

## in that case

Michael and Diana live in a staffed group home where they receive general supervision and support, which includes learning to be independent. Michael is 30-years-old and has a mild degree of disability from a head injury as a child. He has difficulties learning and remembering new skills, and is sometimes impulsive and has mood swings. Michael has been working in a sheltered workshop and is now undertaking a 'Preparing for employment' course. Michael has a close relationship with his mother who lives in the same city.

Diana is 35-years-old and has a mild degree of intellectual disability of unknown cause. She is the only daughter of rural parents and has been living with them until her move to the group home four years ago. Diana has completed both pre-employment and living skills courses at the Polytech. She is now employed part-time in a childcare centre, following a year's work experience.

Over the past two years, Michael and Diana have developed a close and intimate relationship. When staff became aware of this, they arranged for them to attend health education courses in sexuality and relationships. Prior to this, Diana had been given the Depo Provera contraceptive injection continuously since age 15 without knowing its purpose. She had been told it was 'to keep her healthy'. When Diana learns about reproduction and the purpose of the injections, she refuses to have any more.

Michael and Diana express a clear wish to move into their own flat with some staff support. Staff are generally supportive, as is Michael's mother, but Diana's parents are opposed to the relationship. Before any move takes place Diana becomes pregnant. Both she and Michael are delighted, and with support, they have both begun attending baby care classes. Michael's mother is prepared to lend practical and emotional support; however, Diana's mother has concerns about the safety of a baby in their care and thinks that the baby should be adopted out. She has contacted the child protection services, who are considering applying to the Family Court for an order removing the baby from Diana and Michael at birth. The social worker involved believes the child will be at risk from abuse and/or neglect. She reasons that it is better to remove the child as soon as possible and get permanent care in place rather than wait until what she believes is inevitable removal. In contrast, both Diana's midwife and her childcare employer are supportive of Diana's ability to parent, with support.

The whole situation is distressing for Diana and Michael, and for all those involved.

## response

Anne Woodside

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The starting premises of any intervention in anyone's lawful activity should be:

- a) is it necessary – for the individual or society?
- b) will the intervention cause less harm than the original situation?

In practice what this means is that people, regardless of disability label, are free to do what they want inside the law, unless there is a specific, court-ordered injunction to the contrary.

The situation Diana and Michael find themselves in is not unusual and their responses are similar to others throughout New Zealand and the world who find they are expecting a child. For starters they:

- are happy and delighted at being able to make a baby together. A testament of their love for each other.
- feel nervous about their ability to parent for the first time and are attending baby care classes together
- look to family, friends and others for guidance and support.

The only reason that Diana and Michael's situation is *seen by others as different* is because they have a label of intellectual disability. Is this label being used to define them? Can it predict their ability to love, to nurture, and to parent? It appears that the social worker is making assumptions based on a label that has, for generations, caused widespread discrimination based on ignorance and fear.

The relevant legislation in this instance is the Children Young Persons and their Families Act (1989), and it is this which would guide any action. The prime intention of the act is to protect families from the type of discrimination, which appears to be informing the social worker's decision. However, to remove any child from its parents is one of the most powerful actions any Social Worker can take at any time, and such power is not bestowed lightly. The CYPF Act (1989) gives very clear

parameters under which social workers may exercise this power. When any social worker is considering an application to the Family Court to remove a child, they must first look to the principles of the Act itself, which clearly define its actions.

The principles of the Act clearly state that:

13(b) ... the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whanau, hapu, iwi and family group and that accordingly –

- i A child or young person's family, whanau, hapu, iwi and family group should be supported, assisted and protected as much as possible; and
- ii Intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection.

This puts the onus on services to provide support, assistance and protection to the family so that they can carry out their primary role. It also talks about minimum intervention to ensure safety and protecting *not* taking the child away (maximum intervention) as the first resort.

Prior to the Act, children were often removed from the family setting based on assessments, which were judgmental about 'family competence' and assumed norms of child-rearing practice. This was particularly damaging for Maori children and their families. Since the passing of the Act, at least in principle, a framework now exists for making more informed and less judgmental decisions based on knowledge about and assessment of a child's particular situation. These assessments are based on:

- substantiated instances of abuse or neglect or
- strong supportive evidence that it is likely to occur because of past history.

The onus of proof lies with the social worker. This person must demonstrate that the parents are not able to care for their child. This child hasn't even been born yet and there is nothing to indicate such a risk.

From the information given, Diana has shown both her midwife and employers through her work and actions that she will be able to parent this child, with support. In particular her employers have known her and observed her interactions with young children for some time. What other parents get such an opportunity to learn childcare skills and be assessed at the same time? Any decision, regarding their ability to parent, should be based on their own current competence and evidence of sufficient support to extend and sustain this competence.

The other key players here are Diana and Michael's parents. Often disability support services fail and those who 'pick up the pieces' are the parents. Therefore their views and participation in support and planning are vital. If we accept the view expressed by those who know Diana and how she deals with children, that is her employer and midwife, that Diana

and Michael are entirely adequate parents with support, then the issue really is, not are Diana and Michael competent, but are the supports competent? Are those services contracted to help people such as Diana and Michael able to do their job, and are they demonstrably able, enough to reassure the parents?

Unfortunately, however, well-intentioned legislation may be, it still has to be interpreted by social workers, supervisors, lawyers and judges. Negative and stereotypical views of disabled people abound and this is another example of how fear and prejudice can be used to deny people their rights and destroy their lives.

So the ethical decision we are making here is not really about Diana's and Michael's rights versus competence. It is about whether it is reasonable to take away someone's civil rights based on the potential failure of the system that exists to protect and support its citizens. It is our considered opinion, as professionals working in the disability support area and as citizens of New Zealand, that no New Zealand citizen should be prepared to subsume their clearly articulated rights to the competency of government agencies.

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## response

### Professor Mark Henaghan

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New Zealand courts were the first in the Commonwealth to make protection orders regarding children prior to the birth. In the case of *Baby P* (an unborn child) a 14 year old girl agreed to a wardship order being made two weeks before birth in order to protect the unborn child from a violent boyfriend. But, in this case there is no current physical risk to the unborn child.

Courts do have jurisdiction under the Children, Young Persons and Their Families Act 1989 to intervene once a child is born if the child is being or is 'likely to be' abused or neglected. There is no emergency situation here so police powers to remove children who are critically at risk could not be invoked nor are there grounds on the facts for obtaining a warrant to remove. In theory there is nothing to stop a court removing a child at birth if the Court believes it is in the best interests of

the child which is the overriding consideration. The House of Lords in *Re D* allowed removal at birth from drug addict parents who ignored medical warnings to stay off drugs during the pregnancy period. The child was born with drug dependency. There is no such parallel here – both prospective parents are acting responsibly during the pregnancy period.

The underlying principle of the care and protection law of children in New Zealand is to keep children within their family and family group provided the child is safe. Children cannot be adopted without natural parents' consent unless the parents are unable to carry out the normal duties of parenthood which involve feeding, clothing, nurturing and educating the child. Michael and Diana are able to do this with support. Support is the key here. With support Michael and Diana can look after the child.

## response

### Nicola Atwool

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There are two sets of guidelines when considering this situation – The Children, Young Persons, and their Families Act 1989 and the UN Convention on the Rights of the Child. Both emphasise the significance and importance of family. The principles guiding action under the CYP & F Act are outlined in Section 13. The first principle states that children and young persons must be protected from harm, their rights upheld, and their welfare promoted. Section 13(b) stipulates that the primary role in caring for and protecting a child or young person lies with the family, whanau, hapu, Iwi and family group and that they should be assisted and protected as much as possible. Section 13(b) (ii) stipulates that intervention into family life should be the minimum necessary to ensure a child's safety and protection.

Article 9 of the UN Convention on the Rights of the Child states:

States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Both sets of guidelines emphasise the centrality of family in children's lives, the parents' right to involvement in decision-making and to on-going contact with their child.

There appear to be two key issues. The first is the child's right to develop to their full potential. This goes much further than meeting basic needs. Parents must be able to respond sensitively to the child, provide stimulation, have the capacity to think ahead, and the flexibility to adapt as the child's needs

change with growth and development. The social worker is presumably of the opinion that the parents' disability will result in a failure to care for, and protect the child. The second issue concerns the parents' rights to care for their child and the possibility that they are being discriminated against on the basis of their disability.

The option of removing the child at birth does not seem consistent with the principle of minimum intervention, as there is no existing information indicating a failure to provide an appropriate level of care in the past. However, the second option of allowing the child to remain with parents carries a level of risk for the child if the parents are not able to manage. There is a high risk that the different professionals involved in this situation will become polarised with each faction seeking evidence to support their position. When faced with conflict, there is a tendency to adopt either/or solutions. However, both the CYP & F Act and the UN Convention make it clear that it is not that simple.

Those motivated by a desire to protect the child are likely to cite the 1994 amendment to the Act which states that the welfare and interests of the child shall be the first and paramount consideration. However it is important to note the final words of the amendment: 'having regard to the principles set out in sections 5 and 13 of this Act'. The removal of children from families has significant long-term consequences. Adoption research has demonstrated the continuing significance of birth parents for adoptees. Foster care does not always provide stability and security and it carries its own stigma for children. Children in care also have the right to continuing contact with parents and it is important that positive ways are found to achieve this goal. It is important to avoid disputes around 'ownership' of the child.

Those supporting the parents may overlook the child's needs and rights, inadvertently compromising these when focusing

on parental rights. There is also a danger when parents require support, that the child's primary attachment is formed with those providing support rather than the parents. If these are paid workers, this can result in significant loss for the child if a support person leaves. The demands of parenting are ever changing and support networks may need to be maintained throughout the child's life. It is important that a long-term view is taken.

There is an alternative to polarisation. A plan could be put in place to address the concerns of all parties and base decisions on the best information available. An important component of such a process would be an assessment of the parents completed prior to the birth of the child. Key dimensions of care such as attachment, the ability to think ahead, and the ability to adapt to changing needs could be assessed. Diana's employment provides opportunities for her interaction with pre-school children to be observed. Michael is described as impulsive and having mood swings. This would need to be explored to assess whether this behaviour is likely to place a child at risk. As part of an assessment, it would also be important to explore Diana's mother's concerns because these may be based on fear or they may be based on substantive

evidence that her daughter will not be able to cope with the demands of parenting. An assessment would also provide the opportunity to assess the support available including the level of commitment, and any constraints.

A decision based on an assessment is more likely to ensure that all parties are informed and willing to participate in the actions that would flow from the decision. For example if the child is to remain with the parents, there could be an agreement to monitoring so that if problems arise the situation could be re-evaluated. Risk to the child can be kept to a minimum because even if the parents are not able to manage, timely intervention can occur.

The challenge is to find common ground and a process whereby the tensions can be managed without compromising either the parents' rights or the rights of the child. Professionals need to be aware of their own value base and the dangers inherent in taking sides in a situation that has the power to determine a child's future. As soon as we take sides, we cease to listen to what is perceived to be an opposing faction. All of the professional knowledge and expertise available needs to be utilised in making decisions in this situation.