

1-1-1998

Sterilization: Choice, Right, or Requirement? A Comment on the Best Interests Test in *Re Eve*

Laura Fraser

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](#).

Recommended Citation

Laura Fraser, "Sterilization: Choice, Right, or Requirement? A Comment on the Best Interests Test in *Re Eve*" (1998) 7 Dal J Leg Stud 163.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

NOTES & COMMENTS

STERILIZATION: CHOICE, RIGHT, OR REQUIREMENT? A COMMENT ON THE BEST INTERESTS TEST IN *RE EVE*

LAURA FRASER[†]

I. INTRODUCTION

In 1986 the Supreme Court of Canada rendered its decision in *E. (Mrs.) v. Eve*.¹ In that case, an application was made by the mother of Eve asking the Court to consent under its *parens patriae* jurisdiction to the sterilization of her daughter for both menstrual management and contraceptive purposes. Eve was described by the trial judge as a 24 year old "mild to moderately" mentally incompetent person who "might be able to carry out the mechanical duties of a mother under supervision...[but] incapable of being a mother in any other sense."²

The Supreme Court of Canada concluded that an involuntary sterilization for a mentally incompetent woman for non-therapeutic reasons was unavailable in Canada. In rendering the Court's judgment, Justice LaForest stated, "...the procedure should never be authorized for non-therapeutic purposes under [the Court's] *parens patriae* jurisdiction."³

The "best interests" test has been widely adopted in Canada by both the courts and the legislatures as the standard of review when dealing with whether a substitute decision maker should be

[†] B. Comm. (Alberta), LL.B. anticipated 1998 (Dalhousie). This comment was presented as "Sterilization: Choice, Right, or Requirement? Determining What is in the Best Interests of Mentally Incompetent Persons" at the 9th Annual Canadian Bioethics Society Conference held in Halifax, Nova Scotia, October 16-18, 1997.

¹ *Re Eve*, [1986] 2 S.C.R. 388, [hereinafter *Eve*].

² *Ibid.* at 394.

³ *Supra* note 1 at 430-431. It should also be acknowledged that the provincial legislatures have also refused to implement legislation dealing directly with sterilization procedures for mentally incompetent adults fearing that such procedures are not in the "best interests" of these individuals.

permitted to consent to a sterilization procedure for an incompetent person. The question asked is usually whether this procedure is in the best interests of the particular patient in question; if so, then a substitute decision maker may consent to the procedure on the patient's behalf.⁴ However, as will be shown, the courts have generally misapplied the criteria concerning what is in a patient's "best interests" and have focused on what is medically necessary or "therapeutic." Sadly, other important practical considerations affecting the social and mental well-being of the patient in question as well as those persons closely connected to this person have been discarded.

This comment challenges the current "best interests" criteria as developed in the *Eve* case. The criteria are used to determine when it is appropriate to grant an involuntary sterilization order on behalf of a mentally incompetent person. It should be acknowledged at this point that my personal experience with my mentally incompetent sister is a factor in my discussion and additionally was an impetus for addressing this issue.

It will be suggested that the "best interests test," in its current form, has not been properly applied by the courts as it ignores important realities of physical and mental trauma surrounding childbirth for some mentally incompetent adults. In addition, it is my view that the current "best interests" standard is insufficient in that it fails to consider the resulting burdens on a third party to care for the child where a mentally incompetent adult cannot.

Both the history of eugenics in Canada and the requirement of informed consent have influenced the development of the "best interests" test and will thus be examined. Although valid in a contextual sense, I will argue that a more complete analysis of the best interests of a mentally incompetent person is needed—one that will examine the particular circumstances of the individual and those of a materially affected third party.

⁴ See for example the *Dependent Adults Act*, R.S.A. 1980, c. D-32, s. 20.1(1). In *Eve*, the court decided that this test was commensurate with the courts "*parens patriae*" jurisdiction which is also based on the court acting in the best interests of a person who is unable to care for or make decisions for herself. As Justice LaForest put it, "the discretion [given to the Court under the *parens patriae* jurisdiction] is to do what is necessary for the protection of the person for whose benefit it was exercised." *Eve*, *supra* note 1 at 427.

There are two limits on the discussion in this comment. The first is that I will only consider mentally incompetent adults, or persons who do not have the requisite legal capacity to make their own sterilization decisions. Much of the discussion will refer to mentally incompetent women. For purposes of this discussion, the term "mental incompetent" or "mentally incompetent person" will refer to those persons, male and female, suffering severe or profound mental retardation rather than mild or moderate mental retardation, mental illness or dementia.⁵ This limitation is based on the Alberta Institute of Law Research and Reform's statement in 1988 that "it is likely that all persons classified as severely or profoundly mentally retarded will be permanently mentally incompetent to make personal decisions about sterilization for any purpose".⁶ This is compared to mild or moderately incompetent persons where only some of those persons in a given category would be incompetent to make such decisions. Therefore, as the former cases are most likely to result in substituted decision making for the mentally incompetent person, it seems most effective when presenting my arguments, to limit the definition of "mental incompetent" to those suffering severe or profound mental retardation.

The second limit is in relation to the purpose for which sterilization is sought. Currently there are three reasons why a person, incompetent or otherwise, may seek a sterilization operation: medical treatment, menstrual management, and contraception.⁷ For purposes of this comment, sterilization or mentally incompetent individuals for the purpose of contraception shall be examined since it is this purpose which is the most controversial.⁸

⁵ This is unlike the condition of Eve who was found to be mild or moderately mentally incompetent. By limiting this comment to severely or profoundly mentally incompetent persons who are less likely to have the requisite legal capacity to consent to the procedure, the argument in favor of granting a sterilization is strengthened.

⁶ Institute of Law Research and Reform "Sterilization Decisions: Minors and Mentally Incompetent Adults" Discussion Paper No. 6 (Edmonton: University of Alberta, 1988) [hereinafter the *Alberta 1988 Report*].

⁷ *Ibid.* at 2.

⁸ See the *Alberta 1988 Report*, *supra* note 6 at 88:

Sterilization for contraception purposes presents more difficult

II. ARGUMENTS IN SUPPORT OF THE CURRENT LEGAL STATUS

1. Shameful History

The history of eugenics in Canada has played a significant role in the reluctance of the courts to issue an involuntary sterilization order. Eugenics is premised on the notion that a "perfect society" can and should be created by manipulation of the gene pool. Between 1928 and 1972, provincial legislation in Canada supported eugenics by enabling legislation that permitted the sterilization of persons who were assessed as "moronic" or idiots" by medical practitioners.⁹ Timothy Caulfield and Gerald Robertson in their

considerations. We are persuaded by the argument that there could be cases where a mentally incompetent person may experience benefits from a sterilization for contraception similar to those experienced by persons in the normal population. She may be spared the burden of caring for offspring when she lacks parenting skills, the financial resources to raise them* or the inclination to have them....She may...wish to be spared the heartache of having her child removed from her because of her inadequate parenting ability. She may desire to live a freer, less encumbered sexual life. Although because of her mental incompetence at law to make the decision, it must be made by another on her behalf, it is nevertheless arguable that it would be wrong to deprive her of access to a means of contraception that is increasingly the birth control of personal choice for others in society.

*The authors of the Alberta 1988 Report note that:

Sterilizing a mentally incompetent person because of the economic burden alone seems drastic but financial matters are a legitimate consideration for a mentally incompetent person and there may well be cases where it is equally appropriate to protect a mentally incompetent person from the added financial costs of children. Indeed, the Law Reform Commission of Canada has pointed out that the "additional financial burden of children on top of already existing economic problems may become the triggering factor for other psychological or emotional adjustments problems and may impair the ability to cope." [Law Reform Commission of Canada *Sterilization, Implications for Mentally Retarded and Mentally Ill Persons*, Working Paper 24, 1979 31.]

⁹ Two of the most notable are *The Sexual Sterilization Act*, S.A. 1928, c. 37, as

article *Eugenic Policies in Alberta: From the Systematic to the Systemic?*,¹⁰ point out that eugenic policies had a great impact on legislative decision making during this period; for example, the Province of Alberta endorsed 4,725 cases for sterilization, 2,822 of which were actually performed.¹¹

The "eugenics" movement was formed in 1904 by Sir Francis Gaulton who promoted what were termed "positive" and "negative" eugenics. The former encouraged procreation of those individuals who were seen as having desirable characteristics which would strengthen the gene pool of society, where the latter discouraged procreation by individuals who were viewed as possessing inferior or undesirable characteristics.¹² Of course, these policies were based on the assumption that many, if not all, such characteristics were genetic and therefore hereditary.¹³

Nancy Leys Stepan notes that with the spread of the eugenic theory in the United States and Europe, socially successful people were also taken to be genetically and innately well endowed while the poor and unsuccessful were viewed as products of poor heredity.¹⁴ As a result, this latter group as well as other persons seen as mentally incompetent, mentally defective, idiots, and criminals, were forced to either undergo sterilization or in the alternative, be permanently institutionalized, segregated, or prohibited from marriage.¹⁵

One of the most unfortunate effects of such sterilization policies as exemplified in Alberta, was the realization that many of the procedures performed were based on incorrect assessments of so-called mentally incompetent persons' capabilities and/or Intelligence Quotient (IQ). In one of the more recent cases on this topic, *Muir v. Alberta*,¹⁶ a fifty year old woman sued the Alberta Government for sterilizing her at age fourteen. She had been classified as a "mental defective" under the Provincial *Sexual*

am. by 1937, c. 47; R.S.A. 1942, c. 194; and *The Sexual Sterilization Act*, R.S.B.C. 1960, c. 353.

¹⁰ (1996) 35:1 Alta. L.R. (3rd) 59.

¹¹ *Ibid.* at 61.

¹² *Supra* note 10 at 64.

¹³ *Ibid.*

¹⁴ *The Hour of Eugenics* (Ithaca: Cornell University, 1991) at 27.

¹⁵ *Supra* note 10 at 64.

¹⁶ (1996) 36 Alta. L.R. (3d) 305 (Q.B.).

Sterilization Act.¹⁷ Ms. Muir's case has spurred over seven hundred claims currently against the Alberta Government for damages resulting from involuntary sterilizations performed during the era in which the legislation was in place.

Marked by such a history, fear of retreat into uncontrollable eugenic practices have positioned courts in Canada against involuntary sterilization of mentally incompetent adults for purely contraceptive purposes.¹⁸ Further, a fear of reinforcing past views such as those regarding the "poor and unsuccessful" plays a significant role. As Kathleen Powderly recognizes:

Sterilizations have sometimes been advocated for women with serious medical conditions such as tuberculosis, diabetes, or cardiovascular disease. While these illnesses may make pregnancy medically undesirable, it is important to recognize that they are conditions more common among the poor and women of color. Thus, although sterilization under these circumstances may be offered with the best of medical intentions, it is apt to be perceived as racist or promoting eugenics. Counseling regarding sterilization as a contraceptive option must be done with sensitivity to the historical context.¹⁹

2. Lack of Consent

As discussed earlier, severely and profoundly mentally retarded adults are unable to give fully informed consent to a sterilization procedure carried out on their behalf. As a result, courts are forced to decide the issue based on what is seen to be in the "best interests" of the mentally incompetent person. This assessment is based on a belief that the "best interests standard allows decisions to be made which promote a patient's best interests...[and] is usually applied in

¹⁷ *Sexual Sterilization Act*, R.S.A. 1955, c. 311, s. 4(1).

¹⁸ For example, in *Eve supra* note 1, Justice LaForest at page 427-428 states that, "the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States."

¹⁹ K Powderly "Contraceptive Policy and Ethics: Illustrations from American History" Special Supplement (1995) 25:1 *Hastings Center Report* 9 at 10.

terms of beneficence and looks to consequences which will benefit a minor or incompetent."²⁰

The fact that mentally incompetent adults are unable to give fully informed consent to a sterilization procedure lies at the heart of the current law. For example, legislation throughout Canada highlights the necessity of informed consent by patients or legally substituted decision makers for any medical procedure.²¹ And, in the cases of persons who are unable for whatever reason to give this consent, a stringent standard of determining what would be in the best interests of that patient is required before consent may be given.²² In *Eve*, Justice LaForest repeatedly noted that because Eve was unable to consent to the irreversible sterilization procedure the court should act with the utmost caution:

The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.²³

The fact that mentally incompetent persons cannot consent to a sterilization procedure which is permanent and irreversible is a highly persuasive argument in favour of the court's exercising caution when granting sterilization orders. However, an incapacity to consent should not monopolize and cloud the court's vision when determining if such a procedure is truly in the best interests of the person involved. As will be shown, there are other, at times more important, factors which must also be considered.

²⁰ L. Lebit, "Compelled Medical Procedures Involving Minors and Incompetents and Misapplication of the Substituted Judgment Doctrine" (1992) 7 *Journal of Law and Health* 107 at 125.

²¹ For example, *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181; *Hospitals Act*, R.S.N.S. 1989, c. 208, s. 54(1); R.R.O. 1990, Reg. 965, s. 26 [made pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40, s.32(1)]; *Health Care Consent Act*, S.O. 1996, c. 2, s. 10.

²² For example, *Substitute Decisions Act*, S.O. 1992, c. 30, as am. by 1994, c. 27, ss. 43(2), 62; 1996, c. 2, ss. 3-60.

²³ *Supra* note 1 at 431.

III. ARGUMENTS FOR CHANGE

1. Misapplication of the Conventional "Best Interests Test"

Even though both legislators and the courts have determined that substituted consent for sterilization procedures may be given if it is found to be in the "best interests" of the patient, there are difficulties in exercising such decision making due to the inconsistency and uncertainty among decision makers regarding the appropriate circumstances in which sterilization is in a patient's best interests. Josephine Shaw states the problem as follows:

[T]here is...no consensus among judges, legislators and other policy makers on recourse to the social 'problem' of sexual activity by those unable by reason of mental disability to conform to the norms and demands of modern society; the divergence of responses to the issues...offer another example of the differential operation of conditioning factors such as religion, family formation, and gender politics.²⁴

There are a number of suggested alternatives for dealing with the question of whether involuntary sterilization is in the best interests of a mentally handicapped person.²⁵ However, since *Eve*, whether a given sterilization procedure is medically necessary or "therapeutic" seems to be the most often used criteria among courts. As LaForest J. states:

[T]he line is to be drawn between therapeutic and non-therapeutic sterilization.... Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person.²⁶

This approach is problematic as it effectively takes us from one extreme to the other. As the Manitoba Law Reform Commission states:

The *Eve* case effectively prevents [Canadian eugenic history] from happening again by prohibiting, without

²⁴ J. Shaw, "Sterilization of Mentally Handicapped People: Judges Rule OK?" (1990) 53 Mod. L. R. 91.

²⁵ See the *Alberta 1988 Report*, *supra* note 6; Manitoba Law Reform Commission, *infra* note 27; and Areen, *infra* note 58.

²⁶ *Supra* note 1 at 433-434.

exception, all non-therapeutic sterilizations performed on people who cannot legally consent personally.

...the *Eve* decision means that the message "we will not risk letting you have babies" of eugenic sterilization days has changed to the message "we insist that you risk having babies of the modern era."²⁷

The Commission further adds that the decision in *Eve* has caused concern amongst persons who feel that such a "blanket prohibition" may unjustly prevent the performance of non-therapeutic sterilizations in situations where it may truly be in an individual's best interests to do so.²⁸ For example, allowing a pregnancy to occur in a mentally incompetent woman could result in a heavy burden being placed on her during pregnancy and afterwards. In *Eve*, this argument was considered but rejected by Justice LaForest: "I cannot agree that a court can deprive a woman of [the privilege of giving birth] for purely social or other non-therapeutic purposes without her consent."²⁹

It is argued that by ignoring the non-therapeutic factors which affect the best interests of the person involved is to fail to exercise a power which was intended to be for the "benefit" of those who cannot help themselves.³⁰ As a result, the courts should give weight to one or more of the following factors in order to determine whether a sterilization procedure is truly in the best interests of the mentally incompetent person involved.

2. The Trauma of Pregnancy and Childbirth Typically Outweighs the Trauma of a Sterilization Procedure

Pregnancy can be an overwhelming and traumatic experience for many women, including mentally incompetent women. However, in the past, courts have been quick to dismiss a "traumatic effects" argument based on their perception that the trauma associated with

²⁷ Manitoba Law Reform Commission, "Discussion Paper on Sterilization of Minors and Mentally Incompetent Adults" Discussion Paper (Winnipeg: Manitoba Law Reform Commission, 1990) at 10.

²⁸ *Ibid.*

²⁹ *Supra* note 1 at 434.

³⁰ Justice LaForest in *Eve*, *supra* note 1 at 426, concludes that "the Crown's *parens patriae* jurisdiction existed for the *benefit* of those who could not help themselves...." [emphasis added]

pregnancy was the same for both severely mentally handicapped women and competent or "normal" women. For example, in *Eve*, the Supreme Court of Canada states:

The [Law Reform Commission of Canada] dismisses the argument about trauma of birth by observing...:

For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.³¹

In response it is argued that the trauma associated with pregnancy and the "stress of delivery" is greater in the case of mentally handicapped women than it is for others. Robert Neville, in his article, "The Philosophical Arguments" is one author who suggests that:

[C]hildbearing is...beyond the capacities of...mentally retarded people precisely because of the characteristics of their retardation. The fact that childbearing is in practice also beyond the emotional capacities of any normal people should not obscure the overwhelming difficulty this often poses for the retarded.

...

[W]hat begins to make the situation for the retarded "not equal" to that for "normals"? For mildly retarded women, the physiological and emotional changes that take place during pregnancy, and the violence of childbirth, are often experienced as disorienting and terrifying traumas.³²

Alternatively, it could be argued that Justice LaForest's entire comparison is inappropriate. Perhaps a better, more realistic assessment is to compare the associated trauma of pregnancy with the associated trauma of a sterilization procedure in a mentally incompetent woman. The Supreme Court's analysis above is grounded in the assumption that mentally incompetent persons

³¹ *Supra* note 1 at 430.

³² (June 1978) Hastings Center Report 33.

have one kind of trauma and so called "normal" women have another. To compare mentally incompetent women to the "norm" is unrealistic. A better question becomes: should not the trauma associated with a sterilization procedure, or any operative procedure for that matter, be determined on a case by case basis? And, if we accept this question, it seems only appropriate to ask whether a person would suffer more by undergoing a sterilization procedure than if she were to become pregnant, rather than asking if she would suffer more or less than a "normal" woman would in the same situation.

Judge Beck in the *Estate of C.W.* rejects the line of reasoning used in *Eve* and holds instead that a sterilization order should be granted because "the record is clear that the risks and trauma associated with pregnancy far outweigh the risks and trauma associated with tubal ligation."³³ Further, Lockwood and Lockwood support this type of analysis in their case commentary respecting a seventeen year old mentally incompetent woman whose parents petitioned on her behalf for an abortion. The authors felt that an abortion should have been granted in that case because, "however great the trauma involved in a termination [of pregnancy], it could hardly be greater, surely, than that of giving birth."³⁴

3. The Benefits of Sterilization as a Contraceptive Method

In evaluating what is in the best interests of a mentally incompetent person, courts must also consider the benefits associated with sterilization as a contraceptive method and in so doing, assess the benefits and risks of this method compared to other methods currently available.

³³ 640 A.2d. 427 at 432 (Pa. Super. 1994).

³⁴ G. Lockwood and M. Lockwood, "Case Conference: Making up her mind: consent, pregnancy and mental handicap" (Case Comment) (1983) 9 Journal of Medical Ethics 225 at 226.

B. Gonzales notes that "liberal thinkers and those who are interested in reproductive freedom for all sexually mature persons argue...no group of persons should be categorically denied the benefits of sterilization" regardless of the alternative contraceptive methods also available.³⁵ Contraceptive options other than sterilization may not always be the most practicable or least burdensome option. For example, hormonal therapy administered orally on a daily basis would require a third party to make it part of a mentally incompetent's daily regimen.³⁶ Whether this is more burdensome than sterilative surgery would depend on the facts of each case.

In *Estate of C.W.*, Judge Beck suggested that in choosing a contraceptive method, the least intrusive means available to reach the desired outcome should be of primary importance.³⁷ This involves "an evaluation and comparison of the net benefits associated with each available alternative to determine which is the most practicable."³⁸ "Practicable" in the true sense of the word may go as far as to mean "efficient" in order to be effective. If so, then it may also be relevant to consider that in many cases, physicians support a sterilization procedure as opposed to other methods of contraception as it requires a fifteen minute operation as opposed to continual and indefinite maintenance.³⁹

Of course, it would be absurd to allow the involuntary sterilization of a mentally incompetent person solely on the basis of popular medical opinion. As noted above, a comparison of the benefits and risks of sterilization versus other contraceptive procedures is highly relevant. In the following table, Adler outlines some of the particular difficulties and risks associated with alternative contraceptive methods which he feels are "non-existent"

³⁵ B. Gonzales, "The International Medicological Status of Sterilization for Mentally Handicapped People" (1982) *Journal of Reproductive Medicine* 257.

³⁶ See *infra* note 60 at 213.

³⁷ *Supra* note 33.

³⁸ R. Adler, "Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled" (1996) 20 *Nova Law Review* 1323 at 1331.

³⁹ S. Haavik & K. Menninger, *Sexuality, Law and the Developmentally Disabled Person*, (1981) 109 at 113 referred to in Adler, *supra* note 38 at 1333. Adler further reveals that in a survey of 652 professionals and parents of retarded children, 85.8% either favored or strongly favored sterilization for mentally disabled persons.

with sterilization procedures such as tubal ligation. His results are summarized as follows:

Alternative Contraceptive Methods and their Associated Risks⁴⁰

Methods	Associated Risks
<i>Intra-uterine device (IUD):</i>	<ul style="list-style-type: none"> ‡ perforation of the uterine wall ‡ pelvic inflammatory disease ‡ cramping pain ‡ heavy bleeding during periods ‡ must be replaced each year
<i>Diaphragm</i>	‡ requires a high level of understanding
<i>Hormonal methods such as Depo-Provera</i>	<ul style="list-style-type: none"> ‡ cervical cancer after prolonged use ‡ irregular bleeding ‡ physical variations caused by product ‡ exposes incompetents who are epileptic to higher risks of destabilization, grand mal seizures and status epilepticus
<i>Oral Contraceptives</i>	‡ increase risk of liver, breast and cervical cancers

Sterilization is a medically supported and beneficial means of contraception with apparently fewer associated medical risks than other contraceptive methods as noted above. *Eve* was concerned not only with the medical risks, but also with the potential psychological impact of a permanent inability to procreate as well as the severity of the procedure:

[T]he implications of sterilization are always serious...it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by means of hysterectomy, the procedure is irreversible; it is major surgery.⁴¹

Although one can certainly sympathize with this argument and Justice LaForest's concerns about the permanence of the sterilization procedure and the potential infliction of psychological

⁴⁰ *Supra* note 38 at 1331-1332.

⁴¹ *Supra* note 1 at 428.

harm on persons under the *parens patriae* jurisdiction of the courts, two things must be remembered. First, mental distress is a result of a variety of factors and cannot be isolated to the inability to procreate. One of these factors may include a person's incapacity to deal with pregnancy and/or to care for children.⁴² Second, and more importantly, it is maintained throughout this discussion that such sterilization orders should only be considered on a case by case basis. That is to say, if the court feels that in a particular case, a sterilization procedure is not in the best interests of the person in question because the mental stress of sterilization outweighs the benefits of the procedure, then the order should not be granted. However, if there are cases where the opposite is clear, it is argued that the Court should consider granting the order instead of ruling out the option altogether as the law currently dictates.

3. The Burden of Child Care

In applying the best interests test, the Court has been reluctant to include an assessment of the effects the burden of child care might have on a mentally incompetent adult in a particular situation. Instead, when addressing the fitness of being a parent, the Court has tended to focus on the difficulties surrounding parenthood generally. For example, Justice LaForest in *Eve* states:

The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people.... Many it is true may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent; it is a social problem and one, moreover, that is not limited to incompetents. Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues,

⁴² See Neville, *supra* note 32 at 33.

provincial sterilization boards have revealed serious differences in their attitudes as between men and woman, the poor and the rich, and people of different ethnic backgrounds.⁴³

Justice LaForest raises three important points in the above comment: one, that mentally incompetent parents are concerned for their children; two, the unfitness of particular parents is not limited to incompetents; and three, this is not an issue that falls within the limited powers of the courts.

With respect to the first argument, Justice LaForest takes for granted that a "fondness and concern for their children" is enough for mentally incompetent adults to cope with the many other obligations and burdens of raising a child. However, fondness and concern are not enough. Indeed, in suggesting that sterilization should be an appropriate form of contraception for a severely mentally incompetent person, it is not argued that a mentally incompetent person cannot care and show concern for a family member or his or her own child. Obviously, mentally incompetent persons have many skills enabling them to function successfully in a complex world. As H.J. Bourguignon has observed:

Individuals with mental retardation develop their own techniques for problem solving. Though they may not be able to tell time, they devise ways of knowing when their favorite TV programs are on or when to be ready for the bus. Although they may not be able to succeed at mathematical skills in school, they can develop effective strategies for remembering telephone numbers, paying their bills, and managing their money. They think concretely, not abstractly, but they do think.⁴⁴

However, it is debatable whether such skills and abilities among certain severely or profoundly mentally incompetent people are functionally transferable to parenthood. Robert Neville suggests this is not the case:

[C]hildbearing is...beyond the capacities of [some] mentally retarded people precisely because of the characteristics of their

⁴³ *Supra* note 1 at 430-431.

⁴⁴ H. Bourguignon, "Mental Retardation: The Reality Behind the Label" (1994) 3 Cambridge Quarterly of Healthcare Ethics 179 at 186.

retardation. The fact that childbearing is in practice also beyond the emotional capacities of many normal people should not obscure the overwhelming difficulty this often poses for the retarded.⁴⁵

As my sister is a mentally retarded adult woman, I have personal experience with the issues raised in the above two quotations. Bourguignon is correct in stating that mentally incompetent individuals think concretely and develop ways of telling time and managing their affairs. However, these skills do not infer that such a person has the requisite parenting abilities to care for another totally dependent human being.⁴⁶ My sister, although she can be left at home alone, can cook her own food, make her bed and operate small appliances, still must be guarded against the everyday "dangers" of the household. For example, even after numerous attempts at coaching, she still has trouble remembering to turn the burner of the stove off after she has made soup. Although she very seldomly forgets her house key, she has trouble keeping the doors locked once she is inside. Further, if she takes a bath, it is difficult for her to know if the water is too hot for her to bathe. This list is not exhaustive but it does illuminate the unique challenges my sister, as a mentally incompetent person, would face if she was a parent.

My sister does not understand the consequences of being a parent. Of course, this does not necessarily mean that she might not be able to carry out the functions of a parent although, having lived with her for twenty-three years, I believe this to be the case. If she is ever in a situation where she might be able to conceive a child, my family would likely want to consider sterilization as an option. This is not out of selfishness or a lack of respect for her autonomy, but rather because this option might be in her best interests—even though it is also probable that she could show more "fondness and concern" for her child than many other women who become mothers. The ability of a mentally incompetent person to show concern for a child cannot be considered in isolation. Fondness and concern alone do not account for the realities of being a parent and

⁴⁵ *Supra* note 32 at 33.

⁴⁶ Judge Beck in the *Estate of C.W.*, *supra* note 33 at 433, used this line of reasoning when he stated: "C.W.'s mental and physical disabilities render her substantially incapable of caring for herself, let alone another person."

should not be determinative in deciding whether or not to grant a sterilization order.

Justice LaForest's second argument rests on the fact that coping with parenthood is a social problem not limited to incompetents. Again, LaForest J. confuses the issue by comparing the situation of mentally incompetent persons with that of the "normal" majority when in fact whether a mentally incompetent adult can care for a child should be decided on a case by case basis. In addition to the purely physiological trauma associated with pregnancy and childbirth, other psychological, emotional, and financial problems may affect a mentally incompetent person's inability to cope with the new responsibilities of parenthood. The Law Reform Commission of Canada states:

The additional financial burden of children on top of already existing economic problems may become the triggering factor for other psychological or emotional adjustment problems and may impair the ability to cope.⁴⁷

Although it is agreed that such factors might be applicable to any parent, it is important to keep in mind that most parents faced with such burdens will have the mental capacities to deal with them and to find alternative solutions. The Alberta Institute of Law Research and Reform, has stated that severely or profoundly mentally incompetent persons lack the mental capability to understand a sterilization procedure and consequently would almost never be able to give a fully informed consent to such an operation.⁴⁸ If this is the case, is it reasonable to expect a severely or profoundly mentally incompetent person to fully understand the consequences of financial or other child care burdens and make informed decisions regarding the same?

Finally, Justice LaForest felt that a mentally incompetent person's inability to cope with parenthood was not an issue that fell within the limited powers of the courts as provincial sterilization boards have had difficulties in dealing with this issue in the past. Two arguments can be used to refute these concerns. First, the courts are currently the only body given the authority under its *parens patriae* jurisdiction to use discretion in order to decide what

⁴⁷ *Supra* note 8 at 34.

⁴⁸ *Alberta 1988 Report*, *supra* note 6.

is in an individual person's best interests after hearing all of the relevant facts and weighing all of the evidence. Second, the provincial sterilization boards of the past were legislated to act for society's best interests and not the individual's in deciding when to sterilize. These boards were not afforded the opportunity to conduct hearings, listen to evidence or consider the individual person's autonomy. Further, at that time, the *Canadian Charter of Rights and Freedoms*⁴⁹ was not in force and therefore the relevant legislation was not subject to *Charter* scrutiny. In summary, the eugenic period in Canada and its ensuing principles is largely different and can be distinguished from what is being advocated here, both in the *Eve* case and for cases leading into the twenty-first century.

Thus, it is only appropriate that when considering such issues as the involuntary sterilization of mentally incompetent persons, one must place the analysis in the context of the day. To use the comments of LaForest J. himself in quoting Lord MacDermott in *J. v. C.*⁵⁰ "the authorities have inexorably 'moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion...'"⁵¹

IV. THE CURRENT "BEST INTERESTS" TEST: FAILURE TO CONSIDER THIRD PARTY INTERESTS

Lockwood and Lockwood suggest that "other persons, by virtue of the relationship in which they stand to the [mentally incompetent] person, have legitimate interests relating to their own welfare...."⁵² This was the case in *Eve*, where one argument put forth by the respondent in asking the court to grant an involuntary sterilization order was to prevent the burden of child care from ultimately falling upon her.⁵³ As her daughter could not adequately cope with the duties of a mother, she believed the responsibility would cause her great difficulty as she was then a widow approaching the age of

⁴⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵⁰ [1970] A.C. 668 at 708.

⁵¹ *Supra* note 1 at 426.

⁵² *Supra* note 34 at 224.

⁵³ *Supra* note 1 at 429.

sixty. The Supreme Court did not place much weight on this argument stating:

One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve.⁵⁴

Third party interests are, thus ignored in a consideration of whether an involuntary sterilization order should be granted. It is argued here that such concerns, while they should not dominate judicial analysis, should still be a factor considered by the courts when determining whether such a procedure is in the "best interests" of the mentally incompetent person. In its 1988 discussion paper no. 6, the Alberta Institute of Law Research and Reform recommended:

[T]hat the likely effect of undergoing or foregoing the proposed sterilization on the ability of those who care for the person to provide required care should be a factor, *but looked at only from the perspective of the person for whom sterilization is being considered*. For example, would the person have to be moved to another residence because the burden of supervision without sterilization would be more than family caregivers are able to handle? Would the move or the sterilization best serve her interests? [emphasis added]⁵⁵

In 1989, the Institute commented on this issue again:

We think it would be a mistake to pretend that persons who are not competent to make sterilization decisions live in a social vacuum when in fact they depend on a network of family, friends and others to assist them in living as normal a life as possible. As we see it, the nature and extent to which a person can count on others is relevant to the determination of her present and likely future circumstances and this, in turn is relevant to the consideration of her best interests.⁵⁶

⁵⁴ *Supra* note 1 at 430.

⁵⁵ *Alberta 1988 Report*, *supra* note 6 at 143.

⁵⁶ Institute of Law Research and Reform, "Competence and Human

This recommendation is an important contextual element which, it is argued, must not be ignored by the Courts. Mentally incompetent persons, by the fact of their incompetence live dependent lives. Therefore, it is argued that by ignoring third party considerations in the analysis, the court compromises the best interests of mentally incompetent persons insofar as their support systems may be strained by the birth of a child.

Although consideration of third party interests in such an analysis is being advocated, it is not suggested that this factor be determinative. If, for example, a court were to find that the granting of such a sterilization order is clearly not in the best interests of the person in question, perhaps because the procedure might cause her more physical harm than pregnancy and childbirth, then it is felt that third party interests should not then become a determining factor in granting the order. This limitation is crucial given the past eugenic history in Canada and the fact that courts must weigh a variety of factors when determining what is in the "overall" best interests of the person.

1. The Individual Interest as Distinct from the Societal Interest Promoted in Eugenic Theory

When defining interested third parties, it is important to consider only third persons who have a legitimate personal interest at stake if their son, daughter or relative were faced with the onerous burden of caring for a child. It is argued here that it not a consideration of a third party state or government interest.

The *Alberta 1989 Report* recommends that a judge consider whether the child of a mentally incompetent person can be cared for by another person:

We recommend that the proposed legislation require the judge, before making an order authorizing the performance of an elective sterilization, to consider,

...

(k) the likelihood that a child of the person could be cared for by some other person.⁵⁷

However, it must be emphasized that "some other person" cannot mean the government or the state as these interests differ greatly from those of individuals directly connected to the mentally incompetent person. For example, a child welfare agent application for a court ordered sterilization requesting the court to consider the well-being of a particular governmental agency where public funding concerns might be at issue, it is argued here that these concerns would shift the focus away from the best interests of the mentally incompetent individual. Further, if these interests were to be allowed in such an analysis, a strong argument would lie in favor of those who advocate against the granting of involuntary sterilization orders on the basis that we, as a society, would again be promoting eugenics.

This comment is premised on the belief of absolute necessity of individual assessments in determining the appropriateness of sterilization. Each case must be decided on its own facts and the party advocating for the sterilization order must be deemed to be acting in the best interests of the mentally incompetent person and not in the interests of the state, which may have other fiscal, or political motives.

V. THE NECESSITY FOR GUIDELINES OR LEGISLATION

As previously mentioned, an impediment for courts in granting involuntary sterilization orders is the fear of repeating historic eugenic practices. In addition, the potential for abuse inherent in situations where courts are unclear about which factors are to be included in a "best interests" analysis will only further their reluctance. It is suggested that state supported guidelines be effected to mitigate such concerns and provided guidance for judges in Canada. Similar legislation with respect to child welfare and adoption practices has already been enacted throughout the country giving judges pre-determined factors to consider in deciding whether it is in a child's best interests to be removed from

⁵⁷ *Ibid.* at 143.

the custody and care of his or her family.⁵⁸ It is argued that similar factors could be outlined either in the form of state supported guidelines or government enacted legislation regarding sterilization practices. Judith Areen⁵⁹ has developed guidelines similar to those outlined by the Pennsylvania Court in *Mildred J. Terwilliger*.⁶⁰ They are as follows:

1. Those advocating sterilization bear the heavy burden of proving by clear and convincing evidence that sterilization is in the best interest of the incompetent.
2. The incompetent must be afforded a full judicial hearing at which medical testimony is presented and the incompetent, through a guardian appointed for the litigation, is allowed to present proof and cross-examine witnesses.
3. The judge must be assured that a comprehensive medical, psychological, and social evaluation is made of the incompetent.
4. The judge must determine that the individual is legally incompetent to make the decision whether to be sterilized, and that this incapacity is in all likelihood permanent.
5. The incompetent must be capable of reproduction and unable to care for off-spring.
6. Sterilization must be the only practicable means of contraception.
7. The proposed operation must be the least intrusive alternative available.
8. To the extent possible, the judge must hear testimony from the incompetent concerning his or her understanding and desire, if any, for the proposed operation and its consequences.

⁵⁸ See for example the Nova Scotia *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 3(2), as am. by 1994-95, c. 7; 1996, c. 3, s. 10.

⁵⁹ J. Areen, "Limiting Procreation" in R. Veatch, ed., *Medical Ethics* (Boston: Jones and Bartlett, 1989) 106-107.

⁶⁰ 450 A.2d 1376 at 1383-1384 (Pa. Super. 1982).

9. The judge must examine the motivation for the request for sterilization.⁶¹

Such guidelines could be useful for the courts, particularly for the sake of consistency. It is argued that a Canadian Court of Superior Jurisdiction be the only authority given power to order an involuntary sterilization on behalf of a mentally incompetent person as this is also where the *parens patriae* jurisdiction currently exists. Further, independent court guidance under such guidelines could aid in avoiding liability among surgeons who actually perform these procedures. This is not to say that a medical opinion would not be required in a judge's decision. In fact, medical opinion would likely be very relevant and material with respect to a judge's final decision. The risks are minimized, however, by appointing a judicial decision making body. As the *Alberta 1989 Report* suggests:

[T]he risk of misapplication] is minimized, if not eliminated, by the choice of the superior court judge as decision maker and by the provision of a broad range of substantive and procedural safeguards for the judge to observe.⁶²

As an alternative to guidelines, provincial legislation may also be enacted in order to aid the judiciary in their decision making under issues of involuntary sterilization. As mentioned, current child welfare legislation grants discretion to the courts in deciding when it might be in the best interests of children to be placed in the custody of one other than their natural parent. It is argued that because the provincial governments have already enacted legislation in the family law area when dealing with cases involving substitute decision making on a best interests standard, the same could and should be done regarding the granting of an involuntary sterilization order. A good example of such legislation is recommended by the *Alberta 1989 Report*, which directs a judge to consider factors commensurate with what has been suggested here.⁶³

⁶¹ Applebaum & La Puma, "Sterilization and the Mentally Handicapped Minor: Providing Consent for one who Cannot" (1994) 3 Cambridge Quarterly of Healthcare Ethics 209 at 212.

⁶² *Supra* note 56 at 68.

⁶³ *Ibid.*

In drafting such legislation, however, it is important to remember the consequences of past eugenics legislation as well as the potential abuse under-inclusive legislation could have on the interests of all mentally incompetent persons. Overall, the degree to which the interests of mentally incompetent persons must be protected and that state interests be ignored cannot be overstated.

VI. CONCLUSION

Contraceptive sterilization for mentally incompetent persons is a controversial issue which judges and legislators should take seriously and approach with caution. However, in so doing, it must be remembered that such caution should not be exercised so as to categorically deny sterilization as a contraceptive option for all mentally incompetent individuals. Although the current "best interests" standard adopted by the Supreme Court of Canada in *Eve* is a good starting point for determining when an involuntary sterilization order should be given, it has yet to be properly applied and is insufficient insofar as it fails to compare the effects of childbirth against the effects of the sterilative procedure itself, fails to consider the benefits of sterilization as a contraceptive method compared to other contraceptive methods, and fails to consider the burden of child care on the mentally incompetent person in question.

For an incompetent person, the trauma associated with pregnancy must be weighed against the trauma associated with a sterilization procedure, and the benefits of sterilization as a contraceptive procedure coupled with the burden associated with child care must also be considered. And, insofar as it does not dominate the decision, third party interests should be factored into the analysis albeit only from the perspective of the person for whom sterilization is being considered. Further, this third party interest, should not include state or government interests for fear of retreat into historic eugenic practices.

It is suggested that legislation similar to that in child welfare legislation could be enacted where judges are given some guidance as to what other factors might be appropriate in a given case. Judges and legislators must not let their vision be clouded by the shameful eugenic history in Canada from 1928–1972, nor must their

decisions be dominated by the fact that many mentally incompetent persons cannot give fully informed consent to a sterilization procedure. With proper guidance from the legislators and the substantive and procedural safeguards inherent in the judicial system, a factual and informed decision to grant an involuntary sterilization order can be made.

Finally, a best interests analysis must be carried out on a case by case basis and within a contemporary context. Although many mentally incompetent individuals will not need to utilize sterilization as a contraceptive option, there will be cases where some will. It is in these cases that courts must not categorically deny sterilization—where such an option may truly be in the “best interests” of the mentally incompetent individual.