 to July 1,1934. (1946) 50 *Am. J. Mental Def.* 437.

Katz, S.N. Model Act to Free Children for Permanent Placement. In Eekelaar, J. and Katz, S.N. *Family Violence*. Toronto: Butterworths, 1978.

Lafollette, H. Licensing parents. (1980) 9 *Philosophy and Public Affairs*, 182.

Linn, B.J. and Bowers, L.A. The historical fallacies behind legal prohibitions of marriages involving mentally retarded persons — the eternal child grows up. (1978) 13 *Gonzaga Law Rev.* 625-690.

MacKay, H. Implications of sterilization for parents of mentally handicapped persons. In *Sterilization and Mental Handicap: Proceedings of a Symposium*. Toronto: National Institute on Mental Retardation, 1980.

Madsen, M.K. Parenting classes for the mentally retarded. (1979) 17 (4) *Mental Retardation* 195.

Mecredy-Williams, B. Marriage Law and the Mentally Retarded, (1979) 2 *Can. J. Fam. Law* 63.

Mickelsen, P. The feebleminded parent: A study of 90 family cases. (1947) 51 *Am. J. Mental Deficiency* 644.

National Council of Welfare. *In The Best Interests of the Child*. Ottawa: National Council of Welfare, 1979.

Note: Low intelligence of parents: A new ground for state interference with the parent-child relationship. (1973-74) 13 *J. Family Law* 379-391.

Note: A damages remedy for abuses by child protection workers. (1981) 90 *Yale L.J.* 681-701.

Ontario Association for the Mentally Retarded. *Positions on Social Issues*. Toronto: 1978.

Page, E. Miracle in Milwaukee: Raising the I.Q., in *Exceptional Infant*, Friedlander et al, eds., New York: Brunner/Mazel, 1975.

Payne, A.T. The law and the problem parent: Custody and parental rights of homosexual, mentally retarded, mentally ill and incarcerated parents. (1978) 16 *J. Fam. Law* 797-818.

Semler, J.D. A child's emotional health — the need for legal protection. (1979) 15 *Tulsa Law J.* 299-326.

Shaman, J.M. Persons who are mentally retarded: Their right to marry and have children. (1978) 12 *F.L.Q.* 61.

Swadron, B. *Mental Retardation — The Law — Guardianship*. Toronto: National Institute on Mental Retardation, 1971.

Thomson, G. and Barnhorst, R. *Policy and practice in the child welfare area*. Paper presented to the Faculty of Law, University of Toronto, Family Law and Social Policy Workshop, February, 1982.

Wald, P. The mentally retarded citizen and the law. In Kindred et al., eds., *Proceedings of the President's Committee on Mental Retardation*, 1976.

Wald, M. State intervention on behalf of "neglected" children: A search for realistic standards. (1974) 27 *Stanford L.R.*, No. 4, 985.

Wald, M. Standards for removal of children from their homes, monitoring the status of children in foster care, and termination of parental rights. (1976) 28 *Stanford Law Rev.*, 623.

Wolfensberger, W. *The Principle of Normalization in Human Services*. Toronto: National Institute on Mental Retardation, 1972.