

Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People, by Terry Carney and Peter Singer (Human Rights Commission Monograph Series No. 2, Australian Government Publishing Service, Canberra, 1986) pp. i - x, 1-120, bibliography 121-124. ISBN 0 644 03433 5.

This monograph "takes the form of an options paper", discussing guardianship "in a human rights context" (iii). Early chapters examine the pertinent law in the various Australian jurisdictions, and current reform proposals. Associated issues such as the medical treatment and legal capacity of the intellectually disadvantaged are also briefly considered. Principally, however, the authors are concerned to examine three important models for caring for and protecting intellectually disadvantaged people. These are referred to as the legalistic or 'substituted judgment' model, the welfare or therapeutic model, and the 'parent-child' or developmental model. Their main distinguishing feature is the different weight they attach to the value of maximizing the freedom of the intellectually handicapped on the one hand, and the protection of their welfare on the other.

The legalistic model stresses freedom rather than welfare. Guardianship is seen as a purely legal relationship, not as a social service (57). Procedural safeguards are emphasized. The number of people subjected to guardianship is kept to a minimum. Where it is dubious whether an individual is sufficiently disabled to warrant guardianship, the value of not depriving him of the freedom to run his own affairs is generally taken to be the deciding factor. Furthermore, guardianship is limited to the areas in which the intellectually disadvantaged person is found to be legally incompetent. In contrast, the second or welfare model sees guardianship as a service which should be available to social workers in their care of the intellectually disadvantaged (114). The dangers inherent in under-use rather than over-use of guardianship are emphasized. Disadvantages of this model are cost (guardianship being the domain of professional social workers), and the lack of procedural safeguards. Also, unlike the legalistic model, no provision is made for limited guardianship. Finally, the developmental model draws an analogy between "the functional relationship between a guardian and a ward and that between a parent and a child" (68). The guardian is, according to this model, to assist in developing the ward's capacities (69). The 'eternal child' image of the intellectually disadvantaged is rejected. This model shares with the welfare model, however, a lack of procedural safeguards. "Broad powers are conferred on the guardians, who are then expected to do their own tailoring of the order" (117).

The authors warn against seeing the models in terms of a simple distinction between maximizing freedom and maximizing welfare (116). The two values are highly interrelated: the value of freedom depends at least in part on how an individual can use his freedom to improve his welfare (115). Likewise, the degree of control an individual has over his life is an integral component of his general well-being (115). The final choice of a structure of guardianship depends on which model "best combines the two central values, while remaining practical and economically realistic" (116). Although they do not see themselves as choosing between the three models, but merely as pointing out their respective advantages and disadvantages (114), the authors appear to favour on balance the legalistic model. They do so on the grounds that its flexibility makes it more able to accommodate welfare requirements, than the alternative models can satisfy basic civil rights (117). The developmental model in particular is given short shrift, as showing "scant regard for the civil rights of intellectually disabled persons" (69).

In short, this is a useful work which should serve to stimulate rational and informed debate on a highly contentious social issue.

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