Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")

APPLICANTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

DOCUMENT: REPLY OF THE PUBLIC TRUSTEE OF ALBERTA

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REPLY BRIEF OF THE PUBLIC TRUSTEE OF ALBERTA

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A. The Purpose of the Public Trustee's Application

1. The Public Trustee's application is directed at securing active representation, by way of appointment of a litigation representative, for the minors affected by the Sawridge Trustees' Application for Advice and Direction. The secondary purpose of the application is to request guidance from this Court on several matters.

2. The purpose of the Public Trustee's application is not adversarial nor is the purpose to secure rulings on individual Band membership entitlements.

3. By way of background, the Public Trustee received notice of the Sawridge Trustee's Application for Advice and Direction, as required by the Order of Justice Thomas dated August 31, 2011.

   Order dated August 31, 2011 [Tab 22, Sawridge Trustee's Authorities]

4. On receipt of that notice, the Public Trustee undertook what it considered to be a responsible review of the potential impacts on the interests of minors whose financial interests could be affected by the Sawridge Trustees' Advice and Direction application. The Public Trustee was, and remains, of the view that the Sawridge Trustees' Advice and Direction application has important social and economic impacts on the interests of minors.

5. The Public Trustee's review of this matter suggested that an independent and objective litigation representative was required. Further, it appeared no other party was willing or interested in actively representing the interests of the affected minors. The Public Trustee's review of the matter also suggested that the Advice and Direction application raised issues that are, potentially, more complex and

involved than issues generally seen in Advice and Direction applications relating to trusts.

6. The Public Trustee's application is brought on the basis that it was willing to assist the minors, and the Court, in relation to protection of the minor's interests in the within proceeding if the Public Trustee is indemnified for its costs to do so.

7. While the Sawridge Trustees appear critical of the Public Trustee's position, it must be borne in mind throughout this application that where there is no statutory duty to act, the Public Trustee has a statutory right to decline to act if the terms of its appointment are not acceptable. That right has been recently confirmed by the Court of Queen's Bench.

> *Public Trustee Act*, S.A. 2004 ,P-44.1, s.6 [Tab 14, Public Trustee Authorities, Brief dated February 22, 2012]
> *L.C.* v. *Alberta* [2011] A.J. No. 396 (Q.B.) [Tab 10, Public Trustee Authorities, Brief dated February 22, 2012]

8. Further, the Sawridge Trustees have not explained why they themselves have not taken proactive steps to secure appropriate representation for the interests of the minors, a step that a review of the overall context of this proceeding suggests would be consistent with the Sawridge Trustees' fiduciary duties and obligations of due diligence. Had such steps been taken, the costs associated with the minor's representation would have been paid by the 1985 Trust.

B. Requirement for a Litigation Representative for Affected Minors

9. As discussed in the Public Trustees' February 22, 2012 brief, this case appears to be one where appointment of an independent and objective litigation representative for affected minors is required. [see paragraphs 44-67]

10. The Sawridge Trustees deny such a need exists. Clearly, if this Court determines that there is simply no need for such independent and objective representation of affected minors in this case, the Public Trustee need not become involved in this application. The Public Trustee maintains such a need exists, but is before this Court seeking guidance on exactly this point.

11. The Public Trustee has identified the potential conflicts of interest on the part of the Sawridge Trustees and Sawridge First Nation parents who will be recognized as beneficiaries under the proposed definition change as one indicator that appointment of an independent and objective representative has merit in this case. The history of the Sawridge membership issue also suggests that such an appointment has merit. Indeed, both Respondents' briefs confirm that any reference to the membership issues are perceived as highly contentious within the community. If the Court concurs that any aspects of the membership process are relevant to the Advice and Direction application, it seems highly unlikely a member of the community would represent the minors objectively on any such issues.

12. The Sawridge First Nation's response suggests the Public Trustee has failed to explain its position that there is a potential conflict of interest on the part of the Sawridge Trustees, citing paragraph 97(v) of the Public Trustee's brief. The Public Trustee provided a detailed explanation of these matters in paragraphs 31-32, 54-56 and 57-66 of the Public Trustee's brief. This context indicates, at minimum, a perception of conflict of interest.

13. It is trite law that fiduciaries such as trustees are under a strict obligation to avoid not only actual conflicts of interest but even perceived conflicts of interest. Similar principles would apply to a litigation representative, as they also act in a fiduciary capacity.

Re: H.M.L.K. Estate [2000] A.J. No. 694 at para. 29-30 [Tab 3, Public Trustee's Reply Authorities]

14. The Sawridge Trustee's object to the suggestion that any parent, who is also a beneficiary, could be at risk of not acting solely in their child's best interests.

15. The Public Trustee has identified for the Court what it considers to be a real potential for a conflict of interest. The reality is that with current membership figures each beneficiary holds a "share" in the trust that would be almost 2 million dollars in the case of a per capita distribution. Given the small class of beneficiaries, the recognition of 23 minors as beneficiaries with full rights would effectively reduce the value of a parent's interest in the trust by approximately 50%.

16. As commented by the Court in *Re: Eve* in cases where a parent's interests may not be entirely *ad idem* with a child's interest "the court must exercise great caution to avoid being misled by this all too human mixture of emotions and motives."

E. (Mrs.) v. Eve, [1986] S.C.J. No. 60 (S.C.C.) at para. 82 [Tab 2, Public Trustee's Reply Authorities]

17. In response to paragraphs 52-53 of the Sawridge Trustee's submissions, it should be noted that in both the *V.B.* and *Thomlinson* case the Court had before it a parent that was willing to <u>actively</u> represent the minor's interests. That is not the case here.

18. Further, the *V.B.* decision acknowledged the exception to the general approach that preference will be given to an infant's guardian as next friend is where the parent has a conflict of interest with the infant. *Thomlinson* also refers to the

Court's ability to appoint an independent representative where the parent is not interested in acting as litigation representative.

> *V.B.* v. *Alberta* [2004] ABQB 788 at para. 19 [Tab 7, Sawridge Trustees' Authorities]
> *Thomlinson* v. *Alberta* [2003] A.J. No. 716 (Q.B.) at para. 107 [Tab 22, Public Trustee Authorities, Brief dated February 22, 2012]

19. Recognition of a conflict of interest, or a potential therefore, should not be characterized as an affront to parental rights or an attack on an individuals' abilities as a responsible parent. The Public Trustee raises the issue of conflict of interest or the potential therefor, in order to ensure the affected minors obtain sufficiently objective and independent representation.

20. The Sawridge Trustees' response makes it clear they oppose the application for appointment of the Public Trustee as a litigation representative. However, the response provides little insight into how the Sawridge Trustees propose to ensure that the interests of even the most obviously affected minors will be protected in the course of the within proceeding.

21. Despite suggestions that the issues raised by the Public Trustee in relation to minor's interests has the potential to turn this proceeding into a more adversarial process, the Sawridge Trustees have not explained why they have not taken proactive steps to appoint a litigation representative for the minors.

22. The Sawridge Trustees appear to rely on the lack of parental opposition to the Advice and Direction application as a sufficient indicator that the affected minors have guardians who have actively considered the impact of the Advice and Direction application on their child's interests, who are in a position to advance those interests before the Court and who are sufficiently objective in this

particular matter to act as litigation representatives. [paragraph 60, Sawridge Trustee's Brief]

23. On such logic, the lack of parental opposition to the Public Trustee's application could also be taken as an indicator of parental support for the appointment of the Public Trustee as litigation representative with an order to provide for the Public Trustees' costs.

24. A more responsible approach would be to assess whether this is, in fact, a proceeding where the affected minors are entitled to active representation of their interest and whether the Court's *parens patriae* jurisdiction requires it to take steps to secure that active representation.

C. Groups of Affected Minors

25. The Sawridge Trustees have clarified that the definition change will not result in any affected minors gaining beneficiary status. Rather, a group of 23 minors will lose beneficiary status. [Sawridge Trustee's Brief, para. 72-74]

26. The Sawridge Trustees have provided no additional insight into the number of minors affected by pending applications for Band membership.

27. However, given the clarifications provided by the Sawridge Trustees, it does appear an appropriate litigation representative could represent the interests of all minors affected by the main application.

28. It is submitted the Sawridge Trustee's submissions do not eliminate concerns that the main application will have significant impacts on the interests of those 23 minors and that the minors are entitled to active representation in relation to those interests.

29. In relation to the group of minors who would lose beneficiary status under the new definition, the Public Trustee submits, with respect, that it is an oversimplification to suggest that loss of such a key status has no practical consequences simply because it is the current intention of the Sawridge Trustees to provide benefits for the minor dependants of beneficiaries.

30. This position does not recognize that once these minors lose beneficiary status, there will be no <u>obligation</u> for the 1985 Trust to provide them with benefits and they may be excluded from any future distributions that occur. Any benefits they receive would be entirely at the discretion of the Sawridge Trustees.

31. Further, as the trust instrument does not expressly contemplate use of trust funds for the benefit of non-beneficiaries, it is questionable whether this proposed solution can actually be implemented- or withstand challenge by actual beneficiaries.

32. Currently, those 23 minors would not need to apply in order to obtain beneficiary status once they turn 18. Under the proposed definition change, their only opportunity to become beneficiaries rests on the outcome of the Sawridge First Nation membership process, which the Sawridge Trustees acknowledge has no certain outcome. [Sawridge Trustee's Brief, para. 138]

33. Simply because some of the impacts of the loss of beneficiary status may not be experienced, in a practical sense, until these 23 minors reach the age of majority does not address the loss of status while they are minors.

34. While beyond the scope of this application, these impacts on the group of 23 minors raises suggests there may need to be a further modification to the proposed definition variance that might serve to grandfather in minors who are currently hold beneficiary status.

D. Previous Sawridge Litigation

35. The Public Trustee's brief includes an overview of limited aspects of the previous Sawridge litigation. This information is provided to the Court in order to ensure the Court has been provided with sufficient background on these matters. That background makes this case potentially unique in several respects.

36. As stated in para. 45 of the Public Trustee's brief: "*The history of the Sawridge membership litigation strongly suggests there is a need for a particular emphasis on the Sawridge Trustee's duty to definitively ascertain the identity of all beneficiaries. Given the information about membership applications being left undecided for lengthy periods in the past, it would be prudent to proceed on the basis that there may be undecided membership applications affecting the interests of minors and make inquiries into said pending membership applications. This is particularly important given the Trustees intention to proceed to distribute trust assets.*"

37. The Public Trustee has not stated that the previous factual findings in other decisions are accurate as of today's date. Rather, those findings have been referenced to explain the need for further inquiry. The findings have also been referenced to highlight the potential for perceived conflicts of interest on the part of the Sawridge Trustees.

38. While this proceeding should not be used to relitigate old issues, it would be difficult to provide the Court with a full appreciation of the possible ramifications of the proposed variance to the definition of beneficiary in the 1985 Trust without the full background.

39. This Court does have jurisdiction to grant, or refuse, a variation to the definition of beneficiary. The Court should not asked to adopt an artificial approach to that matter and ignore that beneficiary status would rest entirely on Band membership status under the new definition.

40. If, as past litigation suggests, the Sawridge membership process is not functioning and there are a significant number of applications pending, that does have the potential to affect the ability of the Sawridge Trustee's to administer, and particularly distribute funds. Such matters are entirely relevant to the question of whether the definition change, as proposed, is appropriate and in the best interests of the affected minors.

41. Similarly, if the Sawridge First Nation membership criteria and process are so uncertain that it is impossible to know who will qualify as a member, this raises real issues as to whether the proposed definition change will meet the requirement of certainty of objects. The Public Trustee concurs with the Sawridge Trustees that it may not be in the best interests of the affected minors to have the Trust found to fail on certainty of objects. As such, it would also not be in the best interests of minors to implement a definition change that, as currently framed, has the potential to create that result.

42. In summary, the Public Trustee refers this Court to the past history of the Sawridge membership issues to, *inter alia,* highlight the minor's need for a litigation representative who can assist the Court in examining a fully contextualized analysis of the impact of the proposed definition change.

E. Scope of the Sawridge Trustee's Advice and Direction Application

43. The Respondents' submissions suggest the scope of the main Advice and Direction application is limited to approval of the variation of the definition of beneficiary and approval of the asset transfer.

44. The Public Trustee relies on the original affidavit of Paul Bujold, dated August 30, 2011, which does note at paragraph 14 that the Court's assistance with "determination of the beneficiaries" is sought. The Public Trustee does not adopt the interpretation of this paragraph as offered by the Sawridge First Nation.

45. Regardless, in any application for advice and directions, particularly relating to operation of a trust, the Court has a broad jurisdiction.

46. The Sawridge Trustee's Application for Advice and Directions involves a variance in the definition of beneficiary under the terms of the 1985 Trust. Should the Court find the proposed definition change raises issues in relation to the administration of the Trust, the Sawridge Trustee's ability to fulfill their obligations to identify the entire class of beneficiaries prior to a distribution or creates issues in relation to the validity of the Trust, it is submitted the Court has the authority to inquire into those matters, and provide appropriate directions to the Trustees.

47. Further, this application involves and affects the interests of minors. As such, if the Court identifies any issues that affect, or potentially affect, the interests of minors, the Court's inherent *parens patriae* jurisdiction is a sufficient basis for the Court to provide advice and direction on such matters.

F. Costs

48. The Sawridge Trustee's reply on the application for exemption from costs suggests the Public Trustee seeks to broaden the scope of this proceeding, including "participating in membership applications", and as such they should be treated as any plaintiff and liable for costs. [Paragraph 97, Sawridge Trustee Brief]

49. The Public Trustee's application does not state it wishes to "participate in membership applications". It does seek to have access to information about such applications that may be relevant to the within proceeding and may be required to address the interests of minors affected by said applications.

50. The Public Trustee has identified issues that relate the Sawridge membership criteria and process. Those matters will dictate the qualification as a beneficiary of the 1985 Trust, if the definition variance is approved. Those matters will affect the Sawridge Trustee's ability to identify the class of beneficiaries. Any such impact will affect the Sawridge Trustee's ability to make any distributions from the Trust.

51. The Public Trustee does not view these as adversarial matters or matters which go beyond the scope of the question of whether the proposed change to the definition of beneficiary is appropriate. Surely, the Court being asked to approve a significant change to a trust definition, should have the benefit of all relevant information in order to full assess the impact of the definition change. The Public Trustee, if appointed as litigation representative, would speak to those matters on behalf of affected minors, but as an objective and independent third party.

52. The Public Trustee maintains the cases cited regarding exemption from the liability to pay costs fully apply to the facts of the within application.

> *L.C.* v. *Alberta (Métis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.) para 29-30, 53-55 [Tab 9, Public Trustee Authorities, Brief dated February 22, 2012]
> *Thomlinson* v. *Alberta (Child Services)* [2003] A.J. No. 716 para 117-119 [Tab 22, Public Trustee Authorities, Brief dated February 22, 2012]

53. The Sawridge Trustees response to the application for advance costs rests almost entirely on whether the Public Trustee has met the tripartite test set out in

Okanagan. While the Public Trustee does not, in general, dispute the Sawridge Trustees' explanation of that test, the Public Trustee does take the position that the *Okanagan* test is not determinative here.

54. The Public Trustee's application puts in question whether there is a need for active and independent representation of the minor's interests in this advice and directions application. Clearly, if the Court finds the minors do not require such representation, the Public Trustee need not be involved and the issue of advance costs becomes moot.

55. However, if the Court determines that active and independent representation of the minor's interests is required, the Court's *parens patriae* jurisdiction becomes operative. That jurisdiction is broad and may be exercised as necessary to act for those who are not able to act for themselves.

> *E. (Mrs.) v. Eve*, [1986] S.C.J. No. 60 (S.C.C.) at paras.73-74 and 82 [Tab 2, Public Trustee's Reply Authorities]

56. The authorities cited by the Sawridge Trustees do not address a situation where the Court's *parens patriae* jurisdiction is relied upon as the source of the Court's authority to require payment of advance costs.

57. While advance costs may be granted in only exceptional circumstances, such circumstances may indeed exist here. The Court is faced with a situation where there is no party willing to represent the interests of minors in relation to an application that will have significant financial and social impacts on their lives. The Public Trustee does not have a budget to fund representation of minors they have no statutory duty to represent. The minors can be assumed to have no significant financial resources of their own. Both the parents of the affected minors, and the Sawridge Trustees, have a conflict of interest- or at minimum a perceived conflict of interest. Finally, it is clear from the Respondents' briefs that

if the Public Trustee, or another suitable litigation representative for the minors, is not appointed the issues identified by the Public Trustee will not be addressed. Indeed, the only active parties to this proceeding vigorously oppose consideration of the issues raised by the Public Trustee.

58. Further, it is relevant to consider that the Sawridge Trustees have not acted proactively to apply to this Court under Rule 2.15 for appointment of a litigation representative for the minors. Had the Sawridge Trustees done so the minors would have their needs for a litigation representative addressed and the costs associated with providing that litigation representative would certainly have been paid out of the trust. The Sawridge Trustees have failed to take this step despite being of the view that the issues raised in relation to minor's interests potentially render this proceeding more adversarial in nature.

59. Should the Court concur there is a need for independent and active representation of the minor's interests, the question becomes how that need may best be served. In this case, no other individual or entity has indicated a willingness to play that role.

60. The Public Trustee is capable of acting but has a statutory right to decline to act if the terms of its appointment are not acceptable.

> *Public Trustee Act*, S.A. 2004 ,P-44.1, s. 6 [Tab 14, Public Trustee Authorities, Brief dated February 22, 2012]

61. The ability of the Public Trustee to refuse to accept the financial burden of representation of minors they are not statutorily obligated to act for has been recently confirmed by Court of Queen's Bench of Alberta.

> *L.C.* v. *Alberta* [2011] A.J. No. 396 (Q.B.) [Tab 10, Public Trustee Authorities, Brief dated February 22, 2012]

62. If the Court is satisfied that independent representation of the minors is required, absent identification of another, suitably independent, litigation representative, the Public Trustee will not act without terms and conditions of appointment that indemnify it for its solicitor-client costs of this proceeding.

G. Relevance of Questions on Membership

63. There can be little doubt, based on both Respondents' briefs, that the matters relating to the Sawridge membership criteria and process are matters of considerable sensitivity for the Respondents. The history of those issues indicates that, at least in the past, they have also been controversial.

64. However, these sensitivities do not serve to render information relating to the Sawridge membership criteria and process irrelevant to the main application.

65. The Respondents take the position that the within application is not about membership and appear to suggest all information relevant to the Sawridge Band membership process and criteria is entirely irrelevant to the application.

66. However, the definition change sought by the Sawridge Trustees would cause beneficiary status and entitlement to rest solely, and entirely, on Sawridge Band membership. If the information regarding the Sawridge Membership criteria and process indicates that the proposed definition changes would create difficulties for the Sawridge Trustees in identification of the beneficiary class, the proposed definition change may seriously impair the Sawridge Trustees to implement any distributions from the 1985 Trust in the future.

67. Similarly, if the information regarding the Sawridge Membership criteria and process indicates that the proposed definition changes would create issues

regarding certainty of objects, the proposed definition change may jeopardize the validity of the trust- at least as much as the current definition does.

68. The authorities provided by the Sawridge Trustees recognize that certainty of objects requires the Trustees be able to ascertain the totality of the membership of the class of beneficiaries. If the proposed definition change would make it difficult or impossible to identify the class, that is certainly relevant to the Sawridge Trustee's application.

> D.M.W. Waters, Law of Trusts in Canada, 3rd (2005) [Tab 26, Sawridge Trustees' Authorities]

69. The Public Trustee wishes to make clear that it is not seeking to "challenge" the Sawridge membership criteria or process. Nor is the Public Trustee seeking to "interfere in the affairs of the First Nations membership application process" in its application.

70. Rather, the Public Trustee has concerns that in the face of an application to vary the beneficiary definition to one that depends entirely on Band membership, this Court has been provided with essentially no information on the current process. Without access to such information, it is unclear how the Court could assess whether approval of the definition change is appropriate.

71. The history around Sawridge membership certainly makes it reasonable to inquire as to whether tying beneficiary status to membership status could make it difficult or impossible for the Sawridge Trustees to fulfill their obligations to identify the beneficiary class prior to a distribution. Surely, the Sawridge Trustees cannot be suggesting that the Court should approve a potentially invalid beneficiary definition without examining whether the proposed new definition raises any similar issues.

72. Indeed, paragraph 123 of the Sawridge Trustee's brief appears to provide some limited acknowledgment that they may have some duty to make inquiries to identify beneficiaries. The question then arises as to why the Sawridge Trustees would not fully examine how the proposed definition change would affect their ability to make inquiries and identify the entire beneficiary class prior to seeking implementation of a new definition.

73. The Respondents' briefs appear to assume that if parties are permitted to make inquiries into <u>any</u> aspects of the Sawridge membership process and criteria, including the status of pending membership applications, the Public Trustee will immediately leap to ask this Court to render decisions on individual membership entitlements.

74. With respect, nothing in the Public Trustee's motion or brief supports the conclusion that the Public Trustee is seeking any such finding from this Court.

75. It would be more accurate to suggest that the Public Trustee is of the view that this Court cannot be asked to approve a definition change on the basis of ignoring all practical realities of how the new definition would operate and affect the administration of the Trust.

76. The Respondents rely on paragraph 3 of this Court's original procedural order to suggest that any and all matters relating to the Sawridge membership process and criteria are irrelevant to the within proceeding.

77. This appears to be an extraordinarily broad reading of said Order. Rather, it appears this Court wished to ensure the individuals who received Notice of the Advice and Direction application did not rely on the Notice itself as some proof of membership entitlement.

78. Further, the procedural order resulted from an ex parte application and it seems unlikely the Court would render an advance ruling on the scope of relevance for the balance of the proceeding without ensuring any and all affected parties had an opportunity to make submissions on that point.

H. Summary

79. The Public Trustee has brought this application because it has identified a need for an objective and independent party to represent the interests of the minors affected by the main Advice and Direction application. There currently appears to be no other party willing to play that role.

80. Should the Court find no such need exists, the Public Trustee need not become involved in this proceeding.

81. Should the Court find that such a need does exist, the Public Trustee will not consent to act unless it is indemnified for the legal fees associated with its representation of the minors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 16th day of March, 2012.

CHAMBERLAIN HUTCHISON

Per: ______________________________

JANET L. HUTCHISON
Solicitors for the Public Trustee of Alberta

Estimation of time for Oral Argument for Reply: ¾ hour

LIST OF AUTHORITIES

1. *Alberta Rules of Court*, Alta Reg 124/2010

2. *E.(Mrs.)* v. *Eve* [1986] S.C.J. No. 60 (S.C.C.)

3. *Re: H.M.L.K. Estate* [2000] A.J. No. 694 (S.C.A)

Current to February 29, 2012

Alta. Reg. 124/2010, r. 2.21

Judicature Act

ALBERTA RULES OF COURT

Alta. Reg. 124/2010

Part 2 The Parties to Litigation

Division 2 Litigation Representatives

RULE 2.21

Litigation representative: termination, replacement, terms and conditions

2.21 The Court may do one or more of the following:

(a) terminate the authority or appointment of a litigation representative;

(b) appoint a person as or replace a litigation representative;

(c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

Alta. Reg. 124/2010 r2.21 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Case Name:
E. (Mrs.) v. Eve

Eve, by her Guardian ad litem, Milton B. Fitzpatrick, Official Trustee, appellant;
v.
Mrs. E., Respondent; and Canadian Mental Health Association, Consumer Advisory Committee of the Canadian Association of the Mentally Retarded, The Public Trustee of Manitoba, and Attorney General of Canada, interveners.

[1986] S.C.J. No. 60

[1986] A.C.S. no 60

[1986] 2 S.C.R. 388

[1986] 2 R.C.S. 388

31 D.L.R. (4th) 1

71 N.R. 1

J.E. 86-1051

61 Nfld. & P.E.I.R. 273

13 C.P.C. (2d) 6

2 A.C.W.S. (3d) 42

File No: 16654.

Supreme Court of Canada

1985: June 4, 5 / 1986: October 23.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

Courts -- Jurisdiction -- Parens patriae -- Scope of doctrine and discretion required for its exercise -- Whether or not encompassing consent for non-therapeutic sterilization of mentally incompetent person -- Chancery Act, R.S.P.E.I. 1951, c. 21, s. 3 -- Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2.

Family law -- Mentally incompetent person -- Application made for non-therapeutic sterilization of adult daughter by parent -- Whether or not court authorized to grant consent -- Whether or not authority to be found in statutes -- Whether or not authority flowing from parens patriae power -- Mental Health Act, R.S.P.E.I. 1974, c. M-9, am. S.P.E.I. 1976, c. 65, ss. 2(n), 30A(1), (2), 30B, 30L -- Hospitals Act, "Hospital Management Regulations", R.R.P.E.I., c. H-11, s. 48.

Human rights -- Disabled persons -- Mentally incompetent person -- Application made for non-therapeutic sterilization of adult daughter by parent -- Whether or not court authorized to grant consent -- Whether or not authority to be found in statutes -- Whether or not authority flowing from parens patriae power.

"Mrs. E." applied to the Supreme Court of Prince Edward Island for permission to consent to the sterilization of "Eve", her adult daughter who was mentally retarded and suffered from a condition making it extremely difficult to communicate with others. Mrs. E. feared Eve might innocently become pregnant and consequently force Mrs. E., who was widowed and approaching sixty, to assume responsibility for the child. The application sought: (1) a declaration that Eve was mentally incompetent pursuant to the Mental Health Act; (2) the appointment of Mrs. E. as committee of Eve; and (3) an authorization for Eve's undergoing a tubal ligation. The application for authorization to sterilize was denied, and an appeal to the Supreme Court of Prince Edward Island, in banco, was launched. An order was then made appointing the Official Trustee as Guardian ad litem for Eve. The appeal was allowed. The Court ordered that Eve be made a ward of the Court pursuant to the Medical Health Act solely to permit the exercise of the parens patriae jurisdiction to authorize the sterilization, and that the method of sterilization be determined by the Court following further submissions. A hysterectomy was later authorized. Eve's Guardian ad litem appealed.

Held: The appeal should be allowed.

The Mental Health Act did not advance respondent's case. This Act provides a procedure for declaring mental incompetency, at least for property owners. Its ambit is unclear and it would take much stronger language to empower a committee to authorize the sterilization of a person for non-therapeutic purposes. The Hospital Management Regulations were equally inapplicable. They are not aimed at defining the rights of individuals.

The parens patriae jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity -- the need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the parens patriae jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

Sterilization should never be authorized for non-therapeutic purposes under the parens patriae jurisdiction. In the absence of the affected person's consent, it can never be safely determined that it is for the benefit of that person. The grave intrusion on a person's rights and the ensuing physical damage outweigh the highly questionable advantages that can result from it. The court, therefore, lacks jurisdiction in such a case.

The court's function to protect those unable to take care of themselves must not be transformed so as to create a duty obliging the Court, at the behest of a third party, to make a choice between two alleged constitutional rights -- that to procreate and that not to procreate -- simply because the individual is unable to make that choice. There was no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. Further, since the parens patria jurisdiction is confined to doing what is for the benefit and protection of the disabled person, it cannot be used for Mrs. E.'s benefit.

Cases involving applications for sterilization for therapeutic reasons may give rise to the issues of the burden of proof required to warrant an order for sterilization and of the precautions judges should take with these applications in the interests of justice. Since, barring emergency situations, a surgical procedure without consent constitutes battery, the onus of proving the need for the procedure lies on those seeking to have it performed. The burden of proof, though a civil one, must be commensurate with the seriousness of the measure proposed. A court in conducting these procedures must proceed with extreme caution and the mentally incompetent person must have independent representation.

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Act to provide for the care and maintenance of idiots, lunatics and persons of unsound mind, 15 Vict., c. 36 (P.E.I.)
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APPEAL from a judgment of the Prince Edward Island Court of Appeal (1980), 27 Nfld. & P.E.I.R. 97, 74 A.P.R. 97, with addendum (1981), 28 Nfld. & P.E.I.R. 359, 97 A.P.R. 359, 115 D.L.R. (3d) 283, allowing an appeal from a judgment of McQuaid J. dismissing an application for consent to the sterilization of a mentally incompetent person. Appeal allowed.

Eugene P. Rossiter, for the appellant.
Walter McEwen, for the respondent.
B.A. Crane, Q.C., for the intervener the Canadian Mental Health Association.
David H. Vickers, Harvey Savage and S. D. McCallum, for the intervener the Consumer Advisory Committee of the Canadian Association for the Mentally Retarded.

M. Anne Bolton, for the intervener The Public Trustee of Manitoba.
E.A. Bowie, Q.C., and B. Starkman, for the intervener the Attorney General of Canada.

Solicitors for the appellant: Scales, Jenkins & McQuaid, Charlottetown.
Solicitors for the respondent: Campbell, McEwen & McLellan, Summerside.
Solicitors for the intervener Canadian Mental Health Association: Gowling & Henderson, Ottawa.
Solicitors for the intervener Canadian Association for the Mentally Retarded: Vickers & Palmer, Victoria.
Solicitor for the intervener The Public Trustee of Manitoba: The Public Trustee of Manitoba, Winnipeg.
Solicitor for the intervener Attorney General of Canada: Roger Tasse, Ottawa.

The judgment of the Court was delivered by

1 **LA FOREST J.**:-- These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid J. of the Supreme Court of Prince Edward Island -- Family Division. In the interests of privacy, he called the daughter "Eve", and her mother "Mrs. E".

Background

2 When Eve was a child, she lived with her mother and attended various local schools. When she became twenty-one, her mother sent her to a school for retarded adults in another community. There she stayed with relatives during the week, returning to her mother's home on weekends. At this school, Eve struck up a close friendship with a male student; in fact, they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end.

3 The situation naturally troubled Mrs. E. Eve was usually under her supervision or that of someone else, but this was not always the case. She was attracted and attractive to men and Mrs. E. feared she might quite possibly and innocently become pregnant. Mrs. E. was concerned about the emotional effect that a pregnancy and subsequent birth might have on her daughter. Eve, she felt, could not adequately cope with the duties of a mother and the responsibility would fall on Mrs. E.

(e) the surgeon shall write and sign a statement that a delay would endanger the life of the patient.

Section 16 of the Act under which it was enacted reads as follows:

> 16. Upon the recommendation of the Commission, the Lieutenant Governor in Council may make such regulations with respect to hospitals as may be deemed necessary for
>
> (a) their establishment, construction, alteration, equipment, safety, maintenance and repairs;
> (b) their classification, grades, and standards;
> (c) their inspection, control, government, management, conduct, operation and use;
> (d) respecting the granting, refusing, suspending and revoking of approval of hospitals and of additions to or renovations in hospitals;
> (e) prescribing the matters upon which bylaws are to be passed by hospitals;
> (f) prescribing the powers and duties of inspectors;
> (g) providing that certain persons shall be by virtue of their office members of the Board in addition to the members of the Board appointed or elected in accordance with the authority whereby the hospital is established;
> (h) respecting their administrators, staffs, officers, servants, and employees and the powers and duties thereof;
> (i) providing for the certification of chronically ill persons;
> (j) defining residents of the province for the purposes of this Act and the regulations;
> (k) respecting the admission, treatment, care, conduct, discipline and discharge of patients or any class of patients;
> (l) respecting the classification of patients and the lengths of stay of and the rates and charges for patients;
> (m) prescribing the manner in which hospital rates and charges shall be calculated;
> (n) prescribing the facilities that hospitals shall provide for students;
> (o) respecting the records, books, accounting systems, audits, reports and returns to be made and kept by hospitals;
> (p) respecting the reports and returns to be submitted to the Commission by hospitals;
> (q) prescribing the classes of grants by way of provincial aid and the methods of determining the amounts of grants and providing for the manner and times of payment and the suspension and withholding of grants and for the making of deductions from grants;
> (r) respecting such other matters as the Lieutenant Governor in Council considers necessary or desirable for the more effective carrying out of this Act.

29 As will be evident from a reading of s. 16, the purpose of the regulations is to regulate the construction, management and operation of hospitals. They are not aimed at defining the rights of individuals as such. Section 48 of the regulations (which appears to have been enacted under s.

16(k)) does not so much authorize the performance of an operation as direct that none shall be performed in the absence of appropriate consents, except in cases of necessity. The enumerated consents and necessity are at law valid defences in certain circumstances to a suit for battery that might be brought as a result of an unauthorized operation. So, for the purposes of managing the workings of the hospital, the regulations require that these consents be signed. They do not purport to regulate the validity of the consents; this is otherwise governed by law. Indeed, I rather doubt that the Act empowers the making of regulations affecting the rights of the individual, particularly a basic right involving an individual's physical integrity. For in the absence of clear words, statutes are, of course, not to be read as depriving the individual of so basic a right. In a word, the intent of the regulations is to provide for the governance of hospitals, not human rights.

30 In summary, MacDonald J. appears to have been right in doubting that the trial judge had properly addressed the threshold question of whether Eve was incompetent. In truth, however, these questions of possible statutory power only amounted to a preliminary skirmish. Argument really centred on the question of whether a superior court, as successor to the powers of the English Court of Chancery could, in the exercise of its parental control as the repository of the Crown's jurisdiction as parens patriae, authorize the performance of the operation in question here. It is to that issue that I now turn.

Parens Patriae Jurisdiction -- Its Genesis

31 There appears to have been some uncertainty in the courts below and in the arguments presented to us regarding the courts' wardship jurisdiction over children and the parens patriae jurisdiction generally. For that reason, it may be useful to give an account of the parens patriae jurisdiction and to examine its relationship with wardship.

32 The origin of the Crown's parens patriae jurisdiction over the mentally incompetent, Sir Henry Theobald tells us, is lost in the mists of antiquity; see H. Theobald, The Law Relating to Lunacy (1924). De Prerogativa Regis, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties"; see Theobald, supra, p. 1.

33 In the 1540's, the parens patriae jurisdiction was transferred from officials in the royal household to the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the Crown exercised its jurisdiction through the Lord Chancellor to whom by letters patent under the Sign Manual it granted the care and custody of the persons and the estates of persons of unsound mind so found by inquisition, i.e., an examination to determine soundness or unsoundness of mind.

34 Wardship of children had a quite separate origin as a property right arising out of the feudal system of tenures. The original purpose of the wardship jurisdiction was to protect the rights of the guardian rather than of the ward. Until 1660 this jurisdiction was also administered by the Court of Wards and Liveries which had been created for the purpose.

35 When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its parens patriae jurisdiction; see, for example, Cary v. Bertie (1696), 2 Vern. 333, at

p. 342, 23 E.R. 814, at p. 818; Morgan v. Dillon (Ire.) (1724), 9 Mod. R. 135, at p. 139, 88 E.R. 361, at p. 364. In time wardship became substantively and procedurally assimilated to the parens patriae jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery exercises its parens patriae jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the parens patriae jurisdiction.

36 It follows from what I have said that the wardship cases constitute a solid guide to the exercise of the parens patriae power even in the case of adults. There is no need, then, to resort to statutes like the Mental Health Act to permit a court to exercise the jurisdiction in respect of adults. But proof of incompetence must, of course, be made.

37 This marks a difference between wardship and parens gatriae jurisdiction over adults. In the case of children, Chancery has a custodial jurisdiction as well, and thus has inherent jurisdiction to make them its wards; this is not so of adult mentally incompetent persons (see Beall v. Smith (1873), L.R. 9 Ch. 85, at p. 92). Since, however, the Chancellor had been vested by letters patent under the Sign Manual with power to exercise the Crown's parens patriae jurisdiction for the protection of persons so found by inquisition, this difference between the two procedures has no importance for present purposes.

38 By the early part of the nineteenth century, the work arising out of the Lord Chancellor's jurisdiction became more than one judge could handle and the Chancery Court was reorganized and the work assigned to several justices including the Master of the Rolls. In 1852 (by 15 & 16 Vict., c. 87, s. 15 (U.K.)) the jurisdiction of the Chancellor regarding the "Custody of the Persons and Estates of Persons found idiot, lunatic or of unsound Mind" was authorized to be exercised by anyone for the time being entrusted by virtue of the Sign Manual.

39 The current jurisdiction of the Supreme Court of Prince Edward Island regarding mental incompetents is derived from the Chancery Act which amalgamated a series of statutes dealing with the Court of Chancery, beginning with that of 1848 (11 Vict., c. 6 (P.E.I.)) Section 3 of The Chancery Act, R.S.P.E.I. 1951, c. 21, substantially reproduced the law as it had existed for many years. It vested in the Court of Chancery the following powers regarding the mentally incompetent:

> ... and in the case of idiots, mentally incompetent persons or persons of unsound mind, and their property and estate, the jurisdiction of the Court shall include that which in England was conferred upon the Lord Chancellor by a Commission from the Crown under the Sign Manual, except so far as the same are altered or enlarged as aforesaid.

By virtue of the Chancery Jurisdiction Transfer Act, S.P.E.I. 1974, c. 65, s. 2, the jurisdiction of the Chancery Court was transferred to the Supreme Court of Prince Edward Island. It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same parens patriae jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there.

Anglo-Canadian Development

40 Since historically the law respecting the mentally incompetent has been almost exclusively focused on their estates, the law on guardianship of their persons is "pitifully unclear with respect to some basic issues"; see P. McLaughlin, Guardianship of the Person (Downsview 1979), p. 35. De-

spite this vagueness, however, it seems clear that the parens patriae jurisdiction was never limited solely to the management and care of the estate of a mentally retarded or defective person. As early as 1603, Sir Edward Coke in Beverley's Case, 4 Co. Rep. 123 b, at pp. 126 a, 126 b, 76 E.R. 1118, at p. 1124, stated that "in the case of an idiot or fool natural, for whom there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the King" (emphasis added). Later at the bottom of the page he adds:

> 2. Although the stat. says, custodiam terrarum, yet the King shall have as well the custody of the body, and of their goods and chattels, as of the lands and other hereditaments, and as well those which he has by purchase, as those which he has as heirs by the common law.

At 4 Co. Rep. p. 126 b, 76 E.R. 1125, he cites Fitzherbert's Natura Brevium to the same effect. Theobald (supra, pp. 7-8, 362) appears to be quite right when he tells us that the Crown's prerogative "has never been limited by definition". The Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.

41 The famous custody battle waged by one Wellesley in the early nineteenth century sheds some light on the exercise of the king's parens patriae jurisdiction by the Lord Chancellor. Wellesley (considered an extremely dissolute and objectionable father due to his philandering ways and vulgar language, in spite of his "high" birth), waged a lengthy court battle to gain custody of his children following the death of his estranged wife who had entrusted the care of the children to members of her family. In Wellesley v. Duke of Beaufort (1827) 2 Russ. 1, 38 E.R. 236, Lord Eldon, then Lord Chancellor, in discussing the jurisdiction of the Court of Chancery, touched upon the King's parens patriae power at 2 Russ. 20, 38 E.R. 243. He there made it clear that "it belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them". He then underlined that the jurisdiction has been exercised for the maintenance of children solely when there was property, not because of any rule of law, but for the practical reason that the court obviously had no means of acting unless there was property available.

42 The discussion on appeal to the House of Lords (Wellesley v. Wellesley (1828), 2 Bli. N.S. 124, 4 E.R. 1078) is also instructive. Far from limiting the jurisdiction to children, Lord Redesdale there adverted to the fact that the court's jurisdiction over children had been adopted from its jurisdiction over mental incompetents. He noted that "Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way"; 2 Bli. N.S. at p. 131, 4 E.R. at p. 1081. The jurisdiction, he said, extended "as far as is necessary for protection and education"; 2 Bli. at p. 136, 4 E.R. at p. 1083. It continues to this day, and even where there is legislation in the area, the courts will continue to use the parens patriae jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit; see Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716.

43 It was argued before us, however, that there was no precedent where the Lord Chancellor had exercised the parens patriae jurisdiction to order medical procedures of any kind. As to this, I would say that lack of precedent in earlier times is scarcely surprising having regard to the state of

medical science at the time. Nonetheless, it seems clear from Wellesley v. Wellesley, supra, that the situations in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been, and indeed cannot, be defined. I have already referred to the remarks of Lord Redesdale. To these may be added those of Lord Manners who, at Bli. pp. 142-43, and 1085, respectively, expressed the view that "It is ... impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances."

44 Reference may also be made to Re X (a minor), [1975] 1 All E.R. 697, for a more contemporary description of the parens patriae jurisdiction. In that case, the plaintiff applied to Latey J. for an order making a fourteen year old girl who was psychologically fragile and high strung a ward of the court and for an injunction prohibiting the publication of a book revealing her father's private life which, it was felt, would be grossly damaging psychologically to her if she should read it. Latey J. issued the wardship order and the injunction requested. In speaking of his jurisdiction in the matter, he had this to say, at p. 699:

> On the first of the two questions already stated, it is argued for the defendants, first, that because the wardship jurisdiction has never been involved in any case remotely resembling this, the court, though theoretically having jurisdiction, should not entertain the application, but bar it in limine. I do not accept that contention. It is true that this jurisdiction has not been invoked in any such circumstances. I do not know whether they have arisen before or, if they have, whether anyone has thought of having recourse to this jurisdiction. But I can find nothing in the authorities to which I have been referred by counsel or in my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing, and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts are available to protect children from injury whenever they properly can is no modern development.
>
> (Emphasis added.)

Latey J. then cited a passage from Chambers on Infancy (1842), p. 20 that indicates that protection may be accorded against prospective as well as present harm. The passage states in part:

> And the Court will interfere not merely on the ground of an injury actually done, or attempted against the infant's person or property; but also if there be any likelihood of such an occurrence, or even an apprehension or suspicion of it.

45 The Court of Appeal disagreed with Latey J.'s exercise of discretion, essentially because he had failed to consider the public interest in the publication of the book, and accordingly reversed his order. The court, however, did not quarrel with his statement of the law. Thus Lord Denning, M.R., at p. 703 had this to say:

> No limit has ever been set to the jurisdiction. It has been said to extend 'as far as necessary for protection and education': see Wellesley v Wellesley by Lord

> Redesdale. The court has power to protect the ward from any interference with his or her welfare, direct or indirect.

Roskill L.J., also reinforced the broad ambit of the jurisdiction. He said, at p. 705:

> I would agree with counsel for the plaintiff that no limits to that jurisdiction have yet been drawn and it is not necessary to consider here what (if any) limits there are to that jurisdiction. The sole question is whether it should be exercised in this case. I would also agree with him that the mere fact that the courts have never stretched out their arms so far as is proposed in this case is in itself no reason for not stretching out those arms further than before when necessary in a suitable case.

Sir John Pennycuick at p. 706 agreed:

> ... the courts, when exercising the parental power of the Crown, have, at any rate in legal theory, an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a ward. It is, however, obvious that far-reaching limitations in principle on the exercise of this jurisdiction must exist. The jurisdiction is habitually exercised within those limitations.

At p. 707 he added:

> Latey J's statement of the law is I think correct, but he does not lay sufficient emphasis on the limitations with which the courts should exercise this jurisdiction.

46 It will be observed from the remarks of Sir John Pennycuick, as well as the words emphasized in Latey J.'s judgment, that the theoretically unlimited nature of the jurisdiction, to which I have also previously referred, has to do with its scope. It must, of course, be used in accordance with its informing principles, a matter about which I shall have more to say.

47 In recent years, the English courts have extended the jurisdiction to cases involving medical procedures. In Re S. v. McCorse. S. and M.; W. v. W., [1972] A.C. 24, the House of Lords, relying in part on its protective jurisdiction over infants, approved of a blood test being taken of a husband and his wife and a child with a view to determining the paternity of the child.

48 The court's jurisdiction to sanction the non-therapeutic sterilization of a mentally handicapped person arose before Heilbron J. of the Family Division of the English High Court of Justice in Re D (a minor), [1976] 1 All E.R. 326, a case that bears a considerable resemblance to the present. D, a girl, was born with a condition known as Sotos Syndrome, the symptoms of which include accelerated growth during infancy, epilepsy, clumsiness, an unusual facial appearance, behavioural problems including aggressiveness, and some impairment of mental functions that could result in dull intelligence or more serious mental retardation. D displayed these various symptoms, although she was not as seriously retarded as some children similarly afflicted. She possessed a dull normal intelligence. She was sent to an appropriate school but did not do well partly because of behavioural problems. When she was ten, however, she was sent to a school specializing in children with learning difficulties and associated behavioural problems. She then showed marked improvement in her academic skills, social competence and behaviour.

49 D lived with her widowed mother, Mrs. B., who was fifty-one, and two sisters. The family lived in extraordinarily difficult circumstances in a grossly overcrowded house with no inside toilet. The mother was described as a very hard-working woman who kept the house spotless and impressed everyone with her sincerity and common sense.

50 It was common ground that D had sufficient intelligence to marry in due course. Her mother, however, was convinced that she would always remain substantially handicapped and unable to maintain herself or care for any children she might have. Accordingly, when D was a child, her parents had decided that she should be sterilized, and when she reached puberty at ten, Mrs. B.'s concern increased; she worried that D might be seduced and give birth to an abnormal child. She consulted a doctor, who took the view that there was a real risk that she might indeed give birth to an abnormal child. He agreed that D should be sterilized and arrangements were made for the purpose. When other doctors questioned the purposes of the operation, however, a wardship application was made to the court with a view to preventing it from being carried out.

51 Heilbron J. refused to sanction the operation. After reviewing the nature of the wardship jurisdiction arising out of the sovereign's obligation as parens patriae, she observed, at p. 332:

> It is apparent from the recent decision of the Court of Appeal in Re X (a minor) that the jurisdiction to do what is considered necessary for the protection of an infant is to be exercised carefully and within limits, but the court has, from time to time over the years, extended the sphere in the exercise of this jurisdiction.
>
> The type of operation proposed is one which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for non-therapeutic reasons and without her consent, be a violation of such right. Both Dr. Gordon and Miss Duncan seem to have had in mind the possibility of seeking the child's views and her consent, for they asked that this handicapped child of 11 should be consulted in the matter. One would have thought that they must have known that any answer she might have given, or any purported consent, would have been valueless.
>
> (Emphasis added.)

At page 333, she added:

> This operation could, if necessary, be delayed or prevented if the child were to remain a ward of court, and as Lord Eldon LC, so vividly expressed it in Wellesley's case: "It has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."
>
> I think that is the very type of case where this court should 'throw some care around this child', and I propose to continue her wardship which, in my judgment, is appropriate in this case.

(Emphasis added.)

Later, at pp. 334-35, she expressed agreement with the consulting doctors' opinion that sterilization for therapeutic purposes was not entirely within a doctor's clinical judgment:

> Their opinion was that a decision to sterilise a child was not entirely within a doctor's clinical judgment, save only when sterilisation was the treatment of choice for some disease, as, for instance, when in order to treat a child and to ensure her direct physical well-being, it might be necessary to perform a hysterectomy to remove a malignant uterus. Whilst the side effect of such an operation would be to sterilise, the operation would be performed solely for therapeutic purposes. I entirely accept their opinions. I cannot believe, and the evidence does not warrant the view, that a decision to carry out an operation of this nature performed for non-therapeutic purposes on a minor, can be held to be within the doctor's sole clinical judgment.
>
> (Emphasis added.)

52 Since that time, there have been several cases where the English courts have given permission to perform medical operations under the parens patriae jurisdiction. In re F. (a Minor) (1981), 80 L.G.R. 301, local authorities invoked the court's wardship jurisdiction to permit an abortion on a fifteen year old girl who had previously given birth and was caring for the first child in facilities provided by the authority. The evidence indicated that the girl was taking good care of the first child but could not cope with a second, and that the girl consented to the operation. Butler-Sloss J. authorized the abortion, despite her father's objection, on the ground that it was in the girl's best interest.

53 More recently still, the English Court of Appeal had to consider the poignantly sad case of Re B (a minor) (1982), 3 F.L.R. 117. A baby girl was born suffering from Down's Syndrome (mongolism). She also had an intestinal blockage from which she would die within a very short time unless it was operated on. If she had the operation there was a considerable risk that she would suffer from heart trouble and die within two or three months. Even if the operation was successful she would only have a life expectancy of from twenty to thirty years, during which time she would be very handicapped, both mentally and physically. Her parents took the view that the kindest thing in the interests of the child was for her not to have the operation. Nonetheless, the court, on a wardship application by a local authority, authorized the operation. Though it expressed sympathy for the parents in the agonizing decision to which they had come, it emphasized the protective quality of its jurisdiction, as the following statement by Lord Templeman, at pp. 122-23 indicates: "The evidence in this case only goes to show that if the operation takes place and is successful then the child may live the normal span of a mongoloid child with the handicaps and defects and life of a mongol child, and it is not for this court to say that life of that description ought to be extinguished."

54 Turning now to Canada, the parens patriae jurisdiction has on several occasions been exercised to authorize the giving of a blood transfusion to save a child's life over its parents' religious objection. More germane for present purposes is the recent case of Re K and Public Trustee (1985), 19 D.L.R. (4th) 255, where the Court of Appeal of British Columbia ordered that a hysterectomy be performed on a seriously retarded child on the ground that the operation was therapeutic. The most serious factor considered by the court was the child's alleged phobic aversion to blood, which it was feared would seriously affect her when her menstrual period began. It should be observed, and the fact was underscored by the judges in that case, that Re K and Public Trustee raised a quite different

issue from that in the present case. As Anderson J.A. put it at p. 275: "I say now, as forcefully as I can, this case cannot and must not be regarded as a precedent to be followed in cases involving sterilization of mentally disabled persons for contraceptive purposes."

55 I now turn to the American experience to which all parties referred.

The American Experience

56 The American experience in this area cannot be understood without reference to the interest in the eugenic sterilization of the mentally incompetent manifested in that country early in this century. Eugenics theory, founded upon the rearticulation of the Mendelian theories of inheritance, developed from the premise that physical, mental and even moral deficiencies have a genetic basis. In the early part of this century, many social reformers advocated eugenic sterilization as a panacea for most of the troubles that had been created by "misfits" in society. This general attitude, coupled with the evolution of surgical sterilization techniques, provoked the widespread adoption of enabling legislation. In time, over thirty states enacted statutes providing for the compulsory sterilization of the mentally retarded; see Sherlock and Sherlock, "Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives, 60 N.C.L.Rev. 943 (1982), at p. 944."

57 The constitutionality of such statutes arose before the United States Supreme Court in the landmark case of Buck v. Bell, 274 U.S. 200 (1927). Carrie Buck, a mildly retarded woman, was the daughter of a similarly afflicted woman and had herself given birth to an allegedly retarded child. A majority of the court sanctioned her sterilization despite claims that such a course violated substantive and procedural due process as well as the equal protection rights of the handicapped. The case constituted the high water mark of eugenic theory, as the strong judgment of Holmes J. attests. He sets the tone at p. 207:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. ... Three generations of imbeciles are enough.

58 During the 1930s researchers and biologists began to denounce the sweeping generalizations concerning heredity in relation to mental and physical disorders. By 1937 both the American Neurological Association and the American Medical Association had criticized the overwhelming emphasis sis on heredity as a cause of mental retardation, mental illness, pauperism, epilepsy and other disabilities; see Burgdorf, Jr. and Burgdorf, "The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons," 50 Temp. L.Q. 995 (1977), at p. 1007. Today, the assumptions made in Buck v. Bell are widely discredited; see McIvor, "Equitable Jurisdiction to Order Sterilizations," 57 Wash. L.R. 373 (1982), at p. 375; Lachance, "In re Grady: The Mentally Retarded Individual's Right to Choose Sterilization," 6 Am.J.L. & Med. 559 (1981), at pp. 569-70.

59 Scientific exposure of the fallacious reasoning of the eugenicists led to a waning of the initial enthusiasm for laws requiring eugenic sterilization. Along with a growing legal recognition of

the fundamental character of the right to procreate, this was sufficient to trigger a reappraisal of the courts' position. Courts became extremely reluctant to order the sterilization of mentally handicapped persons in the absence of specific statutory authority; see Ross, "Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions," 9 Fla. St. U.L. Rev. 599 (1981). Their rationale was that "the awesome power to deprive a human being of his or her fundamental right to bear or beget offspring must be founded on the explicit authorization of the Legislature ..."; Guardianship of Tulley (app.), 146 Cal.Rptr. 266 (1978), at p. 270.

60 Not surprisingly, this argument has been strongly asserted by some of the parties to the present appeal. Thus, counsel for the Canadian Mental Health Association contended that the weight of authority in the United States is to the effect that there is no inherent jurisdiction in state courts, either by way of the parens patriae doctrine or otherwise, to order the sterilization of persons found to be mentally incompetent. For this proposition, he cited Hudson v. Hudson, 373 So.2d 310 (Ala. 1979) at pp. 311-12; Matter of Guardianship of Eberhardy, 294 N.W.2d 540 (Wis. 1980); Norris, "Recent Developments -- Courts -- Scope of Authority -- Sterilization of Mental Incompetents," 44 Tenn. L. Rev. 879 (1977).

61 The proposition thus advanced would, I think, have been unassailable until a few years ago. Since 1978, however, the tide has changed significantly. The precipitating event appears to have been the decision of the Supreme Court of the United States in Stump v. Sparkman, 435 U.S. 349 (1978). The question at issue there was whether an Indiana judge, who had ordered the sterilization of a "somewhat" retarded child on her mother's petition, was immune from liability in a suit subsequently brought by the incompetent. On obtaining court approval, the mother had had the procedure performed without the knowledge of her daughter who had been led to believe she was undergoing an appendectomy. The daughter discovered her deprivation when she subsequently married and attempted to have children. The Supreme Court held that the judge was immune from liability on the basis of an Indiana statute which conferred upon the Indiana circuit court original jurisdiction "in all cases at law and in equity whatsoever".

62 Though the precise precedential value of the case has been the subject of considerable judicial and scholarly debate, Stump v. Sparkman appears nonetheless to have had a catalytic effect. Since that decision, the vast majority of state courts before which the question has been raised have held that they have equitable authority, in the absence of statute, to order sterilization of the mentally retarded; see Matter of Guardianship of Eberhardy, 307 N.W.2d 881 (Wis. 1981), at p. 887; In re Grady, 426 A.2d 467 (N.J. 1981), at p. 479; Matter of C.D.M., 627 P. 2d 607 (Alaska 1981), at p. 612; Matter of A.W., 637 P. 2d 366 (Colo. 1981), at p. 374; Matter of Terwilliger, 450 A.2d 1376 (Pa. 1982), at pp. 1380-81; Wentzel v. Montgomery General Hospital Inc., 447 A.2d 1244 (Md. 1982), at p. 1263; Matter of Moe, 432 N.E.2d 712 (Mass. 1982), at p. 718; P.S. by Harbin v. W.S., 452 N.E.2d 969 (Ind. 1983), at p. 976; cf. Hudson v. Hudson, supra. Thus as McIvor, supra, at p. 379 concludes, despite Sparkman v. Stump's weakness as a precedent, it "provides a de facto point of departure for the emerging rule recognizing equitable jurisdiction to authorize the nonconsensual sterilization of mentally retarded persons".

63 The rationale on which state courts have acted in recent years is conveniently summarized in a passage from a pre-Sparkman case. In Matter of Sallmaier, 378 N.Y.S.2d 989 (1976), the court, basing itself on expert testimony concerning the likelihood of a psychotic reaction to pregnancy, other evidence of psychological and hygienic difficulties, and the patient's proclivity for sexual en-

counters with men, authorized the sterilization of a severely retarded adult woman. The court had this to say, at p. 991:

> The jurisdiction of the court in this proceeding arises not by statute, but from the common law jurisdiction of the Supreme Court to act as parens patriae with respect to incompetents. (Moore v. Flagg, 137 App.Div. 338, 122 N.Y.S. 174; Matter of Weberlist, 79 Misc.2d 753, 360 N.Y.S.2d 783.). The rationale of parens patriae, as was stated by the court in Matter of Weberlist, supra, p. 756, 360 N.Y.S.2d p. 786, is "that the State must intervene in order to protect an individual who is not able to make decisions in his own best interest. The decision to exercise the power of parens patriae must reflect the welfare of society, as a whole, but mainly it must balance the individual's right to be free from interference against the individual's need to be treated, if treatment would in fact be in his best interest."

I should perhaps add that subsequent to Sallmaier, another New York court expressly refused to authorize sterilization in the absence of legislative guidelines; Application of A.D., 394 N.Y.S.2d 139 (1977).

64 While many state courts have, in recent cases, been prepared to recognize an inherent power in courts of general jurisdiction to authorize sterilization of mentally incompetent persons, they differ on the standard of review. Two distinct approaches have emerged: the "best interests" approach and the "substituted judgment" approach.

65 In five of the nine states in which equitable jurisdiction to authorize the non-consensual sterilization of a mentally incompetent person is recognized, that jurisdiction is based on the inherent equitable power of the courts to act in the best interests of the mentally incompetent person; P.S. by Harbin v. W.S., supra, (Ind.); Matter of Terwilliger, supra, (Pa.); In re Penny N., 414 A2d 541 (N.H. 1980); Matter of C.D.M., supra, (Alaska); In re Eberhardy, supra, (Wis.). The test necessarily leads to uncertainties; see Matter of Guardianship of Hayes, 608 P. 2d 635 (Wash. 1980), at p. 637, and in an effort to minimize abuses, American courts have developed guidelines to assist in determining whether the best interests of the affected person would be furthered through sterilization. MacDonald J. proposed a series of similar guidelines in the Dresent case; see (1981), 115 D.L.R. (3d) 283, at pp. 307-09.

66 How far American courts would go in allowing sterilization for purely contraceptive purposes is difficult to say with certainty, since the above decisions were at the appeal level where the question was whether courts could exercise jurisdiction. Yet the guidelines put forward in those cases suggest that the courts would have considerable latitude. The facts in Hayes, supra, where the appeal court remanded the case to the applications judge, are revealing. They are thus stated at p. 637:

> Edith Hayes is severely mentally retarded as a result of a birth defect. Now 16 years old, she functions at the level of a four to five year old. Her physical development, though, has been commensurate with her age. She is thus capable of conceiving and bearing children, while being unable at present to understand her own reproductive functions or exercise independent judgment in her relationship with males. Her mother and doctors believe she is sexually active and quite likely

> to become pregnant. Her parents are understandably concerned that Edith is engaging in these sexual activities. Furthermore, her parents and doctors feel the long term effects of conventional birth control methods are potentially harmful, and that sterilization is the most desirable method to ensure that Edith does not conceive an unwanted child.
>
> Edith's parents are sensitive to her special needs and concerned about her physical and emotional health, both now and in the future. They have sought appropriate medical care and education for her, and provided her with responsible and adequate supervision. During the year or so that Edith has been capable of becoming pregnant, though, they have become frustrated, depressed and emotionally drained by the stress of seeking an effective and safe method of contraception. They believe it is impossible to supervise her activities closely enough to prevent her from becoming involved in sexual relations. Thus, with the consent of Edith's father, Sharon Hayes petitioned for an order appointing her guardian and authorizing a sterilization procedure for Edith.

67 As noted these facts indicate that the courts of the United States in acting under the best interests test have a very wide discretion.

68 The second approach, the substituted judgment test, raises Charter implications about which I shall have more to say later. This test was first applied in the context of the sterilization of a mentally incompetent by the New Jersey Supreme Court in In re Grady, supra. In affirming a lower court's grant of the petition of the parents to sterilize their adult daughter, a victim of Down's Syndrome, the court based its decision on an analysis of the daughter's rights. It began by recognizing that any court-authorized sterilization potentially violates the right to procreate, which it described as "fundamental to the very existence and survival of the race". However, the court went on to distinguish the situation before it from both voluntary and compulsory sterilization on the ground that the individual there had not expressed a desire to be sterilized or not to be sterilized, but was simply incapable of indicating her will either way. It then reviewed the U.S. Supreme Court decisions dealing with privacy and contraception and concluded that they supported a broad personal right to control contraception which included an affirmative constitutional right to voluntary sterilization. Given that there was also a right to be free from non-consensual bodily invasions, the individual was free to choose which of those two rights to exercise.

69 The Grady court held that in order for this choice to be meaningful, mental incompetence should not be permitted to prevent an individual from exercising it. The court, relying on the famous case of Matter of Quinlan, 355 A.2d 647 (N.J. 1976), recognized judicial power to make that choice in instances where limited mental capacity has rendered a person's own right to choose meaningless. The Supreme Courts of Massachusetts and Colorado later adopted this approach in Moe, supra and A.W., supra, respectively.

70 The primary purpose of the substituted judgment test is to attempt to determine what decision the mental incompetent would make, if she were reviewing her situation as a competent person, but taking account of her mental incapacity as one factor in her decision. It allows the court to consider a number of factors bearing directly upon the condition of the mental incompetent. Thus the court may consider such issues as the values of the incompetent, any religious beliefs held by her, and her societal views as expressed by her family. In essence, an attempt is made to determine the

actual interests and preferences of the mental incompetent. This, it is thought, recognizes her moral dignity and right to free choice. Since the incompetent cannot exercise that choice herself, the court does so on her behalf. The fact that a mental incompetent is, either because of age or mental disability, unable to provide any aid to the court in its decision does not preclude the use of the substituted judgment test.

71 The respondent submitted that this test should be adopted in this country. As in the case of the best interests test, various guidelines have been developed by the courts in the United States to ensure the proper use of this test.

Summary and Disposition

72 In the foregoing discussion, I have attempted to set forth the legal background relevant to the question whether a court may, or in this case, ought to authorize consent to non-therapeutic sterilization. Before going on, it may be useful to summarize my views on the parens patriae jurisdiction. From the earliest time, the sovereign, as parens patriae, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in Wellesley v. Duke of Beaufort, supra at 2 Russ., at p. 20, 38 E.R., at p. 243 is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the parens patriae jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The parens patriae jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

73 The parens patriae jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

74 The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in J. v. C., [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X, supra, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

75 What is more, as the passage from Chambers cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

76 I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the parens patriae jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and I have little doubt that in a proper case our courts should do the

same. Many of these instances are related in Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969), where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far or as in Quinlan permit the removal of life-sustaining equipment, I leave to later disposition.

77 Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in Re X, at pp. 706-07, and Heilbron J. in Re D, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

78 There are other reasons for approaching an application for sterilization of a mentally incompetent person with the utmost caution. To begin with, the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of mental defectives; The Sexual Sterilization Act, R.S.A. 1970, c. 341, repealed by S.A. 1972, c. 87; Sexual Sterilization Act, R.S.B.C. 1960, c. 353, s. 5(1), repealed by S.B.C. 1973, c. 79.

79 Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major surgery. Here, it is well to recall Lord Eldon's admonition in Wellesley's case, supra, at 2 Russ. p. 18, 38 E.R. p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done". Though this comment was addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

80 Another factor merits attention. Unlike most surgical procedures, sterilization is not one that is ordinarily performed for the purpose of medical treatment. The Law Reform Commission of Canada tells us this in Sterilization, Working Paper 24 (1979), a publication to which I shall frequently refer as providing a convenient summary of much of the work in the field. It says at p. 3:

> Sterilization as a medical procedure is distinct, because except in rare cases, if the operation is not performed, the physical health of the person involved is not in danger, necessity or emergency not normally being factors in the decision to undertake the procedure. In addition to its being elective it is for all intents and purposes irreversible.

As well, there is considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped; see Sterilization, supra, at pp. 49-52. The Commission has this to say at p. 50:

> It has been found that, like anyone else, the mentally handicapped have individually varying reactions to sterilization. Sex and parenthood hold the same significance for them as for other people and their misconceptions and misunderstandings are also similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of reforming zeal can remove the significance of sterilization and its effect on the individual psyche.
>
> In a study by Sabagh and Edgerton, it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status. Their attempts to pass for normal were hindered by negative self perceptions and resulted in withdrawal and isolation rather than striving to conform ....
>
> The psychological impact of sterilization is likely to be particularly damaging in cases where it is a result of coercion and when the mentally handicapped have had no children.

81 In the present case, there is no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. The purposes of the operation, as far as Eve's welfare is concerned, are to protect her from possible trauma in giving birth and from the assumed difficulties she would have in fulfilling her duties as a parent. As well, one must assume from the fact that hysterectomy was ordered, that the operation was intended to relieve her of the hygienic tasks associated with menstruation. Another purpose is to relieve Mrs. E. of the anxiety that Eve might become pregnant, and give birth to a child, the responsibility for whom would probably fall on Mrs. E.

82 I shall dispose of the latter purpose first. One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the parens patriae jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

83 The justifications advanced are the ones commonly proposed in support of non-therapeutic sterilization (see Sterilization, passim). Many are demonstrably weak. The Commission dismisses the argument about the trauma of birth by observing at p. 60:

> For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.

84 The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see Sterilization, supra, p. 33 et seq., 63-64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent; it is a social problem, and one, moreover, that is not limited to incompetents.

Indexed as:

H.M.L.K. Estate (Re)

IN THE MATTER OF the Estate of H.M.L.K.
AND IN THE MATTER OF an application by the Trustee(s) to pass accounts formally Dependent Adults Act, R.S.A. 1980, C. d-32, as well as a review of the Guardianship and Trusteeship orders.
AND IN THE MATTER OF H.K. and W.K., Trustees of the Estate of H.M.L.K., applicants

[2000] A.J. No. 694

2000 ABQB 398

267 A.R. 162

97 A.C.W.S. (3d) 1250

Action No. 3359

Surrogate Court of Alberta
Judicial District of Edmonton

Lee J.

Heard: May 23, 2000.
Judgment: June 13, 2000. Filed: June 15, 2000.

(41 paras.)

Counsel:

No counsel mentioned.

REASONS FOR JUDGMENT

LEE J.:--

FACTS

1 The matter at hand concerns the passing of accounts of the estate of H.M.L.K. a Dependent Adult, age 32. H.M.L.K. suffers from severe and permanent brain damage and quadrapelegia resulting from her involvement in a car accident early in her life.

2 In 1976 a settlement was made of the Dependent Adult's claim arising out of the motor vehicle accident and the sum of $60,000.00 was paid to the Public Trustee's office on her behalf.

3 These monies were administered by the Public Trustee until the parents were appointed Trustee's and Guardians in 1986. Renewal Orders have been issued in 1988 and 1994 and Accounts have been passed formally in 1988, 1991, 1994 and 1998.

4 In 1994 this Court set compensation at the rate of $250.00 per month to be paid to the trustees. The trustees have not taken compensation between March 1997 to February 2000, and the amount of $9,000.00 is shown as a debt.

5 On May 12, 1988 the Public Trustee made the following submission to the Court on the first review of Guardianship and Trusteeship:

> Please be advised that it is not the intention of the Public Trustee to appear or be represented on this application. However, we believe the transportation charges of $145.00 apparently per trip as well as the monthly compensation requested by the trustees appear to be extremely exorbitant in view of the nature of this estate and the fact that the dependent adult has been residing with her parents, and it also appears that the trustees had purchased a trailer for $4,500.00 out of the Dependent Adult's trust account without court approval.

6 On May 10, 1989 the Court ordered the following on an ex parte basis:

> 1. The Trust Fund established for the Dependent in or about June of 1976 shall only be used to pay for exceptional expenditures required by the Dependent and to provide security for the Dependent's future, and accordingly, the said Trust Fund shall not be accessable [sic] by Alberta Social Services to pay for the Dependent's monthly living expenses (including the monthly cost of staff required to care for the Dependent) while the Dependent lives in a group home established pursuant to the Individualized Funding Project, a pilot project sponsored by Alberta Social Services.
> 2. The exceptional expenditures required by the Dependent for her well-being, namely:
>
>   (a) Furnishing and equipping the group home in which the Dependent lives pursuant to the said Individualized Funding Project, to accommodate the Dependent's disability, such expenditure not expected to exceed $20,800.00; and
>   (b) Purchase of a wheel chair lift for the Dependent, such expenditure not expected to exceed $5,000.00; and

(c) Purchase of a new van for the Dependent's transportation, such expenditure, after the trade in of the current van being used (valued at approximately $5,000.00), not expected to exceed $23,000.00;

are hereby approved, and the said expenditures shall be paid from the Trust Fund established for the Dependent.

3. All requirements for service of the within application and this Order on the Dependent are hereby dispensed with.
4. The legal fees and all disbursements relating to the within application, whether incurred in or out of Court, shall be paid from the Dependent's Trust Fund.

7 Concerns have arisen with regards to the reduction in the value of the estate since the most recent passing of accounts in 1998, as well as the fact that the bulk of her estate is made up of a mortgage of $70,000.00 on which only interests payments have been made, without any principal reduction, over the last three years.

8 There are three other issues in my mind which center on to the mortgage.

9 Firstly, the circumstances and rationale surrounding the creation of the mortgage are somewhat clouded.

10 Secondly, whether in fact the mortgage is a proper investment authorized by legislation to be made by trustees on behalf of a Dependent Adult.

11 Thirdly, whether a conflict of interest has arisen with the trustees having a personal interest in the mortgage. The trustees in this matter are the Dependent Adult's parents, and are the mortgagors of the property. The mortgagee is the Dependent Adult.

12 The mortgage was entered into on the 25th of April, 1997 and was not mentioned in the affidavits that accompanied the last passing of accounts and review of the trusteeship on June 15, 1998. The mortgage provides an interest rate of 6% per year and payments of $2,200.00 every six months to the estate. To date, all of these payments have been met, however there has been of course no reduction in the amount of the principal outstanding. There has been no application for Court approval with regards to this mortgage.

13 The Public Trustee has not opposed the current passing of accounts, and has not made any representations on this matter.

REDUCTION IN VALUE OF THE ESTATE

14 There is no statutory restriction on the reduction of the value of the estate of the Dependent Adult over time, and in this case it would appear that the expenses that have caused the reduction in the value of the estate are bona fide. Depreciation on the valuation of personal effects is a normal expense as are trustee fees, both of which are the predominant contributing causes to the reduction in estate value of roughly $6,000.00 since the last statement of accounts in February 1997 as noted in the affidavits.

15 There is nothing in the accounts nor affidavits that would suggest the decrease in value can be attributable to mismanagement of the assets of the estate.

THE CIRCUMSTANCES AND RATIONALE SURROUNDING THE CREATION OF THE MORTGAGE

(a) Legality of The Mortgage as an Investment on Behalf of a Dependent Adult

16 Mortgage investments by trustees on behalf of a Dependent Adult are not contrary to any legislative mandate.

17 Section 30(a) of the Dependent Adults Act specifically authorizes this investment with the restrictions that the amount of the mortgage does not exceed 75% of the value of the asset as prescribed by the Trustee Act s. 5(p)(i) and that the term of the mortgage does not exceed three years. The mortgage in this case does not appear to contravene any of these provisions according to the materials provided in the affidavit.

18 The house is currently valued with a selling price of $275,000.00 with the mortgage value being $70,000.00 therefore well within the 75% maximum prescribed by the Trustee Act.

19 Further, there is no indication of an amount of interest that must be charged on a mortgage other than the overarching requirements as per s. 39 of the Dependent Adults Act, that the trustee advance the best interests of the Dependent Adult. In form and detail the mortgage in question generally complies with the relevant legal standards and requirements.

20 However, I note that there has never been any formal appraisal done on this property, and it appears from this file quite likely that any legislative compliance herein has been more by accident than by good planning.

(b) Requirement of Court Approval

21 There is no evidence that this transaction was at any time brought to the Court's attention for approval prior to its execution in 1997.

22 Section 29 of the Dependent Adults Act outlines the authority of a trustee with respect to dealing with the assets of the estate without the need for obtaining the authority or direction from the Court. The ability to grant a mortgage is not included within s. 29.

23 Section 30 of the Dependent Adults Act deals specifically with the authority of trustees to enter into mortgages on behalf of the estate and requires prior to execution the authorization of the Court as stated:

> (Authority conferred on trustee by Court - Section 30)
>
> The Court may on any terms and conditions it considers appropriate, authorize a trustee to do all or any of the following in respect of the estate of a Dependent Adult under his trusteeship:
>
> (a) purchase, sell, mortgage, grant or accept leases for more than 3 years or otherwise dispose of real property or personal property having a fair market value that is greater than the amount prescribed by the regulations referred to in section 29(i);

24 This wording, and the fact that executing mortgages as an investment was excluded by the legislature from s. 29, shows that the Court is to be consulted prior to an investment in a mortgage on behalf of the estate.

25 It is of concern that with the assistance of counsel the trustees entered into this transaction on behalf of the estate without the Court's approval as prescribed by statute. It is clearly outside of the scope of their authority as trustees to make this type of investment unilaterally on behalf of the estate.

26 The trustees by virtue of their inaction are in violation of clear statutory requirements.

(c) Conflict of Interest

27 To exacerbate the problems with the mortgage, it is evident that by being mortgagors on this property with the Dependent Adult's estate being the mortgagee, the trustees have put themselves into a position where their interest has the potential to conflict with that of the estate.

28 Section 39(4) of the Dependent Adults Act dictates that a trustee is not to act in an inappropriate manner or in any way which may endanger the estate. To put themselves in the position where their interests may potentially conflict with those of the Dependent Adult, the trustees have acted inappropriately.

29 The general principles regarding conflicts of interests and the duties and roles of the trustee are set out in McLennan v. Newton [1928] 1 D.L.R. 189 (Man. C.A.) at 191 quoting from Aberdeen R. Co. v. Blakie, Bros. (1854) 1 Macq. 461:

> It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict with the interests of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to , that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object.

30 Even though I accept that there is no direct evidence of any prejudice to the estate that has arisen as a result of the trustees also being mortgagors, it is settled law that their role as trustees commands them to act in a manner which does not put them in even a perceived conflict of interest.

> In essence, the law requires the individual subject to the duty to scrupulously avoid placing himself in a possible or potential conflict of interest. Therefore, the fact that a conflict could have arisen, but did not, does not exculpate the fiduciary from wrongdoing.... Entering into a potential conflict of interest is a breach whether or not the conflict is operative. - M.V. Ellis, Fiduciary Duties in Canada, (Scarborough: Carswell Supp., May 1999) at 1-5

31 Section 39(4)(d) of the Dependent Adults Act allows for the Court to make an order discharging the trustee from his duties where he or she acts in this type of manner.

32 By acting in a manner that has put themselves into a conflict of interest with the estate, the trustees have acted improperly. They have entered into an agreement whereby they are personally bound to make payments into the estate of the Dependent Adult, yet they are also bound to manage

that same estate. This has put the trustees into a position where their personal interests have the potential to conflict with their duty to the estate.

33 The trustees in this case have shown no evidence of either knowledge and consent of the cestui que trust nor express authorization (Gold v. Rosenberg (1995) 129 D.L.R. (4th) 152 (Ont. C.A.), Munden Acres Ltd. v. Lincoln Trust & Savings (1975) 63 D.L.R. (3d) 604 (Ont. H.C.)) to defend their course of action.

34 It is also of great concern that the Public Trustee has decided not to appear on this matter nor make any representations to the Court notwithstanding that they have also as indicated had a long-standing involvement in this matter.

35 It would seem to be prudent for the Public Trustee to take a greater interest in matters such as these that appear for review before the Court, given that the Court is presently left in the rather difficult position of having to scrutinize this matter on its own. This is a particularly difficult exercise since this application was part of many cases heard during normal Dependent Adult Chambers.

36 For example the Court had to write the following letter to counsel dated June 12, 2000 after reviewing the file:

> Further to your Dependent Adult Application of May 22, 2000, I have contacted your office and left a message for you to speak with me.
>
> As we have now spoken, I confirm that I am concerned about the fact that my review of the file shows that as of the Accounts submitted to the Court for Review dated February 1997 no mortgage existed in favor of the Dependent Adult. For some reason Accounts were not passed by you based on the February 1997 financial disclosure until some time in 1998.
>
> At the time of the passing of accounts in 1998, it appears that no specific mention was made to the Court of the said mortgage in favor of the Dependent Adult, notwithstanding that this mortgage was executed as best I can tell in April of 1997.
>
> The source of this mortgage, based on my review of the file, appears to be a conversion of approximately $75,000.00 in GIC's, Telus shares and other related 1997 bank accounts.
>
> My questions are:
>
>> Firstly, why the 1998 Passing of Accounts Application do not disclose the April 1997 mortgage.
>>
>> Secondly, I am curious to know why the $75,000.00 or so in investments was converted to this mortgage in the first place, and what was done with the mortgage proceeds.
>>
>> Thirdly, why does the mortgage only call for interest payments alone.

> Fourthly, I would like to know what is presently happening with respect to this mortgage as it appears that it was a three year mortgage for a term beginning in April of 1997 which terms would have ended on May 1, 2000. I would like either the Renewal Agreement or I would like to be involved in setting the terms of the mortgage renewal (if I do not decide to order repayment of the mortgage proceeds). In that regard, is there a recent appraisal of the property available for my perusal.
>
> Fifthly, it appears that the Applicants have not paid themselves pursuant to the 1994 Order.
>
> Sixthly, please explain the relationship between the group home the Dependent Adult lives in and the residence she is mortgagee of.
>
> Please respond, in writing, as soon as possible with this information, along with any other information that you would like to provide me with in this matter. Thank you for your assistance and prompt cooperation in this matter.

37 It also concerns me that the trustees have been represented by counsel throughout their trusteeship and on the execution of the mortgage, yet no application for Court approval of the mortgage was made under s. 30 and a somewhat obvious conflict of interest was allowed to occur.

38 Again, by virtue of their actions, and the fact that they are mortgagors on a mortgage held by the estate, the trustees have put themselves into a position that runs contrary to legislation and allows for the Court to remedy the situation.

POWERS OF THE COURT

39 Pursuant to s. 36 of the Dependent Adults Act, on hearing an application for review of a trusteeship order, the Court may amend, cancel, terminate, continue, vary or replace the order subject to any conditions or requirements it considers necessary.

40 Also, pursuant to s. 39(4) of the Dependent Adults Act in these circumstances, the Court may make an order discharging the trustee from his office or make any other order it considers appropriate in the circumstances, considering first under s. 39(5) of the Dependent Adults Act that suitable arrangements will be made on behalf of the estate of the Dependent Adult or an application for another trusteeship order will be made.

41 In this regard, the Public Trustee will be notified of this matter and will be provided with a copy of these Reasons. The Public Trustee is directed to report to the Court within 90 days hereof with its conclusions and its recommendations with respect to this estate and whether it is being maintained for the benefit of the Dependent Adult, and will recommend to the Court steps that it should take with respect to the existing conflict of interest and to ensure that no further conflicts will arise. The Public Trustee will consult with Counsel for the Applicants in this regard, who of course are also welcome to make further submissions to the Court with respect to these issues.

LEE J.

cp/ci/i/qljpn