IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 60/94

IN THE MATTER of B.E. W

Date of Hearing: 28 June 1994

Date of Judgment:

Counsel: D.B. Collins for Mrs B.E. W
J.W. Gendall counsel appointed to assist the Court
Miriam Menzies for Mrs C (Mother of Mrs W)
Pamela Bertram for Director-General of Social Welfare
M.J. Hay for Mr J. W (Husband of Mrs W)

JUDGMENT OF NEAZOR J

Mrs B.E. W, who is aged 36, was made subject of the Court's parens patriae jurisdiction on 14 March 1994. That came about by reason of Mrs W having given birth to a child on 12 March 1994. The fact of her having become pregnant gave rise to concern because of her limited intellectual capacity. Various orders have been made in consequence of the primary order.

Counsel appointed to represent Mrs W has now applied for a direction from the Court in the exercise of its parens patriae jurisdiction that he apply on her behalf to the Family Court for an order declaring Mrs W's marriage on 16 March 1991 to be void. The basis of that application would be that by reason of mistake or lack of intellectual capacity there was at the time of the marriage an absence of consent by B.E. W to marry J. W. Reliance will be placed on ss 29, 30 and 31 of the Family Proceedings Act 1980.

The application is opposed by Mr W, for whom Mr Hay argued that:

(1) the order sought is not within the High Court's parens patriae jurisdiction;

(2) there is no jurisdiction for counsel to seek such an order within the Family Court jurisdiction; and

(3) there is no evidence that by reason of mistake or lack of intellectual capacity at the time of the marriage there was an absence of consent by Mrs W to marry Mr W.

The application made to this Court was supported by Mr Gendall, by Miss Menzies on behalf of Mrs C and by Mrs Bertram on behalf of the Director-General of Social Welfare.

In the course of various proceedings up to this date, psychological assessments have been made of Mrs W in 1990 and on 24 May 1994. The 1990 reports were made when one of Mrs W's sisters applied for care and protection orders in respect of her under the Protection of Personal and Property Rights Act 1988. Those proceedings were withdrawn when Mrs W was married.

In the 1990 reports she was assessed as having limited intellectual and self-help skills, with no skills above a 6 year 9 months level, many being below that level. She was described as functioning in the mild to moderate range of intellectual disability.

The 1990 report, which I should note records that Mr W was encouraging of Mrs W during the assessment interviews, was made at the direction of this Court. Using the Stanford Binet Intelligence Scale - 4th Edition Mrs W was assessed as falling within the severe mental retardation range. Her verbal activity on other testing was found to be at the age equivalent level of 3 years 9 months. She is unable to read and unable to write her own name. On tests of independent and physical functioning, she performed averagely well compared to other mentally retarded individuals. She was assessed as being able to be independent in domestic activity but as showing weakness in economic activity (i.e. giving change) language development, and numbers and time concepts. She was tested on knowledge of sex, pregnancy and marriage and on the basis of her responses, the psychologist said that it was hard to make an accurate judgment about what her actual level of understanding is. The further assessment was made that from

her cognitive assessment, it is clear that Mrs W cannot reason and think logically about concepts she has no direct experience of, and therefore cannot predict outcomes or generate hypotheses about an event she has not experienced, or possibly even events she has experienced.

On the basis of the information in these reports I conclude that there is sufficient evidence as to the facts to warrant the making of the application sought. The essential argument is that raised by Mr Hay in his first grounds of objection and in particular whether this Court has jurisdiction to give the direction counsel seeks.

The basis of the Court's jurisdiction is argued to be s 17 of the Judicature Act 1908 which is in these terms:

> "17. Jurisdiction as to mentally disordered persons, etc - The Court shall also have within New Zealand all the jurisdiction and control over the persons and estates of ... idiots, mentally disordered persons, and persons of unsound mind, and over the ... managers of such persons and estates respectively, as the Lord Chancellor of England, or any Judge or Judges of Her Majesty's High Court of Justice or of Her Majesty's Court of Appeal, so far as the same may be applicable to the circumstances of New Zealand, has or have in England under the Sign-manual of Her Majesty or otherwise."

The words "mentally disordered persons" appear in this section by reason of s 129(4) of the Mental Health Act 1969 in place of the words "mentally defective persons". The sub-section provided that:

> "Every reference in any enactment ... to a mentally defective person within the meaning of the Mental Health Act 1911 ... shall hereafter, unless the context otherwise requires, be read as a reference to a mentally disordered person within the meaning of this Act."

In *Re P (Re Mental Patient)* [1961] NZLR 1028 Turner J treated the words in s 17 in their unamended form as applying to a mentally defective person within the meaning of the Mental Health Act 1911 (at 1029) and in *Re R (a protected patient)* [1974] 1 NZLR 399 the Court of Appeal also treated the section as applying to such a person.

The definition of "mentally disordered" in the Mental Health Act 1969 applied to three categories of persons:

> "'Mentally disordered', in relation to any person, means suffering from a psychiatric or other disorder, whether continuous or episodic, that substantially impairs mental health, so that the person belongs to one or more of the following classes, namely:
>
> (a) Mentally ill - that is, requiring care and treatment for a mental illness;
> (b) Mentally infirm - that is, requiring care and treatment by reason of mental infirmity arising from age or deterioration of or inquiry to the brain;
> (c) Mentally subnormal - that is, suffering from subnormality of intelligence as a result of arrested or incomplete development of mind."

In both *Re P* and *Re R* it was held that this Court continues to have inherent jurisdiction over the persons and estates of persons coming within the descriptions in s 17 of the Judicature Act, notwithstanding that the English Judges no longer had such jurisdiction after 1959. Those two cases were concerned with property transactions, but matters of property alone are not what s 17 of the Judicature Act places within the jurisdiction of this Court. The section refers to "the persons" as well as "the estates" of the people to whom it extends.

The Mental Health Act 1969 was repealed by the Mental Health (Compulsory Assessment and Treatment) Act 1992 but that repeal alone would not affect s 17 of the Judicature Act: s 20(b) of the Acts Interpretation Act 1924. Section 136 of the 1992 Act provided in any event that nothing in that Act should limit or affect in any way the provisions of any other Act except as expressly provided in the 1992 Act. So far as I can see, nothing in the 1992 Act purported to amend the definition in the 1969 Act which I have taken to have been imported into s 17 of the Judicature Act. As Mr Collins noted, the 1992 Act certainly did not repeal s 17 of the Judicature Act.

On the face of it, the statutory amendment effected by the Mental Health Act 1969, read in light of the decisions in *Re P* and *Re R* would give this Court a protective jurisdiction in respect of such a person as Mrs W.

The challenge to that jurisdiction is based primarily on doubts expressed by His Honour Judge Inglis QC in the Family Court in *Re H* [1993] NZFLR 224 at 228 and 229. The decision was made on an application for appointment of a welfare guardian for an

intellectually disabled person under the Protection of Personal and Property Rights Act 1988 and for directions to consent to a termination of her pregnancy and for sterilisation. In the course of his judgment, Judge Inglis said:

> "The Family Court's exclusive originating jurisdiction under the Protection of Personal and Property Rights Act 1988 is a modern statutory expression of the ancient parens patriae jurisdiction over those whose capacity is limited by intellectual disability. Under the parens patriae jurisdiction it is the duty of the Crown to protect the persons and property of those unable to do so for themselves. In England that power and duty were assigned by Warrant under the Sign Manual to the Lord Chancellor and the Chancery Judges, and in New Zealand assigned to the Judges of the High Court by the Judicature Act 1908, s 17. That section conferred on those Judges the power which the Lord Chancellor and the Chancery Judges 'has or have' in this clase of case. However the Warrant assigning the parens patriae jurisdiction in intellectual disability cases to the Lord Chancellor and the Chancery Judges was revoked in 1960 contemporaneously with the passing of comprehensive mental health legislation. Although there is authority in New Zealand to the effect that this branch of the parens patriae jurisdiction survived (*In Re P (A mental Patient)* [1961] NZLR 1028; *Re R (A protected patient)* [1974] 1 NZLR 399 (CA)), that view may now have been overtaken by the decision of the House of Lords in *In re F (Mental Patient: Sterilisation)* (1990) 2 AC 1 in which it was held, apparently for the first time, that the Courts' parens patriae jurisdiction over persons with an intellectual disability was totally extinguished when the Warrant was revoked and that its resuscitation, if desired, must depend on the legislature, not the Courts: see at pp 51, 54, 57-58, 70, 79. The wording of the New Zealand Judicature Act, s 17, expressed in the present tense, does not appear apt to assign a jurisdiction deliberately withdrawn in England more than 30 years ago to Judges in New Zealand appointed since 1960. In regard to minors the parens patriae jurisdiction has however been expressly preserved by the Guardianship Act 1968 s 9(3). I mention these points so that it will be understood that there must be doubt whether, in New Zealand, the parens patriae jurisdiction remains available in the case of an intellectually disabled adult and that the choice by the present applicant of the similar statutory jurisdiction under the 1988 Act was well-advised. It will be seen that the principles to be applied in terms of the 1988 Act are very similar to those which would have been applied in terms of the parens patriae jurisdiction if it still existed."

With respect, I do not believe there is any doubt about the jurisdiction of this Court. It was held in *Re P* in 1961 to exist notwithstanding that the jurisdiction was conferred in New Zealand by reference to a jurisdiction which had once existed in the United Kingdom but had been withdrawn from the High Court there. The source of jurisdiction

in New Zealand was s 17 of the Judicature Act, not the continued existence of the English jurisdiction, and the extent of the jurisdiction must be taken in my view to have been what existed in the United Kingdom when the jurisdiction was conferred. It was so held by the Court of Appeal in *Re R* where McCarthy P said "New Zealand Judges continue to have the inherent powers which the appointed English Judges had prior to 1959". The New Zealand jurisdiction would of course be subject to any changes effected by statute in New Zealand, but not to changes made by statute or other action in the United Kingdom.

The jurisdiction was not withdrawn by the Mental Health Act 1969, but in my view the classes of persons to whom it applied were defined by that Act. The Court of Appeal in 1974 confirmed the existence of the jurisdiction, and in my view its continuance and the persons to whom it was applied were not affected by the Mental Health (Compulsory Assessment and Treatment) Act 1992. The continued existence of whatever jurisdiction is given to this Court under s 17 was affirmed by s 114 of the Protection of Personal and Property Rights Act 1988 which provided that:

> "Nothing in this Act shall limit the general jurisdiction of the High Court under s 17 of the Judicature Act 1908 or otherwise."

Mr Collins also argued that this Court has an inherent jurisdiction in such matters. For myself I prefer to rely on the jurisdiction conferred by statute, the existence of which is much less open to debate than an inherent jurisdiction may be.

Mr Collins submitted that the jurisdiction is very broad, referring to what was said by Lord Eldon in *Wellesley* v *Duke of Beaufort* (1827) 2 Russ 1, 20:

> "jurisdiction 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 around them."

Heilbron J in *Re D (A Minor)* [1976] 1 All ER 326 at 332 relied on the same passage but it is not a very positive support in terms of authority since it is clear from the whole

sentence in the report, from which the words are taken, that Lord Eldon was not expressing his conclusion but was setting out arguments about the issue.

Most of the cases in which the court's jurisdiction over disordered or handicapped persons has been discussed relate to property: see for example the judgments referred to in *Re P* and *Re R* and those judgments themselves. *Wellesley* v *Duke of Beaufort* concerned children, which is a different although comparable jurisdiction.

The principles applied in respect of property matters were clear cut, and I need go no further than the judgment of McCarthy P in *Re R* at p 401:

> "In theory, the inherent powers of the Judges to deal with a lunatic's estate were unlimited. Lord Halsbury LC summed up the situation in *Attorney-General* v *Marquis of Ailesbury* (1887) 12 App Cas 672, 680, by saying that the Judges could do any act which they judged to be for the lunatic's benefit. However, in practice they accepted certain restrictions."

It appears, however, that the jurisdiction extended beyond property. Suits for nullity of marriage could before 1857 be instituted on behalf of a lunatic, as the term then was, by his committee - see *Baker* v *Baker* (1880) 5 PD at 149/50; affirmed 6 PD 12. It appears that the making of a petition for divorce or separation in such a case was subject to the supervision and direction of the Court having jurisdiction in lunancy: *Woodgate* v *Taylor* (1861) 2 Sw and Tr 512 (164 ER 1095) referred to in *Mordaunt* v *Moncrieffe* (1874) LR 2 HL 2 Sc and D at 380.

Mr Hay accepted that the Court continues to have the parens patriae jurisdiction and that it has been exercised where health or related matters or the protection or disposition of property have been in issue. He submitted that it did not, however, extend to such an issue as the present one where what is sought is an order which would change Mrs Whittaker's status.

Mr Hay submitted that the Protection of Personal and Property Rights Act 1988 is a modern statutory expression of the parens patriae jurisdiction over those where capacity is limited by intellectual disability. Mr Hay drew attention to s 18(1)(a) as showing Parliament's intention to limit the powers of intervention on behalf of a person who is intellectually disabled, and submitted that this Court's inherent jurisdiction cannot be extended to allow such intervention.

In my view, whatever might be the full extent of the jurisdiction, the materials to which I have referred support the conclusions that authorising an application for a decree of divorce or nullity was part of the jurisdiction originally conferred on this Court by s 17 of the Judicature Act, that the jurisdiction still extends to questions of validity of marriage and of dissolution of marriage and to persons within the definition in the Mental Health Act 1969, and that it is not restricted by the Personal and Property Rights Act 1988. Indeed it may well be that the restriction on the power of the Family Court imposed by s 18(1)(a) of that Act may have been the reason for the express preservation of this Court's jurisdiction contained in s 114 of that Act.

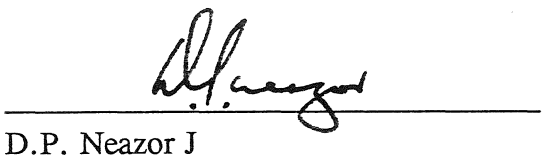
No doubt in deciding whether to exercise the jurisdiction conferred by s 17, this Court will have regard to the extent of the powers of a welfare guardian whom the Family Court may appoint under s 12 of the Protection of Personal and Property Rights Act 1988; but making application for dissolution of marriage or making any decision relating to the entering into marriage is a power which a welfare guardian does not have - see s 18(1)(a) of the 1988 Act. It may accordingly be arguable whether such a guardian has power to seek a declaration of nullity. Be that as it may, when there is no clear-cut power in a welfare guardian if one were to be appointed, this Court may, for the avoidance of doubt, think it proper, acting under s 17 of the Judicature Act, to authorise the taking of that step.

Mr Gendall submitted that in deciding whether to authorise an application for a declaration that a marriage is void the Court should ask the question whether, having regard to the evidence placed before the Court it would have granted its consent for the marriage if the person concerned had been a ward of the Court. Mr Gendall submitted that if this Court was of the view that it would not have granted consent to marriage if it had been asked at the time of the marriage, or if it was left with a reasonable doubt whether it would have granted consent, it would be appropriate to direct an application to be made to the Family Court so that the question of absence of consent by reason of incapacity could be determined in that Court which has exclusive jurisdictions on such issues. Approaching the matter in that way would call for quite an extensive enquiry and indeed enquiry by this Court into the very issue which is raised on the present proceedings, namely whether the person on whose behalf that it is suggested the power should be exercised had the capacity to consent.

I would prefer to express the matter in a more general way: that the question for the Court in any exercise of the jurisdiction is always what is in the best interests of a person who may not be able by reason of lack of understanding to make the decision for

herself or himself. Applying the general principle in a case such as the present the Court should consider whether the entry into marriage, the strength of doubts about the capacity of the person concerned to consent, and the circumstances of that person after marriage, together convince this Court that the welfare and interests of the person concerned require that the validity of the marriage should be challenged. I do not think it is useful to express the criteria more narrowly than that.

In the circumstances of this case as disclosed in the reports, in light of what has already befallen Mrs W, and in light of Mr W's opposition, in my view the case for directing counsel on her behalf to make an application is sufficiently made out and a direction is given accordingly.



D.P. Neazor J

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Grubi & Newell, Upper Hutt for Mrs C (Mother of Mrs W)

Social Welfare - Legal Services Bureau, Wellington for Director-General of Social Welfare

Hornblow Carran Kurta & Bell, Wellington for Mr J. W (Husband of Mrs W)

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