

CHILD ABUSE AND NEGLECT

POST-DISPOSITIONAL DECISION-MAKING AND PROCEDURES FOR MONITORING STATE CONTROL OF CHILDREN REMOVED FROM PARENTAL CARE

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INTRODUCTION

In a previous article the writer discussed the processes of adjudication and disposition in abuse and neglect proceedings.¹ A restrictive standard for removal of abused or neglected children from their homes was supported so as to minimize unwarranted disruption of families. The importance of providing services to abusive or neglectful parents and of protective supervision within the home was emphasised. The law must also provide standards and procedures to govern what happens after initial disposition. This article will outline the key decisions that may have to be made, consider to whom the decision-making power should be entrusted, and suggest the criteria according to which the various decisions should be made. It will also consider what procedures and devices should be available to ensure independent monitoring of those decisions that are entrusted to the welfare agency rather than reserved to a court. The general principles discussed will be related to New Zealand law and practice.

THE KEY POST-DISPOSITIONAL DECISIONS

The primary concern here is with decisions in cases where the child has been removed from parental care. Post-dispositional decision-making in cases where the initial intervention has been limited to supervision will be dealt with briefly first. The writer has previously suggested that the court should have power to order the provision of services by the state and this implies some judicial control over the nature of the services provided.² This is important not only from the child's point of view but also from that of the parents since a failure to help the family to independence may result in further proceedings and an attempt to have the child removed from home. On the other hand the court itself is not a welfare agency and cannot be responsible for the detailed nature of the intervention. Some flexibility must be ensured by giving the welfare agency power to adapt the services provided to the family's needs. It is submitted that a reasonable compromise between the need for flexibility and the need for accountability would be as follows: any decision by the welfare agency that was not provided for in the

¹ "Child and Abuse and Neglect: The Adjudication Process and Standards and Procedures for Initial Disposition" 9 NZULR 355.

² *Ibid.*

court's order (e.g. a decision to terminate or significantly reduce protective supervision within the period envisaged by the court on the ground that it was no longer necessary, or to cease counselling or therapy for the parents on the ground that they were not responding to it) should be the subject of a written report to the court; a hearing would only result if requested either by counsel for the parents or by counsel for the child (each of whom would be entitled to a copy of the report). If either of these counsel challenged the decision then the court would have to consider whether the decision was justified. Furnishing a copy of the report direct to the lawyer who appeared for the parents at the original hearing rather than simply to the parents themselves is intended as a response to the fact that many parents who become involved in these proceedings are unable or reluctant to help themselves by questioning official decisions or by seeking independent advice and support. Obviously the lawyer could only challenge the decision on the parents' instructions but the device suggested would at least help ensure that the opportunity for challenge was not lost for the wrong reasons.

Where the initial disposition was removal of the child from his home the key post-dispositional decisions fall into three main groups. The first consists of decisions directly affecting the interim welfare of the child: placement, education, contact with parents, counselling and therapy. The second area is the home: what services should be provided to the parents to prepare them for the child's safe return? The third group consists of the options for ultimate disposition: return of the child to his parents, termination of parental guardianship, and adoption or permanent placement of the child away from his original family.

It is submitted that the first group of decisions should be entrusted primarily to the state welfare agency but with opportunities for independent review at the instigation of either the child or the parents. This will be elaborated below.³ The second area should be the subject of definite oversight by the court since it is crucial to the long term future of the child and his family. The detailed nature of the services provided to the parents must be left to the discretion of the welfare agency but it is submitted that a decision to terminate services (whether on the ground that the parents cannot be helped or on the ground that treatment has been successful and they are now ready for the child's return) should be referred to the court. Both the parents and the child would then have an opportunity to challenge the decision. The final group of decisions (i.e. ultimate disposition) should be seen as the sole responsibility of the court (although it will obviously be guided to some extent by the views of the welfare agency). A partial exception should perhaps be recognized in the case of a decision to return a child to his family. Arguably the welfare agency should in the first instance be able to make such a decision on the ground that reserving it to the court would lead to undue rigidity. But the decision should at least be reported to the court so that an opportunity for review of it arises.

Regarding the last point, the present position in New Zealand under the Children and Young Persons Act is that the Director-General of Social Welfare may discharge a guardianship order made in his favour "if [he]

³ See under 'Accountability'.

is satisfied that it is in the interests of the child or young person and consistent with the public interest to do so": s.49(7). Such a decision is not referred to a Children and Young Persons Court and could apparently only be challenged (by the child, for example, or by a foster parent) by invoking the High Court's jurisdiction in wardship or its general administrative jurisdiction.⁴ It is not clear whether the wardship jurisdiction can be invoked against the Department of Social Welfare in such circumstances and even if it can it is doubtful whether the Court would inquire into the merits of the Director-General's decision.⁵

Where the initial disposition was to terminate parental rights and free the child for adoption then the task remaining is to find an adoptive placement. There should be provision for automatic review by the court (say within 6 months) to ensure that the child is not allowed to linger unnecessarily in an institution or in an impermanent foster placement. Obviously some abused or neglected children will not be able to be placed for adoption or found a permanent home within that time but an obligation to report to the court will at least put pressure on the agency to work in the child's interests. An important aspect of the child's welfare in these circumstances will be knowing that he has a secure home.

GUIDELINES FOR DECISION-MAKING IN RELATION TO CHILDREN REMOVED FROM PARENTAL CARE

It is submitted that the primary objective must be to reunite the child with his family as soon as possible, consistently with his safety: "planning for the child's return should begin at the same time as planning for placement".⁶ When return of the child cannot be achieved within a reasonable time then the emphasis should shift to securing the child a new permanent family. What should generally be avoided is the use of long-term foster care in which the child's attachments to his original parents are undermined but proper bonds are not established with the substitute caretakers because of the insecurity of the relationship:⁷

. . . no child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis. He cannot invest except in a minimal way (just enough to survive) if tomorrow the relationship may be severed To grow, the child needs at least the promise of permanency in relationships and some continuity of environment.

The above approach to ultimate disposition is now widely supported by

⁴ See Johnston "Wardship of Court and the Children and Young Persons Act 1974" [1982] NZLJ 48.

⁵ *Ibid.* And see *M v M & D-GSW* (1982) 1 NZFLR 136.

⁶ Levine, "Caveat Parens: A Demystification of the Child Protection System" (1973) *U of Pittsburgh L.Rev.* 1, 21.

⁷ Jane Rowe, "Adoption in a Changing Society" *Proceedings of First Australian Conference on Adoption* (1976) at p.12.

commentators⁸ but its implementation presents real difficulties which will be discussed below. First, criteria for the other two groups of decisions will be outlined.

Interim decision-making about the child

Interim decisions on matters like placement and access should be based on the child's welfare as interpreted in the light of the ultimate objective of returning him to his family. This will indirectly allow consideration of parental interests as well, to a proper extent. It is the child's long-term welfare that should be borne in mind rather than merely his immediate interests. Thus, for example, while contact between the child and his parents might seem unsettling for the child and might make life more difficult for the social workers involved, a question that must be asked is whether termination or restriction of access will help or hinder the rebuilding of the parent-child relationship. Again, the choice of a placement should be made in the light of the prospects for the child's eventual return to his family. A foster placement which appears to meet the child's immediate needs perfectly might be unsuitable from a long-term point of view because it reduces the opportunities for contact between the child and his natural parents or because the foster parents are unlikely to be able to cope with continued involvement by the natural parents. The welfare agency in effect needs to estimate the length of time for which the child will have to remain separated from his family and to choose a placement accordingly. There will be cases for example where the prospects for the child's return to his family are very poor. In these, foster parents should be sought who will be willing, if necessary, to try and become genuine substitute parents (and even to adopt), so that the disruption caused by successive placements, which can be very detrimental to the child's welfare, is avoided. The difficulties of prediction are clearly very great but they must be faced if the child's interests are taken seriously. Generally speaking the parents should be involved as much as possible in interim decision-making about their child. As well as countering the loss of parental self-esteem that commonly accompanies child removal⁹ and serving the end of rehabilitating the parents this approach should provide further opportunities for assessing them and for predicting the eventual outcome. It should also help to avoid a danger noted by Levine:¹⁰

. . . When the parent's energies and desires are sapped by the bureaucratic labyrinth, the child is figuratively "escheated" to the care of the agency.

⁸ E.g. Derdeyn, "Child Abuse and Neglect: The Rights of Parents and the Needs of their Children" *Amer. J. Orthopsychiat* 47: 377 (1977); Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases" 63 *Georgetown L.Jo.* 887; Wald, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights" 28 *Stanford L.Rev.* 623 (1976); Ketcham and Babcock, "Statutory Standards for the Termination of Parental Rights" 29 *Rutgers L.Rev.* 530 (1976); Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" 39 *Law and Contemporary Problems* 226 (1975).

⁹ Levine, *op.cit.* n.6 at 21-22.

¹⁰ *Ibid* at 20.

Helping the parents

The matter of rehabilitative services to the parents of a child who has been removed from home is crucial to the future of both the child and his family:¹¹

In considering the treatment of the abusive family, the treatment of the parents should be the first priority. Many disturbed parents cannot cope with the idea of their child receiving help while they do not. They will be jealous—reminded of the neglect and rejection in their own childhoods—and may possibly sabotage the child's treatment.

Services aimed at rehabilitating the parents with a view to the child's return should be seen as a matter of entitlement.¹² The welfare agency should outline to the court at the time of initial disposition (or soon after) the services it intends to provide to the parents.¹³ Progress reports on the implementation of the plan should then be made to the court at regular intervals.¹⁴ It will be suggested below that failure by the state to offer appropriate services and treatment to the parents should be taken into account by the court when considering a subsequent application for termination of parental rights.¹⁵ Although this approach may operate in a particular case against the interests of the child involved it is the only way of protecting children generally against unnecessary loss of their original families through agency inaction.

The extent to which services should be *imposed* on unresponsive parents is also a difficult problem. It is submitted that if parents refuse necessary treatment in spite of being clearly advised that they stand to lose parental guardianship altogether, there is little point in trying to force change in the name of the child's welfare, which is more likely to be secured by permanent placement in another family.

Final disposition

From the decision-maker's point of view perhaps the most difficult aspect of the whole process of intervention against abuse or neglect is ultimate disposition. As time passes the interests of a child who has been removed from his family tend increasingly to diverge from those of his parents. In particular, the objective of reuniting the child with his family ceases to correspond with his best interests after he has formed ties with substitute parents the disruption of which would undermine his new-found security. The central policy dilemma has been stated thus:¹⁶

When should the state's purpose be to encourage the development of new ties for the child rather than the reunion of the child with his natural parents?

¹¹ Ruth S. Kempe and C. Henry Kempe, *Child Abuse* (Fontana/Open Books 1978) at 92.

¹² Derdeyn, *op.cit.* n.8 at 382.

¹³ Mnookin, "Foster Care—In Whose Best Interest?" (1973) *Harvard Educ. Rev.* 599, 633-4.

¹⁴ Areen, *op.cit.* n.8 at 936.

¹⁵ Cf. Derdeyn, *op.cit.* n.8 at 382.

¹⁶ Mnookin, *op.cit.* n.8 at 280.

Some of the specific issues that arise in the working out of this shift in the balance between parental interests and the child's interests are these:

- What criteria should guide the decision to terminate parental guardianship?
- Should a fixed period be specified within which the choice between return and termination has to be considered?
- If termination is considered to be justified in what way should it be effected and in particular should it be linked with adoption or another form of secure placement for the child?

Approaching the question of return of the child simply in terms of parental rights is obviously unsatisfactory. On the other hand there are serious problems with the adoption of the best interests standard in this context. It could tend to discourage the welfare agency from helping the parents to rehabilitate themselves and to maintain contact with the child. It could influence foster parents to undermine the child's relationship with his parents and to discourage the exercise of access by the parents. It would in practice place an impossible burden on the natural parents even if they had participated in treatment. And finally it would involve all the difficulties of assessment and prediction that result from the inherent vagueness of the standard.

Wald proposes "that the standard for return be the same as the standard for removal: that is, whether the child can be protected adequately from the specific harm(s) justifying removal".¹⁷ This standard also calls for prediction of course but only the same sort of prediction that has been shown to be manageable at the stage of initial disposition.¹⁸ On the basis of their experience in Colorado the Kempes have been able to formulate objective criteria for assessing the risk of returning an abused child to his parents.¹⁹

First, the abusive parent's image of himself must have improved to the point where he has made at least one friend with whom he shares regular and enjoyable experiences Second, both parents must have found something attractive in their abused child and be able to show it by talking lovingly, hugging, or cuddling. Third, both parents must have learned to use lifelines in moments of crisis, so that they telephone their social worker, a friend, or another member of Parents Anonymous, or else take their children to a crisis nursery. Last, weekend reunions with their child in hospital or foster care must become more and more enjoyable, and increasing responsibility must not have strained family life unduly.

The difference between the best interests standard and the "end-of-endangerment" standard should not be underestimated. A child who is returned, say, because the risk of physical abuse that led to his original removal has ceased, may still face significant emotional abuse though not of a sufficiently serious degree to justify removal on its own. Applying the best interests standard to that same child might well mean his continued separation from his family. Despite this it is submitted that realism and

¹⁷ *Op.cit.* n.8 at 684.

¹⁸ See Mnookin, *op.cit.* n.8 and n.13.

¹⁹ *Op.cit.* n.11 at 132-3.

consistency in the overall scheme for intervention make the end-of-endangerment standard preferable and that the answer to the problem of inadequacy in the reunited family must be sought in continued support for and treatment of the parents and the child.²⁰

The idea of introducing a time limit within which permanent disposition must be considered is an attempt to meet the problem of "drift" in foster care and to recognize the fact that the passage of time tends to widen the gap between the child's interests and those of his parents.²¹

A child's developmental timetable simply does not allow undue delay. A parent may require three or four years of treatment before he can safely look after a child, but the child cannot wait that long in "temporary placement".

The end-of-endangerment standard supported above as the criterion for return becomes unacceptable once the child's substitute caregivers have become his psychological parents. At that point a quite new risk is posed by the prospect of return to his original family. Even before that occurs however there may be a shift in the balance of competing interests—keeping the possibility of eventual return open for the sake of the parents may prevent the formation of new attachments which are essential to the well-being and development of the child.²² Hence the need, if the child cannot safely be returned home within a reasonable time, for the emphasis to shift towards securing him a permanent home away from his original family.

Should a fixed period be stated in the legislation or is a flexible formula preferable (such as "within a reasonable time of removal")? Despite the acknowledged arbitrariness of definite limits several recent commentators are convinced of the need for them:²³

. . . flexible, discretionary standards in the context of social-welfare bureaucracy and juvenile courts will too often result in children being left in limbo for years because of repeated routine extensions, even though it is improbable that the child will ever go home.

Goldstein, Freud and Solnit, although originally opposed to the idea of a "rigid statutory timetable",²⁴ have changed their view to some extent in *Before the Best Interests of the Child*²⁵ and now accept the need in this context to rely partly on defined statutory periods:²⁶

. . . given the present state of knowledge and limitations of law, we have come to conclude that specific statutory periods, when coupled with the explicit wish of the long-time caretaker to become permanently responsible for a child's care, are the most reliable indicators and the least detrimental means that we have for giving "new" relationships full legal recognition.

²⁰ Ibid at 134.

²¹ Ibid at 131.

²² Principally by inhibiting foster parents from making a commitment to the child when their own position is so insecure.

²³ Mnookin, op.cit. n.8 at 281. See also Areen, op.cit. n.8 at 937, Wald, op.cit. n.8, Ketcham and Babcock, op.cit. n.8 at 554.

²⁴ *Beyond the Best Interests of the Child* (The Free Press, New York, 1973) at 48.

²⁵ The Free Press, New York (1979).

²⁶ P.42.

What periods should be specified then? Different suggestions have been made by different commentators: one is that for children under the age of three at the time of removal termination of parental rights should be available after six months (if return home is still not possible), whereas in the case of children over the age of three the issue would arise after twelve months.²⁷ Given the present state of knowledge the most appropriate periods cannot be accurately determined but any definite period at least serves the objective of putting pressure on the welfare agency to make permanent plans. The longer the period chosen, however, the greater the risk that the child will lose one set of attachments without developing another or that new attachments that he does develop will, to his serious detriment, be disrupted by eventual return to his natural parents.

It is important that appropriate flexibility be allowed in the termination decision itself. There are several aspects to this. First, termination at the end of the specified period should be permissive not mandatory²⁸ although a presumption in favour of termination may be necessary (if the child cannot be returned home) in order to overcome judicial conservatism. Otherwise the present tendency for children to linger indefinitely in foster care could continue. Secondly, the court must be directed to consider all factors relevant to the termination decision, bearing in mind that at this point the child's interests assume primary importance (the ultimate objective being to ensure for him security within a family) but that the interests of the natural parents cannot be ignored altogether. Questions that would need to be asked include the following:²⁹

- What progress have the natural parents made toward being fit to look after the child?
- What services have they been offered?
- What are the prospects for further change and what is the likely impact of additional services?
- What interest have the parents shown in the child, e.g. by exercising access, contributing towards his maintenance, and communicating with his custodians?
- What is the nature of the child's remaining emotional ties with his natural parents, and, if he is old enough to express a view, what is his attitude to severance of the link with his parents?
- What ties has he formed with his custodians?
- What are the prospects for his successful integration into their family or into another new home?

Thirdly, the termination decision should be seen as linked with adoption. This does not mean that termination should only occur as the consequence

²⁷ Wald, *op.cit.* n.8 at 690-1, 695-6. See also Institute of Judicial Administration/American Bar Association—Juvenile Justice Standards on Abuse and Neglect.

²⁸ Bourne and Newberger, " 'Family Autonomy' or 'Coercive Intervention'? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect" 57 *Boston U. L.Rev.* 670 (1977) at 694-5.

²⁹ Cf. Katz, "Freeing Children for Permanent Placement through a Model Act" 12 *Fam L. Q.* 203 (1978) at 216-218; Mnookin, *op.cit.* n.8 at 281.

of an adoption order. There is a case for prior termination so as to free children for adoption:³⁰

Waiving the requirement of parental consent at the adoption hearing generally is not a very satisfactory approach. Most prospective adoptive parents are understandably reluctant to proceed as far as the adoption hearing without a prior guarantee that the child will be declared eligible for adoption. Moreover, many agencies believe it best to keep the natural and adoptive parents from meeting so the parents can preserve their privacy.

This may not apply though if the foster parents themselves are the prospective adopters. In those circumstances the termination decision can be taken in the adoption hearing. To avoid the danger inherent in termination without regard to the prospects for adoption (viz that the child may be left without legal ties to any parent) the termination decision should take the form of transfer of the power to consent to an adoption.³¹ It could be an interlocutory order lasting say six months and if no adoption application were made within that period the order would lapse. This would encourage proper efforts by the welfare agency to find the child a permanent home.

Finally, alternatives to adoption should be considered. An alternative way of achieving secure placement of a foster child would be to give legal custody to the foster parents and possibly to appoint them guardians as well. This could be done without severing the legal tie with the natural parents i.e. they could remain guardians also, but without custody. While technically less secure than adoption this approach would still give substantial protection to the foster family. One situation in which it is likely to be the least detrimental alternative is where the foster parents themselves do not wish to adopt but are willing to provide a permanent home for the child. Placing the child in a new family for the sake of adoption would involve yet another disruption of attachments. One reason why foster parents sometimes do not wish to adopt is that they cannot afford to lose the payments made to them in that role. This suggests a need to consider subsidised adoptions, which are now in use in many states in the U.S.A.:³²

Three basic types of subsidy are offered: those for specific services such as medical care, legal services, or special education; time-limited subsidies to mitigate the immediate costs of acquiring a new member of the family; and long term subsidies paid periodically until the child reaches majority. By paying adoption subsidies at rates less than the foster care fee, states preclude adoption of children for money while they assist foster families or low-income families who are financially unable to shoulder the full cost of adoption.

The position in New Zealand with respect to ultimate disposition will now be briefly outlined. The most notable discrepancy between the Children and Young Persons Act and the standards supported above is that there are no provisions designed to encourage permanent planning and to require a final disposition within a period that accords with the child's sense of time. A guardianship order can last until the child attains the age of

³⁰ Areen, *op.cit.* n.8 at 929.

³¹ *Ibid* at 937.

³² *Ibid* at 916.

20 years³³ and does not have to be independently reviewed at all. On the other hand it is always open to review at annual intervals.³⁴ Where review is sought the criteria for the decision are not clear. On one interpretation of the Act the parents can expect the child's return if they have improved their position to the extent that the original reasons for the guardianship order are no longer present and they can offer the child a satisfactory home.³⁵ (This could presumably be overridden however by a clear finding that return of the child would be detrimental because of other attachments he has formed.³⁶) An alternative view is less parent-oriented: the principle of the paramountcy of the child's interests (as elaborated and qualified in s. 4 of the Act) governs in this context.³⁷

Although The Children and Young Persons Act itself makes no provision for permanent placement and drift in foster care is common, it is not inevitable. There is other legislation under which a more secure future can be sought for children whose parents are not fit, within a reasonable time, to have them back viz the Adoption Act 1955 and the Guardianship Act 1968. Under the former, termination of parental guardianship occurs as a necessary consequence of an adoption order³⁸ but the grounds for dispensing with parental consent are not child-oriented so this solution is not commonly available.³⁹ However, the Department of Social Welfare is beginning to give more consideration to the adoption of state wards and there are recent instances of successful applications.⁴⁰ One provision which may prove to be useful in the present context (although it was probably not intended for this purpose) is s. 8(3) of the Act.⁴¹ By using this subsection the Director-General of Social Welfare can seek to have a state ward freed for adoption by applying for dispensation with parental consent prior to an actual adoption application. This has the advantage of protecting the adopters against involvement in a bitter and possibly expensive contest with the natural parents. A safeguard is provided in that the dispensing order lapses if no adoption application is made within six months.

³³ Children and Young Persons Act 1974 s. 49(7). Earlier automatic termination occurs on the child's marriage (subs. (7) (a)) or adoption (subs. (7) (b)).

³⁴ S. 64.

³⁵ This view relies on the wording of s. 64.

³⁶ S. 64 itself directs the Court to have regard to all relevant circumstances.

³⁷ S. 4 is expressed to apply to the exercise of "any powers conferred by [the] Act" but there is no attempt in the Act to reconcile it with the specific criteria indicated in s. 64.

³⁸ S. 16.

³⁹ The grounds for dispensing with parental consent are in s. 8(1).

⁴⁰ E.g. *E v M* Supreme Court, Wellington, M 361/79, 13 September 1979; *DSW v D* District Court, Auckland, 217/80, 3 April 1981.

⁴¹ The subsection reads:

"On application by any person having the care of a child, the Court may dispense with the consent of a parent or guardian of a child under this section before any application is made for an adoption order in respect of the child; and any order so made shall lapse after the expiration of six months from the date on which it is made for all purposes except an application made to the Court within that period for an adoption order in respect of the child."

If adoption is not possible consideration can alternatively be given to the seeking of custody and guardianship orders in favour of the foster parents under the Guardianship Act 1968.⁴² If this step is taken by the foster parents alone, without the concurrence of the D.S.W., a jurisdictional problem arises under s. 34 of the Act.⁴³ But if the D.S.W. supports the plan and the Director-General is willing to discharge the guardianship order made in his favour under the Children and Young Persons Act there should be no jurisdictional obstacle and the governing criterion would simply be the paramountcy of the child's welfare.⁴⁴ A practical problem arises here though: the change in the foster parents' status might mean the end of board payments.

It can be seen then that what hinders permanent planning in accordance with the child's needs is not so much the current legislative framework but Departmental policy and practice. The Department has previously stated a blanket policy of working to reunite children with their families.⁴⁵ This is clearly unrealistic and inconsistent with the principle of the paramountcy of the child's welfare. It should instead be formulated with reference to factors like the length of separation. Clearer legislative support for such a shift of policy would obviously be desirable. The other problems are the depressingly familiar ones of bureaucratic inertia and lack of resources. Review procedures can help overcome the first of these. The latter will only be overcome as a result of political recognition that economies in welfare spending on children are in the long run not economies at all.

ACCOUNTABILITY

Unmonitored discretion . . . cloaked with the veil of benevolence, invites arbitrary decision-making and other abuse.⁴⁶

On the other hand not all decision-making can be reserved to the court: a balance must be struck between the need for flexibility and the need for

⁴² Ss. 11 and 8. Foster parents would require the leave of the Court before making a custody application: s. 11(1) (b).

⁴³ "Except as expressly provided in this Act nothing in this Act shall limit or affect the provisions of the [Children and Young Persons Act 1974] . . ." (The words in square brackets have been substituted for the Child Welfare Act 1925 by virtue of s. 21 of the Acts Interpretation Act 1924). See Johnston, "Wardship of Court and the Children and Young Persons Act 1974" [1982] NZLJ 48. In *Re A* (Unreported, High Court, Auckland, M.782/79 and M.1441/79, 3 March 1981) Sinclair J. rejected the Department's jurisdictional objections and made guardianship and custody orders in favour of foster parents. The learned judge considered that the guardianship order in favour of the foster parents could run "in tandem with", though subordinate to, the order under the Children and Young Persons Act, even though the Director-General's powers under the latter order are expressed in s. 49(1) to be "to the exclusion of all other persons". Nor, it is respectfully submitted, did the learned judge adequately explain or justify the effect of the custody order on the Department's "absolute discretion" under s. 49(5) to terminate any placement of a child with foster parents.

⁴⁴ Guardianship Act s. 23.

⁴⁵ See Couch, "The Legal Context of Fostering", Unpublished Honours Paper, University of Canterbury 1978; Devine, "Foster Care in New Zealand", Unpublished Honours Dissertation, University of Otago, 1981.

⁴⁶ Levine, *op.cit.* n.6 at 8.

accountability by the social welfare bureaucracy. It is submitted that generally speaking the appropriate compromise is to confer reasonably wide discretionary powers on the welfare agency but to provide for independent monitoring or review of their exercise. It was suggested above that the major post-dispositional decisions (such as termination of parental rights) should be taken only by a court and that the important decision to return a child to his parents should be reported to the court when it is made. Routine progress reports to the court are also desirable at regular intervals—some writers suggest as often as three months⁴⁷—to ensure independent monitoring and encourage permanent planning by the welfare agency. Opportunities for review of discretionary decisions should be available to interested parties (the child, natural parents, foster parents) both within and independently of this system of progress reports. Thus, for example, if a particular placement, whether in an institution or in a family, is objected to by the child he should be able to have the social worker's decision assessed against the criterion of his long-term interests; if parents are told that they may not exercise access for a period, or that they may visit their child only once a week, they should be entitled to have the matter considered independently; if a decision is made to remove a child from his foster family and return him home the foster parents should have standing to object and to put their view of the child's interests before a court.⁴⁸

To ensure that opportunities for the child to seek review of decisions affecting him are neither wasted nor abused the lawyer appointed in the original proceedings could have a continuing role. He should not only be available to advise the child at the child's request but should take the initiative at regular intervals to contact the child and to monitor his handling by the agency. In the institutional setting the use of such devices as an Official Visitor or Visiting Committee would be a less cumbersome and more appropriate way of enabling the child to seek independent consideration of his grievances than allowing resort to a court. It is important though that the Visitor have a measure of independence rather than being confined to a secret report to the head of the welfare agency or the minister responsible for it. The office of children's Ombudsman has also been proposed.⁴⁹

There should . . . be a child's Ombudsman, in each regional area, to watch over the care of children who have been removed from home. The Ombudsman would be able to review decisions made by local authority agencies and to hear grievances from children and families. He would have power to refer to the court any matters referred to him by the child or persons concerned about the child.

⁴⁷ Areen, *op.cit.* n.8 at 936-7. See also Wald, *op.cit.* n.8 at 681-3, and the American Bar Association Standards, *op.cit.* n.27 (noted by Flannery, "Synopsis: Standards Relating to Abuse and Neglect" Ch.9 in *Critical Perspectives on Child Abuse* R. Bourne and E. H. Newberger, eds., 1979).

⁴⁸ Merely showing that return would be contrary to the child's best interest would, of course, not be enough if the end-of-endangerment standard explained above were applicable.

⁴⁹ A. Morris, H. Giller, E. Szwed, and H. Geach, *Justice for Children* (Macmillan 1980) at 140.

The position in New Zealand regarding monitoring of state intervention in families is far from satisfactory. Internal review procedures within the D.S.W. in relation to children removed from parental care have improved recently but external accountability is minimal. Detailed plans do not have to be submitted to the court either at the time of initial intervention or subsequently. Opportunities for review of guardianship orders and supervision orders are restricted.⁵⁰ The Children and Young Persons Act makes no provision for review of decisions on matters like placement, changes of placement, access, education, services to parents, counselling or treatment of the child, and the return of the child to his parents. The writer has shown elsewhere that it is open to serious doubt whether jurisdiction can be invoked under the Guardianship Act for these purposes.⁵¹ Even if such jurisdiction is not entirely ousted the judicial principles governing its exercise are very restrictive.⁵² What would be more more satisfactory would be express provision for independent review in the Children and Young Persons Act itself.

There is of course a danger that routine involvement of the court in a review role will lead to its over-identification with the Department of Social Welfare so that it becomes in effect a rubber stamp for Departmental decisions. Safeguards against this tendency can only be sought in the selection and training of judges and in the training of lawyers who appear in the court so that the court itself develops a genuine expertise in matters of child welfare and is able to bring independent judgment to bear on agency decisions.

CONCLUSION

This article has discussed recently expressed views on a legal framework for post-dispositional decision-making in relation to abused or neglected children. Aspects of the present New Zealand law which are inconsistent with the principles supported have been indicated. It is submitted that particular consideration should be given to the following reforms in the law governing the handling of children removed from parental care on the ground of abuse or neglect:

1. The enactment of provisions designed to encourage permanent planning at or as soon as practicable after the initial removal. These provisions should include an obligation on the Department of Social Welfare to submit to the Court a detailed plan for the child and his family and a power in the Court to monitor progress in the implementation of the plan. The Court's role should include scrutiny of the rehabilitative services provided to the parents.

2. The improvement of opportunities for interested parties (e.g. natural parents, foster parents, the child himself) to seek independent review of important decisions taken by the Department in the exercise of its discretionary powers with respect to the child and his family.

⁵⁰ Ss. 64 and 65.

⁵¹ Johnston, *op.cit.* n.43. And see *M v M & D-GSW* *supra* n.5.

⁵² *Ibid.*

3. Clarification of the legal criterion for the decision whether or not to return a child to his family. It is submitted that in the initial stages after removal the emphasis should normally be on early reunification of the family and this would be achieved better by the adoption of an end-of-endangerment standard for return than by the best interests test. If safe return is not possible within a period indicated by the child's needs and sense of time the emphasis should normally shift to securing his permanent placement in a substitute family. Subsequent return of the child to his original family would then, in the event of adoption, become impossible, or, in other cases, would only be permissible if shown to be in the child's best interests i.e. the child's welfare would override his parents' interests.

4. The introduction of a time limit within which the question of final disposition would have to be considered by the Court (though not necessarily decided). If at that point return was not possible and was not likely to become possible in time to meet the child's needs for a permanent home then one of the following courses should normally be adopted:

- (a) the making of custody and guardianship orders in favour of the child's foster parents;
- (b) freeing of the child for adoption by dispensing with parental consent. Such a dispensing order would lapse after a fixed period if no adoption placement had been found but the court could be asked to renew it.

5. The introduction of subsidized adoptions.