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HOW NEW ZEALAND LAW AND POLICY MAKERS TREAT OLDER PEOPLE

(LLM RESEARCH PAPER)

PUBLIC LAW – EXPLORING THE EDGE (LAWS 505)

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2003

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ABSTRACT

This paper adopted a critical model of analysis derived from a Canadian Law Commission report on Elder Law. The three themes that the Canadian Law Commission suggested were that the law either ignores older people exist, treats them the same as younger adults, when they should be treated differently, or treats them as frail, vulnerable and in need of special protection. The author developed a fourth theme; that is, the law treats older people differently when they should be treated the same. These four themes were used to analyse how the law in New Zealand treats older people. The specific areas which were analysed were the enduring power of attorney provisions of the Protection of Personal Property Rights Act 1988, income and asset testing for older people for older people entering residential care and grandparents rights with regards to custody, access, guardianship and adoption. In all of the areas there are proposed changes and these were also analysed using the analytical framework. In general, there is a growing awareness of the issues around ageing and the law and policy makers in New Zealand are making changes which are favourable to older people.

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14900 words.

I INTRODUCTION

This paper will look at how the law and policy in New Zealand treats older people. In 1999, the Canadian Law Commission published a paper on older people and the law. It was suggested that Canadian law either ignores older people exist, treats them the same as younger adults, when they need to be treated differently, or treats them as frail, vulnerable and in need of special protection.

This paper, firstly, sets out the social context in relation to older people in New Zealand. New Zealand's ageing population, developments in the area of elder law and the attitudes that exist about older people are all discussed.

Secondly, Beaulieu and Spencer's three themes are examined and illustrated with examples from both Canadian and New Zealand law and policy. Here the author suggests and develops a fourth theme, that is, the law treats older people differently, when they should be treated the same.

Lastly, three specific areas of law and policy affecting older people are then analysed as to whether they fit Beaulieu and Spencer's suggested themes and the author's fourth theme. The three areas are the enduring power of attorney provisions in the Protection of Personal Property Rights Act 1988 (PPPR Act), income and asset testing for institutional care for older people and grandparent's rights with regards to custody, access, guardianship and adoption.

In all of the three areas to be examined, there has been, and still is, a lot of activity. There are proposed changes in each area. The New Zealand Law Commission (NZLC) has proposed changes to the PPPR Act and this is currently with the Ministry of Social Development for re-evaluation.[1] In

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[1] See Ministry of Health *Health of Older People Strategy: Health Sector Action to 2010 to Support Positive Ageing* (April 2002)18, Objective 1.3.1 states that the enduring power of attorney provisions of the PPPR Act will be re-evaluated.

April 2002, the Hon Ruth Dyson announced that asset testing for older people entering residential care would be removed in 2005.[2] The new Care of Children Bill was introduced to Parliament by the Hon Lianne Dalziel in June 2003 and proposes new ways of treating grandparents.[3] The NZLC also reviewed the adoption laws and made recommendations that would impact on grandparents if enacted. These proposed changes for each area will also be analysed using the four suggested themes.

The paper will show that there are certain parts of the New Zealand law that are consistent with the themes. Some of the proposed changes to these laws also tend to fit within the themes. In general, however, the law and policy makers in New Zealand do seem to be making changes that are favourable to older people and respect their position in our society.

II WHY IS THIS TOPIC IMPORTANT?

A The Ageing Population

'Older people' are those who are over 65 years of age. In New Zealand the population of older people will change dramatically over the next few decades. There will be a lot more people over 65 years as a result of a decrease in birth rates, the post war baby boom generation entering this age group and an increase in life expectancy.[4]

At the time of the 2001 census there were almost half a million people aged over 65 years.[5] In 2011, this is expected to reach 566,000 and 1 million in 2030.[6] In 2050, it is supposed to level off reaching 1.2 million.

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[2] Hon Ruth Dyson "Asset testing to be removed" (2 April 2003) http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=16395 (last accessed 15 September, 2003).

[3] Care of Children Bill 2003, no 54 -1.

[4] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 6; Age Concern New Zealand Incorporated *Challenging the Future: Policies and Aims of Age Concern New Zealand* (Age Concern National Office, Wellington) 6.

[5] Statistics New Zealand "Older People" http://www.stats.govt.nz/domino/external/web/Prod_Serv.nsf/htmldocs/Older+People>

At present the older population makes up 12 percent of the total population and by 2021 this is expected to rise to 18 percent. By 2050, older people will make-up around 26 percent of all New Zealanders.[7] So in general, the older population is, and will continue to become, a more prominent group in the total population.

Both the Maori and Pacific Island populations are ageing.[8] In Maori society, low birth rates, and the ageing of those born in the 1950's and 60's all contribute to the ageing Maori population.[9] In 1996, older Maori accounted for 4 percent of the population and by 2016 this is expected to rise to 6 percent.[10]

Maori life expectancy is dramatically different to non-Maori life expectancy. Over the last 20 years non-Maori life expectancy has substantially increased, whereas Maori life expectancy has remained relatively static.[11]Non-Maori females have a life expectancy of 80.8 years whereas Maori females have a life expectancy of 71 years. Non-Maori males can expect to live until they are 75.7 years, whereas Maori male's life expectancy is only 65.8 years.[12]

The Pacific Island population over 65 years numbered approximately 7000 in 2000 (3 percent of New Zealand's total population). Like Maori, the Pacific population over 65 years is expected to increase rapidly. By 2011, the older Pacific population is expected to reach 13,000 and make up

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(last accessed 15 September 2003).

[6] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 1.

[7] Ministry of Social Development, above, 1.

[8] Ministry of Social Development, above, 3.

[9] David Richmond and others *Care for Older People in New Zealand – A report to The National Advisory Committee on Core Health and Disability Support Services* (Ministry of Health, Wellington, 1995) 11.

[10] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 3.

[11] Ajwani S and others *Decades of Disparity: Ethnic Mortality Trends in New Zealand 1980-1999* (Ministry of Health, Wellington, 2003) 47-48; http://www.moh.govt.nz (last accessed 2 September 2003).

[12] Ajwani and others, above, 21-22.

4 percent of the total population. This will reach 8 percent by 2031.[13]

Currently the Asian population is comparatively young. This is because many are recent migrants and are still of working age. However, the number of Asian older people is likely to double by 2011 and they will number around 17,000. [14]

B Developments in Elder Law:

In contrast to topics like "Women and the Law," there has been relatively little activity in the area of elder law. This is beginning to change.

In New Zealand the specialisation of Elder Law is really just beginning to develop. In May 2003, the New Zealand Law Society held an Elder Law seminar. This was a half day seminar and it covered such areas as age discrimination, rights of grandparents, enduring powers of attorney and the PPPR Act, Wills, Trusts, Rest Homes, Living Wills and Guarantees.

Currently in New Zealand, none of the Universities provide an elective on Elder Law. The number of lawyers specialising in this area is at present minimal but it is expected to increase.

In other jurisdictions, for example, Australia, the University of Western Sydney has established a Centre for Elder Law. The centre's main aim is to contribute to the advancement and awareness of older people, their needs and interests under the law.[15] In Australia, both the University of West Sydney and Griffiths University offer Elder Law as an elective subject for a law degree.

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[13] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 1.
[14] Ministry of Social Development, above, 1.
[15] Peter Connor and Alistaire Hall "Elder Law" (New Zealand Law Society Seminar Papers, May 2003) 2.

In the United States of America, elder law has been a speciality subject since 1993.[16] Lawrence A. Frolick is one of the founders of elder law and teaches Elder Law at the University of Pittsburgh School of Law. He now believes that the practice of elder law can be summed up as "late life legal planing"[17] and that the growing area is with the 'old olds' (those over 85 years) and their health and financial planning. He states that elder law is not a fringe practice but actually represents the core of many solicitors' practice, however, there has been a lack of growth in the academic arena.[18]

C Attitudes towards Older People

In 1993, an amendment to the Human Rights Act prohibited discrimination on the basis of age.[19] In December 2001, the Government, government agencies and anyone who performed a public function became accountable for unlawful discrimination and so were no longer exempt from compliance with the Human Rights Act.[20]

People have very different perceptions as to when "old age" begins. "Older people" as termed by the government[21] are those who are over 65 years of age. At this age you are eligible for New Zealand Superannuation, rest home subsidies, admittance to geriatric wards in hospitals, cheap bus fares and movie passes.

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[16] Lawrence A. Frolick "The Developing Field of Elder Law Redux: Ten Years After" (2002) 10 Elder Law Journal, 1.
[17] Lawrence A. Frolick, above, 2.
[18] Lawrence A. Frolick, above, 7.
[19] Human Rights Act 1993, s 21 (i)
[20] See Human Rights Act 1993, Part IA; Any act of omission that is inconsistent with the right to freedom from discrimination is tested against the standard set out in section 5 of the New Zealand Bill of Rights Act 1990, that is, those acts or omissions complained about must be shown to be a reasonable limit on the right to be free from discrimination, prescribed by law, which is demonstrably justified in a free and democratic society.
[21] See for example Ministry of Health *Health of Older People Strategy: Health Sector Action to 2010 to Support Positive Ageing* (April 2002).

Now that in the overall population, our life expectancy is increasing,[22] that discrimination on the basis of age is prohibited[23] and that retirement cannot be imposed upon anyone,[24] this age may indeed change and in time 'older people' will be seen as those over 70 or even over 80 years.

There are various negative stereotypes that exist about older people. Older people are viewed as irritable, unproductive, and set in their ways[25]. Old age also brings frailty, disability and dependency.[26] Older women are seen as inactive, unhealthy, asexual, and ineffective. Jokes about older women often characterise them as lonely, frustrated, and shrivelled.[27] There are also positive stereotypes regarding older people. Older people are sometimes viewed as possessing wisdom and valuable experience.[28]

As with any stereotype, the group is seen as sharing many similar characteristics. Older people are seen as having similar views on things, having the same needs, income, health, interests and past experiences. But older people, as a group, are probably the most heterogeneous group in society and are a very diverse group of people.[29] Older men and older women have had very different life experiences throughout their lives and consequently have a variety of interests. Within this group there is also a huge range of income. Some live on the basic superannuation, whereas

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[22] Ajwani S and others *Decades of Disparity: Ethnic Mortality Trends in New Zealand 1980-1999* (Ministry of Health, Wellington, 2003) 47-48; http://www.moh.govt.nz (last accessed 2 September 2003).

[23] Human Rights Act 1993, s 21(1)(i).

[24] Human Rights Act 1993, s 22 (1)(d), although High Court and Court Appeal Judges in New Zealand are required to retire at age 68 years under the Judicature Act 1908, s 13.

[25] Anne Sarzin "Old Stereotypes Blasted" (The University of Sydney News, 2000), 1 http://www.usyd.edu.au/publications/news/2K0210News/10.2.stereo.html (last accessed 2 September 2003).

[26] Go60.com "Myths about Ageing: Helping Seniors Improve with Age" http://www.go60.com/myths.htm (last accessed 2 September 2003).

[27] Linda M Woolf "Effects of Age and Gender on Perceptions of Older Adults" (Webster University, May 2001) http://www.webster.edu/~woolflm/ageismgender.html (last accessed 2 September 2003).

[28] Vijai P Sharma "Old People to Practice Ageism?" (Mind Publications) < http://www.mindpub.com/art485.htm> (last accessed 2 September 2003).

[29] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (1999), 6 http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 17 March 2003).

some live off large investments that they have accumulated over their working lives. Older people live in a variety of places, for example at home, with family or in retirement villages or institutions. Any group of older people will also have a very wide range of health status. Some people will be very healthy with no issues at all, whereas others will have multiple health issues.

Contrary to the negative stereotypes older people often express positive views about life in old age.[30] They rate their own health as good to excellent[31] and most older people live with minimal support in the community. [32]

A significant amount of gerontological research has focused on understanding what the key elements of "successful ageing" are.[33] The characteristics of "successful ageing" differ according to different theories. Disengagement theory suggests that successful ageing is when a person withdraws from former roles and society reciprocates by withdrawing from the older adult. The activity theory proposes that successful ageing occurs when a person becomes more, not less involved in social activities.[34] The continuity theory suggests that successful ageing occurs when the person continues to do whatever they did before in life.[35]

Despite the differing theories, Beaulieu and Spencer found that among all of the research on ageing there are two key elements to "successful ageing." [36] These include

1) what people expect of themselves as they age, and
2) how society expects people to act, behave and change as they grow

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[30] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 91.
[31] Ministry of Social Development, above, 91.
[32] Ministry of Social Development, above, 91.
[33] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (1999), 12 http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 17.03.03).
[34] Beaulieu and Spencer, above, 12.
[35] Beaulieu and Spencer, above, 12.

older.

III THE CANADIAN LAW COMMISSION'S PAPER

In 1999, Marie Beaulieu and Charmaine Spencer from the Canadian Law Commission released a report entitled "Older Adults Personal Relationships and the Law in Canada – Legal, Psycho-social and Ethical Aspects."

Among the various goals the authors stated they had for the paper[37], they wanted to examine the underlying values and assumptions in the law and the legal approaches to older people's personal relationships. They also wanted to look at these values and ask why and how the law governs certain types of personal relationships involving older people.

To achieve these goals they asked a range of questions. What are the major problems regarding law and older adult's relationships? What has already been said on older adult's relationships and the law? What values can be seen in both legal and social literature?[38]

Chapter I of the report set the scene and looks at ageing in Canada. Like New Zealand, Canada's population is ageing rapidly.

Chapter II defines the concept "older adults' personal relationships" by looking at the social and legal literature.

Chapter III, which is most relevant to this paper, discusses the development of elder law in Canada, the barriers facing older people in getting access to justice, what the legal literature says and how the law perceives older adults.

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[36] Beaulieu and Spencer, above, 12.
[37] Beaulieu and Spencer, above, 3.
[38] Beaulieu and Spencer, above, 4.

Chapter IV focuses on the Canadian Charter of Rights and Freedoms and whether the treatment of older adults is in compliance with this.

Chapter V covers interviews conducted with professionals working with older adults and how they perceive the law treats older people and what the key problems and inherent biases are. Some of the main issues that emerge are in the area of health-related laws, for example, issues around consent, capacity and substitute decision-making.[39]

Chapter VI of the Canadian Law Commission's Report looks at several key areas of the law, for example, contract law, family law, health and substitute decision-making, criminal law, wills and estate planning and welfare guardianship. They also look at their adult protection laws, which cover elder abuse and neglect situations. These are framed in a similar fashion to their child protection laws. In New Zealand, there is no such law governing elder abuse.

Chapter VII examines three cases and the underlying assumptions in the judgments about older people. For example, there is often an automatic assumption that being older is equivalent to being vulnerable and/or mentally incapacitated.[40]

Chapter VIII is a concluding chapter, which brings all the main problems, and issues together and some recommendations are made.

IV THEMES IN THE LAW

Chapter III of the Canadian Law Commission's research paper provides most of the framework for analysing the law in relation to older people. Beaulieu and Spencer assert that there are three contradictory responses to older people in the law in Canada[41]:

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[39] Beaulieu and Spencer, above, 42 – 44.
[40] Beaulieu and Spencer, above, 61.
[41] Beaulieu and Spencer, above, 25.

1. The law ignores they exist.
2. The law treats them as frail, incapable, vulnerable or in need of special protection.
3. The law treats them exactly the same as younger adults even when their differences necessitate different treatment. It is assumed that the law should have equal or 'neutral' application to younger and older adults.

Beaulieu and Spencer argue "older adults frequently are treated differently in the law, its application and its practice."[42] Both lawyers, who act as advocates, and judges, when making decisions display underlying ageist assumptions and this heavily influences the quality of legal advice and service.[43] The law has tended, for example, to assume that old age might be a sign of diminishing capacity and in the past, the validity of wills made by the very old have been easily challenged on the basis that the older person was mentally incapable.[44]

Before focusing on the three main areas of law and policy to be analysed, the three suggested themes of how the law treats older people will be explored and illustrated with examples from both Canada and New Zealand. The author will also suggest and develop a fourth theme.

A The law ignores they exist – an example

The focus of legal literature illustrates that older people are forgotten about in the law. There are numerous articles on "Women and the Law" and "Children and the Law" but very few on older people and the law. Beaulieu and Spencer suggest:[45]

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[42] Beaulieu and Spencer, above, 25.
[43] Whitton L S "Ageism: Paternalism and Prejudice" 46 DePaul Law Review (1997) 453, 479.
[44] Whitton, above, 479.
[45] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (1999), 22 http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 17.03.03).

> "This may reflect the perception that older people are essentially the same as younger adults, or it may reflect a perception that older adults are external to the functioning of the law."

The literature also constantly stresses that lawyers need to be aware as to exactly who their client is when an older person and their relative come to the office, that is, the older person is the client and not the accompanying relation. This suggests that lawyers have a tendency to ignore the older person and instead focus on the younger relative. Beaulieu and Spencer point out that "lawyers may tend to act inappropriately with an older client out of prejudice and paternalism by erroneously assuming that a family member's interest will be the same as the older adult's."[46] For example, Adams and Morgan in their paper entitled "Representing the client who is older in the law office and in the Courtroom"[47] assert

> "The first priority for the attorney is to determine who is the client."

Surely the presenting problem or issue would give the lawyer enough of an indication as to who the client is in this kind of situation.

(B) The law treats them as frail, incapable, vulnerable or in need of special protection - an example

Beaulieu and Spencer argue that the law has a tendency to treat older adults as vulnerable and in need of special protection.[48] Much of the legal research on the law and older people tends to focus on the limitations of old age and the potential for loss of mental competence.

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[46] Beaulieu and Spencer, above, 24.
[47] William E. Adams and Rebecca C Morgan "Representing the Client who is Older in the Law Office and in the Courtroom" (1994) 2 Elder Law Journal 1, 14.
[48] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (1999), 25 http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 17.03.03).

> "The attorney who represents elderly clients should educate herself about the process and problems of ag[e]ing. Only then can the attorney avoid paternalism and respect the independence and individuality of her elderly clients."[49]

An example of this perceived 'vulnerability' can be seen in the common law doctrine of 'undue influence.' Under this doctrine, a transaction can be set aside where it is proved that a stronger, more dominant, person has misused power against a weaker person.[50] The otherwise valid agreement is seen as not representing the true intentions of the weaker party, but rather represents the intentions of the stronger party.[51]

In *Royal Bank of Scotland Plc v Etridge (No 2)*[52], Lord Nichols stated:

> "Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other."

In *Contractors Bonding v Snee*[53] it was declared that there is no automatic presumption of undue influence of a child over a parent. To prove undue influence, the complainant must firstly show that they placed their confidence in the other party in relation to their financial affairs and secondly that "the transaction calls for an explanation."[54] Typically most alleged victims of undue influence are the older parents of children who have used their parents as guarantors for loans. [55]

Parents of children are at quite a high risk if they become guarantors because if they have to honour a guarantee, they will usually never be able

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[49] L F Smith "Representing the elderly client and addressing the issue of competence" (1988) 14 Journal of Contemporary Law 61, 104.
[50] *Contractors Bonding v Snee* [1992] 2 NZLR 157, 165 referring to 18 Halsbury's Laws of England, para 332.
[51] L. A. Frolick " The biological roots of the undue influence doctrine: What's love got to do with it? (1996) 57 University of Pittsburgh LR, 841-843.
[52] *Royal Bank of Scotland Plc v Etridge* (No 2) [2001] 4 All ER 449, 458.
[53] *Contractors Bonding v Snee* [1992] 2 NZLR 157, 166.
[54] *Royal Bank of Scotland Plc v Etridge* (No 2) [2001] 4 All ER 449, 453.
[55] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and

to get back to their original financial position. The consequences are, therefore, even higher for older people than, for example, a wife or partner.

In New Zealand a very high proportion of older people own their own home. At the 1996 census eighty one percent of 65-79 year olds owned their home without a mortgage.[56] There is, therefore, a very strong temptation for a child (often in there 30's or 40's) who needs financial help, to see an elderly parent or grandparent as a source for a guarantee.[57]

At the Elder Law Seminar it was noted that[58]:

> "Older guarantors are likely to be vulnerable to financial exploitation due to potential mental and physical decline and increased emotional and physical dependence on family members."

Lawrence A. Frolick takes the opposite view.[59] He has seriously questioned whether there can be such a thing as undue influence and whether one person can truly influence another. He suggests that the use of the undue influence doctrine to overturn decisions by older people who had capacity, rests on assumptions of human nature and in particular older people. Frolick says that the Courts believe older people are more susceptible than younger people to the schemes of others. He questions whether this can be true as if the older person had capacity, then they were fully aware of what they were doing. He thinks the law should not treat older adults differently to younger adults.[60]

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published by the Law Commission of Canada (September, 1999), 31 http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 29.06.03).

[56] Statistics New Zealand *"Population Ageing in New Zealand – Key Statistics"* (January 2000) 7; http://www.stats.govt.nz (last accessed 6 September 2003)

[57] Peter Connor and Alistaire Hall "Elder Law" (New Zealand Law Society Seminar Papers, May 2003) 55.

[58] Connor and Hall, above, 55.

[59] L. A. Frolick " The biological roots of the undue influence doctrine: What's love got to do with it? (1996) 57 University of Pittsburgh LR, 841-843.

[60] L. A. Frolick, above, 841-843.

This view was evident in the Australian case, *Janesland Holdings Pty Ltd v Francisc Simon and Ors.*[61] Mr and Mrs Simon, pensioners in there 60's, became the guarantors of a loan taken out by their son for his business. They mortgaged their home. The son then went overseas and the loan was unpaid. It was found that Mr and Mrs Simon had "judged the transaction to be both improvident and contrary to their interests"[62] but had signed due to the pressure from their son and their desire to assist him. However, it was held that a "contract of guarantee will be unenforceable only if the lenders conduct has been unconscionable."[63] The lenders conduct hadn't been, so the Simons lost their house.

Another example of where the law treats older adults as frail and incapable is the legislation in one province in Canada governing medication management for those older people in residential care. The legislation assumes that everyone in care is the same and not capable of taking their own pills. There is one blanket rule that states that staff are responsible for the drug distribution. One professional is quoted in the Canadian Law Commission's paper.[64]

> "In paying attention to the letter of the law, and not the spirit of the law, they ignore the diversity of seniors in care. As a result, administrations do not like it if you talk about cohorts, individuality and differences. The focus is on treating everyone the same."

In New Zealand, medication management for people in residential care is not governed by law but by policy. The Ministry of Health puts out guidelines for the "Safe Management of Medicines"[65] for older people in residential care. Even though residents are allowed to manage their own medication, the medicines have to be checked every week and the

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[61] *Janesland Holdings Pty Ltd v Francisc Simon and Ors* [2000] ANZ CONVR 112.
[62] *Janesland Holdings Pty Ltd v Francisc Simon and Ors,* above, 115.
[63] *Janesland Holdings Pty Ltd v Francisc Simon and Ors,* above, 115.
[64] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (September, 1999), 43; http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 29.06.03).

resident's ability to take their own medicine has to be assessed by the doctor every three months.[66] In contrast doctors are not required to assess older people who live in their own homes and who manage their own medication. Although the intention of these guidelines is to keep older people safe, it assumes that all older people in care have or are close to being mentally incapable of managing their own medication. But there are many people in residential care whose main needs are physical/medical as opposed to mental.

(C) The law treats them the same as younger adults even when their needs are different – a New Zealand example

Older people are often treated by law or policy makers as having the same or very similar needs to people with disabilities.[67] In New Zealand this can be clearly seen in how the health policies with regards to older people have developed.

Prior to 1992, both older people and younger people with disabilities were able to access funding for their care from either the Department of Social Welfare or their local Area Health Boards. This system was very confusing so in 1992, the Ministry of Health produced a policy, which placed the funding of all disability services, for example home care and residential care, under health.[68] A new section called "Disability Support Services" sprung up in the Ministry of Health.[69]

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[65] Ministry of Health (Medsafe Section) *Safe Management of Medicines – A Guide for Managers of Old People's Homes and Residential Care Facilities* (November 1998).
[66] Ministry of Health, above, 7.
[67] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (September, 1999), 22; http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 29.06.03).
[68] Dr Anne Bray "Review of Policy Developments in Needs Assessment and Service Co-ordination in New Zealand" (July 2002) 8; New Zealand Guidelines Group http://www.nzgg.org.nz/development/documents/Brays_report.pdf (last accessed 6 September 2003).
[69] David Richmond and others Care for Older People in New Zealand – *A report to The National Advisory Committee on Core Health and Disability Support Services* (Ministry of Health, Wellington, 1995) 17.

Older people, who lived in the community and who needed help were then defined as needing 'disability services'. Needs Assessment and Service Co-ordination (NASC) agencies were established to do comprehensive needs assessments and co-ordinate necessary services for "people with disabilities of all ages."[70] These were either attached to health services or were completely separate organisations in the community. This brought many difficulties.

For a start older people did not necessarily see themselves as being "disabled" and people with disabilities did not see themselves as "sick".[71] The Ministry of Health perceived that the health of younger people with disabilities was neglected and tended to concentrate on their needs as opposed to those of older people.[72] Policy emphasised the need to move away from a "narrow medical focus"[73] towards a more holistic approach. The problem with this was that older people often have multiple medical problems, whereas young disabled people don't.[74] The separation between NASC agencies and the health services for older people produced great concern that older people were not getting their medical needs met. This was partly because Assessors were failing to refer people to specialist health services for older people.[75]

Since then, however, there have been changes to the health policy and the Ministry of Health has proposed a new integrated model for service delivery.[76] Key themes include integration and co-ordination of older people's health care services. This policy has yet to be fully implemented and even though it is not explicit, what this probably means in practice is that a multi-disciplinary team from the health sector will undertake the

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[70] Dr Anne Bray, above, 5.
[71] Dr Anne Bray, above, 9.
[72] David Richmond and others, above, 17.
[73] Dr Anne Bray "Review of Policy Developments in Needs Assessment and Service Co-ordination in New Zealand" (July 2002) 10; New Zealand Guidelines Group http://www.nzgg.org.nz/development/documents/Brays_report.pdf (last accessed 6 September 2003).
[74] Dr Anne Bray, above, 30.
[75] Dr Anne Bray, above, 31.

needs assessments for older people.[77] Importantly, there will be a separation of funding between the care of older people and the care of people with disabilities.[78]

(D) A Fourth Theme – The law treats them differently to younger adults when they should be treated the same

In addition to the Canadian Law Commission's suggestion that the law treats older people the same even when their needs are different, I would like to suggest that the converse of this also applies. The law treats older people differently to younger people when they should be treated the same. Therefore, the law discriminates against older people.

The Oxford Dictionary[79] defines 'discriminate' as

> "2 (usu. discriminate against) make an unjust distinction in the treatment of different categories of people, especially on the grounds of race, sex, or age."

During this research it was evident that various laws in New Zealand do make unjust distinctions in the treatment of older people, that is, the law discriminates on the basis of age. Even though discrimination on the basis of age is prohibited under section 21(1)(I) of the Human Rights Act 1993, it will be shown later in the paper that this fourth theme is applicable to some current New Zealand laws.

The three specific areas of law and policy affecting older people will now be examined and analysed in the light of Beaulieu and Spencer's (B&S) themes and the fourth theme suggested by the author. Firstly, the

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[76] See Ministry of Health *Health of Older People Strategy: Health Sector Action to 2010 to Support Positive Ageing* (April 2002).
[77] Dr Anne Bray "Review of Policy Developments in Needs Assessment and Service Co-ordination in New Zealand" (July 2002) 43; New Zealand Guidelines Group http://www.nzgg.org.nz/development/documents/Brays_report.pdf (last accessed 6 September 2003).
[78] Dr Anne Bray, above, 42.
[79] Judy Pearsall (ed) *The Concise Oxford Dictionary* (Tenth Edition, Oxford University Press, 1999) 409.

enduring power of attorney provisions in the Protection of Personal Property Rights Act 1988 (PPPR Act) will be analysed. The changes that were suggested by the New Zealand Law Commission (NZLC) will also be analysed. Secondly, the income and asset testing requirements for older people entering residential care and the proposed changes will be discussed and analysed. Thirdly, the current laws governing grandparent's rights with regards to custody, access, guardianship and adoption will be examined. The changes proposed to those laws will then be analysed in light of B&S's themes and the author's fourth theme.

V THE PPPR ACT

A The Current Law

This legislation was designed to cater for the physically and intellectually disabled, however Part IX, which relates to enduring powers of attorney is very relevant to older people. Part IX was very much an 'afterthought'[80] inserted at select committee stage.[81] It came about after intense lobbying from the people in the community working mainly with the intellectually disabled.[82]

Part IX allows for a power of attorney to endure beyond the onset of mental incapacity.[83] The person who makes the EPA, "the donor", must make it in accordance with the Third Schedule to the PPPR Act.[84] Legal advice is not required.

A donor can decide whether to make an EPA for either property or welfare or both. A person can request that the attorney for property act

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[80] New Zealand Law Commission discussion paper *Misuse of Enduring Powers of Attorney* (NZLC PP40, Wellington, 2000) 1.
[81] WR Atkin "The Courts, Family Control and Disability – Aspects of New Zealand's Personal and Property Rights Act 1988" (1988) 18 VUWLR, 345, 347.
[82] WR Atkin, above, 346-347.
[83] Protection of Personal Property Rights Act 1988, s 96.
[84] Protection of Personal Property Rights Act 1988, s 95(1)(a).

immediately, however, the welfare attorney cannot act until such time as the donor becomes mentally incapable.[85]

Section 5 of the PPPR Act provides for a presumption of competence principle, however, this does not presently apply to Part IX.

For property, a person is mentally incapable if they are "not wholly competent to manage his or her own affairs in relation to his or her property."[86] With regards to welfare, a person is mentally incapable if they wholly or partly lack the capacity to understand the nature and foresee the consequences of their decisions or can't communicate their decisions.[87]

B Analysis of the Current Law

The PPPR Act will now be analysed in terms of whether they are consistent with Beaulieu and Spencer's (B&S's) three identified themes and the fourth theme identified by the author. The proposed changes in this area will also be discussed in light of these themes.

(i) The law ignores they exist

An obvious omission in the PPPR Act is that it makes no mention of older people anywhere in the statute. One might be tempted to conclude that this fits the first of B&S's themes, that is, the law ignores that older people exist. However, the Act also makes no mention of intellectually disabled people which is a group to whom the Act applies. The whole statute instead refers to people without capacity and therefore the law cannot be said to ignore older people exist.

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[85] Protection of Personal Property Rights Act 1988, s 98(3).
[86] Protection of Personal Property Rights Act 1988, s 94(1)(a).
[87] Protection of Personal Property Rights Act 1988, s 94(1)(b).

(ii) The law treats them as frail and incapable and in need of special protection

Generally the first part of the PPPR Act has relevance to those people with intellectual disabilities, whereas Part IX mainly affects older people. Section 5 in the first part of the Act incorporates a presumption of competence principle, but this does not apply to Part IX. In effect, older people are not presumed competent whereas younger intellectually disabled people are. This law, therefore, treats older people as frail and incapable which is consistent with B&S's second theme. This omission was noted by NZLC and it was recommended that this principle be incorporated into Part IX.[88] If this recommendation is implemented, older people will therefore be presumed competent by the law as opposed to the law treating them as frail and incapable and in need of special protection.

(iii) The law treats them the same as younger adults even when their needs are different

Not applicable here.

(iv) The law treats them differently to younger adults when they should be treated the same

Property Managers, who, under the first part of the Act are appointed by the Court, have to provide financial reports on a regular basis.[89] These are audited by the Public Trust. Property attorneys, on the other hand, are not accountable to any outside organisation. They are not supervised but they are making very important decisions about a person's property which a donor may have taken years to accrue. People to whom the first part of the Act applies, (mainly intellectually disabled), therefore, have far greater protection than those to whom Part IV mainly applies (older people). This

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[88] New Zealand Law Commission report *Misuse of Enduring Powers of Attorney* (NZLC R71, Wellington, 2001) 13.
[89] Protection of Personal Property Rights Act 1988, s 45.

is consistent with the author's identified theme, the law treats older people differently to younger adults even when their needs regarding protection are the same.

The "mentally incapable test" provides another example of where the current law treats older people differently to younger people when their needs are the same. Section 12(2) in the first part of the Act (which in general mainly applies to younger disabled people), states that a person is "mentally incapable" when they *wholly* lack the capacity to understand the nature and consequences of their decisions.[90] In contrast, section 94(1)(b)[91] in Part IX states that a person must *wholly or partly* lack the capacity to understand or foresee the consequences of their decisions. Older people can therefore have an attorney making decisions regarding their welfare when they partially lack capacity, however young disabled people must be wholly incapacitated before a welfare guardian can act. Both younger and older people need the same level of protection by the law. If the person's level of competence indicates they require assistance with decision-making in certain areas, then this should be the determining factor and not the person's age. The current law is consistent with the fourth theme identified by the author.

C Proposed Changes: The New Zealand Law Commissions Report

The NZLC recently reviewed this legislation after concern had been expressed, mainly from Age Concern Auckland Incorporated, about an increase in the occurrence of the misuse of EPAs and the lack of safeguards in the Act.[92]

Parliament clearly wanted an informal, inexpensive, accessible procedure.[93] However, there is currently no in-built accountability

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[90] Protection of Personal Property Rights Act 1988, s 12(2).
[91] Protection of Personal Property Rights Act 1988, s 94(1)(b).
[92] New Zealand Law Commission discussion paper *Misuse of Enduring Powers of Attorney* (NZLC PP40, Wellington, 2000) 1.
[93] New Zealand Law Commission discussion paper, above, 3.

mechanisms or external body to monitor attorneys. Welfare attorneys have no guidelines to follow as to when they can or should invoke an EPA. They receive no supervision when they are making both minor and major decisions about the donor's life. In essence, therefore, it allows an attorney to override a person's self-determination. This cuts across all of the legislation that promotes human rights and freedoms. It leaves donors, who are usually older people, with very little protection.[94]

Age Concern reported that in the space of seven months (Nov 2000-June 2001) there were at least 46 cases involving abuse by an attorney.[95] Nine out of the 46 were abusing property only, 6 welfare only, but 20 were abusing both property and welfare. The total number of EPAs in New Zealand is unknown but the Public Trust in Auckland has executed over 30,000 with less than 2000 being currently active.[96]

The NZLC[97] identified five areas where EPAs were misused:

- During the initial creation of EPAs, for example, donors did not have capacity or were subject to undue influence
- Neglect of the donor by the attorney, for example, failure to place in residential care because of a loss of inheritance
- Embezzlement of moneys and theft of property
- Bullying or failure to consult the donor
- Section 98(3) – the mentally incapable test has difficulties. This test must be satisfied before a donor can act.

The NZLC asked several key questions and these included whether legal advice should be compulsory, whether 'competence' assessments should be carried out by general practitioners or geriatricians, how the

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[94] New Zealand Law Commission discussion paper, above, 3.
[95] Age Concern New Zealand Incorporated *Report of Age Concern Elder Abuse and Neglect Services –An Analysis of Referrals (for the period 1 July 1998 to 30 June 2001)* August 2002, 15.
[96] Sue Martin *Enduring Powers of Attorney* (submission to Law Commission, 24 July 2000) 2. Clearly not all EPAs are made by older people.
[97] New Zealand Law Commission report *Misuse of Enduring Powers of Attorney* (NZLC R71, Wellington, 2001) 8.

"mentally incapable" test could be improved and whether there should be a central registration system to hold all EPAs.

The NZLC made a series of recommendations which included:

If the attorney is a person other than the donor's spouse or de facto partner and if the donor at the time of executing is either aged 68 years or over or a resident in any hospital home or other institution, valid execution would, following the NZLC's recommendation, require compliance with the following:

- A solicitor must witness the donor's signature
- That solicitor must be retained independently by the donor and the solicitor must give the donor advice regarding:

(i) matters referred to in the Third Schedule which include whether the donor wants the EPA to continue passed mental incapacity, if and how they want an attorney to benefit themselves or others;

(ii) the donor's choice of attorney(s), for example two for property and one for welfare;

(iii) that the donor has a choice over whether the attorney can act in relation to property or welfare or both;

iv) that conditions can be imposed (for example "not to sell the family home");

v) if and how they want an attorney to be monitored and

vi) that the donor can revoke the EPA at any time, if the donor has capacity.

Other recommendations included:

- There should be a "presumption of competence" principle incorporated;
- A registered medical practitioner needs to state in writing that the donor is mentally incapable before an attorney can act in relation to personal care and welfare;
- The donor must be *wholly* mentally incapable (as opposed to 'partly');

- An attorney is obliged to encourage the donor to participate in the decisions about their property and their personal care and welfare as much as possible AND consult the donor or other interested parties for advice regarding any decisions;
- That consideration is given to the creation of the position of the Commissioner for the Aged, and they are to act as a champion for older people.

The NZLC rejected:

- A central registration system holding all EPAs. It was acknowledged it would be easier for professionals and institutions to find out if an EPA existed and would prevent multiple EPAs from being made, but the NZLC believed the benefits did not outweigh the resultant expense and loss of privacy.[98]
- A certificate of capacity by a medical practitioner be required before an EPA could be created. They saw that solicitors regularly make similar judgements regarding capacity in relation to the execution of wills and consult medical practitioners if in doubt.
- Specialists should do the competency assessments, not medical practitioners, before the EPA can be invoked. The belief was that this role should stay with medical practitioners and, if there was any doubt, the medical practitioner should obtain a specialist opinion.

D Analysis of Proposed Changes

These recommendations will now be analysed in light of B&S's framework.

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[98] New Zealand Law Commission report *Misuse of Enduring Powers of Attorney* (NZLC R71, Wellington, 2001) 18.

(i) The law ignores they exist

The whole point of the review was to combat the criticism that the PPPR Act basically ignored older people exist and hence ignored any of their specific associated problems under the Act.

The NZLC rejected the idea of a central register on the grounds it would be too expensive. Expense is a matter of judgement and how much a government wants to spend will be largely determined by how much they see this as an important issue. In order for people to be fully protected a central register would be a good way to monitor the actions of donors and attorneys.

There are expenses involved in not having a central register. There are costs involved of keeping someone in hospital whilst health professionals try to determine whether or not a person has an EPA. A person may also be kept in hospital at great expense to the health system while health professionals make a PPPR application in the false belief that an EPA does not exist.[99] In addition to these expenses, are the social costs of elder abuse. To avoid these expenses it may be more cost effective to fund a central register.

If the government decides that a register is not necessary on the grounds that it is too expensive, it suggests that elder abuse is not recognised as an important enough issue to require resources. It indicates that the needs of older people are so low on the list of priorities that they can be set aside and in effect ignored, which is consistent with B&S's first theme.

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[99] Rachel Kent "Misuse of Enduring Powers of Attorney" (August 2003) 34 VUWLR 497, 515.

(ii) The law treats them as frail and incapable and in need of special protection

The NZLC thought there needed to be criteria for when a solicitor is required. It recommended it be limited to cases where:

- the attorney is not the donor's spouse or partner *and*
- if the donor is over 68 years old *or*
- where the donor is in an institution.

So, for example, where a 69-year-old creates an EPA and makes a daughter or son an attorney they will need to get legal advice.

The NZLC acknowledged, "whatever age we impose is likely to attract taunts that we are purporting to impose an age of senility" but the question is why 68? People do suffer early onset dementia on occasion. The age is very arbitrary and as the NZLC almost acknowledges, it is ageist.[100] The proposed law treats the majority of older people as frail, incapable and in need of special protection, which is consistent with B&S's second theme.

The NZLC has also made an assumption that people in institutions are more dependent than those in the community and therefore are in need of special protection. In line with the 'ageing in place' policy[101] (supporting peoples' wish to stay at home), there are people in their own homes receiving a large amount of home care and these people are just as dependent as those in institutions. This assumption is, therefore, misguided and many older people in the community are just as in need of protection.

It must also be noted that, although it is mainly sons and daughters who abuse, spousal abuse does occur.[102]

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[100] Rachel Kent, above, 505.

[101] See Ministry of Health *Health of Older People Strategy* (2002) 59, objective 8.1.3 states that the Ministry of Health will work with the DHBs to develop community based options to support people to age in place.

[102] Age Concern Auckland Incorporated *Current and Future Implications for the Older Population with the Enduring Power of Attorney Provision* (submission to Law Commission) Auckland 72 (Appendix 1 C 1).

The criteria proposed by the NZLC is flawed and consistent with second B&S's theme, that the law treats older people as frail and incapable and in need of special protection. If you are under 68 years and you make someone other than your spouse or partner an attorney you will not need to get legal advice. But if you are over 68 years you will need advice. All people who make an EPA, regardless age or perceived frailty or vulnerability, should be required to get legal advice simply because of the importance of the decision.

(iii) The law treats them the same as younger adults even when their needs are different

One of the reasons put forward by the NZLC for rejecting the creation of a central register was that it would be an invasion of people's privacy. In life we register our cars, births, deaths and marriages. Given the power an attorney holds, one would think that their actions should be open to some public scrutiny. In relation to B&S's themes, older people here are being treated the same as younger adults when in fact their need to be protected requires that they receive different treatment. As with any legislation designed to protect people, there is an assumption that in order for this to be effective, people's privacy will be need to be compromised to some extent.[103]

In order to get consistency within the Act and treat older adults the same as younger adults, the NZLC wanted the definition of mentally incapable in section 94 (1)(b) PPPR Act to be reworded to be more like the provision in section 12(2). The NZLC recommended that section 94 (1)(b) be narrowed from *wholly or partly* lacking the capacity to understand the nature and foresee the consequences of their decisions, to simply *wholly* lacking capacity.[104] This appears to solve the problem of the law treating

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[103] See the Children, Young Persons and their Families Act 1989, s 15 – 18, which gives social workers and police the power to investigate allegations of child abuse and neglect.
[104] New Zealand Law Commission report *Misuse of Enduring Powers of Attorney* (NZLC R71, Wellington, 2001) 13.

older people differently to younger people when their needs are the same, however the test itself must be examined before a conclusion can be drawn.

One Psychogeriatrician has stated that when someone is 'wholly' lacking in capacity, the person is either "dead or unconscious."[105] It is at the very extreme end of the scale. Many people with partial competence still need assistance with making decisions. The same can be said for younger people with intellectual disabilities. A person may be competent in one area and yet need help with another. For example, a person may be very good at managing their own care and welfare, but be very poor at managing their money. This applies to all ages. In relation to B&S's third theme, the NZLC's attempt at treating older people the same as younger people is inadequate, not because they have different needs, but because the test itself is flawed. This needs to be addressed and worked on by those who understand how competency is determined, for example, clinicians who work in this area.

(iv) The law treats them differently to younger adults when they should be treated the same

The current law is unclear as to when an EPA for welfare can and should be invoked. The NZLC rejected the idea that competence assessments should be done routinely by a specialist for the elderly. Instead the NZLC recommended that a medical practitioner would have to certify in writing that someone is mentally incapable before an EPA for care and welfare can be invoked. The NZLC believed that requiring a specialist would be impractical due to a lack of specialists in this area.

Competency assessments are a very specialised area and many people who made submissions to the NZLC were concerned about general

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[105] Dr Crawford Duncan, Psychogeriatrician quoted in Rachel Kent "Misuse of Enduring Powers of Attorney" (August 2003) 34 VUWLR 497, 506.

practitioners holding this role.[106] In comparison to the PPPR Act, if a younger person needs to be committed to a hospital for treatment under the Mental Health (Compulsory Assessment and Treatment Act) Act 1992, both a medical practitioner and a psychiatrist are required to assess the person.[107] The Mental Health Act 1992 clearly recognises that removing a person's rights to make their own decisions is very serious step. Older people's rights to freedom are just as important as the rights of younger people, however, the NZLC appears to have missed this point. It can therefore be seen that older people are treated differently to younger adults by the law, however, they need to be treated the same. This is consistent with the author's fourth theme.

[106] See New Zealand Law Commission report *Misuse of Enduring Powers of Attorney* (NZLC R71, Wellington, 2001) 12.
[107] Mental Health (Compulsory Assessment and Treatment) Act 1992, s 8B, s 8A and S 9.

VI INCOME AND ASSET TESTING

A The Current Law

If a person over the age of 65 years requires residential care, whether this is in a rest home or private hospital, they are presently income and asset tested by Work and Income New Zealand. An income test is administered for those people aged between 50- 64 years old who are single, widowed or with no dependants, and who are considered to be "close in interest." People who are "close in interest" have a disability or disease that would normally occur for someone who is older. An example of this is if they are incapacitated as a result of having a stroke or suffer from an early onset of dementia. A geriatrician normally decides if they are "close in interest".[108]

If they have over the minimum amount allowed, then they have to pay for their care privately. When their money is down to the minimum amount, they then qualify for a 'residential care subsidy' and the state pays this directly to the institution.

The minimum amounts allowed are as follows:

- $15,000 for a single or widowed person in care;
- $30,000 for a couple who are both in care
- $45,000 for a couple when only one is in care. The partner not in care can also keep their house and car.

Assets such as the house, holiday home, car, shares, bonds and savings are all taken into account during the income and asset test. The most anyone has to pay is capped at $636 per week and so if the cost of the care is greater than this amount per week, the rest is state funded.

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[108] Office of the Associate Minister of Health "Memorandum for Cabinet Education and Health Committee: Removal of Asset Testing for Long Term Residential Care: Detailed Policy Proposals" (13 June 2002) 5.

People eligible for residential care subsidy receive a clothing allowance of $209.64 per year and a weekly allowance for personal items, for example, toiletries, of $29.60.

B Analysis of the Current Law

The first three themes that B&S suggest are not applicable, however, the author's fourth theme can be applied.

(i) The law treats them differently to younger adults when they should be treated the same

Income and asset testing for older people going into care is stressful and often unexpected. Older people are often very surprised once given the information about the income and asset test and are dismayed at the thought of losing their home in order to pay for their care. Often they have always wanted to pass their property onto their children and this is hugely disappointing to them.

The main problem with the current regime (as will be demonstrated below) is that it discriminates on the basis of age, marital status, family status, employment status and disability.[109] Contributions towards the cost of care are determined on those factors. Discrimination on all of these grounds is prohibited by s 21 of the Human Rights Act 1993.

The current regime discriminates in two ways. Firstly, there is discrimination as to whether the tests are applied or not, and secondly, discrimination occurs with regards to the actual income and asset thresholds before residential care funding applies.[110]

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[109] Ministry of Health "Health Report: Removal of Asset Testing for Long Term Residential Care: Detailed Policy Proposals" (26 August 2002) 20022770, 12.
[110] Ministry of Health, above, 12.

For older people over 65 years, discrimination occurs because younger adults who need institutional care are not income and asset tested. When the income and asset regime was introduced,[111] this age discrimination was justified on the basis that everyone who requires residential care effectively makes the residence their home and so should be expected to contribute to the costs. However, the distinction between those over 65 and those under 65 was made because people over 65 were thought to have had time to save and acquire assets that they would run down if they were living in the community during their retirement years. Those under 65 would not be as likely to have done this. It was seen that it was only going to be cost effective to run a system that tested income and assets for those over 65. The revenue that the system would gather would outweigh the costs involved. This was not the case for those under 65.

> "This is the principal reason for the different income and asset testing regime between the two age groups. It is a pragmatic administrative issue, rather that one of intentional age discrimination."[112]

There are a number of arguments against asset depletion to pay for long-term care in old age. Sickness is beyond the older person's control and they are being financially penalised for this. Older people cannot protect themselves fully against incapacity or sickness in old age as it is a contingent event.[113] It unfairly disadvantages the "rich sick" over the "rich well". Asset testing may be a disincentive to save and prepare financially for retirement which is exactly what the government is encouraging. Also asset testing encourages financial dependence as older people shift their funds over to family early on.

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[111] Asset testing was introduced in 1993.
[112] Ministry of Health "Health Report: Removal of Asset Testing for Long Term Residential Care: Detailed Policy Proposals" (26 August 2002) 20022770, 13.
[113] A John Campbell Professor of Geriatric Medicine "Funding Long Term Care for Elderly People" New Zealand Medical Journal (24 May 1995) 193, 194.

John Campbell, Professor of Geriatric Medicine[114] asserts that

> "income has a significant independent effect on the risk of functional impairment. A poor and dependent economic situation is a factor associated with physical disability and dependency in old age."

Those people who are deemed to be "close in interest" who are 50-64 years are income tested if they are single/widowed and have no dependants. This is discrimination on the basis of marital status, family status and disability. The rationale for this is that they are not expected to return home and need to contribute to their living costs. This puts Maori and Pacific people at a disadvantage as they are more likely to suffer from age–related disabilities at a young age. If all people who needed residential care regardless of age were income tested, this would remove this discrimination on all of these grounds.[115]

Further to the suggested forms of discrimination, the current regime also discriminates indirectly on the basis of gender. Women live longer than men[116] and are more likely to age alone.[117] They are more likely than men to have long-term chronic illnesses and multiple disabilities.[118]Men tend to die quickly and of acute illnesses. Women are therefore more likely to require residential care and indeed make up the majority of the residents.[119]

With regards to the theoretical framework, this law clearly fits within the fourth theme (identified by the author) as the law treats older people differently to younger adults when they should be treated the same. People

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[114] A John Campbell Professor of Geriatric Medicine "Funding Long Term Care for Elderly People" New Zealand Medical Journal (24 May 1995) 193, 195.
[115] Ministry of Health "Health Report: Removal of Asset Testing for Long Term Residential Care: Detailed Policy Proposals" (26 August 2002) 20022770, 13.
[116] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 9
[117] Ministry of Social Development, above, 12.
[118] Ministry of Health "Health Report: Removal of Asset Testing for Long Term Residential Care: Detailed Policy Proposals" (26 August 2002) 20022770, 14.
[119] Ministry of Health *Health of Older People in New Zealand: A Statistical Reference* (2002) 94.

in both groups occasionally require residential care so there should not be the age distinction.

C The Proposed Changes

In response to the fact that this legislation discriminated on the basis of age, in April 2002, the Hon Ruth Dyson announced that as from 1 July 2005 new legislation will be introduced to gradually remove asset testing.[120] The levels are to be raised progressively.

From the 1 July 2005 the thresholds will increase:

- from $15,000 to $150,000 for a single or widowed person in care;
- from $30,000 to $150,000 for couples who are both in care;
- from $45,000 to $55,000 for couples with one partner in care and the car and house is still exempt.

These asset exemption thresholds will be increased by $10,000 per year from 1 July 2006. Eventually it will be totally removed. Asset testing for those "close in interest" will be removed fully by 1 July 2005.[121] All assets will be eligible for exemption, including the house, holiday home, car, shares, bonds and savings.[122] Income testing will remain.

The Hon Ruth Dyson believes that by removing asset testing progressively, the human rights considerations will be balanced against the substantial costs involved with removing asset testing.[123]

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[120] The new legislation proposed is the *Social Security (Removal of Asset Testing for long-term Residential Care) Amendment Bill.*

[121] Ministry of Health "Health Report: Removal of Asset testing for the Long Term Residential Care: Paper for POL on the Preferred Approach" (19 March 2003) 20033574, 1.

[122] Hon Ruth Dyson "Asset testing to be removed" (2 April 2003) http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=16395 (last accessed 15 September, 2003).

[123] Hon Ruth Dyson "Asset testing to be removed" (2 April 2003) http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=16395 (last accessed 15 September, 2003).

D Analysis of Proposed Changes

Again the first three themes that B&S suggest are not applicable, however, the author's fourth identified theme can be applied to the proposed changes.

(i) The law treats them differently to younger adults when they should be treated the same

Although the intention of the proposed law change was to address concerns about the unfair impact of the policy on older people, this law will not achieve compliance with the Human Rights Act 1993. Income testing will remain which means that older adults will still be treated differently to younger adults when they should be treated the same. Even though compliance with the Human Rights Act 1993 will gradually improve as the asset test for older people is removed, discrimination on the basis of age will remain because of the continuation of the income test.

Asset testing will not be abolished immediately but instead it will only be gradually phased out. This is apparently because of the substantial costs involved. By 2005-06 the expected costs were $103 million and by 2020 the costs are expected to be $345 million.[124] However as Graham Tapper, President of Christchurch Grey Power asserts:[125]

> "This same Government can find $800m for an airline and many millions of dollars for Maori TV."

Grey Power has called for a complete repeal of the income and asset testing policies on the grounds that they discriminate on the basis of age.[126]

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[124] Michelle Brooker "Elderly asset testing eased" (3 April 2003) *The Press – City Edition* Christchurch, 12.
[125] Graham Tapper, Grey Power Christchurch, President quoted in Michelle Brooker "Elderly asset testing eased" (3 April 2003) *The Press – City Edition* Christchurch, 12.
[126] Ron Baker, Health Spokesperson Grey Power "Submission to the Social Services Select Committee on the Social Security (Residential care) Amendment" (27 August 1998) 1.

In their submission they make reference to Article 25 of the Universal Declaration of Human Rights[127] which states:

> "Everyone has the right to medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his/her control."

Long-term care has two financial components.[128] There are the medical, nursing and rehabilitation costs and then there are the accommodation and living costs. If an older person does have a high income then it is reasonable to charge for living expenses as everyone is subject to these and older people would be paying for these costs if they were living independently in the community. However as no one else is subject to the cost of medical, nursing or rehabilitation expenses, it is unfair to make older people pay for these services. This is a clear example of where older people are treated differently to the younger adults when they should be treated the same.

With regards to the asset test, the Green Party responded to the proposal stating they were pleased the Government was finally getting around to changing "the insidious and unfair asset testing regime" but that they would prefer it started sooner.[129] They stated they were concerned that some families would keep older people at home, who actually needed residential care, in order to preserve family assets.

There is some anecdotal evidence that this has already been occurring. One of the members of the Age Concern Elder Abuse and Neglect Team in Auckland, for example, has had several cases where this has been the issue and families have kept an older relative at home where they have clearly

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[127] Universal Declaration on Human Rights, art 25, in The International Bill of Human Rights, no.1 (10 December 1948) A Compilation of International Instruments Vol 1 (First Part) (United Nations, Geneva and New York, 1994) 1.
[128] A John Campbell Professor of Geriatric Medicine "Funding Long Term Care for Elderly People" New Zealand Medical Journal (24 May 1995) 193, 194.
[129] Sue Kedgley and Mike Ward "Asset testing will be Aged before it starts" (2 April 2003) Green Party of Aotearoa New Zealand <http://www.greens.org.nz/searchdocs/PR6178.html> (last accessed 8 August 2003).

needed residential care. The older person has been at risk and not had their care needs provided for at home. This is all in order to preserve the family home. To promise a change at some future date has put and will continue to put older people at risk whereas younger adults are not subject to this risk. Again older people are treated differently when they should be treated the same.

Removal of the asset test will favour those who are already asset rich, for example, those who own their own home. This does not assist those who are on a lower income as they are less likely to build up assets. Coupled with this is that the financial burden of removing asset testing will fall most heavily on the working age population, so those on lower incomes will be taxed more.[130] They will, therefore, be disadvantaged by these proposed changes.

The removal of the asset test will also disadvantage the Maori and Pacific Island population. They are less likely to survive into old age or use residential care but will still be required to contribute a higher amount of tax in order to fund residential care. One of the emerging issues identified by the Ministry of Social Development in their Positive Ageing Report was that "improving outcomes for younger Maori and Pacific people is essential to prevent material disadvantages extending into old age."[131] If the removal of asset testing is going to be more of a financial burden on these two groups then the material disadvantages will most certainly extend into old age. Older Maori currently have a much lower living standard than non-Maori[132] and this may well continue if the proposed changes come into affect.

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[130] Ministry of Health "Health Report: Further Options for Changing the Means Testing Regime for Long-Term Residential Care" (4 December 2002) HC 43-06-2-2, 5.
[131] Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001) 20.
[132] Ministry of Social Development, above, 25.

The gradual removal of asset testing will start to bring the current policy into compliance with the Human Rights Act 1993. However, disturbingly, because these changes have been delayed until 2005, some older people may be at risk of abuse or neglect from family members who wish to retain the family assets. Both income and asset testing should be abolished completely if the government is truly committed to treating older people the same as younger people. The removal of asset testing alone may disadvantage those who do not use residential care or survive until old age, for example Maori and Pacific Island people.

VII RIGHTS OF GRANDPARENTS

Some grandparents want a full and active role in bringing up and caring for their grandchildren. Some are able to participate in their grandchildren's lives without any legal intervention. However, difficulties do arise in family relationships. If grandparents think that the child's best interests are being overlooked or indeed ignored, they will occasionally need to resort to legal remedies.

Under the law, their rights to this are protected to some degree. However, some grandparent organisations have argued this protection is inadequate and they should have more rights in terms of custody, access, guardianship and adoption.[133]

Issues to do with grandparents are generally seen as issues to do with older people.[134] It is, however, important to note that not all grandparents are over 65 years. As the majority of grandparents are over 65 years and are therefore "older people" (as defined by various government policies),[135] I will proceed for the purposes of this research paper on the basis that grandparents are "older people".

The current laws in relation to custody, access and guardianship will firstly be analysed in relation to B&S's themes. The proposed Care of Children Bill will then be analysed. Secondly, the current adoption laws and the proposed new laws will then be discussed as to how they affect grandparents and both will be analysed under B&S's framework.

Underlying this analysis is the question as to whether grandparents

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[133] See "Grandparents Raising Grandchildren" http://www.raisinggrandchildren.org.nz/disc3_frm.htm (last accessed 08.07.03).

[134] For example, see Peter Connor and Alistaire Hall "Elder Law" (New Zealand Law Society Seminar Papers, May 2003) 49 – 54 where there is a section about grandparents rights.

[135] See generally Ministry of Social Development *Positive Ageing in New Zealand, Diversity, Participation and Change* (2001); Ministry of Health *Health of Older People in New Zealand: A Statistical Reference* (2002).

should be given more rights under the law to contribute to the upbringing of grandchildren. This assumes that grandparents play a major role in grandchildren's lives and that contact between grandchildren and grandparents is going to be beneficial for all parties. Interestingly, Beaulieu and Spencer point out that in a study on healthy ageing, contact with friends and peers is more important than increased contact with family members.[136] Whether this study is applicable across cultures is unknown.

A Custody – The Current Law

Under section 11 of the Guardianship Act 1968, the Family Court has the jurisdiction to make custody orders with respect to a child, subject to such conditions as the court thinks fit.

S 11(a) states that a father, mother, stepparent or guardian of a child can apply for custody. Under s 11(b), however, "any other person" can apply for a custody order with leave of the court.

In *Tito v Tito,*[137] a father of a 3-year-old boy wanted his parents, the paternal grandparents to have custody of the boy. No steps were taken by the grandparents to make an application of their own. The Court of Appeal had to decide if it had the jurisdiction to grant a custody order when, under s 11(1) a father, mother, step-parent or a guardian, applied for a someone else who is not a party, for example, a grandparent, to have custody.

The Court decided it did have the jurisdiction as under s 11(1) the Court is authorised to make such a custody order as it thinks fit.[138] In any case the best interests of the child were always the paramount consideration

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[136] Marie Beaulieu and Charmaine Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psychosocial and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (September, 1999), 14; http://www.lcc.gc.ca/en/themes/pr/oa/spencer/spencer/html (last accessed 29.06.03) quoting a study by J.A Mancini "Friend interaction, competence and morale in old age" (1980) 2(4) Research on Ageing 416-431.

[137] *Tito v Tito* [1980] 2 NZLR 257.

[138] *Tito v Tito* [1980] 2 NZLR, 257, 258.

under s 23 Guardianship Act 1968.[139] A Court would of course have to be satisfied that they were willing to take on the responsibility.[140]

This kind of decision is uncommon, however, it does give the Court the power to make an order where granting custody to the father or mother is not in the best interests to the child and these will be best met by a grandparent or any other person.[141] But in most cases, a grandparent will firstly have to apply for leave of the Court if they wish to gain custody of a child. They do not have an automatic right or statutory status in s 11.

B Analysis of the Current Custody Laws

(i) The law ignores they exist

At present, the law states that only a father, mother, stepparent or guardian of a child can apply for custody directly.[142] S 11 (b) does allow for 'any other person' to apply for a custody order with leave of the Court.[143] A grandparent, unless a guardian, therefore has no automatic right to apply and has in fact no more rights than a distant relative or non relative.[144] When assessing what is in the best interests of a child in terms of custody, a grandparent is often an obvious person to consider. This law is consistent with B&S's first theme, the law ignores they exist as they are not specifically mentioned in s 11.

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[139] *Tito v Tito* [1980] 2 NZLR, 257, 261.
[140] *Tito v Tito* [1980] 2 NZLR, 257, 259.
[141] Peter Connor and Alistaire Hall "Elder Law" (New Zealand Law Society Seminar Papers, May 2003) 50; see *A v T* [1987] NZ Recent Law, 397, where a grandmother was granted custody as the mother and father were considered too immature to care for the child.
[142] Guardianship Act 1968, s 11(a).
[143] Guardianship Act 1968, s 11(b).
[144] Peter Connor and Alistaire Hall "Elder Law" (New Zealand Law Society Seminar Papers, May 2003) 50.

(ii) The law treats them as frail and incapable and in need of special protection

This theme does not apply here.

(iii) The law treats them the same as younger adults even when their needs are different

Under this law, grandparents are treated the same as younger adults in the family/whanau, that is, neither they, nor the younger adults, for example aunts or uncles, have automatic right to apply for custody. They should however, be mentioned as a specific group in s 11(a) allowing them to apply for custody. Wider whanau members should also have similar rights to apply for custody. In making a decision as to who should have custody, the best interests of the child is the paramount consideration[145] and the law cannot assume that grandparents, over aunts or uncles, are the best people to have custody. In saying this, grandparents and younger family members should have increased, but similar rights under the custody laws.

In some cultures grandparents have an elevated status above the younger family members. In Paheka society, although grandparents play a very important part in the grandchild's life, in general it is perhaps not as prominent as that in the Maori or in Pacific Island cultures.

In Maori society the relationship between grandparents and grandchildren is extremely important.[146] The role of grandparents focuses on three main activities. These include praising the child and fostering self-esteem, helping the child develop verbal skills through storytelling and discussion, and having discussions about sex and emotional matters.[147]

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[145] Guardianship Act 1968, s 23.
[146] Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (2 ed, Lexisnexis Butterworths, Wellington, 2002) 54.

In terms of custody, a feature of the whanau is that children often move between different households including that of the grandparent.[148] Given the role that whanau and in particular, grandparents play in a child's life, s 11(a) is inconsistent with tikanga Maori, where only parents, stepparents or guardians of a child may apply for custody.[149]

It would be unwise to grant grandparents greater statutory rights than other younger family members given that granting custody to grandparents may not be in the best interests of the child, but the importance of their role does need to be recognised in some way. This is probably more of a matter of policy, rather than law. If a policy were developed recognising the importance of the grandparent role, this could be given effect in case law.

In terms of B&S's third theme it is clear that the law treats older people the same as the younger people in the family. However it is indicated that different treatment is required as the role and status of grandparents within a family requires some form of recognition. This can probably be best achieved by the development of a policy on this issue.

(iv) The law treats them differently to younger adults when they should be treated the same

In 2001 in New Zealand, over 4000 grandparents were caring for their grandchildren full time.[150] In their submission to the Ministry of Justice regarding the review of the Guardianship law, Grandparents Raising Grandchildren stated that many grandparents are placed in the situation of having to care for grandchildren because of emotional or psychological problems of their own adult children.[151] These problems include mental illness, substance abuse, domestic violence or neglect or abandonment.

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[147] Mark Henaghan and Bill Atkin, above, 54.
[148] Mark Hennagan and Bill Atkin, above, 60.
[149] Mark Hennagan and Bill Atkin, above, 59.
[150] Department of Statistics New Zealand "2002 Snapshot: Children" 10; http://www.stat.govt.nz (last accessed 10.07.03).
[151] Grandparents Raising Grandchildren *Review of Guardianship and Families Act* (submission to the Ministry of Justice, October 2000) 2.

Often the children are traumatised, are difficult to manage on a day-day basis and the Children, Young Persons and their Families Service are involved.

A major issue raised in their submission was that grandparents are often receiving no financial support from the parents or the state.[152] This is sometimes because of fear of intimidation and violence from the parents who are in receipt of the Domestic Purposes Benefit in respect of the children and are defrauding the state. Grandparents Raising Grandchildren argue that if a child is classified as needing care and protection under the CYPFs Act 1989, then they as grandparents should be receiving payments like foster parents. They submit that this inequity between caregivers is discriminatory and not fair to the grandchildren.[153]

In terms of Beaulieu and Spencer's themes, it can be seen that the law/policy treats grandparents and foster parents (often younger adults) differently where there is a strong argument for them being treated as the same as foster parents. There should be some financial recompense given to grandparents for caring for any extra dependants. This should be at the same rate as that given to foster parents as their role is fundamentally the same as foster parents in these circumstances.

C Access – the Current Law

The court has power to make access orders to a non-custodial parent under s 15 of the Guardianship Act 1968. Only a parent has an automatic right to apply for an access order. Unlike s 11 there is no provision for 'any other person' to seek leave of the Court to apply for access.

If other relatives or a grandparent wants to apply for access they must do so under s 16. A grandparent can apply under s 16(a) if the

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[152] Grandparents Raising Grandchildren *Review of Guardianship and Families Act* (submission to the Ministry of Justice, October 2000) 13.
[153] Grandparents Raising Grandchildren, above, 14.

grandparent's child is the parent of that grandchild, and only if the parent of the grandchild:

- has died; or
- has been refused access to the child by a court; or
- has access to the child but is not making any attempt to exercise access to the child.[154]

In *Tito v Tito*, the Court of Appeal held that Parliament did not give grandparents the same rights as parents regarding access in the Guardianship Act 1968, otherwise this would have been indicated.[155] In this case Richardson J looked at the language in s 11(2) which states that a Court can make a custody order and this order "may be made subject to such conditions as the Court thinks fit."[156] He questioned whether an order as to custody might be subject to the condition that the person, who was granted custody, allows access in favour of someone other than the parent or stepparent. Richardson J thought that the language was "wide enough to permit the imposition of such a condition" and he thought that this course could be followed as a matter of jurisdiction.[157]

But Richardson J thought there was a danger involved as regards to the enforcement of any such order. Section 19 sets out a procedure for the enforcement of access rights whereby there can be a warrant issued to a social worker, any constable or other person to take possession of the child and deliver them to the person to whom should have access. However an application for a warrant can only be made by a person who has been granted access by way of an order. Richardson did not think this would cover a person who had gained access as a condition under s 11(2).[158] S 19 therefore effectively renders any such condition unenforceable.

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[154] Guardianship Act 1968, s 16.
[155] *Tito v Tito* [1980] 2 NZLR 257, 261.
[156] *Tito v Tito,* above, 260.
[157] *Tito v Tito*, above, 260.
[158] *Tito v Tito*, above, 260.

Richardson goes on to say[159]:

> " It may therefore be that in practice it would be safer for a Court to indicate the importance of a child being allowed to see, for example, grandparents as part of its general welfare than to go to the extent of imposing a condition to that effect. The imposition of a condition might lead to the belief that there was an enforceable right of access whereas my present view, as I have said, is that that would not be its effect."

There have been cases where grandparents have claimed that their rights are protected by the New Zealand Bill of Rights 1990 (NZBORA). In the case of *B v M,* [160] a grandfather applied for leave to be made a second defendant in proceedings between parents in respect of the custody of an 11-year-old girl. He also wanted variation to the custody order to allow him access to the child. The Family Court had previously awarded the mother (his daughter) custody with a condition that the child should see her maternal grandfather. The girl had previously complained that the grandfather had sexually molested her. He was subsequently tried and acquitted.

The High Court stated that the Family Court had neglected to look at s 17 Guardianship Act 1968 which provides the Court with the authority to vary or discharge a custody or access order. "Any person affected by the order" can make the application.[161] The grandfather was seen to be affected by the order as it deprived him of access to his granddaughter.[162]

The High Court also held that a grandfather's right to "ordinary social intercourse" with his granddaughter was a part of his freedom of association under section 17 of the NZBORA.[163] Furthermore, he had the right to natural justice under s 27 NZBORA and therefore had a right to be heard by a Court which had deprived him of this freedom.

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[159] *Tito v Tito*, above, 260.
[160] *B v M* [1997] 3 NZLR 202.
[161] Guardianship Act 1968, s 17 (3).
[162] *B v M*, above, 205.
[163] *B v M* [1997] 3 NZLR 202, 206.

D Analysis of the Current Access Laws

(i) The law ignores they exist

Grandparents do not have automatic right to apply for access. Only a parent has this right and there is no provision for 'any other person' to seek leave of the Court to apply for access. Under s 16, grandparents are given limited rights to apply if the parent has died or that parent has been refused access by the Court or is not exercising their right to access. Although grandparents are specifically mentioned and given very limited rights in s 16, the law does not give grandparents automatic rights to apply for access. The law does not recognise that contact between grandparents and grandchildren can be very beneficial to both parties and that provision should be made for this regardless of the status of the parent's relationship. In effect the role of grandparents is not given the recognition it deserves by the law and therefore the access laws in general, ignore grandparents exist. This is consistent with B&S's first theme.

(ii) The law treats them as frail and incapable and in need of special protection

Not applicable here.

(iii) The law treats them the same as younger adults even when their needs are different

A number of submissions to the Ministry of Justice regarding the Guardianship Act were received from grandparents who wanted the law to change to enable them to have access to their grandchildren.[164] Grandparents Raising Grandchildren argue that the current law has the

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[164] Ministry of Justice *Responsibilities for Children: Especially when Parents Part - Summary of Submissions* (Wellington, 2001) 17.

effect of children being unable to maintain effective relationships with grandparents or other relatives.[165]

Children can benefit from contact with their wider family as grandparents and other relatives often tend to play a part in conveying to children cultural values and attitudes, identity and family history.[166] Children need to be able to talk to someone other than their parents but who is a part of the family.[167] This would apply to most cultures. Some of the submissions to the Ministry of Justice suggested that grandparents be given special consideration under the law before the wider family.[168] It can therefore be seen that the law treats older people the same as younger adults when they need to be treated differently, not only for their own benefit but also for the benefit of the whole family. This is consistent with B&S's third theme.

(iv) The law treats them differently to younger adults when they should be treated the same

Not applicable here.

E Guardianship – The Current Law

Under s 6 of the Guardianship Act, a child's natural guardians are his or her mother and father. The father is only granted the status of guardian if he is married to the mother or is living with the mother at the time the child was born.[169]

Under s 10 (2), the Court is able to remove the guardianship powers of

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[165] Grandparents Raising Grandchildren *Review of Guardianship and Families Act* (submission to the Ministry of Justice, October 2000) 11.
[166] Ministry of Justice *Discussion Paper: Responsibilities for Children Especially when Parents Part: The Laws About Guardianship, Custody and Access* (August 2000) 4.
[167] Ministry of Justice *Responsibilities for Children: Especially when Parents Part - Summary of Submissions* (Wellington, 2001) 29.
[168] Ministry of Justice *Responsibilities for Children: Especially when Parents Part - Summary of Submissions* (Wellington, 2001) 30.
[169] Guardianship Act 1968, s 6(2).

a mother or father but only if there is grave concern about the parent's abilities as a guardian or if the parent is unwilling to exercise his or her responsibilities of a guardian.[170] A near relative can apply to the Court to remove the guardianship powers of a parent.[171] A near relative is defined in s 2 and includes stepparent, grandparent, aunt, uncle, brother or sister, including half brother or sister.[172]

The Court under s 8 can appoint a grandparent as a guardian. Unless the guardianship of the parents has been removed under s 10, the grandparent is an additional guardian to the child.

F Analysis of the Current Guardianship Laws

(i) The law ignores they exist

It cannot be said that the guardianship laws totally ignore grandparents exist as if a grandparent wishes to remove the guardianship rights of a parent they can do so under s 10 (1). They can apply to be guardians themselves under s 8 and if the parent's guardianship powers remain, they have the status as additional guardians.

(ii) The law treats them as frail and incapable and in need of special protection

Not applicable here.

(iii) The law treats them the same as younger adults when their needs are different

Under s 2 of the Guardianship Act 1968, grandparents are given the same status as other 'near relatives' and so are therefore treated the same as

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[170] Guardianship Act 1968, s 10(2).
[171] Guardianship Act 1968, s 10 (1).
[172] Guardianship Act 1968, s 2.

younger adults. As argued previously[173] however, grandparents' role and status need to be given some recognition. In saying this, the guardianship law should not assume that grandparents would be the best people to be guardians of grandchildren if the parents are unable or unwilling to fulfil this role. The paramount consideration is always the best interests of the child and of course some grandparents may not be suitable guardians.[174] But as a matter of policy, grandparents should be recognised as being very important people in terms of the well-being and functioning of a family/whanau. In terms of B&S's third theme, older people are treated the same as younger people by the law. Older people, however, require different treatment, not by law, but as a matter of policy.

(iv) The law treats them differently to younger adults when they should be treated the same

Not applicable here.

G Proposed Changes: The Care of Children Bill (and Analysis)

This Bill was introduced in June 2003. It replaces the current Guardianship Act 1968 as this Act is based around concepts of the traditional nuclear family. A new law was needed to encompass the diverse range of families that exist now including single parent families, extended families, reconstituted families and de facto relationships (including same sex de facto relationships).[175] The explanatory note to the Bill explains, "That challenge is magnified when the varied cultural dimensions of families are considered."[176]

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[173] See *Analysis of Current Custody Laws*, under sub-heading (iii).
[174] Guardianship Act 1968, s 23.
[175] Care of Children Bill 2003, no 54 - 1, (the explanatory note) 1.
[176] Care of Children Bill 2003, no 54 - 1, (the explanatory note) 1.

(i) The law ignores older people exist?

It is clear in the explanatory note that grandparents' rights to contribute to the upbringing of their grandchildren have strengthened under this Bill. The Bill sets out to fully recognise The United Conventions on the Rights of the Child (UNCROC), in particular articles 3, 5, 9, 12,and 18.[177] Article 5[178] states that:

> "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the *members of the extended family or community as provided for by local custom*, legal guardians or other persons legally responsible for the child...." (emphasis added)

The Bill is also influenced by the principles in sections 5 and 13 of the Children, Young Persons and their Families Act, 1989 (CYPF Act). Section 5 (a) states that wherever possible a child's family, whanau, hapu, iwi or family group should participate in the making of decisions affecting the child.[179] Section 13 (2) (a) states that the primary role for caring rests with family/whanau[180], which is very different from the Guardianship Act 1968 where the primary role rests with the parent or legal guardian.

The proposed law cannot be said to ignore grandparents exist as they are clearly part of the extended family that Article 5 of UNCROC refers to. Grandparents are also included in the family group/whanau which both s 5(a) and s 13 (2)(a) of the CYPF Act refers to.

(ii) The law treats them as frail and incapable and in need of special protection

Not applicable here.

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[177] Care of Children Bill 2003, no 54 – 1, (the explanatory note) 2.
[178] United Nations Convention on the Rights of the Child (2 September) 1577 UNTS 44, art 5.
[179] Children, Young Persons and their Families Act 1989, s 5 (a).

(iii) The law treats them the same as younger adults even when their needs are different

In terms of the actual clauses in the Bill, custody and access are replaced by "Parenting Orders."[181] Instead of using the terms 'custody,' the Bill uses the term "day-to-day care of the child[182] and instead of 'access' the word 'contact' is used.[183] This was to get away from concepts of ownership of children. If a child is no longer 'owned' by a parent or parents, it implies that greater access to that child is available for other members of the whanau/family.

Any 'eligible person' may apply for a parenting order and an eligible person includes a parent, a guardian, a stepparent or "any other person who is a member of the child's family, whanau, or other culturally recognised family group."[184] Clause 43 (1) (e) is similar to s 16 Guardianship Act 1968 where a grandparent can apply to have contact with the child if the parent has died, been refused contact by the Court or isn't exercising their rights to contact.

Under this Bill, grandparents have now got direct access to the Courts to apply for a parenting order. Grandparents are not expressly singled out as a separate class of persons but clearly come into the category of family group or whanau. Older people are therefore not treated any differently to other members of the family group which is consistent with B&S's third theme. As argued previously, grandparents should not necessarily be elevated above other younger family members in the statute but their role and status should be recognised as a matter of policy. In relation to B&S's theme, grandparents should therefore be treated differently to the younger members of the family/whanau.

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[180] Children, Young Persons and their Families Act 1989, s 13 (2)(a).
[181] Care of Children Bill 2003, no 54 – 1, cl 43 – 51.
[182] Care of Children Bill 2003, no 54 – 1, cl 44 (1) (a).
[183] Care of Children Bill 2003, no 54 – 1, cl 44 (1) (b).
[184] Care of Children Bill 2003, no 54 - 1, cl 43 (1)(d).

With regards to guardianship, clause 30 basically re-enacts s 10B Guardianship Act 1968. However, unlike s 10B, clause 30 specifies the range of persons who are "near relatives" who may apply for a guardianship order and so grandparents are specifically named. A grandparent has the right to apply for removal of a guardian under clause 28 which re-enacts s 10 of the 1968 Act. It appears that the Bill does not, therefore, grant grandparents any further rights in terms of guardianship. Again, grandparents should not be given any stronger statutory rights than other near relatives. They should, however, be recognised as having an important role within the family/whanau as a matter of policy.

(iv) The law treats them differently to younger adults when they should be treated the same

Not applicable here.

H Adoption – The Current Law

Under s 7 of the Adoption Act 1955, often just the mother needs to consent to an adoption. The father's consent will only be required if he is a guardian. No other family members need to be involved with the decision. Consent of the mother can be dispensed with if she has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child or failed to exercise the normal duties of parenthood.[185] Before making an adoption order the Court must be sure that the people seeking to adopt are "fit and proper people" and that the welfare and interests of the child will be promoted by the adoption.[186]

Historically adoption used to be secret and closed. The policy then changed after it was recognised that adopted children wanted to know who their birth parents were and birth parents were left wondering where their child was. Open adoption has developed where on-going communication

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[185] Adoption Act 1955, s 8.

between the child and the birth parents is encouraged. Open adoption, however, is not a legislative requirement and is only a policy.

In the case of *MR v Department of Social Welfare*, a grandparent was denied an adoption order as it was found that it was not in the child's best interests.[187] The Court was concerned that the change in status from grandchild to child would mean that the child's parent becomes his or her sister. The Court referred to the 1949 case of *In re DX (an Infant)*[188] where Vaisey J said:

> "The ostensible relationship of sisters between those who are in fact mother and child is unnatural and its creation might sow the seeds of grievous unhappiness for them both, and indeed, for the adopters themselves."

Vaisey J held the view that adoption orders in favour of grandparents "should be regarded as exceptional and made with great caution."[189] The Court in *MR v Department of Social Welfare* thought that the existing guardianship and custody orders in favour of the grandparent gave her sufficient control over the child and no adoption order was made.[190]

In contrast to this, in *Re T (An Adoption)*,[191] Tompkins J did not believe that adoption orders in favour of grandparents should only be made in exceptional circumstances nor did he consider that Vaisey J's view should be generally applied.[192] He thought that view did not reflect present day attitudes in New Zealand, "particularly in some sections in the community."[193] Tompkins J thought each case should be decided on an individual basis taking into account the best interests and welfare of the child. The case involved a Samoan family and the Court found that adoption was in accord with the Samoan culture and that the child was

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[186] Adoption Act 1955, s 11.
[187] Adoption Act 1955, s 11.
[188] *In re D X (an Infant)* [1949] ChD 320, 321.
[189] *In re D X (an Infant)* [1949] ChD 320, 321.
[190] *MR v Department of Social Welfare* (1986) 4 NZFLR 326, 329.
[191] *Re T (An Adoption)* [1995] 3 NZLR 373, 375.
[192] *Re T (An Adoption),* above, 376.
[193] *Re T (An Adoption),* above, 376.

already bonded to the applicant grandparents. The Judge suggested that if in the circumstances where an adoption order was not warranted, then guardianship in favour of the grandparents would suffice.

It is clear from these cases that the Courts are not agreed on whether to allow grandparents to adopt and that each case is looked at on an individual basis. The Courts seem more ready to allow a grandparent adoption in Maori or Pacific Island families where the grandparents are often more involved in the upbringing of grandchildren. The Courts have described that one of the most important aspects of adoption is the "security, stability and permanence" that it brings.[194] On the other hand a guardianship order is always open to review and under s 10 Guardianship Act 1968, it is easier to remove a non-parental guardian than a parental guardian. The guardianship order also ceases when the child turns 20 years old,[195] so the guardian has no legal connection with the child from then on.

I Analysis of the Current Adoption Laws

(i) The law ignores they exist

Section 7 requires, at the least, the mother's consent. It is clear that the law ignores any wishes or interests of the grandparents, which is consistent with B&S's first theme. The other relatives in the family are also ignored so the whole of the extended family is left out of the decision. This is in contrast to the Child, Young Persons and their Families Act 1989 where one of the main principles is that families play an important role in the life of a child and should be involved in decisions regarding the child's care and welfare.[196]

The main criticism around inter-family adoption revolves around the

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[194] *L v B* [1982] 1 NZFLR 232, 239.
[195] Guardianship Act 1968, s 9(4).
[196] Children, Young Persons and their Families Act 1989, s 5.

distortion of genealogical structures.[197] For example, if a daughter adopts a child to her parents, the child in effect becomes the birth mother's sister. This concern about the distortion of whakapapa is seen clearly in the cases of *MR v Department of Social Welfare*[198] and *In re DX (an Infant)*[199]. Although the Courts have also expressed another view such as that seen in *Re T (An Adoption)*,[200] where grandparents should have the right to adopt in some circumstances, the criticism still remains that this distorts family structures.

But grandparent adoption does not necessarily have to be analysed in this way. If the law were flexible enough to allow grandparents to adopt, they could still be termed "grandparents" within the family structure and yet still be granted full 'parental' rights under the law. All members of the family could still retain their genealogical position so their status within the family need not necessarily be altered at all. If open adoption became enforceable at law, there would be little danger of a child ever being left not knowing who their birth parents were on the one hand and who actually has full legal responsibility for them on the other. If this were the case then the law would not be criticised as ignoring older people existed.

(ii) The law treats them as frail and incapable and in need of special protection

Before making an adoption order the Court must be sure that the people seeking to adopt are "fit and proper people" and that the adoption will be in the best interests of the child. In *Re T (An Adoption)*, the Samoan grandparents case, Tompkins J had serious concerns about the grandfather's age. He was 63 years old and Tompkins J was concerned that the grandfather be around when the child was a teenager. They were granted the adoption order but only because the grandmother was 51 years

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[197] New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) 142.
[198] *MR v Department of Social Welfare* [1986] 4 NZFLR 326.
[199] *In re D X (an Infant)* [1949] ChD 320.
[200] *Re T (An Adoption)* [1995] 3 NZLR 373, 375.

old and so she was going to survive until the child was an adult. Here the law is treating older people (the grandfather) as frail, vulnerable and incapable which is consistent with B&S's second theme. It is also consistent with the fourth theme identified by the author that is, the law treats older people differently to younger adults when they should be treated the same.

If this case was heard now and an adoption order was not made on grounds of age, there would be a possible case for discrimination under the Human Rights Act 1993. The Court may suggest that under s 11 the child's best interests would not be met by being adopted by an older grandparent, however, one could argue that there are some men who become fathers around this age. It would be a ludicrous situation if the Court or any other authority were to suggest that the father was too old to be a father and it was therefore not in the child's best interests to remain with him.

(iii) The law treats them the same as younger adults even when their needs are different

Not applicable here.

(iv) The law treats them differently to younger adults when they should be treated the same

See the discussion of *Re T (An Adoption)* under *(ii)* above.

J Proposed Changes: The New Zealand Law Commission's Report (and Analysis)

In 2000, the New Zealand Law Commission (NZLC) reviewed the adoption laws. The Commission published a report entitled "Adoption and

it's Alternatives: A Different Approach and a New Framework."[201] The current laws have long been recognised as out-dated and in need of repeal.

The 1955 Adoption Act came out of the era when illegitimate children were frowned upon and adoption was a measure that dealt with the problem. The status of illegitimacy has now been abolished[202] however the NZLC realised that the law still needs to take into account situations where some parents cannot, or do not want to, take responsibility for their children.[203] The NZLC recommended that a new Care of Children Act incorporate adoption laws, however the Care of Children Bill presently before Parliament has not done this.

The NZLC looked at the context in which the adoption laws operate.[204] New Zealand is a party to the United Nations Declaration on Child Placement,[205]which provides:

Article 3

> The first priority is for a child to be cared for by his or her own parents.

Article 4

> When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an institution should be considered.

The NZLC looked at how the adoption laws could be modified to better reflect society today and the family structures. There were several

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[201] New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000).
[202] Status of Children Act 1969.
[203] New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) xv.
[204] New Zealand law Commission, above, 2- 4.
[205] United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (3 December 1986) A Compilation of International Instruments Vol 1 (First Part) (United Nations, Geneva and New York, 1994) 196.

recommendations and some of these will now be analysed in terms of B&S's themes.

(i) The law ignores they exist?

The NZLC has recommended that the range of people eligible to adopt should be relaxed. Adoption law has traditionally focussed, first upon the person's status and then secondly, looked at whether that person is suitable. The NZLC stated that status would no longer be an eligibility issue. The suitability of a specific person or couple to adopt a child will be determined on a case-by –case basis.[206] It is clear that grandparents will be given a better chance to adopt under this recommendation and so it cannot be said that the proposed law ignores older people exist. The proposed changes are therefore not consistent with B&S's first theme.

(ii) The law treats them as frail and incapable and in need of special protection

Not applicable here.

(iii) The law treats them the same as younger adults even when their needs are different

The NZLC also recommended that in keeping with Article 4 of the United Nations Declaration on Child Placement, it should be a legislative requirement to consider intra-family care in the first instance.[207] This should occur before adoption to non-related persons is considered. The NZLC thought it was desirable that the applicants are able to show an established relationship with the child, for example, by requiring the applicants to have lived with the child for three years preceding the

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[206] New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) 59.
[207] New Zealand Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) 141.

application.[208]Grandparents weren't singled out from the rest of the family group. In relation to B&S's third theme, older people are treated the same as younger adults under this proposed law.

As with custody, it is difficult to see any reason why grandparents should be given an elevated status above younger adults in the family in the case of adoption. It will be the best interests of the child that determines who will be the best person/s to adopt a child. Any adoption policy, however, could recognise the importance of a grandparent's role and status. This could, for example, take the form of the Social Workers involved having to consult with the grandparents as to who they consider to be the best people within the family to adopt the child (if it isn't the grandparents themselves applying).

The proposed law therefore treats grandparents the same as younger adults which is consistent with B&S's third theme and in these circumstances, grandparents do require different treatment.

(iv) The law treats them differently to younger adults when they should be treated the same

Not applicable here.

VIII CONCLUSION

Elder law is not well developed in the world but countries such as the United States of America, Canada and Australia all seem to be paying attention to the issues, problems and opportunities of Elder law. In general there is a growing awareness of the issues around ageing and the law in New Zealand. This field of law can only grow in importance as the population ages and by using the themes suggested in the Canadian Law Commission's report, this paper has presented a worthwhile analysis.

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[208] New Zealand Law Commission, above, 142.

Generally the law and policy makers in New Zealand are making changes that are favourable to older people and they have a critical role, along with the judiciary, in ensuring that the law treats older people with respect, fairness and consistency.

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