

Diverging Child Protection Laws in the Commonwealth: A Comparison of Recent Legislation in England and New Zealand

I. INTRODUCTION

Several recent and well-publicized cases have forced the American court system to answer some difficult questions about the legal relationship between parents and their children.¹ Underlying the more novel and provocative issues in those cases have been two questions central to the dispute in each of them: 1) where do the boundaries of parents' rights and children's rights lie, and 2) what course of action is the state to take to ensure that the rights of both parents and children are protected? Those questions are arguably most pertinent, and yet their answers most elusive, when the state undertakes to legislatively define its power to intervene in family life to protect children from abuse.

Drafting child protection legislation involves the difficult task of trying to achieve a balance among the rights of children, the rights of parents, and the power of the state.² The boundaries of state power can be established. But since a child's best interests are frequently inseparable from his relationships with parents and with family, it is difficult, if not impossible, for the law to determine when it is wise

1. See, e.g., *Kingsley v. Kingsley*, 1993 Fla. App. LEXIS 8645 (Fla. Dist. Ct. App. 1993) (reversing the lower court's holding that a minor has the capacity to initiate an action against his parents for termination of their parental rights); *In Re Clausen*, 502 N.W.2d 649 (Mich. 1993) (holding that a child's constitutionally protected interest in family life does not exist independent of its parents absent a showing that the parents are unfit, and that the decision of Iowa courts not to hold a hearing on the best interests of the child in light of the circumstances of the case was insufficient to justify a refusal by Michigan courts to enforce Iowa judgments in the case); *Twigg v. Forty-Two Year Old Resident of Sarasota, Florida*, No. 88-4489CA (Sarasota County Fla. Cir. Ct. 1993) (holding that biological parents have no legal right to visit a teenage child who was switched with another child at birth). These and other similar cases do not involve judicial interpretation or application of legislative standards for state intervention into family life to protect children from abuse. Incorporation of these cases within the analysis of this Note would thus diffuse its focus and for that reason has not been attempted.

2. See Mary Hayes, *Child Protection in New Zealand and England*, 3 CANTERBURY L. REV. 53 (1960).

for the state to intervene.³ Recent legislative acts in England and New Zealand both 1) exemplify the difficulty of trying to inject wisdom into the legislative formula for intervention, and 2) contain non-traditional approaches to child protection issues that legislative bodies in other jurisdictions should consider adopting.

The Children Act 1989 (the "England Act") went into effect in October, 1991, replacing the Children and Young Persons Act 1969. The England Act has been hailed as landmark legislation for its comprehensive reform of child law and for positing a fundamental shift in the state's role in family life.⁴ In addition to provisions for the care, supervision, and protection of children, the Act contains principles of welfare and non-intervention to guide judicial decision-making.⁵

The Children, Young Persons, and Their Families Act 1989 (the "New Zealand Act") went into effect in 1989, replacing the Children and Young Persons Act 1974. It was introduced with accolades, having been described as remarkable legislation containing pervasive child law reform.⁶ The inclusion of extensive statements of principles to guide all activity taken under the authority of the Act's provisions is a key innovation in the New Zealand Act. The principles of the Act not only bind courts, but also those persons who exercise any powers delegated by the Act.⁷

This Note will analyze aspects of both the England Act and the New Zealand Act that pertain to the power of the state to intervene in family life to protect children from abuse. The focus of the analysis will be on whether the principles contained in both acts combine with their provisions to preserve a balance among 1) children's rights to live free of abuse, 2) parents' rights to raise their children free of state intervention, and 3) the power of the state to intervene on behalf of children who are at risk. In addition, particular attention will be given

3. *Id.*

4. See, e.g., Janet Walker, *From Rights to Responsibilities for Parents: The Emancipation of Children*, (Introduction), *FAM. L.*, Oct. 1990, 380; M.D.A. Freeman, *England's New Children's Charter*, 29 *J. FAM. L.* 343, 344 (1990-91).

5. Children Act, 1989, (Eng.) [hereinafter "England Act"].

6. See, e.g., W.R. Atkin, *The Courts and Child Protection—Aspects of the Children, Young Persons, and Their Families Act 1989*, *V.U.W.L.R.*, 1990, 319; P.D. Mahoney, *Family Law Developments*, *N.Z.L.J.*, Nov. 1991, 382.

7. Children, Young Persons, and Their Families Act, 1989, (1 *N.Z. Stat.* 439) [hereinafter "New Zealand Act"]. The opening sentence of section 13 states, in part: "[A]ny Court which, or person who, exercises any powers conferred by . . . this Act shall be guided by the . . . principles."

to how much guidance the principles of the acts give to state authorities to help them determine when intervention is the wisest choice.

Each act affects child and parental rights differently because each act defines the role of the state in different terms. Of the two acts, the New Zealand Act comes closer to striking a balance among participants in the child-protection process. Each act, in its attempt to redefine the role of the state, seeks to limit access to courts. The England Act attempts to do this primarily by giving more discretion to social workers. The New Zealand Act is arguably more effective, in part, because the creation of the family group conference compensates for limiting access to courts; thus, the principles and provisions of the Act work more cohesively to protect both the rights of children and parents.

II. THE EFFECT OF THE ACTS ON THE RIGHTS OF CHILDREN TO LIVE FREE OF ABUSE

A. *The Effect of the England Act on Children's Rights*

1. *The Principles of the England Act and Children's Rights*

The two central principles of the England Act are 1) welfare, defined as the duty of the state to protect children, and 2) non-intervention, which suggests that the family is the best setting for the care of children.⁸ The welfare principle requires courts to prioritize the child's welfare when determining any issue regarding the upbringing of a child.⁹ In any proceeding wherein an issue regarding a child's care is addressed, the court is to follow the principle that "any delay in determining the question is likely to prejudice the welfare of the child."¹⁰ The definition of "child's welfare" is comprehensive, containing a checklist of concerns for the court to keep in mind when rendering decisions affecting children.¹¹

8. See Walker, *supra* note 4, at 380.

9. England Act, *supra* note 5, § 1(1). The statute provides:
When a court determines any question with respect to

a) the upbringing of a child; or

b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

Id.

10. *Id.* § 1(2).

11. *Id.* § 1(3)-(4). The statute provides:

3) In the circumstances mentioned in subsection 4), a court shall have

It has been argued that the inclusion of a checklist within the section containing the welfare principle has, for the trial court, the rather diminutive purpose of focusing attention on specific issues which should guide the use of the court's discretion, and that any significant effect it might have will be at the appellate level.¹² However, the mere presence of a checklist in the Act is indicative of legislative concern about the wisdom of judicial decision-making. The previous Act required the judge to give no more attention to the child's welfare than attention to the past incidents and present situation which resulted in the child landing in his court. The 1989 Act requires the judge to consider how his decision will affect the child's future.¹³

Requiring the judge to ascertain the feelings of the child, to consider the child's emotional and educational needs, and to weigh the effect upon the child of a change in his circumstances must be viewed as an increase in the support of children's rights, even if the practical effect of the checklist might be difficult to discern. Requiring the judge to regard the wishes of the child suggests legislative recognition that the

regard in particular to

- a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
 - b) his physical, emotional and educational needs;
 - c) the likely effect on him of any change in his circumstances;
 - d) his age, sex, background and any characteristics of his which the court considers relevant;
 - e) any harm which he has suffered or is at risk of suffering;
 - f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
 - g) the range of powers available to the court under this Act in the proceedings in question.
- 4) The circumstances are that
- a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
 - b) the court is considering whether to make, vary or discharge an order under Part IV.

Id.

12. Andrew Bainham, *The Children Act 1989: Welfare and Non-Interventionism*, FAM. L., April 1991, at 143. Bainham notes that the House of Lords had established a high standard for appeal in children's cases, namely that the decision of the lower court had to be "plainly wrong." *Id.* Under the England Act, where it can be shown that a court has not considered one or more of the statutory factors, it should be easier to overcome that standard of review and thus easier to make a successful appeal. *Id.*

13. See England Act, *supra* note 5, § 1(3)(b)-(c).

promotion of children's rights entails both self-determination and protection.¹⁴

2. *The Provisions of the England Act and Children's Rights*

The primary tool in the England Act for protecting children who are believed to be in immediate physical danger is the emergency protection order (EPO). The EPO supersedes the place of safety order, which was deficient because it failed to address the emergency aspect of the need for intervention.¹⁵ An authority's application for an EPO is appropriate when he has reasonable cause for believing a child will likely suffer significant harm unless 1) he is removed to accommodation provided by the authority, or 2) he is kept in a place where he is being provided safe accommodation.¹⁶ The court may issue the EPO only when it is convinced that the requesting authority has such a reasonable belief, or that efforts to make inquiries about the safety of the child are being frustrated by denial of access to the child, and the requesting authority reasonably believes that access to the child is urgently necessary.¹⁷

An EPO operates as an order, to anyone in a position to do so, to produce the child for the authority.¹⁸ It also authorizes removing the child from current accommodations at any time or preventing removal of the child from a hospital or any place he was staying prior to the issuance of the EPO.¹⁹ The authority granted an EPO is cautioned not to take action under it in excess of that reasonably necessary to protect or promote the welfare of the child.²⁰

The court has discretion regarding the amount of access to the child that will be allowed under the EPO,²¹ although there is a presumption that reasonable access will be permitted.²² The court also has discretion regarding the extent of the investigation and whether to require medical or psychiatric examinations.²³ However, the child may

14. Bainham, *supra* note 12, at 144.

15. Freeman, *supra* note 4, at 350.

16. England Act, *supra* note 5, § 44(1).

17. *Id.*

18. *Id.* § 44(4).

19. *Id.*

20. England Act, *supra* note 5, § 44(5).

21. *Id.* § 44(6).

22. Freeman, *supra* note 4, at 350; England Act, *supra* note 5, § 44(13).

23. England Act, *supra* note 5, § 44(6).

refuse to submit to medical examination or any other evaluation if he is discerning enough to make an informed decision.²⁴

The authority has a duty to return the removed child to the person caring for him, a parent, or anyone with parental responsibility for the child after he has made an evaluation and it appears to him to be safe to do so.²⁵ But as long as the EPO is in force, the authority may remove the child again if circumstances make it appear necessary.²⁶

An EPO may last a maximum of only eight days.²⁷ However, a person given parental responsibility for a child under an EPO may apply for a seven-day extension of the order.²⁸ The court may grant an extension only if it reasonably believes that the child will likely suffer significant harm unless the EPO is extended.²⁹ The court may grant only one extension.³⁰

The child assessment order (CAO) is the mechanism the England Act provides for handling instances of suspected abuse. The CAO is only effective for seven days.³¹ A CAO operates for the purpose of evaluating a child, either in or out of the home, to determine whether the child is at risk.³² Authority is given to the person making such an assessment to do so according to the terms of the CAO.³³ Along with this grant of authority, there is recognition of child autonomy in the provisions: "If the child is of sufficient understanding to make an informed decision, he may refuse to submit to a medical or psychiatric examination or other assessment."³⁴

3. *Conclusion on the England Act and Children's Rights*

The presence of the welfare principle in the England Act indicates its drafter's concern that the rights of children be prioritized. This principle will help ensure that children's rights will be kept in mind by the judges who make decisions affecting their futures. However, once a court issues either an EPO or a CAO, the welfare principle no

24. *Id.* § 44(7). "The child may, if he is of sufficient understanding to make an informed decision, refuse to submit to the examination or other assessment." *Id.*

25. *Id.* § 44(10)-(11).

26. *Id.* § 44(12).

27. England Act, *supra* note 5, § 45(1).

28. *Id.* § 45(4).

29. *Id.* § 45(5).

30. *Id.* § 45(6).

31. England Act, *supra* note 5, § 43(5).

32. *Id.* § 43(1).

33. *Id.* § 43(7).

34. *Id.* § 43(8).

longer has any role; the principle is binding on court activity only, and has no power over persons carrying out the various orders under the authority of the Act.³⁵ The rights of children would be more adequately protected if the welfare principle bound all persons working under the Act's authority.

The brief duration of the CAO and the EPO leaves authorities acting under the England Act with insufficient means for evaluating the child's situation; the seven or eight days for which the orders last will not assist the child whose assessment may take a period of several weeks.³⁶ Application for a further order cannot be made until six months have passed since the prior one, unless the court gives leave; therefore, the only viable option for acquiring more time for assessment is to try to obtain an interim care order, which comes under the care provisions of the England Act, rather than the provisions for child protection.³⁷ This will escalate the intervention process, since the child will be remanded to the custody of the state merely to allow the state enough time to determine whether intervention was even necessary.³⁸ Arguably, the length of the CAO could be increased without an adverse effect on parental rights, since it is an order for assessment only.

B. *The Effect of the New Zealand Act on Children's Rights to Live Free of Abuse*

1. *The Principles of the New Zealand Act and Children's Rights*

The primary change in emphasis and philosophy under the New Zealand Act from its predecessor is that the welfare of the "child"³⁹

35. See England Act, *supra* note 5, § 1.

36. John Eekelaar, *Investigation Under the Children Act 1989*, 1990 FAM. L. 486, 488. To make his point, Eekelaar uses the rather extreme hypothetical example of a child who has physical symptoms that point to a severe psychological disorder, who is not receiving adequate care, who is not talking, and whose parents are deaf; an evaluation in this situation is likely to take longer than the time allotted under a CAO or EPO. *Id.* at 487-88. Although certainly extreme, and surely the exception rather than the rule, the example adequately supports Eekelaar's assertion that the England Act is not structured to cope with such difficult assessment situations.

37. *Id.*

38. *Id.* at 489.

39. The New Zealand Act defines a "child" as a boy or girl under the age of 14 years and a "young person" as a boy or girl over 14 years old but under 17 years old. New Zealand Act, *supra* note 7, § 2. The term "child" within this Note will thus refer to both children and young persons as defined by the New Zealand Act.

will no longer be the primary consideration; child welfare is only one of several factors which constitute an emphasis on the "family."⁴⁰ Instead of the state taking the leading role in protecting children, the primary role is given to the family.⁴¹ "Family" is not narrowly defined by the Act. One of the main reasons for the change the Act brings to the law is that Maori and Polynesian groups in New Zealand insisted that the prior law disregarded their conceptualization of human relationships, which begins with the extended family or tribe instead of the primary family unit.⁴² This concern is recognized in the Act by the emphasis on the "needs, values, and beliefs of particular cultural and ethnic groups."⁴³ The foundational policy of the Act is to support the family as the unit in society primarily responsible for raising children.⁴⁴

The general objective of the Act is to promote the well-being of children and their families.⁴⁵ One of several ways this is to be accomplished is by assisting the family in carrying out its responsibility to prevent the "harm, ill-treatment, abuse, neglect, or deprivation" of children.⁴⁶ The objectives of the Act imply that its main emphasis is the rights of the family, and children are important only as members of the family.⁴⁷ However, the list of objectives does provide for the protection of children when family support cannot be enlisted.⁴⁸

The autonomy of children is recognized by the Act, but within certain constraints. The wishes of the child must be considered where

40. Atkin, *supra* note 6, at 319. The family, under the New Zealand Act, is not limited to the so-called "nuclear family"; the term not only refers to the nuclear family, but also to "whanau, hapu, iwi, and family group." New Zealand Act, *supra* note 7, § 5(a). "Whanau", 'hapu', and 'iwi' are Maori words referring (roughly) to family (widely defined), sub-tribe and tribe." Atkin, *supra* note 6, at 321. The term "family" within this Note thus refers to the extended family as defined in the New Zealand Act.

41. Atkin, *supra* note 6, at 320.

42. *Id.*

43. New Zealand Act, *supra* note 7, § 4(a).

44. Mahoney, *supra* note 6, at 382.

45. New Zealand Act, *supra* note 7, § 4.

46. *Id.* § 4(b).

47. Atkin, *supra* note 6, at 321.

48. See New Zealand Act, *supra* note 7, § 4(d)(e). The statute provides:

- 4) Objects: The object of this Act is to promote the wellbeing of children, young persons, and their families and family groups by . . .
 - d) Assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:
 - e) Providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation

ascertainable, but are to "be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child."⁴⁹ This may result in a failure to preserve child autonomy in some instances; the principle can be read to mean that the mature child whose wishes can be determined might still be ignored if it is culturally acceptable to do so.⁵⁰ Nonetheless, where there is any conflict of principles or interests, the welfare and interests of the child are to prevail.⁵¹

Authorities acting under the New Zealand Act are also guided by the principle that children should live with their families, and that their education or employment should not be interrupted.⁵² When a child needs protection, the necessary assistance and support should be given to the family to allow it to care for and protect the child.⁵³ Removal from the family will occur only when there is a serious threat to the child's safety.⁵⁴

When the child is removed from the home, efforts are to be made to place the child in a "family-like setting" in the same vicinity as his home and in which his ties to his family can be maintained and supported.⁵⁵ If this is not practicable, efforts should still be made to place the child in a setting compatible with his personal and cultural identity.⁵⁶ The principles in the New Zealand Act thus indicate that promoting the child's welfare is best accomplished by protecting the child's total sense of identity.

2. *The Provisions of the New Zealand Act and Children's Rights*

The New Zealand Act defines a child who needs care or protection as one who "is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived."⁵⁷ A child whose development or emotional health is being, or will likely be, seriously impaired or neglected is also in need of protection.⁵⁸ Several other situations, not all of which necessarily involve physical

49. New Zealand Act, *supra* note 7, § 5(d).

50. Atkin, *supra* note 6, at 323.

51. New Zealand Act, *supra* note 7, § 6.

52. *Id.* § 13(c).

53. *Id.* § 13(d).

54. *Id.* § 13(e).

55. New Zealand Act, *supra* note 7, § 13(f).

56. *Id.* § 13(f).

57. *Id.* § 14(9).

58. *Id.*

abuse, can also result in the child being in need of care.⁵⁹ If a child's situation is to be classified as a care and protection case, it must meet the demands of this definitional section of the Act.⁶⁰

Anyone who believes a child has been, or will likely be, harmed or abused may report the matter to a social worker or to the police.⁶¹ No civil or criminal sanctions may be imposed against a person who reports abuse unless the information is given in bad faith.⁶² When such a report is received, the authority must conduct an investigation into the matter alleged in the report.⁶³

If, after inquiry, the investigator believes the child needs care or protection, he must report the matter to a Care and Protection Coordinator (Coordinator).⁶⁴ The Coordinator must then convene a family group conference (Conference).⁶⁵ Before convening the Conference, the Coordinator must make reasonable efforts to consult with the child's family regarding the date, time, and place of the Conference, the persons who should attend, and the procedures to be adopted by the Conference.⁶⁶

The Conference is the major innovation of the Act. Conference members may govern its procedure in any manner they think fit, subject to any restrictions in the care and protection provisions of the Act.⁶⁷ The broad definition of the term "family" indicates that the participation of the extended family should be engendered by the Conference.

The Coordinator is given discretion to control attendance at the Conference.⁶⁸ Those entitled to attend, subject to Coordinator discretion, are the child who is the object of the proceedings, and everyone

59. See New Zealand Act, *supra* note 7, § 14.

60. See New Zealand Act, *supra* note 7, § 14(1); Atkin, *supra* note 6, at 335.

61. New Zealand Act, *supra* note 7, § 15.

62. *Id.* § 16. The statute provides:

No civil, criminal, or disciplinary proceedings shall lie against any person in respect of the disclosure or supply by that person pursuant to section 15 of this Act of information concerning a child or young person (whether or not that information also concerns any other person), unless the information was disclosed or supplied in bad faith. *Id.*

Section 16 appears to be subject to the interpretation that even the abuser himself can obtain immunity from criminal prosecution simply by being the first person to report the abuse, which is a startling proposition.

63. *Id.* § 17.

64. *Id.* § 17(2).

65. New Zealand Act, *supra* note 7, §§ 18-20.

66. *Id.* § 21.

67. *Id.* § 26.

68. New Zealand Act, *supra* note 7, § 22(b).

who is a parent, guardian, or member of the child's extended family.⁶⁹ The Coordinator's decisions as to who will attend the Conference must be made with the best interests of the child in mind.⁷⁰ If the Coordinator excludes a qualified individual from attending the Conference, the Coordinator must make a reasonable effort to solicit that individual's views regarding the issues to be addressed at the Conference.⁷¹ The Coordinator must also communicate those views to those persons who do attend the Conference.⁷²

Giving complete discretion to the Coordinator to govern attendance at the Conference is arguably at odds with the principle that the family is to be regulating its procedures.⁷³ Legislative preoccupation with protecting the child, the most vulnerable member of the Conference, is evidenced by this internal contradiction. This section could have been drafted more consistently without necessarily jeopardizing the interests of the child. The child could be adequately protected by limiting the Coordinator's discretion to the power to keep the child out of the Conference if the child is too young or too immature to participate, or if the child would be too vulnerable in the presence of certain family members. Excluding family members as a basis for protecting the interests of the child will likely hinder the effectiveness of the Conference in working toward a resolution.

There are three functions of the Conference. Its members are to first consider issues pertaining to the care and protection of the child for whom the Conference was convened, in a manner the members deem appropriate.⁷⁴ Second, when the Conference participants have concluded that the child needs care or protection, they are to make decisions, recommendations, and plans which they consider necessary or desirable, in accordance with the principles of the Act.⁷⁵ And third, the Conference participants are to periodically review the implementation of the decisions, recommendations, and plans made during the Conference.⁷⁶

When Conference members reach a decision or make a recommendation, the Coordinator is to seek approval of every authority

69. *Id.*

70. *Id.*

71. *Id.* § 24(1).

72. New Zealand Act, *supra* note 7, § 24(2).

73. Atkin, *supra* note 6, at 329.

74. New Zealand Act, *supra* note 7, § 28(a).

75. *Id.* § 28(b), § 29.

76. *Id.* § 28(c).

necessary for the implementation of the Conference resolutions.⁷⁷ If consensus is not reached on implementation, the Coordinator may reconvene the Conference to enable its members to reconsider their plans.⁷⁸ The Conference participants may then affirm, rescind, or modify their previous resolutions, or draft new ones.⁷⁹

When Conference members cannot agree on what to do, or the Coordinator is unable to obtain the agreement of those responsible for implementation, the Coordinator must report that indecision to the authority from whom it received its initial report.⁸⁰ That authority may then pursue the course which, under the provisions of the Act, it believes is appropriate.⁸¹ This provision assures that the failure of the Conference will not mean the end of activity on behalf of the child; the Conference is to be the primary mechanism employed in child protection cases, but it is not the final forum.

Where the court suspects that a child is suffering from such harm that a medical examination is necessary, the court may order that one be performed.⁸² If a social worker has the consent of any parent or guardian of the child, or has made reasonable efforts to obtain it, he may arrange for a medical examination of a child who was removed under warrant, or who is in the custody of the Director-General.⁸³

Every child required to have a medical examination is permitted to have an adult present.⁸⁴ A medical examination must not include internal or genital examinations unless the medical examiner believes the child may have been the victim of recent physical or sexual abuse, and the child consents to such an examination.⁸⁵ Thus, the child is allowed to decide how extensive the medical examination will be. However, the New Zealand Act permits the medical practitioner to make at least a partial physical examination regardless of the child's feelings, which is better for assessment purposes than no examination at all.

The normal sequence of events in a care or protection case is expressly set forth in the Act. Normally, no application for a judicial

77. *Id.* § 30(1).

78. New Zealand Act, *supra* note 7, § 30(3).

79. *Id.* § 30(4).

80. *Id.* § 31(1).

81. *Id.* § 31(2).

82. New Zealand Act, *supra* note 7, § 49(1).

83. *Id.* § 53(2).

84. *Id.* § 54.

85. *Id.* § 55.

declaration that a child needs care or protection may be made until a Conference has been held.⁸⁶ This requirement does not apply if a child is in the custody of the Director-General or if it is not possible to locate any members of the child's family.⁸⁷ The role of the family is thus given precedence in the New Zealand Act. If for some reason family support is not available, other provisions in the Act may be invoked to handle the situation, so that the child is not left at risk. Ultimately, the New Zealand Act allows the state to protect the child who is at risk.

3. *Conclusion on the New Zealand Act and Children's Rights*

In the New Zealand Act, the child's welfare is contextually situated within a thematic emphasis on the family. Protection of the child, however, is still the priority; the approach of the New Zealand Act is to force the family into the role of protector, thereby reducing the role of the state in the intervention process. The Act provides for the protection of children even if family support cannot be induced, so ultimately children's rights are not compromised in favor of the family. Where there is a conflict of principles or interests, the welfare and interests of the child are to be the deciding factor.

The new forum the Act provides for handling instances of abuse or suspected abuse, the Conference, is an appropriate setting for implementation of the principles of the Act. The Coordinator has too much discretionary power to control attendance of the Conference, which could hinder its effectiveness. Resolving that problem in the Act's provisions could result in the Conference becoming an adequate setting for enforcing all the principles of the Act. The new emphasis on the family and the introduction of the Conference in the New Zealand Act are laudable attempts to account for the fact that the interests of children and parents are often inextricable.

C. *Conclusion on the Effect of the Acts on Children's Rights*

The principles in the New Zealand Act, because they bind everyone who acts under the authority of the Act, are more effective in protecting children's rights than the England Act, where the principles only affect judicial decision-making. If the welfare principle in the England Act were to bind everyone who carried out judicial orders, the principles

86. New Zealand Act, *supra* note 7, § 70(1).

87. *Id.* § 70(2).

of the England Act would come closer to providing the amount of protection of children's rights found in the New Zealand Act.

The New Zealand Act does not place short time limits on assessment of the child's situation for determining whether the child is at risk. It is thus more effective than the England Act in assuring that, in a situation where extensive assessment might be necessary, the child will not be left unprotected. The England Act cannot protect a child in such a situation without substantially complicating the intervention process, which will increase the trauma suffered by the child, as well as impinge further upon parental rights.

Although the EPO and the CAO permit parents reasonable access to the child, they do not involve the parents and the family in the protection process as does the Conference. The New Zealand Act seeks to reduce the role of the state by forcing the family into the role of protector. Activating the family increases protection of children's rights, because perfunctory displacement of the parents by the state to protect the child, though it might end abuse, might also hinder the child's development emotionally, socially, and culturally. The most desired outcome is for the family to be induced to protect the child, because then the child's identity will not be jeopardized. For these reasons, the New Zealand Act gives greater protection to children's rights than does the England Act.

III. THE EFFECT OF THE ACTS ON THE RIGHT OF PARENTS TO RAISE THEIR CHILDREN FREE FROM STATE INTERVENTION

A. *The Effect of the England Act on the Rights of Parents*

1. *The England Act Principles and Parents' Rights*

Juxtaposed with the welfare principle in § 1 of the England Act is the principle of non-intervention. This principle requires a court, when considering whether to take action, not to issue an order under the authority of the Act "unless it considers that doing so would be better for the child than making no order at all."⁸⁸ With this principle surfaces the legislative intent that access to courts will be limited under the England Act. Indeed, adherence to the principle will have the effect of reducing the court's role in many cases to a marginal level.⁸⁹ The

88. England Act, § 1(5).

89. Bainham, *supra* note 12, at 144.

emphasis on non-intervention is reflected in many of the Act's provisions.⁹⁰ One of the themes of the Act is resolution of child-related issues outside the court system whenever possible.⁹¹

The attempt to provide a check on the possible adverse effects of the non-intervention principle on children's rights is present in the next two sections of the England Act, which redefine the interests of parents in terms of responsibilities rather than rights.⁹² "Parental responsibility" encompasses "all the rights, duties, powers, responsibilities, and authority which by law a parent of a child has in relation to the child and his property."⁹³ The Act definitively lists the types of relationships to which parental responsibility will attach and allows for it to be shared by a number of people at once.⁹⁴ This change in terminology is more than one of semantics;⁹⁵ it implies that children are "persons to whom duties are owed" and that they are not to be treated as property.⁹⁶ It will require that more input by children be included in decisions which affect them, including decisions made by parents and legal authorities.⁹⁷

Defining the role of parents with respect to their children in terms of responsibilities may or may not present any difficulties when implementing those aspects of the Act pertaining to care and provision for children. But protection of children not only involves ensuring that a principle of welfare works when parent and child interests conflict; it also involves the extent to which the state can intervene in family life to protect the child. In this sense, the parents do have rights. They have the right to raise their child free from unjustified state intervention. Once the threshold for intervention is reached (that is, once a court decides to issue an order), the non-intervention principle no longer provides a check against state power and activity. The principle is effective only at the pre-intervention stage as a restraint on judicial decision-making.⁹⁸ The danger in submerging the concept of parental

90. *Id.*

91. Linda Feldman, *Getting Ready for the Children Act*, 134 SOL. J. 1142, 1143 (1990).

92. See England Act, *supra* note 5, §§ 2-3.

93. *Id.* § 3.

94. *Id.* § 2.

95. Freeman, *supra* note 4, at 346. Parental rights have often been viewed as similar to property rights; parental responsibility defines the relationship in terms of obligations. *Id.*

96. Andrew Bainham, *The Children Act 1989: Adolescence and Children's Rights*, FAM. L., Aug. 1990, at 311.

97. *Id.*

98. See England Act, *supra* note 5, § 1(5). The statute provides:

rights within the definition of parental responsibility is that it relaxes the necessity of the state to justify the action it takes upon intervening, which is an unwarranted delegation of power to the state.

2. *The England Act Provisions and Parents' Rights*

The primary tool the England Act provides for handling instances of suspected abuse is the child assessment order (CAO).⁹⁹ Any local authority or authorized person may apply to a court for a CAO.¹⁰⁰ The court may issue a CAO only if it is satisfied that: 1) the applicant reasonably believes that the child is or will likely suffer significant harm; 2) an evaluation of the child is necessary for the authority to decide whether the child is at risk; and 3) it is not likely that an evaluation will take place without the order.¹⁰¹ When a CAO is in force, any person in a position to produce the child who is at risk has a duty to do so, and also has a duty to comply with any directions the court includes in the order.¹⁰²

The child is not to be removed from the home unless it is necessary for the purpose of assessment and may be kept out of the home only for periods designated in the CAO.¹⁰³ If a child is taken from the home, the CAO must include directions for the regulation of access the child will be allowed to have with other persons while the child is kept out of the home.¹⁰⁴ The Act requires the applicant for the CAO to take reasonable steps to assure that notice of the application is given to the child, to the child's parents, to any person who has parental responsibility for the child, and to any person who is caring for the child.¹⁰⁵

Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all. *Id.*

See also William Ackroyd, *The Orkney and Rochdale Cases*, FAM. L., June 1991, at 207, 208. Ackroyd states that:

The courts and the lawyers, under the Children Act 1989, can still avoid involvement in the child's future, and once a care order is made the court will have no control over how it is acted upon unless someone brings it back to the court. These problems are not going to be resolved by the 1989 Act *Id.* at 208.

99. See *supra* Part II.A.2.

100. England Act, *supra* note 5, § 43(1).

101. *Id.*

102. *Id.* § 43(6).

103. *Id.* § 43(9).

104. England Act, *supra* note 5, § 43(10).

105. *Id.* § 43(11).

The CAO is only effective for seven days.¹⁰⁶ These requirements for carrying out a CAO are intended to prevent unjustified state intervention into family life; assessment is to have minimal interference with family life.

3. *Conclusion on the Effect of the England Act on Parents' Rights*

Including a principle of non-intervention in the England Act is evidence of legislative efforts to protect parents' rights to live free from unjustified intervention. However, the same problem arises with adherence to this principle as arises with adherence to the welfare principle; it is only effective up to the point at which the court decides to issue an order. After the court issues an EPO or a CAO, the authorities carrying out the order do so without the guidance or restraint of any of the Act's principles.

Some constraint on state authorities is provided in the regulations governing activity taken under the CAO, which provides parents with some protection when abuse is suspected. But there are no such constraints under an EPO. Under an EPO, parental rights are left unprotected from state power. Making the principles of the Act binding at every step in the child-protection process would increase protection of parental rights.

B. *The Effect of the New Zealand Act on Parents' Rights*

1. *The New Zealand Act Principles and Parents' Rights*

Under the New Zealand Act, wherever possible the child's family is to participate in making decisions regarding the child, and consideration must be given to the views of the family.¹⁰⁷ The relationship between a child and his family must be maintained and supported.¹⁰⁸ Consideration must always be given to how decisions made with respect to the child will affect the child's welfare and the stability of the child's family.¹⁰⁹ These principles indicate that the welfare of the child should not be viewed as isolated from the stability of the family.¹¹⁰

In addition to these general principles guiding action under the entire Act, there are specific principles to guide action taken to protect

106. *Id.* § 43(5).

107. New Zealand Act, *supra* note 7, § 5(a).

108. *Id.* § 5(b).

109. *Id.* § 5(c).

110. Atkin, *supra* note 6, at 323.

children. Children are to "be protected from harm, their rights upheld, and their welfare promoted."¹¹¹ However, the family has the primary role of caring for and protecting them.¹¹² In accordance with these two principles, the family is to be "supported, assisted, and protected as much as possible."¹¹³ Thus, intervention into family life is to be no more than that required to guarantee the safety and protection of the child.¹¹⁴

This combination of principles can be viewed as a strong statement to discourage action taken solely to uphold the interests of the child. The child's interests might therefore be viewed as compromised by the minimalist intervention philosophy that favors the family, and consequently the rights of parents.¹¹⁵ Arguably, the principles can be read as promoting the family for the purpose of strengthening the family unit as the primary caretaker of the child; thus, the role of the state is reserved to ensuring that the family is fulfilling its role in protecting the interests of the child. The principles in the New Zealand Act constitute legislative recognition of the notion that the welfare of the child is not necessarily best served by the state acting to displace the family as the primary caretaker when intervention is necessary.

2. *The New Zealand Act Provisions and Parents' Rights*

The primary innovation in the New Zealand Act is the Conference.¹¹⁶ The purpose of having the Conference is to involve the family in the intervention process. Reducing the role of the state and increasing the role of the family serves to protect parents' rights. If the child is taken from the parents, but remains with the family, the parents' interests in preserving the child's identity as a member of that family and in preserving the child's cultural values are upheld. The family, by having a more active role in the intervention process, will also have a greater voice in the decisions made regarding the future of the child.

It is only when the parents or the family cannot be enlisted to participate in the Conference that more drastic intervention by the state will occur. This assures that the parents are given a chance to have an active role and a meaningful voice in the intervention process, which will minimize the potential for unjustified state intervention.

111. New Zealand Act, *supra* note 7, § 13(a).

112. *Id.* § 13(b).

113. *Id.*

114. *Id.* § 13(b).

115. Atkin, *supra* note 6, at 324-325.

116. *See supra* Part II.B.2.

3. *Conclusion on the New Zealand Act and Parents' Rights*

The New Zealand Act principles and provisions go a long way toward preserving and protecting parents' rights to raise their children free of state intervention. By including a detailed list of principles, along with giving parents and the family an active role in the intervention process, protection of parental rights is accomplished without jeopardizing the interests of the child.

The primary purpose of a child protection law is to protect children at risk. A secondary, but necessary facet of such a law must be its ability to preserve the family as the primary societal unit for raising children. A law that can accomplish both goals without compromising the rights or interests of any participant in the process is to be desired. The New Zealand Act comes close to achieving both goals because its provisions contain protection of both parents' rights and the rights of children.

C. *Conclusion on the Effect of the Acts on Parents' Rights*

The non-intervention principle in the England Act fails to completely protect the rights of parents because it is not effective beyond the judicial stage of the intervention process. The philosophy of non-intervention accomplishes preservation of parental rights under the New Zealand Act because it does provide a check on state activity throughout the entire child-protection process.

The non-intervention principle in the England Act is the means by which the Act reduces the role of courts at the intervention stage. Beyond the judicial stage, authorities acting under an EPO or a CAO need not involve the parents in either the protection or the assessment process. The lack of a principle to check state activity under the EPO and the CAO leaves parents' rights under the England Act in jeopardy.

By prioritizing the family throughout the intervention stage, and by including the family in the decision-making process, the New Zealand Act protects parents' rights from excessive state power. Thus, the New Zealand Act comes closer to the goal of preserving the family unit as the primary caretaker for the child.

IV. THE EFFECT OF THE ACTS ON THE POWER OF THE STATE TO INTERVENE IN FAMILY LIFE TO PROTECT CHILDREN

A. *The Effect of the England Act on the Power of the State*

1. *The England Act Principles and State Power*

The two major innovations in the England Act are the presence of principles to guide court action and an attempt to limit access to

courts by giving social workers more discretion at the investigatory stage. These innovations are attempts to change the role of the state. A statement of principles, in particular a principle of non-intervention, to guide court activity is an effective way to reduce unwarranted state intervention into family life. The non-intervention principle evinces legislative belief that too much state power reduces protection of both the rights of children and parents.

Unfortunately, the non-intervention principle is incorporated into the England Act in such a way that it inconsistently affects both children's rights and parents' rights. The inclusion of the non-intervention principle and the omission of a duty to investigate allegations of abuse combine to leave abused children at risk.¹¹⁷ There is a distinct possibility that some abused children will not be protected because of the influence of the non-intervention principle upon the subjective discretion employed by the investigating authority.¹¹⁸

Parents are the beneficiaries of the combination of the presence of the non-intervention principle and the omission of a duty to investigate, because that combination minimizes the chances of state intervention. However, the non-intervention principle applies only to courts, so state actions taken pursuant to court order are left unchecked.¹¹⁹ Thus, parents' rights, which are sheltered during the investigatory stage, are left exposed to potential unjustified state actions taken under the guise of court order.

2. *The England Act Provisions and State Power*

The provisions of the England Act do not impose a duty upon social workers to investigate allegations of abuse. If a local authority 1) knows a child is the subject of an EPO, 2) knows a child is in police protection, or 3) reasonably believes a child is suffering, or will likely suffer, significant harm, the authority then has a duty to make inquiries extensive enough to determine whether further action is needed.¹²⁰ It

117. See *infra* text accompanying notes 120-23.

118. See *infra* text accompanying notes 120-23.

119. See *supra* text accompanying note 98.

120. England Act, *supra* note 5, § 47(1). The statute provides:

- 1) Where a local authority
 - a) are informed that a child who lives, or is found, in their area
 - i) is the subject of an emergency protection order; or
 - ii) is in police protection; or
 - b) have reasonable cause to suspect that a child who lives, or is found,

has been noted that the duty under this section is only to make inquiries and not to conduct an investigation.¹²¹ This is confirmed by the Act itself, which states that if "a local authority conclude [sic] that they should take action to safeguard or promote the child's welfare they shall take that action."¹²² Thus, the authority is only under a duty to take action that it decides to take, which is a subtle way of informing that the authority has complete discretion as to whether it will take any action at all.

Since investigating authorities are not bound by the welfare and non-intervention principles, and there is no actual duty to bring the situation within the reach of those principles, abuses of discretion by investigating authorities will be essentially immune from appeal. Therefore, the rights of the child at the investigatory stage are severely undermined.¹²³ The intention to make the child's welfare paramount at the judicial stage of the proceedings is of no help to the child left at risk because of an improper use of discretion by the investigator.

An important power reserved to the state under the England Act is that of removing children in cases of emergency. When a constable has "reasonable cause to believe" a child will likely suffer significant harm, he may remove the child to other accommodations or prevent the removal of the child from a safe accommodation.¹²⁴ "Reasonable cause to believe" requires not only reasonable cause, but that the

in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such inquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

Id.

121. Eekelaar, *supra* note 36, at 486.

122. England Act, *supra* note 5, § 47(8).

123. See Eekelaar, *supra* note 36, at 487. Eekelaar notes that:

It may be thought unlikely that a social services department, having investigated and discovered that a child is in significant danger, will decide it 'should' take no action, or no realistic action . . . But is it? Might it decide that it 'should' do no more because: i) personnel resources are so stretched that taking on this case will jeopardise other children; ii) there is an industrial dispute; iii) such action might jeopardise community relations? It is surprising that the imposition of extensive and elaborate duties to inquire do not [sic] lead to a clear and unambiguous duty to take action on the basis of the results of the inquiries where the child is likely to be harmed if no such action is taken.

Id.

124. England Act, *supra* note 5, § 46(1).

person actually believes the child is at risk.¹²⁵ This high standard provides some assurance that intervention will be justifiable, and that family life will not be interrupted unless the situation is actually serious.

The constable is given several duties to perform once he has taken a child into police protection which will ensure that his emergency protective power is not abused.¹²⁶ After making necessary inquiries into the report which led to the belief that the child was at risk, the constable must release the child, unless he still reasonably believes the child is at risk.¹²⁷ Children may not be kept under police protection any longer than 72 hours.¹²⁸ However, if the constable believes it is necessary, he may act on behalf of the local authorized official and apply for an EPO.¹²⁹

A constable who has taken a child into custody is not charged with parental responsibility for the child.¹³⁰ The duty of the constable is similar to that contained in the welfare principle; he must "do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."¹³¹ The constable also has discretion regarding the amount of access to the child that interested individuals will be allowed to have.¹³²

3. *Conclusion on the England Act and State Power*

The attempt to reduce state power in the England Act was accomplished inconsistently, so that while both children and parents have adequate protection at some stages in the child-protection process, both are left vulnerable at other stages. The non-intervention and welfare principles should bind all state authorities throughout the entire process of intervention. The investigating authorities should be given an actual, unequivocal duty to conduct at least minimal investigation in every instance where there is a substantive allegation of child abuse. These changes would bring the England Act closer to balancing the rights and interests of the participants in the child-protection process. As it is, the England Act leaves the state with too much power.

125. *See, e.g.*, *R v. Banks*, 2 K.B. 621, (1916-17), All E.R. Rep. 356, (1916); *R v. Harrison* (1938), 3 All E.R. 134, 159 L.R. 95; *Nakkuda Ali v. Jayaratne* (1951), App.Cas. 66, P.C.

126. England Act, *supra* note 5, § 46(3)-(4).

127. *Id.* § 46(5).

128. *Id.* § 46(6).

129. *Id.* § 46(7)-(8).

130. England Act, *supra* note 5, § 46(9).

131. *Id.* § 46(9)(b).

132. *Id.* § 46(10).

The state's interest in protecting children in emergency situations is upheld by giving police the power to remove children when they reasonably believe that an emergency exists. The parents are adequately protected from unjustified police intervention by: 1) the requirement that the police actually believe the child is in danger; 2) the requirement that the police release the child when they believe it is safe to do so; and 3) the limiting of police protection of the child to 72 hours.

B. *The Effect of the New Zealand Act on the Power of the State*

1. *The New Zealand Act Principles and State Power*

The principles of the New Zealand Act not only bind courts, but also bind any persons who exercise any powers conferred by the Act.¹³³ Thus, the philosophy of promoting the family at all stages of the proceedings, except when doing so would jeopardize the interests of the child, is an effective check on state power. The comprehensiveness of the list of principles and objectives in the Act gives authorities adequate guidelines for implementing their decisions and policies. Little is left solely to the discretion of the authorities under the New Zealand Act principles, which should result in strictly controlled actions taken under the Act's provisions.

2. *The New Zealand Act Provisions and State Power*

When a social worker or the police receive a report alleging child abuse, they must conduct, or arrange for the conduction, of such investigation "as may be necessary or desirable" into the situation alleged in the report.¹³⁴ Thus, the investigator under the New Zealand Act is given some discretion; however, there are effective checks on that discretion. Investigatory activity must be made in consultation with a Care and Protection Resource Panel.¹³⁵ When a decision is made not to investigate a report, the investigator must make an effort to inform the reporter of that decision.¹³⁶ The investigator is also bound by the principles of the New Zealand Act, which require him not to endanger the welfare of the child.¹³⁷

The Director-General has several duties under the New Zealand Act. He is to review every resolution of the Conference, and "unless

133. New Zealand Act, *supra* note 7.

134. *Id.* § 17.

135. *Id.* § 17(1).

136. *Id.* § 17(3)(b).

137. New Zealand Act, *supra* note 7, § 5.

it would be clearly impracticable or clearly inconsistent with the principles" of the Act, must implement those resolutions and provide the services and resources necessary for the taking of such action.¹³⁸ The Director-General may also provide financial assistance to ensure the implementation of the Conference resolutions.¹³⁹

The Director-General thus has a duty to make sure the principles of the Act have not been deviated from in the handling of the case and can refuse to implement Conference resolutions if they fail to adhere to the principles. This provides a check on the discretionary power of the Coordinator and the actions taken by the Conference. It should be noted, however, that the standard is weighted in favor of implementation; the Director-General is to implement the resolutions unless it is "clearly impracticable" or they are "clearly inconsistent" with the principles of the Act.¹⁴⁰

One unwarranted source of state power under the New Zealand Act is the rule that proceedings of a Conference are privileged. No evidence from a Conference is admissible in any judicial setting.¹⁴¹ This restriction is a barrier to appealing from Conference decisions.¹⁴² It might serve the intent of limiting access to courts, but it also makes the power of the Coordinator loom even larger, increasing the chances that the welfare of the child and the interests of the parents might not be properly promoted. The Coordinator needs a significant amount of authority to ensure that the family does not improperly control the Conference; however, providing the Coordinator with immunity from judicial scrutiny gives the state too much power.

The Conference is the normal route through which a care and protection case proceeds. If the Conference is unsuccessful, an application to the court can be made for a declaration that the child needs care or protection, and the court will then take over.¹⁴³ If it is necessary, the Conference may be bypassed initially.

A judicial official who is satisfied that there are reasonable grounds for suspecting a child is suffering, or is likely to suffer, deprivation, abuse, or harm may issue a warrant authorizing the police or a social worker to search for that child.¹⁴⁴ If the authorized person reasonably

138. *Id.* § 34(1).

139. *Id.* § 34(2).

140. *Id.* § 34(1).

141. New Zealand Act, *supra* note 7, § 37.

142. Atkin, *supra* note 6, at 335.

143. *Id.* at 330.

144. New Zealand Act, *supra* note 7, § 39(1).

believes that the child is in danger, he may remove the child, by force if necessary.¹⁴⁵ Any member of the police who reasonably believes that it is critically necessary to act to protect a child from injury or death may, without a warrant, enter, search, and remove that child, by force if necessary.¹⁴⁶

Children removed from home with or without a warrant are considered in the custody of the Director-General, who may place them in accommodations consistent with those described in the principles of the Act.¹⁴⁷ A parent or guardian may make court application for the release of a child, or for access to a child who is in the custody of the Director-General.¹⁴⁸ A child placed in the custody of the Director-General must be brought before a court within five days after being detained or must be released.¹⁴⁹

3. *Conclusion on the New Zealand Act and State Power*

The principles of the New Zealand Act are a formidable barrier to abuse of state power because they bind all who act under the authority of the Act and they are consistent in application. The Director-General's duty to ensure that the principles of the Act are followed in every child-protection situation provides an additional check on state power. The Act places checks on the investigator's discretion, minimizing the potential for its abuse.

The Conference proceedings should not be privileged from judicial scrutiny. This gives the Coordinator too much control over the happenings in the Conference and results in a portion of the Act's provisions being essentially immunized from its principles. Giving the judiciary power to scrutinize Conference proceedings would discourage Coordinator impropriety and give participants in the process a means for appealing abuses of Coordinator discretion.

The police power to protect children in emergency situations effectively preserves the interest of the state in ensuring the physical safety of children. The high standard that must be met before intervention can occur and the limitations on the power of the police to keep children in custody provide protection for both the interests of children and parents.

145. *Id.* § 39(3)(b).

146. *Id.* § 42(1).

147. *Id.* § 43.

148. New Zealand Act, *supra* note 7, § 44.

149. *Id.* § 45(a).

C. *Conclusion on the Effect of the Acts on State Power*

The England Act would benefit from having a list of principles as comprehensive as those found in the New Zealand Act, and would benefit from the imposition of those principles upon all participants in the child-protection process. The principles in the New Zealand Act, because they are both comprehensive and binding on all authorities, provide an effective check on state power throughout virtually all of the provisions in the Act. The principles in the England Act are inconsistently applied, so state power is too great, even though the role of the courts is reduced. Under the New Zealand Act, court action is reduced without placing at risk the rights of children or parents.

Another problem in the England Act is that the investigator has no duty to investigate, which protects parental rights at the expense of the rights of children. The New Zealand investigator is given some discretion, but there are effective checks on his power; thus, children who are at risk should not be left at risk because of an abuse of investigator discretion.

The privilege surrounding proceedings of the Conference leaves the Coordinator with too much power. Removing this barrier to judicial scrutiny would bring the Conference and the Coordinator in line with the amount of state power delegated by the other provisions of the New Zealand Act. Both Acts give proper amounts of power to the police to protect children in emergencies. Comparatively, the New Zealand Act comes closer than the England Act to giving the state the appropriate amount of power necessary for it to fulfill its interest in protecting children from abuse.

V. CONCLUSION

Protecting the rights and interests of participants in the child-protection process involves balancing the concept of non-intervention with that of welfare. However, there are difficulties involved in adhering to both a principle of welfare, which asserts that the child's interests are paramount, and a principle of non-intervention, which implies that parents have the superior interests.¹⁵⁰

Compared to the England Act, the concepts of welfare and non-intervention embodied in the New Zealand Act are more mutually supportive; the concept of parental responsibility posited by the England

150. Bainham, *supra* note 12, at 144-145.

Act, which translates into family responsibility in the New Zealand Act, tends to harmonize the two principles in the New Zealand Act.¹⁵¹ The England Act develops the notion of parental responsibility in a section separate from the welfare and non-intervention principles, which leaves the two principles in an uncomfortable co-existence.¹⁵²

With the New Zealand Act, however, the inclusion of parental responsibility within the welfare and non-intervention principles increases the effectiveness of both principles. Since the principles apply to anyone acting under the authority of the Act, they have a pervasive influence on any action taken that affects the interests of children and parents. Limiting the state's role to intervening only enough to ensure that the family is acting to protect the child protects both the parents and the child, without compromising the interest the state has in protecting the child. Giving the family a substantive role in the decision-making process protects its rights, even though its interests are defined in terms of responsibilities.

The drafters of both Acts had the same goal of reducing state power and court activity. However, the authors of the New Zealand Act recognized that, in attempting to balance the interests of the participants in the child-protection process, the role of the parents would also have to be adjusted. If the role of the state must be reduced, then the parents' role must be increased; changing the role of only one of these two participants adversely affects the rights of the child. A significant problem with the England Act is that it reduces the state's role without increasing the role of the parents or the family in the child-protection process.

The formula for protecting children at risk in the New Zealand Act is one that seeks to align the interests of the state with those of the parents, so that both work together to protect the interests of the child. The New Zealand Act is not without flaws; and, since it creates a new forum for handling child-protection cases, implementation of the Act may reveal practical difficulties with its approach. However, the effort that went into drafting the Act has resulted in a child-protection measure that theoretically, at least, comes close to achieving a balance among children's rights, parents' rights, and the interests of the state.

*Kevin G. Harvey**

151. New Zealand Act, *supra* note 7, § 13(b).

152. See England Act, *supra* note 5, §§ 1-2.

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

