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tor's fiduciary duties (each surety is entitled to notice of such proceeding by personal delivery or by mail to its filed address and any other known address);

- (3) Proceedings for the breach of the bond may be brought against the sureties on petition of a successor conservator or any interested person; and
- (4) Each surety is liable on its bond until the penalty is exhausted regardless of how many proceedings it takes to exhaust it.

[5-412(a)(1)-(4)]. When applicable, sureties are accorded the defenses of *res judicata* and of any statute of limitations which might have been raised by the primary obligor. [5-412(b)].

### § 31.03 Powers of the Court

In dealing with the estate of a protected person, the Court is given paramount control and authority. [5-408]. During the pendency of a protective proceeding, the Court is given the power to preserve and to apply the property of the person to be protected in any manner necessary for the benefit both of that person or his dependents. [5-408(1)]. Although the Court must have a preliminary hearing, there need not be any notice to other persons of this hearing.

After proper formal proceedings have been completed, the Court has extensive powers over

the estates of both minors and other disabled persons. With respect to a minor without other disability, the Court has all powers over the minor's estate and affairs which are or might be necessary to the best interest of the minor, his family and members of his household. [5-408(2)]. Much broader powers are given to the Court with respect to the estate of a person needing protection for a reason other than minority. Here, the Court has all powers over the protected person's estate and affairs which that person could exercise if present and not under the disability. [5-408(3)]. The Court, however, explicitly does not have the power to make a will for the disabled person. Among the specifically mentioned powers which the Court has are the power to make gifts, release property interests, create revocable or irrevocable trusts, exercise the elective share for a surviving spouse and change beneficiaries under insurance or other contractual programs. Any such change of beneficiary, release, renunciation or gift exceeding twenty per cent of any year's income of the estate may be ordered by the Court only after notice and hearing and after it is determined to be in the best interests of the ward. [5-408(4)]. Significantly, any court order made under this provision must follow and consider any estate plan of the protected person of which the Court has knowledge. [5-427].

Court orders under this provision have no effect upon the capacity of the protected person. [5-408(5)]. Consequently, the protected person

is, in spite of any court order, still able to bind himself by contract and transfer his property at least as effectively as any equitable owner of property is able. [2 UPC Practice Manual, 537].

When a conservator is appointed, there is a direct relationship between the powers given to the Court and those given to the conservator. First, the Court is given the authority to exercise its powers either directly or indirectly through a conservator. [5-408]. Second, the Court may in its discretion and subject to the restrictions put upon its own powers, confer upon the conservator any of its own powers or it may give the conservator none of its powers and even limit the powers which he normally possesses. [5-426]. Any such limitation on a conservator's ordinary powers, however, would have to be endorsed upon the conservator's letters of appointment in order to bind third parties.

§ 31.04 Powers, Duties and Liabilities of the Conservator

A. INTRODUCTION

The powers, duties and liabilities of a conservator are extensively detailed in the Code. Of the three kinds of fiduciaries provided for persons under disability dealt with in the Code, the conservator is clearly made the most important and is necessarily given the broadest authority as well as being the most supervised by the Court. Gen-

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erally, the Code treats the conservator's authority over the property of the protected person in a manner very similar to the authority which a trustee has in dealing with the trust estate. [2 UPC Practice Manual, 535]. Because a conservator both is given extensive powers and is dealing with the property of a person by definition unable to effectively manage or apply his own estate, the Code includes protective devices against overreaching or other abuses by such a fiduciary.

B. POWERS

Although the Court has paramount authority over a conservator's powers, in the ordinary case such powers are not exercised by the Court. The conservator is given, therefore, a broad and explicit array of his own powers. [5-424]. Generally, in addition to specifically conferred powers, the conservator is given all powers which a trustee would have under the law of the Code state. [5-424(a)]. He is specifically accorded the power to invest and reinvest funds of the estate without court authorization or confirmation according to the law applicable to trustees investing trust assets. [5-424(b)]. Finally, when reasonably necessary to carry out the purposes of the conservatorship, he is empowered to take any of a long list of specified actions and transactions without court authorization or confirmation. [5-424(c)]. These enumerated powers accorded a conservator are nearly identical to those given to a personal representative of a decedent's estate under the

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Code. [Compare 5-424(c)(1)-(25) with 3-715(1)-(27)]. The following examples illustrate the comprehensiveness of a conservator's powers: (1) to collect, hold and retain assets of the estate although located in another state [5-424(c)(1)]; (2) to participate in the operation of any business or enterprise of the protected person [5-424(c)(3)]; (3) to subdivide and develop real property owned by the protected person [5-424(c)(9)]; (4) to borrow money against the protected person's estate [5-424(c)(18)]; and (5) to pay distributable sums without liability to the protected person's guardian, if any, relative, custodian or directly to the protected person. [5-424(c)(22)].

In addition to the above administrative powers, the conservator is accorded substantial and significant distributive powers. Again, without court authorization or confirmation, the conservator is empowered to expend and distribute the estate's income or principal or both for his protected person's support, education, care or benefit. [5-425(a)]. In making such expenditures and distributions, the conservator is given several guidelines. First, he must consider the recommendations made by the protected person's parent or guardian. [5-425(a)(1)]. By acting pursuant to such recommendations, the conservator will only be liable if he knows that a parent or guardian is deriving personal financial benefit from the payment either directly or indirectly as relief from a legal duty of support, or if the rec-

ommendations are clearly not in the protected person's best interests. Second, when expending or distributing the protected person's assets, the conservator must consider and weigh the size of the estate, the anticipated duration of the conservatorship, the potential for future termination of the conservatorship, the protected person's accustomed standard of living and his other funds or sources of funds. [5-425(a)(2)]. Third, the conservator may also consider the protected person's legal dependents or other members of his household who are in need and are unable to support themselves. [5-425(a)(3)]. Finally, payments may be made to reimburse any person, including the protected person, for proper expenditures or may be made in advance of services when the conservator reasonably expects them to be performed and when advance payment is customary or reasonably necessary. [5-425(a)(4)].

Except for the requirement of court approval for amounts exceeding twenty per cent of the income of the estate for any year, a conservator is permitted to make gifts to charities and to other objects in the same manner as the protected person would be expected to make if the estate is otherwise sufficient for the purposes of the conservatorship. [5-425(b)]. Significantly, this gift-making power does not apply to the conservator of a person who is disabled solely because of minority.

Upon majority for a minor and upon the ceasing of the disability for other protected persons,

the conservator is required to pay over all of the unprotected person's funds and properties to him as soon as possible. [5-425(c)-(d)]. Before making payment, however, the conservator must pay all prior claims and expenses of the administration.

A conservator's power may even extend beyond his protected person's death. If the protected person dies and no personal representative is appointed or no application for such appointment is made within forty days from the date of death, the conservator may be authorized by the Court to act as personal representative. [5-425(e)]. Notice must be given to persons demanding notice under Section 3-204 and to any person nominated executor in any known will of the deceased. Under this section there need not be an actual transfer of title from the conservator to the conservator as personal representative.

If a guardian has not been appointed for a minor who is unmarried, under eighteen years of age, and without parents, a conservator has no duty to commence guardianship proceedings and may, if willing, perform the functions of a guardian until the minor becomes eighteen or married. [5-424(a)]. This discretionary power in a conservator may in the appropriate case eliminate the need for the appointment of a guardian of a minor. The same power does not exist in a conservator for a person who is disabled for reasons other than minority.

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### C. DUTIES

The duties of a conservator are commensurate with his powers. A conservator's pervasive duty is to exercise his power as a fiduciary according to the standard of care set out in the Code for trustees. [5-417; see 7-302]. In addition, every conservator is required to prepare and to file with the appointing court within ninety days of his appointment a complete inventory of the protected person's estate. [5-418]. Copies of this inventory must be provided to the protected person if he is fourteen years of age or more and if he has sufficient mental capacity to understand these matters. A copy of the inventory must also be provided to the parent or guardian with whom the protected person resides.

A conservator also has a record keeping and accounting requirement. Under the Code, the conservator is required to keep suitable records of his administration for the inspection and perusal of any interested person. [5-418]. On termination, a conservator is required to account either to the Court or to the protected person or his personal representative. [5-419]. The conservator may voluntarily or involuntarily proceed through formal intermediate and final accountings before the Court. [See § 31.09]. In such an accounting proceeding, the Court may require, in any manner it specifies, the conservator to submit to a physical check of the estate under his control.

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In the overall administration of a protected person's estate, including the investment and distribution of assets, the conservator, as is the Court in the exercise of its extensive power, is required to take into account any known estate plan of the protected person. [5-427]. The Code includes the protected person's will, trust and any other will substitutes within the term estate plan. Naturally, the conservator is given the authority to examine the protected person's will. This is a beneficial provision with the goal of reducing unfair and unintentional hardship or loss to the eventual beneficiaries of the protected person's estate.

Throughout the administration of the estate, the conservator has the overriding duty to act reasonably according to the functions and purposes of his appointment. [See 5-424(c)]. At any time during the administration of a conservatorship, the Code provides that any person interested in the welfare of the protected person is permitted to file a petition requesting special protection from the conservator's misconduct or for any other appropriate relief. [5-416(a)]. Notice and hearing are necessary for such proceedings. [5-416(c)]. The scope of the petition and of the resultant order is very broad including demands for (1) bond or additional bond, (2) an accounting for the administration, (3) distribution, (4) removal of the conservator and appointment of a successor or temporary conservator, and (5) any other appropriate relief. [5-416(a)].

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#### D. LIABILITIES

Although not specifically stated in the Code, a conservator is liable to interested persons for any damage or loss which results from a breach of his fiduciary duty in the improper exercise of a power. This liability should be characterized as the same as a trustee of an express trust. [See 3-712].

In addition to potential liability for loss and damages due to breach of a fiduciary duty, sales or encumbrances of estate property by the conservator to himself, his spouse, agent, attorney or any corporation or trust in which he has a substantial beneficial interest are voidable unless the Court approves the transaction after notice to interested persons and to others as the Court directs. [5-422]. Similarly, any other transaction which is affected by a substantial conflict of interest on the part of the conservator is voidable.

#### § 31.05    *The Conservator's Title*

Contrary to the common law and to the law of most non-Code states today, the Code vests in a conservator a trustee's title to all of the protected person's property. [5-420; see 2 UPC Practice Manual, 537]. This title vests upon his appointment and covers not only the property presently held by the protected person but any property thereafter acquired and any property held by cus-

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todians or attorneys in fact for the benefit of the protected person. In order that this transfer of title by operation of law does not have unexpected and undesired consequences, the Code specifically provides that the vesting of title in the conservator upon appointment is not a transfer or alienation for purposes of general provisions in statutes, regulations, contracts or other estate planning devices which restrict or penalize the transfer or alienation by the protected person. A specific provision in a contract or other dispositive instrument concerning the effect of the appointment of a conservator will be given effect, however. [See 2 UPC Practice Manual, 537-38].

Proof of the transfer of title between a protected person and his conservator, and vice versa, is handled in an extremely efficient manner in the Code. [5-421]. For the transfer from the protected person to the conservator, the letters of conservatorship represent evidence of the transfer. For the transfer between the conservator and the protected person or his successors, an order of the Court terminating the conservatorship is evidence of the transfer.

For the purpose of being able to give record notice of title as between the conservator and the protected person, the Code permits the letters of conservatorship and the court order terminating a conservatorship to be filed or recorded. The requirements of the filing and recording statutes must be satisfied. This procedure is essential to

protect the conservator from third persons claiming title to real estate purchased directly from the protected person. [See 2 UPC Practice Manual, 538]. This conflict of titles is a possibility because conservatorship, alone does not affect the legal capacity of the protected person. [5-408(5)].

#### § 31.06 Liability of Third Persons

As previously discussed, the Code confers upon the conservator the authority to perform numerous transactions with third persons without court supervision. Under the present law of most non-Code states, any third person who deals with a conservator faces the possibility of being liable for having participated in the conservator's breach of his fiduciary responsibilities. [See § 19.05]. The principal problem for third persons is not the rule but its application. Consequently third persons have become very cautious and conservative in dealing with fiduciaries such as conservators. Without changing or abandoning the basic rule and for the purpose of encouraging third persons to deal with a conservator, the Code necessarily reduces the potential liability of third persons in their dealings with the conservator. Under the Code, if a third person has dealt with or assisted a conservator in good faith and for value, he is protected as if the conservator properly exercised his power unless the transaction is of the type which requires a court order

under Section 5-403. [5-423; see § 31.03]. In addition, the third person is not required to inquire into the existence of a power or into the propriety of its exercise because he knows he is dealing with a conservator. An exception to this rule provides that third persons are bound by restrictions on the powers of a conservator which have been endorsed on the letters of conservatorship under Section 5-426. [See § 31.03].

The reason why the exercised power is improper makes no difference in the application of these protective rules. The impropriety of the action may be because of procedural irregularities and jurisdictional defects occurring in proceedings leading to the issuance of the letters. Although this very comprehensive protection for third persons dealing with fiduciaries is much broader than exists under the general law of most non-Code states, it is not intended to substitute for comparable statutes relating to commercial transactions and simplification of security transfers by fiduciaries such as the Uniform Commercial Code and the Uniform Act for the Simplification of Fiduciary Security Transfers.

#### § 31.07 Creditors' Claims

As with a fiduciary who manages any kind of an estate, one of a conservator's responsibilities is the payment and settlement of claims against the estate. The Code has a provision dealing with this problem which is in some respects similar to

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its provisions concerned with creditor's claims against a decedent's estate. [5-428; see § 21-03].

A conservator upon presentation and allowance is required to pay all just claims against the estate and the protected person. [5-428(a)]. This rule applies whether the claim arose before or after the date on which the conservator was appointed. Proper presentation of the claim may be made in either of two methods. One method permits the claimant to present a claim by delivering or mailing to the conservator a written statement of the claim which indicates its basis, the claimant's name and address and the amount claimed. An itemized bill containing this information presumably should be sufficient. The other method is for the claimant to make his presentation by filing a written statement with the clerk of court and by delivering and mailing it to ~~the~~ conservator. The form of such a written statement is not set out in the Code and must be prescribed by rule of court. Claims are deemed effectively presented upon receipt by the conservator or upon filing with the Court whichever occurs first.

The conservator may either allow or disallow the claim. [5-428(a)]. Failure to mail notice of disallowance constitutes an allowance sixty days after the claim's presentation. Any applicable statute of limitations against a properly presented claim is tolled until thirty days after

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its disallowance. Consequently, actions on disallowed claims must be instituted by the claimant within the applicable statute of limitations and the tolled period.

If claimants desire, they may forego the presentation procedure and directly petition the Court for determination of the claims. [5-428(b)]. Upon due proof of the claim the creditor may obtain an order for its allowance and payment from the estate. In order for a judgment against a protected person to constitute a claim against his estate, however, the successful litigant must give notice of the proceeding to the conservator. This notice is necessary both for proceedings pending against the protected person at the time of the conservator's appointment and for those initiated against the protected person after the appointment.

If the estate of the protected person is insolvent, the conservator must give preference to prior claims for care, maintenance and education of the protected person or his dependents and to existing claims which are for expenses of administration. [5-428(c)].

§ 31.08    *The Conservator's Liability to Third Persons*

The Code deals directly with the difficult problem of a conservator's personal liability to third persons on contracts, from ownership or control of the estate's property and from torts arising out

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of the administration of the estate. [5-429]. The content of the provision is identical to the provision included for personal representatives in Article III. [3-808; see § 19.08]. Under the Code, the conservator's estate is made into a "quasi-corporation" for purposes of such liability. [See 3-808, Comment]. Accordingly, the conservator becomes an agent of this entity and is liable not individually but only as an agent would be liable. More specifically, a conservator is personally liable under the following circumstances: (1) on contracts properly made in the course of the estate's administration only when expressly provided in the contract or when the representative capacity of the conservator is not revealed in the contract. [5-429(a)]; and (2) for torts or for obligations arising from property ownership or control only when the conservator is personally at fault. [5-429(b)]. Third persons may sue the estate for such claims in the name of the conservator in his representative capacity regardless of ~~the~~ conservator's personal liability. [5-429(c)]. The conservator's personal liability to the estate may be litigated during the third person's initial action against the estate or in any other appropriate proceeding such as a proceeding for an accounting. [5-429(d)].

§ 31.09    *Duration, Termination and Removal of the Conservator*

When a minor obtains majority or when the conservator is satisfied that the protected per-

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son's disability no longer exists, the conservator is empowered and required to terminate the conservatorship and to pay over and distribute all funds and assets to the protected person as soon as possible after the payment of claims and expenses of administration. [5-425(c)-(d)]. On such a termination, a conservator is required to account either to the Court or to the protected person or his personal representative. [5-419].

Upon a petition by the protected person, his personal representative, any person interested in the protected person's welfare or the conservator, the Court in its discretion may terminate the conservatorship. [5-430]. Throughout the steps of the termination proceeding, the protected person has the same rights and procedural protections as if it were a proceeding to initiate a protective order. If the Court determines that minority or disability has ceased, it may terminate the conservatorship. Upon termination by Court order, title to the protected person's property passes either to the protected person or to his successors. The order of court may make the title, however, subject to expenses of administration, for evidence purposes to a conservator's conveyance or to both conditions.

Removal proceedings may be instituted by any person interested in the welfare of the protected person. [5-416]. The conservator can be removed by the Court for good cause upon notice and a hearing. [5-415]. Although a conservator may resign his fiduciary office, the resigna-

tion does not terminate the guardianship until it is approved by the Court. The Court is empowered to appoint another conservator if a vacancy occurs because of resignation, removal or death. If a new conservator is appointed, the successor conservator assumes the title and powers of the prior conservator. A conservator who has resigned or has been removed must account to the Court. [5-419].

If a conservator desires to end his potential liability, he may petition for a Court reviewed and approved intermediate or final accounting [5-419]. After notice and hearing, the Court's order concerning such an accounting adjudicates up to the time of the accounting all of the conservator's unsettled liabilities to the protected person and to all his successors subject of course to the ordinary time limitations for appeal or vacation.

#### § 31.10    *The Foreign Conservator*

Similar to the administration of a decedent's estate, the administration of a protected person's estate may require the conservator to administer property in two or more states. [See § 25.01]. Consistent with its general purposes, the Code strives to ease and unify the administration of a protected person's multi-state estate.

To accomplish this goal, the Code contains several provisions for foreign conservators similar to several it has for foreign personal representatives. First, a foreign conservator or similar fi-

duciary appointed by a court in the state where the protected person resides may collect debts or property from persons within the Code state by presenting to the debtors or possessors proof of his appointment and an affidavit. [5-431]. The affidavit must recite that there are no protective proceedings pending within the Code state and that the foreign conservator is entitled to payment or delivery. [Compare 4-201; see § 25.02]. This procedure is available, however, only when there has been no local appointment.

Second, concurrently or alternately, a domiciliary foreign conservator is entitled to exercise all powers which a local conservator could exercise merely by filing in a court in the Code state authenticated copies of the domiciliary appointment and the official bond, if any. [5-432; see § 31.04(B)]. This proof of authority provision was added by the 1975 Technical Amendments. These powers specifically include the power to bring legal proceedings which any nonresident could bring in the courts of the Code nondomiciliary jurisdiction. Similarly, this filing has the above effect only if no local protective proceeding is pending and no local conservator has been appointed.

Because there is no definition of a "domiciliary foreign conservator," the provision is somewhat unclear. Presumably, it refers to the conservator appointed in the state wherein the person protected is domiciled. This interpretation, however, is

potentially inconsistent with the Code's own venue requirement for the appointment of a conservator. Venue for the appointment of a conservator under the Code is based upon the protected person's residence or where his property is located. [5-403; see § 27.02(C)]. Residence, although related to the concept of domicile, is not the same concept. Consequently, this provision needs further clarification either by alteration or by judicial construction.

An additional deficiency is that unlike its comparable provisions in Article IV, there are no supplemental provisions dealing with the protection of locally interested persons [see 4-207, § 25.02] or providing for personal jurisdiction over the foreign conservator. [See 4-301; § 25.03]. Presumably, these deficiencies can be cured by the inherent power of the Court over protective proceeding matters together with the Code state's long-arm statute.

Several other provisions concerned with foreign conservators deserve mention. First, as previously discussed, any foreign conservator or similar fiduciary appointed in the jurisdiction where the protected person resides has priority over all other persons to be appointed conservator in the local Code state. [5-410(a)(1)]. This provision greatly protects the foreign conservator in the administration of the protected person's property in the local jurisdiction. The Code also attempts to give extraterritorial authority to a conserva-

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tor appointed under its provisions. Such a conservator is given the power to prosecute and defend claims of any nature concerning the protection of the estate or of the conservator's fiduciary responsibilities in any jurisdiction. [5-424(c)(24)]. Although some states may refuse to recognize this power, it should aid conservators greatly in administering the protected person's assets in most jurisdictions.

APPENDIX FOUR

LIMITED GUARDIANSHIP FOR THE MENTALLY DISABLED

## MENTAL DISABILITY LEGAL RESOURCE CENTER

ABA Commission on the Mentally Disabled, 1800 M ST.,  
NW, Washington, DC 20036, (202) 331-2242

### Limited Guardianships for the Mentally Disabled

The emergence of the least restrictive alternative concept has fostered a trend away from institutionalization and toward community-based care. A parallel application of the least restrictive alternative concept is occurring in the guardianship area with the increasing acceptance of the concept of limited guardianship.

Current authorities recognize that overly protective, traditional guardianship arrangements may put unnecessary limitations on many disabled persons. Persons under guardianship are found incompetent and are without the power to sue, contract, marry, vote and perform a number of important legal acts.<sup>1</sup> However, many disabled persons do not require such great restrictions of liberty; they may be competent to exercise certain skills and to perform certain functions without the guidance of a guardian.

Under a limited guardianship arrangement, an individual's incompetency is determined for those functions he or she cannot perform due to a disabling condition. A limited guardian is ordered to provide guidance and assistance to the individual only in these specific areas of incompetency. For all other areas, competency is assumed and personal autonomy is maintained.

It is clear that by allowing disabled persons to control their lives to the extent they are capable, community-based treatment is enhanced. This column briefly summarizes the current authority and theories supporting limited guardianships, and notes ongoing legislative efforts to enact limited guardianship laws.

#### National Policy Recommendations

The notion of limited guardianship has received the endorsement of a number of national, blue-ribbon panels and organizations. In 1962, the President's Panel on Mental Retardation recommended in its Report of the Task Force on Law that:

... as much as possible, mentally retarded adults be allowed freedom -- even freedom to make their own mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.<sup>2</sup>

The Panel's Task Force Report goes on to recommend that "plenary guardianship should be reserved for those who are judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic self-management."<sup>3</sup>

The American Association on Mental Deficiency released a position paper in 1973 entitled "Guardianship for Mentally Retarded Persons" in which the following general principle was endorsed:

The boundaries of a specific guardianship should be specified, taking full cognizance of the social competencies and limitations of the individual ward. In other words, the guardian's mandate should be prescriptive in nature permitting the retarded adult to act in his own behalf on all matters in which he is competent.<sup>4</sup>

While not using the term limited guardianship per se, this recommendation embodies the essential aspects of specificity of guardianship control and recognition of individual competencies. In general, the AAMD policy statement urges conservative use of guardianship and maximum feasible participation of retarded persons in decisions which will affect them.

More recently, the President's Commission on Mental Health has recommended that:

State guardianship laws provide for a system of limited guardianship in which rights are removed, and supervision is provided, for only those activities in which a person has demonstrated an incapacity to act competently.<sup>5</sup>

The Commission noted that guardianship "is a highly restrictive method of providing supervision and assistance to mentally disabled persons . . .,"<sup>6</sup> and that "[i]t is therefore essential that guardianship laws be carefully tailored to avoid any unnecessary restrictions on the rights of individuals."<sup>7</sup>

Finally, the President's Committee on Mental Retardation, in its 1976 Report to the President, called for the availability of a personal representative for every mentally retarded person who wishes or requires one. Insofar as this includes appointment of a legal guardian, the Report noted the following:

1. UNITED STATES SENATE SPECIAL COMMITTEE ON AGING, PROTECTIVE SERVICES FOR THE ELDERLY -- A WORKING PAPER, 39-40 (July 1977).  
2. THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW, at 42 (1963).

3. *Id.* at 43.  
4. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, POSITION PAPER ON GUARDIANSHIP FOR MENTALLY RETARDED PERSONS, at 17 (1973).  
5. THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT, at 43 (1978).  
6. *Id.*  
7. *Id.* at 71.

There is, however, need in many states to improve and refine the laws to preserve to the individual the exercise of those functions of which he is capable.<sup>8</sup>

### Community Care and Less Restrictive Forms of Guardianship

There has emerged in recent years a national commitment to providing care, treatment, habilitation, and social support for various disabled groups in a community setting. A General Accounting Office report issued in January, 1977 found that since 1963 a number of federal laws and programs have been mandated by the executive, legislative and judicial branches of government to prevent the unnecessary institutionalization of the mentally disabled and to develop alternative programs and services in the community.<sup>9</sup> The depth of this commitment has been reaffirmed by the President's Commission on Mental Health which completed a year long study of the nation's mental health programs in April:

In our judgment, people are usually better off when they are cared for within their communities, near families, friends, and homes. Our assessment of the past twenty years shows that progress has been made toward this end.<sup>10</sup>

The Senate Special Committee on Aging has condemned the destructiveness of institutionalization on the elderly and urged the use of more effective alternatives:

Most elderly persons would prefer to remain in their homes if at all possible. Many can if appropriate care and assistance are available. In the long run, this can produce savings for our nation because institutionalization is the most expensive form of care.<sup>11</sup>

The fact of "deinstitutionalization," which has brought greater numbers of the mentally disabled back into the community, and the accompanying expansion in types of care, habilitation, and treatment services, has placed new strains on existing guardianship mechanisms. Most state guardianship laws still emphasize the total decision-making role of the

guardian,<sup>12</sup> with the result that the prevailing guardianship structure is in many ways more restrictive of personal freedoms than other forms of individual protection and assistance (such as self-help groups, advocacy agencies, and social work services). Consequently, if the guardian is to make possible the degree of autonomy, dignity and personal integrity necessary for successful reintegration into the community, his role must have clearly set limits.

### Limited Guardianship and the Uniform Probate Code

The Uniform Probate Code, approved by the Uniform Law Commissioners and the ABA in 1969, constitutes the most significant comprehensive proposal for guardianship law reform in recent decades. The Code is based upon a general principle of unsupervised estate administration, and takes the innovative step of separating procedures for guardianship of incapacitated persons from those for the protection of the property of persons under disability (conservatorship or protective orders).<sup>13</sup>

The Code, adopted in significant part by ten states,<sup>14</sup> is liberal and detailed as to the administrative and distributive powers of conservators and gives the court clear authority to enlarge or limit the powers of a conservator. The Code's guardianship provisions set the powers and duties of a guardian to be generally the same as those of a parent, although the court may modify them as may be appropriate. An important step taken by the Code is the elimination of the typical incompetency standard in favor of one based on capacity to make general decisions.

Unfortunately, the Uniform Probate Code is silent on the following key elements of limited guardianship:

- (1) Assessment of actual mental and adaptive limitations of the person needing assistance or protection.
- (2) Court finding of lack of capacity to do specific kinds of tasks or to make specific kinds of decisions.
- (3) Court order of limited guardianship which specifies those legal disabilities to be imposed and grants only those powers the guardian will need in order to act where a legal disability has been specified.

The purpose of such provisions would be consistent with the underlying direction taken by the UPC in establishing a discreet, protective mechanism for managing and preserving the estates of the mentally incapacitated. The idea of limited guardianship would simply require all parties to examine at the start the nature and purpose of the appointment of

8. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, REPORT TO THE PRESIDENT — MENTAL RETARDATION: CENTURY OF DECISION, at 93 (1975).  
9. THE COMPTROLLER GENERAL, SUMMARY REPORT TO THE CONGRESS — RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE, at 1 (1977), summarized at 1 MENTAL DISABILITY L. REP. 370 (March-April 1977), and at 11 CLEARINGHOUSE REV. 120 (June 1977).  
10. PRESIDENT'S COMM. ON MENTAL HEALTH, supra note 8 at 17.  
11. U. S. SENATE SPECIAL COMM. ON AGING, supra note 2 at iv.

12. ABA Developmental Disabilities State Legislative Proj., A Review of Guardianship Legislation, Table I (January 1978) (to-be-published manuscript).  
13. See, Uniform Probate Code, Art. 5, Pts. 3 and 4.  
14. These are Alaska, Arizona, Colorado, Indiana, Minnesota, Montana, Nebraska, New Mexico, North Dakota and Utah.

guardian that is sought. Although additional specificity would be required in the petition and order, the use of limited guardianship should not be at odds with the general freedom of the guardian to act independently (once his mandate is clear) that is a cornerstone of the UPC.

#### State Limited Guardianship Laws

Fifteen states currently permit the court to place some limitations on the powers of a guardian.<sup>15</sup> Generally, this is discretionary on the part of the court. Of these states, five, Idaho, Maine, North Carolina, Texas, and Washington, have enacted formal limited guardianship laws which require a court to specify the legal disabilities and the restrictions to be placed on a limited guardian's powers.<sup>16</sup> Limited guardianship bills are currently being considered in the legislatures of Alaska, Connecticut, Florida, Illinois, and Pennsylvania.<sup>17</sup>

Existing limited guardianship laws are quite similar in most respects. For instance, petitions for limited guardianship must usually set forth the nature and degree of any disability, the specific protections needed and limitations of rights required, and the term of limited guardianship requested. The court is required to order an outside investigation or evaluation by a physician, multidisciplinary panel, or designated agency, upon which it will base its decision as to whether a limited guardianship is appropriate.

An important characteristic of the court's order of limited guardianship is that incompetence is not presumed except insofar as a specific legal disability has been imposed. Also, the existing laws allow restriction of decision-making authority on issues pertaining to both property and personal affairs. The legislative purpose is generally to "encourage the development of maximum self-reliance and independence in the individual"<sup>18</sup> needing limited guardianship services, and appointment of a limited guardian is to occur only "as is necessary to promote and protect the well-being of the individual."<sup>19</sup> Those states now considering limited guardianship laws are reviewing bills containing comparable provisions.

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15. These are Florida, Idaho, Maryland, Michigan, Minnesota, New York, North Carolina, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.

16. 1976 Idaho Session Laws, Ch. 134; 1978 Maine Session Laws, Ch. 627; 1977 N.C. Session Laws, Ch. 725 (2 MDLR 194); 1977 Texas Gen. Laws, S.B. 699; Wash. Rev. Code §11.88.010 (1975 Supp.).

17. Alaska H.B. 235 (introduced February 21, 1977 and carried over) and H.B. 63 (introduced January 17, 1977 and carried over); Connecticut Revised Committee Bill 5541 (February Session 1978); Florida H.B. 1233 (1978 Session); Illinois S.B. 252 (introduced March 16, 1977, passed the legislature on June 30, 1978, and currently awaiting the governor's approval); Pennsylvania H.B. 2162 (introduced March 15, 1978).

18. 1977 Tex. Gen. Laws, S.B. 699.

19. 1976 Idaho Session Laws, Ch. 134.

APPENDIX FIVE

GUARDIANSHIP OF THE MENTALLY IMPAIRED: A CRITICAL ANALYSIS

NCLH Legal Monograph:

GUARDIANSHIP OF THE

MENTALLY IMPAIRED:

A CRITICAL ANALYSIS

The National Center for Law  
and the Handicapped, Inc.  
1235 North Eddy Street  
South Bend, Indiana 46617

May, 1977

During the past decade national and international attention has been focused on the issue of guardianship. The idea that there must be someone formally responsible for protecting those individuals lacking mental capacity to safeguard their own interests was established and expressed long ago. Yet today there is widespread dissatisfaction with guardianship, the mechanism which has been developed for implementing this idea. Guardianship as presently provided for in state laws has proven largely ineffective in meeting the needs of the mentally handicapped.

There are many reasons for the present increasing concern over guardianship laws. In earlier times the position of mentally impaired individuals was not unlike that of slaves, serfs, peasants or poor persons. In each case the individual occupying such status was cast in an inferior position and was deemed to have fewer rights than other people. Often the mentally impaired were exploited or neglected without recognition of their special needs.

For the most part, guardianship laws were geared toward the property of persons considered incompetent, and very little was provided in the way of helping the individual himself. The

primary goal was to prevent the ward from being taken advantage of, or otherwise wasting, his or her estate. As such, relatives and other interested parties were the principal beneficiaries. Protection of the individual was largely ignored and left to the state without any guidelines.

Since the time when guardianship laws first came into being, many changes have taken place in society. Today it is recognized that second class citizenship should not be given to anyone merely because of social, economic, or mental status. Each and every citizen has a right to participate to the fullest extent in society. With increased scientific knowledge and our corresponding awareness of the mentally impaired and their problems, there has been a concerted effort to remold guardianship into a more useful and positive device. Guardianship is a legal instrument that can facilitate the fullest possible participation of many handicapped individuals in society.

Guardianship is no longer being viewed solely as a property preservation device. While protective aspects of guardianship still exist, new emphasis is being placed on the developmental and habilitative aspects inherent in a guardianship relationship. Under the new concept of guardianship, a handicapped individual can realize his or her potential to the fullest possible extent. Therefore, the supportive role of a

guardian is as important, and in some cases may be more important, than the protective functions.

However, before considering guardianship, it is important to realize that a retarded person who needs services does not necessarily need a guardian. Assistance from citizen and legal advocacy groups, in conjunction with personal counseling, may provide sufficient guidance and advice to eliminate the need for a guardian. Friendship and support through voluntary and service organizations should be encouraged.

Although guardianship when needed holds many promises, few have been realized to date. This results from the fact that most guardianship laws were drawn many years ago and have not been revised to reflect the new concepts. The vast majority of existing laws provide basically that the guardian has complete power to impose his advice or desires through the decisions he makes on behalf of the other person. The ramifications of this overprotection are that social growth and adaptation are stymied while legal rights are glossed over.

## I. WHAT IS GUARDIANSHIP?

Guardianship is a legal mechanism for substitute decision making. A guardian is a person lawfully invested with

the power and charged with the duty of taking care of another person. The individual for whom a guardian is appointed is generally called a ward. As a result of some peculiarity of status, or defect of age, understanding, or self-control, a ward is considered incapable of administering his or her own affairs. Guardianship may extend to the person's activities, his property, or both.

Each state has employed a variety of terms to describe the legal relationship between a guardian (i.e., the competent person to whom care and control is entrusted) and a ward (i.e., an "incompetent" person who is unable to manage personal and/or financial affairs because of age minority or disability). The "competent" person in the law is known as a conservator, a tutor or a guardian. The term "incompetent person" may include those individuals described as "insane," "lunatics," "idiots," "imbeciles," as well as "alcoholics," "habitual drunkards," the "old-aged" or those of "advanced age," "improvident," "spendthrifts," "drug users" and the "physically disabled."

Since many of our country's guardianship laws were written in the late 19th and early 20th centuries, when most individuals lacked knowledge and understanding of the mentally

ill and mentally retarded persons, it is therefore not surprising that such labels were used. The primary concern is the fact that many of these antiquated and sometimes derogatory terms still remain in the laws of many states.

## II. TYPES OF GUARDIANSHIP

Today, the most familiar example of a guardianship relationship is the one between parent and child; a parent is considered a child's natural guardian. The parent's authority is limited to personal custody of the child and does not include control over the child's real property. The natural guardian relationship terminates when the child reaches age 18, or the age of majority in the particular state. Most states have statutes which provide for the parent appointing a testamentary guardian through a will. If the parent dies before the child reaches the age of majority, the testamentary guardian assumes the authority of a natural guardian for that child.

The focus of this booklet, however, is not natural guardianship but guardianship by law, which involves a guardian/ward arrangement sanctioned and supervised by the courts.

Any competent adult can petition the court to establish a guardianship for someone alleged to be incompetent. A judicial determination of the prospective ward's incompetency or incapacity generally is required before a guardianship by law is granted.

The test for incompetency or lack of capacity is provided by state statutes and provisions varying from state to state. Typically, these statutes provide the judge with only vague criteria for determining individual competency. Little distinction is made between adult classifications. Thus, the alcoholic and mentally retarded persons may be treated identically. The purpose of the court proceeding is to determine only whether the adult is suffering from an incapacity. There has been almost no recognition that individuals have varying levels of ability in handling their personal and financial affairs. In most states, the guardianship established by the court can be terminated only upon the ward's return to full competency as determined by statute. This must be changed to take into account a person's functioning capabilities. Guardianship should not be total; rather it should be structured to individual needs, periodically reviewed and revised as needed.

A. ESTATE AND PERSONAL GUARDIANS

Most state laws recognize two basic classes of guardians: the guardian of the estate and the guardian of the person. A guardian of the estate is entrusted with the control of the ward's property. This person is responsible for managing the ward's financial assets. In some state statutes, this type of guardian is called a conservator. A guardian of the person has the right of custody of the ward and control of personal affairs. For example, this person could select a ward's residence, determine an educational program and secure medical care.

B. GUARDIAN AD LITEM

The guardian ad litem, by protecting the ward's legal rights, occupies a unique position. It is the duty of the guardian ad litem to defend the ward and assert his rights in the courts, whether the ward is the person bringing suit or is being sued or prosecuted. Historically, this type of guardian was appointed to represent minors in a court of law, but a number of states now provide for the appointment of a guardian ad litem for an adult ward.

This kind of guardian has no right to interfere with the ward's person or property. Furthermore, though the guardian ad litem is appointed to insure that the ward's best interests are advanced and protected, the guardian ad litem is not a substitute for legal counsel. The need for an attorney to provide legal representation and assistance is still present.

### III. SCOPE OF GUARDIANSHIP AUTHORITY

#### A. GENERAL GUARDIANS

Traditionally, courts, upon the finding of incompetency, have appointed a general guardian. The general or plenary guardian is granted nearly complete authority over both the ward's estate and person. General guardianship is the broadest and most comprehensive noninstitutional mechanism for control. The ward under a general guardianship is deprived of exercising the most basic and fundamental legal rights and decisions that all of us take for granted. While general guardianship serves a protection function, and does so in a less restrictive way than total institutionalization, it has serious shortcomings. It completely fails to take into account that the vast majority of mentally impaired

individuals are capable of making decisions independently. The potential for independent living and normalization is greatly diminished under general guardianship.

B. LIMITED GUARDIANSHIP

The concept of limited guardianship has come about only recently. As mentioned previously, general guardianship whereby the guardian is literally given complete control over the ward, has been the rule among the various states. The possible adverse consequences of overprotection by a general guardian have served as an impetus for some progressive state legislatures to enact laws providing for limited guardianship.

Basically, a limited guardian has only those powers expressly given by the court. Limited guardianship is a response to the fact that every individual is different, possessing his or her own unique abilities and disabilities. Limited guardianship laws require the judge to tailor the guardianship program to individual needs.

Limited guardianship is in essence a refinement of antiquated guardianship concepts. Instead of transferring

total or near total power of the guardian as a substitute decision maker, this type of guardianship limits the guardian's power. Given that the vast majority of mentally impaired individuals are capable of making decisions independently on some matters and with advice and assistance on others, general guardianship is overly restrictive and can lead to repression and dehumanization among these individuals. In contrast, limited guardianship can enhance the functioning capability of the individual and his or her potential for independent living.

#### IV. GROUP GUARDIANS

Many states have made provisions in their statutes for some type of group, agency or other organization to serve as guardians. This group appointed guardian generally has the same function as an individual guardian.

While group guardians offer certain advantages, there are significant drawbacks to their appointment. Groups and institutions are, by their nature, impersonal and sometimes rigid in dealing with the problems of individual wards.

Guardianship necessarily demands what is perhaps the most personal of human relationships -- the exercise of one's decision-making and individual rights by another individual or group. Recent exposure of the impersonality and dehumanizing aspects of mental institutions should provide sufficient warning that individual human needs cannot effectively be administered on a large scale institutional basis. Personal interaction between the ward and the guardian is a prerequisite to the ward's mental and social functioning and growth.

A more serious criticism of group guardianship revolves around potential conflict of interest. If the group acting as guardian is also responsible for providing the non-guardian types of services to the ward, there is an inherent conflict of interest. The group as a guardian must strive to see that the ward's needs are being met to the fullest extent possible by the service agency. If the group guardian and service agency are one and the same, this becomes difficult, if not impossible. A ward should never be exposed to this potential conflict; thus groups which are also service providers should never serve as guardians. Similarly, there are some persons who should not be considered as guardians because of this same conflict of interest. These include a

person who is performing some professional or other remunerated service for the ward, e.g., attorneys, physicians, teachers, etc., or someone who is employed in one of the service systems in which the ward is enrolled.

Possible advantages of having groups serve as guardians include efficient administration, greater expertise, and the continuity of the group itself. The accumulative experience of the group, serving in the role of a guardian, should theoretically make the group more efficient, responsive and attuned to particular problems faced by wards. Furthermore, widespread public knowledge of the availability of such groups as potential guardians reduces considerably the serious problem some parents, individuals, and courts face in finding a willing and capable guardian. These advantages of having groups function as guardians are, however, far outweighed if the disadvantages mentioned previously are not first eliminated.

#### A. PUBLIC GUARDIANSHIPS

The concept of public guardianship originated in Minnesota and has since been adopted by other states. Under this plan, a state agency or its representative serves in the capacity of a guardian.

To date, no state has successfully implemented public guardianship. The major problem is that the public agencies designated to serve as guardians are the same agencies responsible for providing other types of services. What happens, in the words of one observer, is that "the agency oversees itself and evaluates its own decision." Past experience and the conclusions of studies by the President's Panel on Mental Retardation raise serious doubts as to the wisdom of public guardianships.

If public guardianship is to work, it is necessary that built-in control mechanisms be developed. The agency providing guardianship services would have to restrict its role to those services and remain as independent as possible from all other departments of government. Theoretically, this may be possible, but in reality the interrelatedness of governmental departments and their reliance on a common funding source have made this impossible to date.

#### B. PRIVATE GROUP GUARDIANSHIP

Chartered non-profit organizations and private specially organized groups also are capable of serving as guardians in some states. These types of guardians offer the same advantages as group guardianships. The primary drawback of this type of guardian again centers around the potential conflict

of interest problem. There exists a possibility that a guardianship relation may continue unnecessarily, especially when additional income or appropriations are involved.

To summarize briefly, it is imperative that any individual, group, or agency acting as guardian be carefully selected, have limited and carefully circumscribed powers, and be subjected to strict accountability procedures.

#### V. WHAT ARE THE LEGAL CONSEQUENCES OF GUARDIANSHIP FOR THE INDIVIDUAL

The following list is a general summary of how guardianship affects specific rights and how these limitations of rights should be scrutinized. Because each state has its own laws, the list may not be accurate in all cases for all states. It is merely provided as a summary of how certain rights are affected by the appointment of a guardian in most states. For specific information for a particular state, that state's law must be consulted.

Right to Enter into Contracts. An adjudication of incompetency has the appointment of a guardian as

an immediate consequence. If a guardian of the estate or a general guardian is appointed, the guardian has the power and duty to manage the ward's financial affairs. Traditionally, the ward has not had the right to enter into a contract. Consequently, any such contract is voidable. However, in applying the progressive concept of limited guardianship, the judge should specifically determine to what degree the individual's impairment affects his ability to enter into contracts and grant the guardian powers commensurate with those disabilities.

Right to Make a Will. The legal effect of general guardianship or guardianship of the person on a ward's ability to make a valid will has been treated in two ways in law. One line of cases holds that adjudication of incompetency creates a presumption of testamentary incapacity. The predominant and preferable line of cases indicates that incompetency is only a part of the evidence available to the court in determining whether the ward possessed the needed testamentary capacity at the time the will was drawn.

Right to Marry and Have Children. Decisions relating to marriage and procreation are fundamental rights protected by the Fourteenth Amendment and the right to privacy. Nevertheless, there are divergent opinions offered by the courts regarding a ward's ability to marry. One holds that if a ward cannot contract, he or she cannot enter into a marriage; however, such decisions can be questioned under the evolving constitutional analysis of fundamental rights. The other holds that the appropriate test to determine eligibility for marriage is the individual ward's soundness of mind at the time of proposed marriage, similar to the test applied to anyone else seeking to marry.

The right to procreate includes decisions concerning sterilization. Some states still permit involuntary sterilization of an individual who is mentally retarded but recent cases indicate such statutes must provide strict procedural safeguards and strictly defined standards based upon a compelling state interest. The trend, moreover, has been away from the involuntary measures toward allowing only truly voluntary sterilizations. Courts continue to wrestle with the question of

who may give consent to the sterilization of an adjudicated incompetent; the direction of many courts, and a direction which would seem to be constitutionally required, is that substituted consent to sterilization is not permissible.

Right to Vote. Louisiana denies adjudicated incompetents the right to vote and hold public office. In other states, voting requirements are established under voter registration laws which may state that "idiots" and the "insane" cannot vote. The use of language like "imbecility" and "idiocy" in guardianship statutes has caused confusion regarding the right to vote and may result in the denial of the ward's voting power. Again, in applying the concept of limited guardianship, a judge should make specific findings on this issue and should only restrict this fundamental right when absolutely required by the individual's impairment.

Right to Access to the Court and Civil Liability. Some guardianship statutes give the guardian the right to sue or defend legal action on behalf of

a ward. In other states, the status of wardship is used as evidence of the ward's inability to understand the nature and consequences of personal actions or to sue and be sued. This should be left to the judge's determination given a specific individual.

Right to Obtain a Motor Vehicle Operator's License.

In most states, the motor vehicle code establishes the physical and mental capacities an individual must have to operate a motor vehicle. Having been judged incompetent, a ward may be prevented from obtaining a driver's license by the guardianship arrangement. Preferably, this should occur only if a judge finds the necessity of so ordering.

Right to Medical Treatment. Nearly all states provide, either in guardianship statutes or in statutes concerning consent to surgical procedures, that a guardian of the person or general guardian can give consent to hospitalization or surgery on behalf of a ward. This should only extend to routine procedures, however, since some courts have recently held that fundamental

rights cannot be affected through the use of substituted "voluntary" consent. This would apply to a range of activities varying from voluntary commitment to an institution, to consent for procedures such as abortions or human experimentation.

Right to Hold or Convey Property. Guardianship of the estate or general guardianship gives the guardian the right to hold or convey real property of the ward. In most instances, the guardian needs approval from the court before acting on the ward's behalf.

The denials of civil rights which follow when guardianship is granted by the court are the legally definable consequences of a judgment of incompetency. But are these severe restrictions on personal freedom always necessary? What should a guardianship program do for mentally retarded individuals?

VI. ARE PRESENT GUARDIANSHIP LAWS UNNECESSARILY  
RESTRICTIVE OR STIGMATIZING?

Although a variety of guardianship laws have been written, the major shortcoming of most of them is a failure to recognize that a ward is an individual who has specific abilities and needs which change with time. Most statutes provide the court with only one alternative when the need for guardianship is considered: the judgment of competency or incompetency. This provision often leaves concerned parents and courts in a difficult dilemma. Is it better to risk the dangers of total legal independence or to provide assistance through a general guardianship which restricts most legal rights? A mentally retarded adult who cannot appreciate the significance of large sums of money might very well lose the right to sue someone, drive a car, or vote, in the process of being "helped" through guardianship. Several states have moved to remedy this shortcoming by establishing limited guardianships and a system of community support services. Under this system, the individual ward is neither socially labeled nor legally viewed as an incompetent person and is still able to make many fundamental decisions.

Guardianship laws must start from the premise that wards, like all other persons, are entitled to their personal freedom

to the fullest extent that is consistent with their abilities. Overprotection is a constant threat. Merely because a retarded person needs some form of assistance does not mean that he or she needs a guardian. Personal counseling, friendship and support on a voluntary basis may supplant the need for any type of guardian. .

Ideally, habilitation and not punishment should be the goal of any guardianship system. It should provide for the development of self-sufficiency in the ward and eliminate unnecessary dependency on others. The role of the guardian is critical in accomplishing this goal. . The guardian must exercise properly limited, but appropriate, control so that the ward can meet situations without being overwhelmed by them. At the same time, new opportunities for growth and independence must be offered. The underlying goal of a guardian should be to do everything possible to help the ward stand on his own feet in all respects. Only in this manner can the principle of normalization be accomplished.

Historically, individual guardians of the person were appointed by the court and charged with the care and custody of the ward. It appeared that the guardian's only duties were to ensure that the ward was fed, clothed and sheltered.

An individual cannot survive if these basic biological or instrumental needs are not met. However, if all the person's instrumental needs are provided by others, the result is nothing more than custodial care. To encourage self-sufficiency in the ward, the guardian should provide access to appropriate education and training which will enable the persons to meet these needs to the maximum degree.

Guardianship programs are incomplete if the guardian's duties are fulfilled at this point. In addition to instrumental needs, everyone has interpersonal needs which are emotional, or expressive, in nature. These include the need for friendship, the need to give and receive love and the need to develop a sense of self-esteem. The conscientious guardian must be aware of these human requirements and provide opportunities for their realization, particularly because of the loss of self-esteem which can occur when a person is adjudged "incompetent". The stigmatizing label of incompetent and the accompanying restrictions on personal freedom associated with general guardianship can seriously affect the ward's self-image. The guardianship program which is unnecessarily broad in application can create in the ward a sense of alienation and rejection. This atti-

tude can happen easily when guardianship is sought and used as a device for controlling social behavior rather than protecting or ensuring legal rights.

In most instances, families of disabled persons have been faced with the difficult decision of abandoning all legal responsibility for their offspring or seeking "all or none" guardianship. Despite the weakness in systems which cause their children to be further stigmatized and unnecessarily denied legal and social standing, many families have opted for guardianship. The parent concerned with a child's welfare has not been given sufficient alternatives which would allow control when necessary and normal development when possible. Guardianship itself must be restructured into a more sophisticated device geared to the particular ward's needs and abilities.

The majority of guardianship statutes can also be criticized for their failure to include provisions for the fulfillment of the ward's instrumental and expressive needs. These statutes were designed to protect an "incompetent" from society and from himself, not to encourage individual growth. Guardianship programs are necessary but they should be designed to assist individuals who currently cannot cope with the variety and complexity of their daily lives.

The type of guardianship program selected and the individual charged with its implementation are important because they have a great impact on the legal, emotional and social life of the ward. An adaptive approach must be developed when writing and revising guardianship statutes. Comprehensive, yet flexible, provisions should be included to allow for different and differing individual needs over time. They should recognize that development, not protection, is the plan's objective. The guardianship program should be viewed as a legal tool which ensures the individual's integration into society.

## VII. THE APPOINTMENT OF A GUARDIAN

### A. APPOINTMENT UNDER EXISTING LAWS

Under most state laws, guardianship proceedings are initiated by petitioning the appropriate court. Typically, the probate or family court where the proposed ward resides handles the proceedings. A written petition is required. It should set forth all necessary facts, name the person proposed to be guardian and his or her consent to be guardian. Usually the petition must be verified and contain at a minimum the following facts: the person's need for a guardian, the

court's jurisdictional basis, and the qualifications of the person to be appointed. In addition to filing the petition, notice of it must be given to certain persons, including the proposed ward. After this is done, a date is set by the court for a hearing.

The purpose of the hearing is for the judge to determine whether there is need for the appointment of a guardian. This determination is made on the basis of evidence presented concerning the individual's condition. While the law of the state where the proceeding occurs is applied, more often than not, it will not provide specific standards or criteria to be used by the judge in making his findings. Generally, the judge will ask a few questions concerning the proposed ward and will receive reassuring answers from the attorney or other interested persons. The usual result is that a guardian is appointed without a careful evaluation being made of the ward's abilities or needs. In the unlikely event that a petition is opposed, the court must delve more deeply into the need for a guardian and the best alternatives available.

Once the court has decided to appoint a guardian, letters of guardianship are issued to the designated guardian. The appointment made by a court with proper jurisdiction cannot

be set aside or questioned by another court except for fraud or by a direct appellate proceeding. The court having made the decision may, however, later alter or revoke the appointment. After appointment, the guardian is subject to judicial supervision by the appointing court. This court may at any time issue orders, compel obedience, or even remove the guardian for failing to carry out responsibilities to the ward or for not acting in the ward's best interest.

While the foregoing is a brief overview as to how guardianship is provided by most state laws, it is not to say that the procedures and requirements are satisfactory or even in accord with modern day constitutional requirements.

#### B. DEFICIENCIES IN THE APPOINTMENT PROCESS

Most existing guardianship laws can be traced in origin back to the days of the feudal period in England. During that era, the King assumed the protection of all people who were unable to protect their own interests. The King, through the Chancery Court and the Chancellor, assumed supreme guardianship over these persons. In effect, the Chancellor acted as a substitute father and was to function "as a wise, affectionate, and careful parent."

As substitute parent, the Chancery Court employed the doctrine of equity, meaning that decisions could be based on fundamental fairness rather than strict rules of law. In essence, equity means to interpret the law according to the spirit rather than the letter of the law. It allows a court to provide remedies that are not available under a strict application of the law, giving it greater flexibility.

Due to the equitable nature of guardianship and its paternalistic aspects, many states viewed it solely as a benevolent action. Consequently, very vague laws allowing for the expeditious appointment of guardians were enacted. Little attention was given to the possible adverse effects resulting when a guardian was unnecessarily appointed.

Today there is a growing awareness that unnecessary or overprotective guardianships carry consequences that are equal to, or in some cases greater than, a criminal conviction. While the alleged criminal, who faces a determinate punishment, enjoys the presumption of innocence and detailed procedural safeguards, the alleged incapacitated person is subjected to a deprivation of liberty without similar procedural protections. However, despite the fact that most existing guardianship laws are morally and legally unsatisfactory, the concept itself is still viable and must not be discarded.

Guardianship is a useful device for many handicapped individuals who are unable to effectively act in their own behalf and who require some type of assistance to protect and effect the exercise and enjoyment of their individual rights. It is widely recognized that guardianship services are very important to the well-being of many individuals and that the state, by providing for the appointment of a guardian, serves an important role. Yet, the state's interest in providing these services, no matter how benign or paternalistic, must be limited so as to recognize the basic human and constitutional rights of individuals asserted to be in need of a guardian. Both the individual's right to avoid unfair restrictions of his or her fundamental liberties and the state's power to provide these services must be protected and balanced. Guardianship services must be available without unnecessary delay or cumbersome procedure. The state's power to provide these services must remain intact and operable while respecting and protecting individual rights.

C. INNOVATIVE CONCEPTS

The movement toward community integration, growing concern for protecting and ensuring individual rights, and the development of community services has given impetus to the development of new guardianship strategies. In the past dec-

ade, a few states have begun to revise and/or make additions to existing statutes, or propose new guardianship statutes which relate more specifically to mentally retarded individuals. Changing perceptions of mental retardation have had a positive impact on the wording and intent of these laws. Legislatures are increasingly aware of the need to develop guardianship programs specifically for retarded persons. The principles on which innovative legislation are based include the following:

There are varying degrees of mental retardation. Although mentally retarded, an individual may have sufficient ability to attend to himself and his personal affairs. For such persons the institution of guardianship must not be invoked.

Mentally retarded persons must be assumed to have full human and legal rights and privileges. The mere fact of retardation must not be in and of itself sufficient to remove rights by appointment of a guardian or otherwise.

Merely because a mentally retarded person is in need of various forms of assistance does not mean a guardian is required. In addition to the institution of formal guardianship, parallel services, such as personal counseling, should be available to retarded individuals who may not require formal guardianship if appropriate guidance and advice is provided on a continuing basis.

Mere intellectual ability or disability is an inadequate determinant as to the necessity for guardianship, as intellect does not necessarily correspond to social adap-

tation. Determination of the need for guardianship must be a process considering both intelligence and functioning ability. Behavior is the crucial determinant.

An adult is presumed legally capable of directing his or her personal life unless a court determines otherwise through guardianship proceedings.

In those instances in which the retarded person is unable to manage himself or his personal affairs, a suitably designated guardianship program must be arranged.

Guardianship of a mentally retarded person should be viewed positively as a means of implementing rights and opportunities with as much participation by the retarded ward in all decisions as is practical. The underlying goal of a guardian should be to do everything possible to help the retarded ward be self-sufficient in all respects.

Mentally retarded persons must be allowed freedom -- the maximum freedom consistent with their abilities, even freedom to make their own mistakes. Guardianship must be designed to fully utilize the retarded person's abilities and capabilities. Limited guardianship with the scope of the guardianship specified in the judicial order is preferred.

The guardian's role as advisor and personal advocate of the mentally retarded ward must transcend the role as manager of the estate. The welfare of the retarded person, not of the estate, must determine the legal and social provisions.

These principles (found in House Bill No. 1516 of the State of Pennsylvania, 1973) contain a recognition of some of the constitutionally based rights which should be guaranteed in any guardianship program. Other provisions necessary to effective updating of guardianship laws are discussed below.

## VIII. DUE PROCESS OF LAW

Since an adjudication of incompetency or incapacity can have serious adverse effects on an individual's ability to exercise many, if not all, civil and legal rights, certain procedures must be followed. These requirements are mandated by the due process clause of the United States Constitution. Basically, due process of law does not embody a fixed set of legal procedures and standards; rather, the specific requirements of due process vary depending upon the importance of the interests involved.

Although the Supreme Court has yet to consider the full impact of the due process clause on guardianship procedures, its decision in other related areas would seem to require the revision of most, if not all, existing guardianship laws. Recent court decisions in the juvenile and mental health areas have mandated that whenever a person may be subjected to the loss of liberty, no matter how benevolent the state's motives, certain procedural safeguards must be followed. Specifically, the Court has required notice, hearing, the right to counsel, and the opportunity to be heard and to present a defense. It is submitted that these are minimum requirements which should also be met in the area of guardianship.

The following is a cursory outline of the major due process procedural safeguards as they would apply to guardianship. The list is not all inclusive; it merely provides those major protections which are lacking in most existing guardianship laws.

A. WHAT PROCESS IS DUE IN GUARDJANSHIP?

1. Notice and Hearing

At a minimum, due process requires that deprivation of liberty be preceded by notice and opportunity for a hearing appropriate to the nature of the case. As mentioned previously, all legal guardianship statutes recognize that some type of notice and a hearing must be given before a guardian can be appointed. Typically, these statutes require only that the proposed ward be notified of the time and date for a guardianship hearing. This policy is grounded on the assumption that guardianship is essentially a benevolent action on the part of the state and that relaxed, informal procedures are most appropriate.

Because of the serious deprivations of liberty which guardianship may entail, it is submitted that the following form of notice and hearing be provided.

The notice given the proposed ward should be sufficiently specific to adequately inform him or her of the character of the proceedings and the serious legal implications that can arise from appointment of a guardian. Meaningful notice, at the very minimum, would require that the individual be given the petition filed for the appointment of a guardian, names of all persons who will testify in the proceedings, notice of the allegations and other bases upon which the need for a guardian is asserted, and, finally, notice of the specific issues to be treated in the guardianship proceedings and the standards that will be applied. In short, notice must be sufficient so as to appraise the individual of the seriousness of the proceedings and to allow him or her a meaningful opportunity to prepare for a hearing.

Notice of the foregoing will not unnecessarily delay or add to the expense of guardianship proceedings. Furthermore, only with this type of notice will a potential ward be in a position to effectively challenge the proceedings. As early as 1863, the Supreme Court stated, "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 68 U.S. 223, 233 (1863).

## 2. Right to Counsel

Even though the appointment of a guardian may mean that the ward is denied the rights Americans consider fundamental, most states do not guarantee the mentally impaired individual the right to counsel. This reluctance can be traced once again to the paternalistic origin of guardianship. When most laws were written, it was felt that there was no need to make guardianship into an adversarial process. Instead, the judge would act as a wise parent acts in seeing that justice was done. The problem with this approach is obvious. Without representation for the proposed ward, the only evidence likely to come before the court is that of the petitioners.

Notice and the opportunity to be heard are of little value if the alleged incapacitated person is denied the assistance of counsel. In juvenile proceedings, the Supreme Court has stated that a child whose liberty is in question, "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." In re Gault, 387 U.S. 1, 36 (1967).

### 3. Right to a Fair and Impartial Hearing

The fundamental requisite of due process is the right to be heard. All states have some type of procedure whereby a judge hears evidence as to the alleged incapacity of the potential ward. In most instances, however, this hearing is merely ex parte, meaning that the only evidence presented and heard is that of the petitioners. Thus, the judge may be exposed to only one side of the story; that is only the proposed ward's alleged incapacities will be presented, while his capabilities are ignored.

To protect an individual from being unnecessarily deprived of legal rights resulting from the erroneous appointment of a guardian or the appointment of a guardian with overly broad powers, the following should be provided:

a. Presence of the Person.

The allegedly incapacitated person should be present at all stages of all proceedings.

b. Right to Confront and Cross Examine Witnesses and to Offer Evidence and Testimony.

Before any findings are made as to the need for guardianship, the proposed ward, through

his attorney, should be given the opportunity to confront and to cross examine witnesses against him and to offer evidence in his own behalf, including the testimony of witnesses. Only by the use of this process will the judge be in a position to make an intelligent decision as to the individual's capacity.

The court should also be required to avail itself of the expertise of behavioral scientists. A comprehensive clinical evaluation should be undertaken covering medical, psychological, educational, social and vocational factors. This evaluation should be utilized in determining the need for guardianship services.

c. The Requirement That There Be Clear and Convincing Proof of Need for Guardianship Services.

That the fact-finder may commit error is a risk of any litigation. In a guardianship proceeding, the questions involved

are primarily subjective, concerning the subject's mental condition and capacity. Such subjective determination cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts are in issue. Consequently, the judge or fact-finder should be persuaded by clear, unequivocal and convincing evidence that the subject is in need of guardianship services and to what extent these services are needed.

In conclusion, the basic guarantees which we feel should be included in comprehensive guardianship legislation are outlined below.

In order to preserve basic civil rights, guardianship statutes should contain language which will guarantee:

that due process requirements, both procedural and substantive, are recognized and followed in the court proceeding;  
and

that an individual is presumed competent to manage all personal and financial affairs until proven otherwise.

Procedural due process requirements ensure individuals of a fair hearing before any civil rights are denied. Fair hearing provisions would include:

the necessity to petition the court to secure guardianship for another;

personal notice of the petition to the person for whom guardianship is requested;

the right to be represented by counsel;

the conducting of the hearing before a judge;

the right of the retarded individual to present evidence on his behalf and to cross-examine all adverse witnesses.

A presumption of competence during the hearing would require guardianship statutes to include provisions for:

the participation of the potential ward, to the extent of ability, in all phases of the hearing process; and

a panel of professionals (e.g., psychologists and physicians) to make not only an adequate and substantial diagnosis of mental retardation, but also to certify the extent to which the person is debilitated and unable to function as a result of retardation. This evaluation will allow the court to determine what specific rights must be restricted in a guardianship order.

When individual rights are denied in the court of law, even by fair hearing, substantive due process guarantees require that the person be provided a program of habilitation which will help regain lost rights. To satisfy this constitutional principle, guardianship statutes should:

establish a wide range of alternative types of guardianship plans for the court to use in designing an individualized plan. The most flexible alternatives would be provisions for either limited guardianship or guardianship by mutual contract;

require the guardianship plan adopted to state specifically the program of services needed to assist the person to become more competent in the area(s) of incompetency;

require periodic review of the guardianship plan. The plan must be checked for effectiveness and the need to be continued or revised. Appropriate restitution of rights should come as the individual achieves certain developmental goals.

recognize that the success of any guardianship program depends on the guardian. Careful consideration should be given to the qualifications necessary for anyone assuming this role.

5/18/77

APPENDIX SIX

PROTECTIVE SERVICES: A PRIVATE SECTOR APPROACH

## Appendix 6

### PROTECTIVE SERVICES: A PRIVATE SECTOR APPROACH

(Prepared by Planned Protective Services, Inc., Los Angeles, Calif.)

#### THE NEED FOR PROTECTIVE SERVICES

The typical recipient of protective services is an aging widow, widower, or couple experiencing difficulty in coping with changes brought about in regard to living arrangements, bill payment, transportation, medical treatment and insurance, credit, psychological adaptation to change, ability to deal with salesmen, contractors, nurses, homemakers, and governmental organizations. The difficulties may have arisen from the onset of physical disability or weakness, organic mental deterioration, low income and inflation, as well as from psychological depression resulting from these and other problems.

Merely possession of money is not always sufficient to avoid many of the above stress situations. In fact, one of the seamiest human traditions has been the preying upon the elderly infirm through ill advised or fraudulent schemes pushed upon a afraid and confused individual by "artful or designing persons" in the guise of bargains, investments, easy money, false promises of free or inexpensive services, oral agreements, and written agreements containing confusing legal jargon or fine print. Homes have been lost, sizeable estates depleted, valuable personal property relinquished for a fraction of value, worthless land purchased, and cheap or worthless goods and services bought at many times real value. Complex financing has been portrayed as simple and inexpensive, though it has often involved repayment plans impossible for the fixed-income senior to follow, thus inviting foreclosure and repossession. Individuals have been locked in hospitals and residential care facilities of varying types, sometimes without need, sometimes involuntarily, with little regard for medical and psychological bases for level of care, and often in surroundings of ill-conceived social planning and poor hygiene.

Although many people caught up in these situations may have no close relatives or no relatives at all, there exist in the southern California area alone thousands of cases where relatives (greedy or well meaning) either are a part of the problem or fail to come to grips with the situation due to their own pressing affairs, their inability to deal effectively with the elderly relative, or their geographical distance from him or her. Husbands, wives, sons, daughters, brothers, sisters, grandchildren, and nieces and nephews have all been known to seize the assets of their elderly relatives and place them in shame-

ful custodial care facilities to waste away and die as one means of "avoiding probate."

Obviously there are available legally based sources of protective services aimed at providing court supervision of the personal and financial affairs of infirm individuals as managed by another party. As will be seen, the nature, scope, and accessibility of these services vary greatly. Some of these sources are traditional and well known; others are relatively new and deserve more study. Still others, of course, are yet to be developed and perfected.

#### AVAILABLE COURT-SUPERVISED PROTECTIVE SERVICES

In California, legal guardianship has long been a practice whereby a relative or close friend of an infirm individual is appointed, under court jurisdiction, to manage the personal and financial affairs of his ward. Although court supervision is mandated by the California Mental Health Code and Probate Code, it is more or less limited to the appointment process, the inventory and appraisal, and the current and final accountings. (Negotiation of certain contractual arrangements as well as sales of securities and real property do require additional court involvement.) However, legal guardianship has inherent negative aspects, both generally and as practiced by the inexperienced guardian—the so-called one time situation.

First, guardianship involves a finding of incompetency. This results in almost total lack of control and even of input by the ward concerning his or her personal preferences about living arrangements, investment, contracts for services, and other related decisions. This total isolation from direction or control of one's affairs brings on, in the more mentally active wards, feelings of uselessness, low self-esteem, and accelerated further mental and physical deterioration.

Second, even well-meaning lay guardians are themselves called upon to make financial, social, legal, and management decisions often without personal experience or ability. The planning involved, both long and short term, can be a difficult proposition for the lay person. Wrong decisions have been made resulting in financial loss and psychological distress to the ward. Also, increased usage of attorney time due to the lay guardian's inability to make some of the required decisions out of his own prior experience can severely inflate guardianship costs.

These factors indicate a need for alternatives both to the one time guardian pattern and to the somewhat extreme nature of the legal guardianship itself. And in California, these alternatives do exist.

Since the late 1950's, the California Probate Code has provided for a middle ground between guardianship and complete self-reliance for the elderly infirm. Legal conservatorship (of the person, estate, or of both) now provides for court-supervised financial and/or personal management involving the same legal safeguards as guardianship, but without the stigma of incompetency. The conservatee has a legal right to consultation with the conservator about the full range of affairs. The conservatee also retains a right to make certain decisions on his own. The conservator is required to take adequate consideration of the wishes of the conservatee as a part of the decisionmaking process. Disposition of assets can only be allowed where need or

justification can be shown to the court, either prior to or subsequent to such disposition.

In cases where after-the-fact approval of disposition is not obtained, the conservator may be surcharged personally, or through his required bond, for any amounts involved. In Los Angeles County, probate judges are requiring that conservators promise under penalty of perjury that their conservatees will not be placed in any health care facility against their will. Many conservatees live in their own homes or apartments, or live happily in board and care environments, in the latter case often retaining their own furniture. Where medical and psychiatric advice indicate, conservatees can drive automobiles, travel at will on public transportation, and even move from one county to another, involving only a change in court jurisdiction for the conservatorship. Conservatees have often recovered to an extent that they can do without the protection of conservatorship; in these cases an orderly and prompt termination, accounting, and release is obtainable through the court in approximately 6 weeks, during which time the conservator is responsible for aiding the conservatee in resuming control.

Although family members can be appointed as probate conservators, the same pitfalls await "one time" conservators as their guardian counterparts. The alternatives to relative involvement ideally should offer total impartiality, ready access to expertise in:

- Accounting,
- Bookkeeping,
- Property management,
- Business management,
- Long and short-range financial planning,
- Insurance,
- Debt collection,
- Creditor relations,
- Paralegal services, and
- Personal financial counseling.

These services should be available at reasonable cost.

For conservatorship of the person, good alternative sources of protective services should offer:

- Visitation, both routine and in crises,
- Coordination of medical consultations with both internists and specialists, as inpatient, outpatient, and in-office visits,
- Transportation,
- Access to professional and semiprofessional nursing services, where indicated by medical advice,
- Adequate physician and nurse screening and supervision,
- Access to all types of government aid and reimbursement, including aid in filing of claims,
- Referral to psychiatric and psychological treatment as inpatient and outpatient (especially where covered by Medicare),
- Maintenance of existing private medical insurance,
- Shopping,
- Budgeting, and
- Aid in corresponding with friends and relatives.

In addition, where institutional care is medically required, close supervision of care quality, including hygiene, therapy, exercise, security of personal belongings, food value and appeal, ventilation, warmth and air conditioning, and employee attitude toward the patient, should be practiced. All of these services to the person of a conservatee should be provided by or directed and supervised by a competent, professional person or persons, ideally educated in gerontology and social service, and where available, a licensed social service practitioner. Individual caseworkers should be mature, adaptable, experienced in dealing with elderly people, and importantly, capable of inspiring trust and confidence; these caseworkers and their supervisor should work toward fostering maximum retention of individual initiative and drive.

Because the organized conservatorship deals with two distinct but interwoven areas of life management, person and estate, the optimum situation is one in which the two areas are served by the same entity. This is because most decisions inevitably require coordination of the two areas of protective services. For example, budgetary considerations, long and short term alike, involve important inputs juxtaposed available funds and required levels of service. When one organization manages both the person and the estate, this coordination is readily attained.

In southern California, as in most regions, banks and trust companies are regularly serving as legal fiduciaries in live estates such as guardianships and conservatorships. However, these firms are not allowed in California to handle guardianship and conservatorship of the person. Another entity must be provided if the protection of the person is required. Furthermore, because these firms are profitmaking in character, they have found it financially unrewarding to accept appointments in estates under \$90,000 and, with few exceptions, do not now take on smaller cases.

For years, the only organized conservator of the person and estate combined was the county public guardian. In Los Angeles County this office traditionally has been a backwater appendage of the county public administrator's office, handling decedent estates. Press coverage and public testimony has indicated in the recent past that the public guardian has, because of staff shortages, poor management, and lack of sufficient budget, been remiss in responding to needful situations in processing the onset of guardianship or conservatorship, in properly maintaining the supervision of personal care, in effectively responding to complaints, changes in care quality, in institutionalizing individuals before need, and in slow response to improvements in physical or mental condition which might indicate termination of the protective service.

For the past several years, however, a private sector approach to organized protective services has been developed, serving several southern California counties. It is Planned Protective Services, Inc., a nonprofit, charitable, Federal and State tax exempt, nonsectarian California corporation, specifically incorporated for the purpose of providing court-supervised, bonded, expert, professional personal and financial management, through conservatorship, to the elderly infirm.

as well as to certain other people of more moderate age with management disabilities.

### HISTORY OF PLANNED PROTECTIVE SERVICES

As early as 1967, a year-long investigation of the need for new sources of protective services was conducted by the Committee on Aging of the Los Angeles Welfare Planning Council (now a Red Feather agency). Testimony from a broad spectrum of public and private agencies and individuals was heard. The conclusion of the study was that an overwhelming unserved need for protective services to the aging existed, and that the county public guardian was not able to meet that need. The council recommended the establishment of a model nonprofit, charitable corporation in Los Angeles and that work be initiated toward eventual passage of legislation to alter the probate code whereby such a corporation could be named to serve as conservator or guardian of the person and estate. PPS was incorporated in 1969 and received charitable designation and tax-exempt status from the Federal and State governments in that year.

During the early years, the president of PPS was the appointed guardian or conservator, and he employed the resources, facilities, and staff of the corporation to aid his wards and conservatees. In turn, when he was awarded court reimbursement, he turned over his fees to the corporation. As the culmination of a long, drawn-out effort, legislation was enacted in 1974, largely through the cooperation and efforts of Assemblyman Alan Sieroty, that effectively allowed Planned Protective Services, Inc. to be appointed directly by the probate court. A copy of the enabling legislation is part of the appendix to this report.

Since 1969, Planned Protective Services, Inc. has grown from a one-room operation (its first quarters were located in a donated room in the Los Angeles Episcopal Cathedral) to a set of offices on Wilshire Boulevard in the McArthur Park section of Los Angeles, as well as a branch office in Torrance serving the south portion of the county. Recently, staff and space were acquired in San Diego as a part of an affiliation program with an organization prominent in social services aid to the elderly in that county. In spring of 1976, the corporation received its first appointment as a conservator in San Diego.

Future plans include the addition of other suburban branch offices, a senior services center for aid and referral of seniors in a variety of problem areas which will include housing, transportation, medical and nursing care and legal services, as well as preretirement counselling. For more than 1 year, PPS has been involved in very promising negotiations with the Social Security Administration, working toward implementation of a large scale representative payee program for SSA beneficiaries who may not require outright court-appointed aid, but who do need some assistance in bill-payment and budgeting.

### OPERATION OF PLANNED PROTECTIVE SERVICES, INC.

Under the direction of John M. Mills, PPS employs personnel trained in property management, bookkeeping, fund raising, medical insurance claims processing, and of course a large social service staff, supervised by two professional social workers.

The agency receives requests from many quarters for investigation and aid where elderly individuals are in need of protective services. Referrals have come from acute hospitals, physicians, nursing services, attorneys, family, friends, judges, as well as from individuals seeking aid for themselves. Many referrals have come directly from the Social Security Administration and the Veterans Administration as a result of study by those organizations into PPS' record as a social agency and after the development of a close working relationship between PPS and SSA and the VA.

Staff members of PPS meet personally with proposed conservatees on a confidential basis, in the presence, whenever possible, of their own lawyer or a trusted friend, relative, or neighbor. All aspects of need are investigated, and the nature of conservatorship is explained clearly and in depth. PPS personnel are in contact with the personal physician or psychiatrist, and attempt to interview all persons interested in the care and welfare of each individual.

One of the most interesting facets of the protective services offered by the corporation is the lack of redtape involved. In cases of real crisis, because of the professional experience of PPS in its field, and due to its excellent reputation with the courts, the bar, hospitals, and the medical profession, the agency is sometimes appointed as temporary conservator within as little as 48 hours after the first crisis call.

Once appointed on this temporary basis, the agency moves to secure adequate medical treatment, food and shelter and, when necessary, in-home care or placement. Staff members immediately secure real and personal property and begin in-depth investigation of needs, assets, potential losses and liabilities, and seek information about lost relatives. In a significant number of cases, PPS discovers that some assets of its conservatees have been stolen or misappropriated, and moves toward regaining them. Within a month, all known relatives have been contacted and made aware of the situation, and a court hearing has been held to determine need for longer term conservatorship protection. PPS conservatees are brought into court whenever possible, and only when a medical declaration (under penalty of perjury) by the attending physician is filed with the court may the agency be appointed without the conservatee present. Only complete physical inability to attend court is satisfactory under the probate code in such situations.

Once appointed, the corporation (which must carry a separate bond for each case in the amount of the total annual income of the conservatee plus the value of all personal property) provides a complete and accurate inventory of assets to the court. Every 14 months, or more often, if necessary, the agency provides to the court a complete accounting of all income received and all disbursements made.

Among the many achievements of Planned Protective Services, Inc. in its backlog of individual case histories are: recovery of real property taken over by the State for back taxes, removal of squatters, avoidance of trust deed note foreclosures, reversion of prior sales of real property at a fraction of market value, psychiatric treatment of some conservatees resulting in their return to individual living arrangements, and the obtaining of competent medical care for individuals who may not have seen a doctor for years.

A paramount objective of the agency is the maintaining of the personal character of its services. Each case is examined and periodically discussed at staff meetings so that the full organization is aware of the variety of needs and desires and feelings of each conservatee. The client is not merely a name in a log or a number on a computer printout. In many instances, the relationship between the caseworker and client becomes very close, similar to that of an older and younger relative or that of longtime friends.

#### THE COST OF CONSERVATORSHIP

Compared with attorney costs of from \$50 to \$75 per hour, and bank or trust company charges of from \$30 to \$50 per hour, the Planned Protective Services, Inc. fee guideline of only \$15 per hour is a bargain. Furthermore, due to the efficiency of the agency, it has been able to guarantee that it will care for the conservatee for life, even if medical care and hospitalization outlays eventually deplete all of the conservatee's assets. Planned Protective Services, Inc. never in its history has requested to be relieved of a case due to lack of funds. No payments are ever received in advance, and only if the court determines that services provided were necessary and reasonable is payment endorsed by the supervising judge in each case.

PPS has been developing a program for volunteer services, to keep the cost of conservatorship low. The corporation has held a biannual ball for donation of funds to support aid to needy conservatees. Several large corporations, including TRW and Northrop, have been involved in yearly donations of funds and gifts, especially at holiday time, for the benefit of the agency's clients. The present ratio of charity cases to private cases is about 31 percent. No public funds have ever been expended by Planned Protective Services, Inc.

#### LONG-TERM CARE PLACEMENT

Most people, lay and professional alike, believe the optimum living arrangement is as a couple or as an individual, in one's own home or apartment. Planned Protective Services works toward supporting its conservatees in this type of personal environment. At-home conservatees, combined with clients living in their own rooms but receiving meals in a residential care setting together make up between 50 and 60 percent of the PPS caseload.

Where inability to walk or incontinence requires placement in a convalescent care facility, the corporation still asserts great care and effort in picking the proper situation for each client in terms of location and quality of care. PPS tries to place such an individual in a neighborhood close to his or her traditional residence area, so that old friends and acquaintances, many of whom have difficulty with transportation, are more likely to continue a relationship with the conservatee. The level of care provided in such facilities is constantly being monitored by the agency, and such facilities are aware that deteriorating conditions of care will cause prompt removal of clients.

As indicated earlier, the probate conservator is not allowed to place its conservatees involuntarily in any medical care facility. In those rare instances where a difficulty arises in this regard, PPS has managed to provide professional outside psychological or psychiatric evalua-

tion combined with its own caring and low key counseling to bring an understanding of the situation to its client. In only one case has the agency been required to submit a conservatee to county investigation and legal hearing under Mental Health Code regulations leading to due process involuntary commitment. (In California an involuntary commitment requires an intensive, involved arbitrary proceeding transacted by a county designated public sector investigating agency, supervised by a special superior court branch.)

#### SUMMARY: THE PRIVATE SECTOR SOLUTION

This is an era when social problem-solving has begun to look away from Government control and responsibility and tax-based financing of social services. And the southern California experience has provided the nongovernmental model. The slow but steady growth of Planned Protective Services, Inc., which has resulted in a vast amount of practical experience in protective services application, from legal, financial, medical and psychological standpoints alike, demonstrates the viability of this private sector approach. Legally administered protective services have been made available to many persons without public fund expenditures through this program. It is expected that the amount of available services will continue to expand, both in terms of numbers and geographical scope.

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APPENDIX SEVEN

LEGAL ISSUES IN STATE MENTAL HEALTH CARE:

PROPOSALS FOR CHANGE:

GUARDIANSHIP INCLUDING THE SUGGESTED STATUTE ON GUARDIANSHIP

**LEGAL ISSUES IN STATE MENTAL HEALTH CARE:  
PROPOSALS FOR CHANGE**

**GUARDIANSHIP**

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## GUARDIANSHIP

### I. INTRODUCTION

Guardianship is generally intended to protect persons who are unable to care for themselves or manage their property. To this end, courts are authorized, under the *parens patriae* power of the state, to appoint guardians to direct the personal or financial affairs of the ward or both. This protection, however, infringes upon the liberty or personal autonomy of the ward to the extent that the guardian is empowered to make unilateral decisions. Moreover, formal adjudication of incompetence entails stigma comparable to that of civil commitment. Exercise of the guardianship authority, therefore, involves the same tension between civil-liberty interests and the desire of the state to protect the individual as exists in the area of civil commitment.<sup>1</sup>

Both *parens patriae* civil commitments and personal guardianships provide a form of coercive intervention to protect the personal well-being of those who are incapable of caring for their own physical needs but refuse psychiatric and other as-

sistance. Statutory revisions only in the area of *parens patriae* civil commitments might simply result in greater use of personal guardianship. The net result would be simply to shift problems and abuses from one area to another.

This chapter, therefore, examines personal guardianship statutes and practices and gives particular attention to their relationship to the civil commitment statute previously suggested. The recommendation is made that personal guardianship be authorized for persons suffering from serious mental disorder who, as a result thereof, are unable to care for themselves and to make informed decisions about their own welfare and would suffer serious physical consequences in the absence of intervention.

In addition, property guardianships are discussed. Although no complete property guardianship statute is proposed, a few recommendations are made with respect to procedures and criteria.

### II. PERSONAL GUARDIANSHIP

#### A. CURRENT LAWS AND PRACTICES

Problems previously discussed in the chapter on civil commitment which also appear in the guardianship area include various procedural deficiencies such as inadequate notice, the lack of provision for effective assistance of counsel, hearing procedures that do not produce careful fact-finding and undue judicial deference to the conclusions of medical personnel with respect to the conclusions of law. Substantive problems include very broad and vague criteria for the imposition of guardianships, the absence of appropriate time limits and a lack of standards for the mental health treatment of wards.<sup>2</sup>

<sup>1</sup> With regard to this tension in the civil commitment areas, see 2 MDLR 77-78.

<sup>2</sup> See Alexander & Lowin, *The Aged and the Need for Surrogate Management* (1972); Horstman, "Protective Services for the Elderly: The Limits of Parens Patriae," 40 *Mo. L. Rev.* 215 (1975); Pickering, "Limitations on Individual Rights in California Incompetency Proceedings," 7 *U. Cal. Davis* 457 (1974); Regan, "Protective Services for the Elderly: Commitment, Guardianship, and Alternatives," 13 *Wm. & Mary L. Rev.* 569 (1972); Comment, "North Carolina Guardianship Laws—The Need for Change," 54 *N. Car. L. Rev.* 389 (1978).

<sup>3</sup> Horstman, *supra* note 2, at 235-42.

A study of 1,010 guardianship and conservatorship cases in Los Angeles County during a one-year period in 1973 and 1974 illustrates the procedural deficiencies in this field.<sup>3</sup> The study showed that in only 7.8 percent of the cases did the proposed ward attend the judicial hearing and that in 84.2 percent of the cases the only persons present were the judge, the petitioner and the petitioner's attorney. Although medical evidence was required, this usually consisted of a physician's certificate. In only one case was an examining physician present to testify in court. In only 2.9 percent of the cases was the proposed ward represented by a lawyer or guardian *ad litem*.

Like the criteria for civil commitment, the statutory standards for guardianships frequently lack precise definition. For example, a guardian may be appointed for an "incompetent" in Illinois if, "because of insanity, mental illness, mental retardation, old age, physical incapacity, or imperfection or deterioration of mentality" the individual "is incapable of managing his person or estate. . . ."<sup>3a</sup> In

<sup>3a</sup> Ill. Ann. Stat. ch. 3, §112 (Smith-Hurd Supp. 1976).

California an "incompetent person" for purposes of guardianship means "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful and designing persons."<sup>3b</sup>

In applying the standards, courts have often relied on conclusory medical opinions presented by the petitioner rather than insisting upon hearings where views may be challenged and the capabilities of the proposed ward considered in light of his recent behaviors. By default, therefore, real decision-making authority has been delegated to physicians who often are not even required to appear in court.<sup>3c</sup>

As is the case under some civil commitment statutes, guardianship laws typically fail to provide for time limits. "Restoration to capacity is often a difficult undertaking and rarely occurs. It has been suggested that the order of appointment of guardian includes [s/c] the phrase 'until death do you part.'"<sup>3d</sup> Not all wards suffer from severe chronic disabilities which warrant long-term guardianships; but state guardianship statutes typically lack provisions for prompt restoration to capacity through periodic judicial review and a requirement that prompt and adequate treatment and rehabilitative services be made available.

Some problems in the guardianship area do not exist in civil commitment. One is the "all-or-nothing" nature of many guardianship statutes. Once a guardianship is imposed, the ward loses all his legal rights to determine his place of residence, to travel freely, to engage in financial transactions—such as signing and endorsing even small checks—and to consent to medical treatment. The ward also may lose such rights as the vote, a drivers' license and the opportunity to marry.<sup>4</sup> Such statutes ignore the fact that a person requiring a guardian for certain specific purposes may be capable of caring for himself or exercising his rights in other areas.

Another problem unique to guardianship concerns the lack of distinction between property and personal guardianships. In some states the imposition of guardianship to provide personal or medical care for the ward results in his automatic loss of control over his financial interests. Thus guardianship may be improperly sought as a means to gain control over the ward's estate for the benefit of the guardian.<sup>5</sup> A further problem in mixing personal and property considerations is the differing qualifi-

cations needed for a personal guardian—one who can provide for personal care, treatment and protection—and a property guardian—one who can wisely manage property and invest funds.

Substantial injustice results from the procedural deficiencies and vagueness of guardianship laws. These include the dubious institutionalization of elderly persons by prospective heirs anxious to gain control of their assets<sup>6</sup> and the appointment of state officials primarily to facilitate their access to the ward's estate to reimburse the state, not to protect assets for the individual's benefit.<sup>7</sup>

Yet there has been very little litigation challenging guardianship statutes. In *Schneider v. Radack*,<sup>8</sup> however, the South Dakota guardianship statute was held unconstitutional because of various procedural deficiencies, the lack of periodic review and the vagueness of the statute's criteria.

## B. SUGGESTED REFORMS

### 1. Procedures

Given the similarity of the issues and the stakes involved in civil commitment and personal guardianship proceedings, essentially the same procedural safeguards are warranted. Accordingly, the proposed statute provides for notice, the right to counsel, prompt, mandatory judicial proceedings and the right to jury trial.

However, some procedural aspects of personal guardianship proceedings require a different approach. The most significant variation is the requirement of multidisciplinary pre-hearing investigation and evaluation of the respondent's social and economic circumstances and mental and physical condition to consider the need for a personal guardianship and acceptable alternative arrangements, and to propose the most beneficial form of any needed guardianship. This evaluation report would be filed with the court but would not ordinarily be admissible as evidence. The proposed ward would have the opportunity to file a response to it.

### 2. Substantive Measures

#### a. Criteria

Although the purpose of any guardianship is to provide care, treatment or protection for an incapacitated person, such benign intentions cannot change the fact that guardianship represents the exercise of state power to impose unwanted measures on the individual. Moreover, a guardianship is a stigma. The reason for overriding the individual's wishes, therefore, should be manifest and the guardianship should hold out substantial benefit to the individual.

<sup>3b</sup> Cal. Prob. Code §1460 (West Supp. 1976).

<sup>3c</sup> See Horstman, *supra* note 2, at 226-30; Regan, *supra* note 2 at 603-04.

<sup>3d</sup> Pickering, *supra* note 2, at 472.

<sup>4</sup> See, e.g., Horstman, *supra* note 2, at 231-32.

<sup>5</sup> Pickering, *supra* note 2, at 465.

<sup>6</sup> *Id.*

<sup>7</sup> Alexander & Lowin, *supra* note 2, at 67-75; Note, "The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?" 73 *Yale L.J.* 676 (1964).

<sup>8</sup> No. 74-50 (So. Dak., Yankton County Cir. Ct. July 30, 1974).

It should also be kept in mind that actively suicidal and self-destructive behaviors are dealt with under the proposed civil commitment law and the guardianship statute should not be redundant.

In light of those considerations, the suggested personal guardianship statute criteria require (a) a present inability, resulting from severe mental disorder, to meet one's personal requirements for nutrition, shelter, clothing, health or safety to the extent that serious physical illness, injury or disease are likely to result in the near future, (b) the lack of capacity to make reasoned decisions about proposed personal care or supervision or treatment, and (c) the availability of appropriate resources to provide needed protection or treatment. All three criteria must be satisfied before a guardianship may be ordered.

#### (i) Inability to Care for Oneself

The first requirement, an inability to care for oneself, is very similar to the criterion for conservatorship under California's Lanterman-Petris-Short Act.<sup>9</sup> The wording of the proposed statute is intended to identify the specific needs which warrant the imposition of a guardianship. The term "severe mental disorder" is defined in the same terms as it was for purposes of civil commitment.

In addition, the proposed statute demands that a finding of inability to care for oneself be supported by evidence of recent behavior that is clearly harmful or potentially dangerous. As in civil commitment, the proof of relevant behavior is to preclude intervention solely on the basis of clinical judgments regarding the individual's mental condition and expert predictions regarding future harmful behavior.

Also, this criterion calls for a finding that the specified harms will likely occur "in the near future." Here again the intention is to eliminate some of the vagueness by requiring the judge or jury to focus on the immediate consequences of imposing or not imposing guardianship.

#### (ii) Inability to Make Informed Decisions About Proposed Care, Supervision or Treatment

The chapter on civil commitment points out that the inability to decide about proposed care or treatment may be a constitutional precondition to court-ordered intervention.<sup>10</sup> That discussion, together with the discussion of the appropriate standard for judging the individual's ability to make informed decisions, seems fully applicable to personal guardianship proceedings. In essence, the approach suggested in the civil commitment area is that involuntary forms of civil intervention are not warranted, at least under the *parens patriae* doctrine, if the individual is capable of understanding

the nature, purpose and potential benefit of the intervention. The reasoning is that actions taken pursuant to the *parens patriae* authority must be in the individual's best interest and, if the individual's comprehension is adequate, generally no one else should presume to make the decision for him.

The proposed personal guardianship statute incorporates the same basic standard for determining ability to make informed decisions as is contained in the suggested civil commitment law. However, it also incorporates the additional kinds of services that a personal guardianship might entail, e.g., personal-care services and medical treatment for physical ailments.

#### (iii) Availability of Appropriate Resources

The third criterion requires that the imposition of the guardianship will surely provide beneficial services. The essential point here is that the infringement upon personal autonomy or liberty inherent in any guardianship should not occur unless there is a corresponding benefit to the individual in the form of needed, helpful services.

#### (b) Individualized Guardianship Orders

As previously noted, a major fault in guardianship statutes is the guardian's unnecessarily broad authority and the ward's diminished legal ability to act for himself. Some states have recently adopted more balanced statutes. For example, a Minnesota statute directs the guardian to "exercise his supervisory authority over the ward in a manner which is least restrictive of the ward's personal freedom consistent with the need for supervision and protection."<sup>11</sup>

As a constitutional matter, it may be argued that the personal freedom of the ward should be infringed no further than necessary to accomplish the protection of the individual.<sup>12</sup> As a policy matter, guardianships should foster the ward's self-reliance rather than increase dependency.

Therefore, the proposed statute requires specific findings of fact to support each grant of authority to the guardian. It also requires the formulation and adoption of a guardianship plan which specifies how the authority is to be exercised, the ward's needs met, and services financed.

#### (c) Durational Limits

To prevent personal guardianships' outliving their usefulness, court appointments should be for limited periods, with reappointments or renewals based on full judicial rehearings identical to the initial hearings. Also, during the guardianship term, the ward and guardian should have the right jointly to petition the court for revocation of the appointment as no longer necessary, and the ward should have the right, upon presentation of documents

<sup>9</sup> Cal. Welf. & Inst'n Code, §§5002(h), 5350 (West 1972).

<sup>10</sup> See 2 MCLR 89-93.

<sup>11</sup> Minn. Stat. Ann. §252A.11 (Cum. Supp. 1976).

<sup>12</sup> See the discussion of the least drastic means principle at 2 MCLR 114-117.

making out a *prima facie* case of restoration to capacity, to petition the court for revocation and obtain a hearing on the issue. The proposed statute incorporates these concepts.

#### (d) Right to Services

Each ward should have the right to adequate care, treatment and rehabilitative services to meet the guardianship mandate and to achieve self-reliance. It can be argued that due process principles require the recognition of such a right either as the *quid pro quo* for the loss of personal freedom and autonomy or as necessary to fulfill the legitimate state purposes under a guardianship law, *i.e.*, protecting the individual and restoring him to full capacity.<sup>13</sup>

Implementation of this right would mean, particularly in the case of a ward whose estate is inadequate to pay for needed services, public subsidy or quality public services. To minimize state and local costs, the ward's assistance program should take advantage of all available federal and insurance funding sources. To help assure full exploration of all financial resources, the guardianship plan must include a description of possible funding sources and the manner of financing services.

#### (e) Mental Health Treatment

To authorize a guardian to supervise mental health services, the proposed statute requires that the ward be found incapable of making his own informed decision about treatment. With respect to most forms of treatment, the guardian would be empowered to give substitute consent on behalf of the ward. When hospitalization or particularly harsh or hazardous forms of treatment are proposed, however, additional safeguards seem warranted. Therefore, the proposed statute requires Human Rights Committee review and approval of mental health inpatient care and similar forms of treatment needing committee approval under the proposed civil commitment statute, *i.e.*, electroconvulsive therapy, certain medication practices and behavior therapy involving the use of aversive stimuli or substantial deprivations.

### C. RELATIONSHIP TO CIVIL COMMITMENT STATUTE AND OTHER PERSONAL GUARDIANSHIP STATUTES

The proposed civil commitment statute does not

include inability to care for oneself among the grounds for commitment. It is recognized, however, that some civil commitment statutes expressly or implicitly include this standard.<sup>14</sup> The reasons for making such inability a ground for personal guardianship and not for civil commitment are founded purely on policy considerations. Most importantly, many people meeting this criterion have significant needs apart from mental health treatment, *e.g.*, noninstitutional housing, personal or medical care for physical ailments. Logically a guardian is better able to handle these matters than a mental health facility. In fact, the ward's condition may make no mental health treatment advisable. Under the recommended guardianship approach, the mental health services system would generally have no direct responsibilities beyond needed diagnostic and treatment services. In some cases, however, an untreatable ward might be placed in a community residence operated by mental health authorities if a structured environment or systematic observation is needed but not available elsewhere.

To the extent other existing guardianship statutes provide for personal care, treatment or supervision on the grounds of those mental disorders commonly regarded as "mental illness," it is recommended that they be repealed. The proposed personal guardianship is intended to provide the exclusive means for meeting such needs. If other guardianship statutes use "mental illness" as a criterion without the same procedural safeguards and substantive limitations, the reformist aims of the new statute will not be served. Likewise, statutes which would provide guardianship on grounds such as old age<sup>15</sup> should be reconsidered.

Finally, property guardianship statutes should be reassessed for strict adherence to their stated purpose. When a prospective ward is neither able to take care of his essential physical needs nor to manage substantial financial interests, separate personal and property guardianships can be established. But the need for property guardianship alone should never result in infringements upon the individual's personal freedom. Nor should the need for personal care alone result in the loss of significant control over financial or property interests unrelated to the costs of such care.

## III. PROPERTY GUARDIANSHIPS

Students of property guardianship statutes have found that they generally need extensive reform in

the same respects as civil commitment and personal guardianship laws.<sup>16</sup>

<sup>13</sup> *Cf. Wyatt v. Adorholt*, 501 F.2d 1305 (5th Cir. 1974). It could also be argued that treatment and other services aimed at restoring the individual's capability are mandated by least drastic means principles. Under the least-drastring means argument, treatment to restore the ward to capacity may, in many cases, be viewed as a less restrictive alternative for protection of the individual than a guardianship of indefinite or unnecessarily long duration. *Cf. Developments in the Law, "Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190, 1245-1253, (1974).*

<sup>14</sup> *E.g., Miss. Code Ann. §41-21-61(c) (Supp. 1976); Wash. Rev. Code Ann. §§71.05.020(i), 71.05.280 (1975).*

<sup>15</sup> *E.g., Cal. Prob. Code §1751 (Deering 1974); Ill. Ann. Stat. ch. 3, §112 (Smith-Hurd Supp. 1976); Minn. Stat. Ann. §525.54 (1975).*

<sup>16</sup> *See generally Alexander & Lowin, supra note 2; Rogan, supra note 2; Frachter, "Toward Uniform Guardianship Legislation," 64 Mich. L. Rev. 983 (1966).*

In recent years, however, property guardianship law reforms have been developed and reference is made to those proposals<sup>17</sup> in lieu of suggesting a further model herein. However, a few suggestions seem appropriate. First, it is recommended that adequate procedures and provision for effective representation of the proposed ward by counsel are essential to implement the laws.

The criteria for property guardianship should focus on the ward's recent business and financial conduct. Thus a showing of gross mismanagement and manifest financial vulnerability should be required.

Property guardianships should also be tailored to the individual's needs. If at all capable of minor transactions, a ward should retain control over a reasonable amount to spend for his own comfort or enjoyment. Likewise, if only certain parts of his estate are of concern, e.g., a business enterprise or stock holdings, the guardianship should be so defined. And, if the ward needs assistance in such specific matters as maintaining adequate books, the guardianship should not infringe upon his other

activities. In all cases, the guardian should be required to consult with the ward with regard to major transactions affecting his interests.

The ward should be offered every treatment, counseling or rehabilitative service that would enhance his possibility of regaining capable management of his estate. Guardianships should be for fixed periods and renewable only after judicial review. In the same vein, the ward should be able to petition for removal of the guardianship upon presenting credible evidence of regained management ability.

Very importantly, persons with an adverse financial interest, such as state officials having claims against the proposed ward, should not be eligible for appointment as guardians.

Finally, public guardianship services should be considered for persons unable to afford private guardianship fees. Too often there are no competent guardianship services for persons with small estates or fees that would soon consume the estate.<sup>18</sup>

#### IV. PUBLIC GUARDIANSHIP AGENCIES

A public guardianship agency could provide personal and property guardianship services in the absence of other willing and capable stewards. In fact, if such an agency had a core staff capable of monitoring and coordinating personal-care and treatment services—e.g., social workers and small-estate managers—designating a staff member of this type of agency might often be preferable to persons traditionally named as guardians. This would be particularly true when the court determines a significant conflict exists between the interests of the prospective guardian and ward. In the cases of persons with small estates, such an agency would fill a frequently unmet need.

In addition to assuring competence and sufficient personnel to render its workload manageable, the key issue in designing such an agency is avoiding conflict of interests between the ward and agency personnel. A guardian must be free to serve as an advocate of the ward's interests. Therefore, the guardianship agency must be independent of health, mental health, welfare and other service-providing agencies. A model for such an agency was published a few years ago.<sup>19</sup> California has a fairly extensive system of public guardians.<sup>20</sup>

#### V. GUARDIANSHIP FEES

One of the more ironic aspects of the operation of guardianship laws is the beggaring of the ward for payment of the costs of the guardianship itself. While it is reasonable to expect the ward's estate to be responsible for the costs of maintenance, care and treatment services which benefit him, despite his non-assent, it is patently counterproductive to destroy the ward's financial means to support himself.

To avoid this, the suggested personal guardianship statute protects the ward's estate from being unduly exhausted by guardianship costs. A provision sets out guidelines for judicial determination regarding the extent to which the ward's estate may be used to pay for the guardian's fees and other

services. Rather than setting out numerical standards, those guidelines call for judicial discretion. A similar provision could be included in property guardianship statutes and in statutes establishing a public guardianship agency.

<sup>17</sup> See the Uniform Probate Code, Article V, which is reviewed by American Bar Association Committee on Problems Relating to Persons Under Disability in "Conservatorship: Present Practice and Uniform Code Compared," 5 *Real Prop., Prob. & Trust J.* 507 (1970) [hereinafter cited as *American Bar Association Committee*]; Alexander & Lowin, *supra* note 2; Frachter, *supra* note 16.

<sup>18</sup> *American Bar Association Committee*, *supra* note 17, at 509.

<sup>19</sup> *Legal Research and Services for the Elderly and National Council of Senior Citizens, Legislative Approaches to the Problems of the Elderly: A Handbook of Model Statutes* 153-56 (1971).

<sup>20</sup> *Cal. Will. & Inst'n's Code* §8000 et seq. (West 1972).

**LEGAL ISSUES IN STATE MENTAL HEALTH CARE:  
PROPOSALS FOR CHANGE**

**SUGGESTED STATUTE  
ON GUARDIANSHIP**

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# SUGGESTED STATUTE ON GUARDIANSHIP

## §1. Definitions

For purposes of this act, the definitions set forth in [section 1 of the statute on civil commitment] shall apply, *provided* that all references to the "respondent" shall be deemed to be references to "ward" or "proposed ward"; and the following definitions shall also apply:

"Gravely disabled" means unable to meet essential requirements for one's physical health or safety as a result of severe mental disorder.

"Guardianship evaluation" means an interdisciplinary evaluation of a proposed ward's physical and mental health, living situation, and legal and financial affairs, available sources of assistance to meet his needs for medical and personal care, the proposed ward's willingness voluntarily to accept services essential to his physical well-being, and his ability to make informed decisions about such services and about treatment.

"Guardianship evaluation service" means that agency or organization designated by the [county or other appropriate political subdivision] to accomplish guardianship evaluations.

"Guardianship screening investigation" means the investigation and review by the Mental Health Review Officer of facts which have been alleged to warrant a personal guardianship, including interviews with the person making such allegations, any other significant witnesses who can readily be contacted for interview and the proposed ward. The purposes of any such interview with the respondent shall be to explain the situation to him and to provide him the opportunity to explain or rebut the allegations in the petition. If, during the interview with the proposed ward it seems advisable to the interviewer to do so, he may attempt to persuade the proposed ward to receive on a voluntary basis any evaluation, care, treatment or other services which may obviate the possible need for personal guardianship. Any witnesses identified by the respondent, or whose identity otherwise becomes known, who are reasonably accessible and purportedly have information which would contradict, rebut or discredit that

provided by the petitioner shall also be interviewed.

"Personal care services" means hygiene, homemaking, nutrition and similar services necessary to protect a ward from serious injury, illness or disease.

"Lack of capacity to make informed decisions about care and treatment services" means the inability, by reason of mental condition, to achieve a rudimentary understanding, after conscientious efforts at explanation, of the purpose, nature or possible significant benefits of care and treatment services to be provided under personal guardianship; *provided that* a person shall be deemed incapable of understanding such purpose if, due to impaired mental ability to perceive reality, he cannot realize that his recent behavior has caused, or has created a clear and substantial risk of serious physical injury, illness or disease to himself; and *provided further* that a person shall be deemed to lack the capacity to make informed decisions about care and treatment services if his reason for refusing the same is expressly based on either the belief that he is unworthy of assistance or the desire to harm or punish himself.

"Unable to meet essential requirements for one's physical health or safety" means unable, through one's own efforts and through acceptance of assistance from family, friends and other available private and public sources, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene and safety so that, in the absence of personal guardianship, serious physical injury, illness or disease is likely to occur in the near future. For purposes of this act, any such inability must be evidenced by recent behaviors causing such harm or creating a clear and substantial risk thereof and at least one incidence of such behavior must have occurred within twenty days of the filing of the petition for personal guardianship. The requirement of the preceding sentence shall not apply in the case of a petition for renewal of personal guardianship.

## §2. Petition

(a) A petition for personal guardianship may be executed by any adult person and must be filed with the Mental Health Review Officer for the county in which the proposed ward resides or is present. The petition must:

(i) state the name, age, present address of the petitioner and his relationship to the proposed ward;

(ii) state the name, age, county of residence and present address of the proposed ward;

(iii) allege that petitioner believes the proposed ward to be gravely disabled and specify the factual information on which such belief is based and the names and addresses of all persons known to the petitioner who have knowledge of such facts through personal observations; and

(iv) request the appointment of a guardian.

(b) The petition, or amendment thereto, may also nominate a guardian and include a request

for temporary guardianship in order to meet immediate, essential needs of the proposed ward which would otherwise create a clear and substantial risk of death, or serious physical injury, illness or disease during the pendency of the guardianship petition. A request for temporary guardianship must specify facts which cause the petitioner to believe that a temporary guardian is necessary.

### §3. Notice of Rights

(a) Upon receipt of a petition for guardianship, the Mental Health Review Officer shall promptly:

(i) interview the proposed ward as part of the guardianship screening investigation;

(ii) explain to the proposed ward, at the beginning of the interview, the purpose of the interview and possible consequences of the proceedings;

(iii) serve a copy of the petition on the proposed ward;

(iv) explain and provide to the proposed ward a written statement of the following:

(A) that he has a right to communicate immediately with an attorney, a physician, and a mental health professional;

(B) that a Mental Health Advocacy Service

attorney, whose name, address and telephone number are to be included in the statement, has been designated to advise and represent him prior to and at any judicial hearings, and that the attorney may arrange for an examination and consultation with a physician and mental health professional; and

(C) that he may, instead, employ an attorney, physician and mental examiner of his own choosing at his own expense; and

(v) offer assistance to the proposed ward in contacting an attorney.

(b) Designation of Mental Health Advocacy Service attorneys to represent proposed wards shall be accomplished in the same manner as provided at [subsection 2(g) of the proposed statute on civil commitment].

### §4. Evaluation

(a) Upon receipt of a petition for guardianship, the Mental Health Review Officer shall cause a screening investigation to be completed by the end of the third day after receipt of said petition. If upon completion of such investigation he finds reasonable grounds to believe that the proposed ward is gravely disabled, he shall direct the guardianship evaluation service to conduct a guardianship evaluation. That evaluation shall be completed within fourteen days of the date of the filing of the petition.

(b) The guardianship evaluation shall be conducted with minimum interference with the proposed ward's activities. Any interviews and examinations shall take place in the proposed ward's usual residence unless the proposed ward does not object to being examined or interviewed in a medical or mental health facility or, with the ap-

proval of the Mental Health Review Officer, it is deemed necessary to conduct certain interviews or examinations in a medical or mental health facility. In cases of such necessity, the Mental Health Review Officer may cause the respondent to be taken into custody and conveyed directly to and from a medical or mental health facility for purposes of examination or interview during the normal business hours of the facility.

(c) Persons conducting guardianship evaluations shall in all cases include at least (i) a psychiatrist, or a physician and a [licensed or certified] psychologist with a doctoral degree in an accredited clinical program, (ii) an attorney, and (iii) a social worker with a graduate degree in social work with field training in a psychiatric facility from an accredited program.

### §5. Evaluation Report

(a) An evaluation report shall be filed in court, together with the petition and proof of service of the report upon the proposed ward and his attor-

ney and the petitioner, within fourteen calendar days of the date on which the petition was filed with the Mental Health Review Officer.

(b) The evaluation report shall

(i) describe medical tests and examinations performed with regard to the proposed ward's physical condition and state and interpret the results thereof;

(ii) describe the proposed ward's mental and emotional condition and specify the data on which such description is based;

(iii) specify the particular services necessary to protect the proposed ward from serious physical injury, illness or disease in the near future;

(iv) specify whether the proposed ward is in need of mental health treatment and whether there is a substantial probability that available treatment will significantly improve his mental condition;

(v) describe the terms and manner in which necessary services were explained to the proposed ward and state whether the proposed ward wishes to accept or refuse such services, what his understanding is of the nature, purpose and benefits of such services, and what his express reasons for any refusal are;

(vi) specify the financial resources of the proposed ward and his entitlements to insurance benefits and publicly operated or sponsored health, mental health and welfare assistance which might be employed in the provision of services to him;

(vii) describe the alternative arrangements to personal guardianship and to hospitalization or

other supervised residence which were explored and, if relevant, why they are not considered to be feasible or in the proposed ward's best interest; and

(viii) if personal guardianship is recommended, propose a guardianship plan which includes recommendations as to:

(A) the proposed guardian and any possible alternatives;

(B) the services necessary and available to protect the proposed ward from serious injury, illness or disease and the means by which they may be financed;

(C) the specific, least restrictive authorities needed by the guardian to provide services necessary to protect the proposed ward from serious illness, injury or disease;

(D) the specific authorities needed by the guardian to control the assets and other financial interests of the proposed ward in order to pay for such necessary services; and

(E) the exemption of part or all of the proposed ward's estate and income from the fees and other costs incurred through guardianship so as to protect the proposed ward from hardship and his ability to sustain himself independent of governmental or other forms of assistance after the guardianship expires or is revoked.

(c) The petitioner and proposed ward shall have five judicial days to file responses to the evaluation report.

## §6. Evaluations: Right to Remain Silent and Silent Observers; Proposed Ward's Experts

(a) A proposed ward shall have the right not to respond to any questions in the course of examinations and evaluations for the purpose of determining whether he meets the criteria for temporary or personal guardianship, provided that, after full explanation of this section 6, he may be required to submit to interviews for the purpose of ascertaining whether he lacks the capacity to make informed decisions about care and treatment services and his failure to respond to questions relevant to that issue may be introduced as evidence of a lack of such capacity.

(b) Statements of proposed wards in the course of evaluations, examinations and treatment pursuant to this act shall be deemed privileged and confidential and, therefore, not admissible without the respondent's consent in any other civil or criminal proceedings other than proceedings pursuant to this act and (the statute on civil commitment). Proposed wards shall at all times have the right to refuse to answer questions when the answers may tend to incriminate them.

(c) During any evaluative interview or testing conducted under this act, the respondent shall have the right to be accompanied by an attorney or other Mental Health Advocacy Service member, or any attorney or mental health professional of his own choosing; and the state's attorney may also attend. Said accompanying persons and state's attorney shall be present as observers only and shall not participate in such interviews or testing through the rendering of advice, making suggestions or other actions which would impede the conduct of the interview or test.

(d) The court shall, if requested by an indigent ward or proposed ward in preparation for and in connection with any hearing provided in this act, appoint a reasonable available psychiatrist, psychologist or physician designated by the ward or proposed ward to examine him and testify on his behalf. Requests for such appointments may be filed in court at any reasonable time prior to such hearings. Reasonable fees and expenses for such expert examiner shall be borne by the [court/county].

## §7. Expert Testimony

(a) Psychiatrists and psychologists testifying at hearings conducted pursuant to this act may, if appropriately qualified, give testimony:

(i) describing the present mental functioning of a ward or proposed ward whom the witness has personally examined;

(ii) stating an opinion as to what the prospects are that proposed and available treatment will improve the mental condition of the ward or proposed ward; and

(iii) stating an opinion whether the ward or proposed ward has a severe mental disorder, as

defined in section 1 of this act; *provided that* any witness so testifying shall be required to provide a detailed explanation as to how any such descriptions and opinions were reached and a specification of all behaviors and other factual information on which such descriptions and opinions are based.

(b) Such witnesses shall not be permitted to give opinion testimony stating the applicable diagnostic category unless the ward or proposed ward raises the issue through cross-examination or the presentation of evidence.

## §8. Psychotropic Medication Influencing Wards or Proposed Wards at Judicial Hearings

(a) It shall be the responsibility of the facility providing treatment to a ward or proposed ward to assure that he is not, without his consent, given any psychotropic medication on the day preceding, and on the day of, any judicial hearing under this act, nor given any medication with an expected effective duration of action extending into such days.

(b) Notwithstanding the provisions of subsection (a) of this section, the ward or proposed ward may be subjected to the influence of psychotropic medication on the day preceding and on the day of a judicial hearing upon the written order of a treatment facility physician who finds it necessary to protect the ward or proposed ward or others from serious bodily harm, and, if he is to be kept

under medication for a period exceeding twenty-four hours, the procedures described at [subsection 5(d) of the proposed statute on civil commitment] are followed.

(c) If, for any reason, the treating facility fails to comply with subsection (a) of this section 8, the ward or proposed ward shall be entitled to a postponement until compliance is attained.

(d) The ward or proposed ward shall be entitled, upon his request at any judicial hearing conducted pursuant to this act while he is under the influence of medication, to have the court and the jury, if any, informed regarding such medication and its effect on his actions, demeanor and participation at the hearing.

## §9. Hearing

(a) Upon the expiration of the period provided at subsection 5(c) of this act for the filing of responses to the evaluation report, the court shall either dismiss the petition on the grounds that no substantial grounds for a personal guardianship appear or order the matter to be scheduled for a hearing.

(b) A hearing pursuant to this section 9 shall be conducted within thirty-five days of the filing of the petition.

(c) At the hearing the proposed ward shall have the following rights:

(i) to be represented by a staff attorney from the Mental Health Advocacy Service or, if he prefers, an attorney of his own choosing;

(ii) to present evidence on his own behalf;

(iii) to cross-examine witnesses who testify against him;

(iv) to remain silent;

(v) to have the hearing open or closed to the public as he elects;

(vi) to be present unless the court determines that his conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with him present; and

(vii) to be proceeded against according to the rules of evidence applicable to civil judicial proceedings; and

(viii) to a trial by jury on the issue of whether he is gravely disabled.

(d) The hearing shall in all respects be in accord with constitutional guarantees of due process and the burden of proof by clear and convincing evidence shall be upon the petitioner.

(e) If the proposed ward is found by the jury or, if a jury trial has been waived, by the court to be

gravely disabled, the court shall promptly resume the hearing without a jury, for the purpose of determining any disputes regarding

- (i) content of the guardianship plan;
- (ii) who should be named guardian;
- (iii) the availability of services necessary to protect the proposed ward from serious injury, illness or disease;
- (iv) whether the proposed ward lacks the capacity to make informed decisions about care and treatment services which the guardian would provide; and

(v) what assets and sources of income of the proposed ward should be exempt from charges to pay the costs and fees involved in the guardianship.

(f) Petitioners, temporary and personal guardians and the guardianship evaluation service shall be represented at all hearings under this act by a state's attorney, *provided that* the state's attorney's office may agree with the petitioner or temporary or personal guardian for representation to be provided by another person licensed to practice law in this state.

## §10. Guardianship Order

(a) If, pursuant to section 9 of this act, it is determined that the proposed ward is gravely disabled, and lacks the capacity to make informed decisions about proposed care and treatment services and that necessary services are available to protect the proposed ward from serious injury, illness or disease, the court shall enter an order which

- (i) names the guardian and establishes a guardian-ward relationship;
- (ii) makes findings of fact on the basis of clear and convincing evidence which support each grant of authority to the guardian;
- (iii) exempts from charges for the costs and fees of the guardianship so much of the estate and income of the ward as is necessary to prevent hardship and to ensure that the guardianship will not cause the ward to become financially dependent upon any governmental agencies or private agencies or persons; and
- (iv) adopts a guardianship plan.

(b) The guardianship plan shall specify those authorities which the guardian will have with regard to

- (i) medical care for the ward's physical condition;
- (ii) mental health treatment which the guardian may deem to be in the ward's best interests; *provided that* [sections 39 and 40 of the proposed statute on civil commitment] shall govern with respect to those forms of treatment for which Human Rights Committee approval is required in the case of civilly committed persons;
- (iii) deciding where the ward shall live and

placing the ward in a hospital or other supervised residential facility; *provided that* the ward shall not be placed in a hospital or other supervised residential facility for any period exceeding ten days unless the Human Rights Committee, following a review hearing conforming to [section 39 of the proposed statute on civil commitment] approves such placement as being in the ward's best interest and in accordance with least drastic means principles;

(iv) personal care services necessary for the physical welfare of the ward;

(v) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health or related services provided to the ward;

(vi) physical and mental examinations as necessary to determine the ward's medical and mental health treatment needs; and

(vii) the estate and income of the ward, consistent with subsection (a)(iii) of this section 10, necessary to pay for the cost of services which the guardian is authorized to obtain on behalf of the ward.

(b) The guardianship plan shall be no more restrictive upon the liberty of the ward than is reasonably necessary to protect the ward from serious physical injury, illness or disease and to provide him with medical care and mental health treatment for his physical and mental health.

(c) An initial guardianship order shall be for no longer than six months and any renewals thereof pursuant to section 13 of this act shall be for no longer than one year.

## §11. Temporary Guardianship

(a) If during the pendency of an initial petition for guardianship it appears that services are needed immediately to prevent serious injury, ill-

ness, or disease, the petitioner or guardianship evaluation service may request the appointment of a temporary guardian to authorize such ser-

vices. Such request shall state the reasons and factual basis for the request and shall immediately be filed with the court and copies immediately served on the proposed ward and his attorney.

A hearing shall be conducted within seventy-two hours of the filing.

(b) At the temporary guardianship hearing, the proposed ward shall have the rights set forth at subsections 9(c)(i) through (vii) of this act.

(c) The burden of proof at the hearing shall be by a preponderance of the evidence and shall be upon the party requesting that a temporary guardian be appointed.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant authorities that are least

restrictive upon the liberty of the proposed ward consistent with ensuring that emergency services necessary to protect the proposed ward from serious injury, illness or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a guardian under section 7 of this act or upon the dismissal of the petition for guardianship.

(f) If emergency life-saving services are needed during the pendency of a request for temporary guardianship, the Mental Health Review Officer may authorize them if, after assessing the situation and, if possible, providing the proposed ward and his attorney the opportunity to present a rebuttal, he determines that the services are necessary and that a delay until the temporary guardianship hearing would entail a life-threatening risk to the proposed ward.

## §12. Revocation and Modification of Guardianship Orders

(a) At any time the guardian and ward may jointly petition the court for revocation or modification of the guardianship. A copy of such petition must be served upon the guardianship evaluation service, which shall have ten days to file a response thereto, together with proof of service thereof upon the guardian, the ward and the ward's attorney. If the service files a response not objecting to the modification or revocation or fails to file a response within ten days, the court shall order the modification or revocation. Any response by the service objecting to the proposed modification or revocation, or any part thereof, shall specify the reasons and factual bases for objection. Upon receipt of such an objection from the service, the court shall determine whether it raises a substantial issue as to whether the modification or revocation is in the ward's best interest. If the court determines that no substantial issue has been raised, it shall order the modification or revocation. If, however, the court determines that the service response raises a substantial issue, it shall immediately cause to be served upon the service, the guardian, the ward and the ward's attorney notice of a hearing to be conducted within five to fifteen judicial days from the date of such notice.

(b) If at any time the guardian deems it necessary to seek a modification of the guardianship order to increase his authorities, he may file with the court, together with proof of service upon the guardianship evaluation service, the ward and the ward's attorney a petition specifying the requested modification and the supporting reasons and factual bases. The service and the ward shall have five judicial days to file a response thereto, together with proof of service upon the guardian. In the absence of a response, the court may order

any requested modification which it finds supported by the petition. If, upon receipt of a response, the court finds that there is clearly no substantial basis for a modification, it may dismiss the petition. Otherwise, the court shall cause to be served upon the service, the guardian, the ward and the ward's attorney notice of a hearing to be conducted within five to fifteen judicial days from the date of such notice. The hearing shall be in accordance with subsection 9(c) of this act except that the right to a jury shall not apply and the burden of proof by clear and convincing evidence shall be upon the guardian.

(c) The ward may file a petition for modification or revocation together with proof of service upon the guardian and guardianship evaluation service, no more than once during any ninety-day period and no later than sixty days prior to the expiration date of the guardianship order. Such petition must state the supporting reasons and factual bases and shall include as attachments summaries of the expected testimony of persons who testify for the ward. The service and guardian shall have ten judicial days to file a response, together with proof of service upon the ward, the ward's attorney, and the service or guardian. Thereafter, the court shall determine whether any substantial disputed factual issues exist and, if none exists, the court may dismiss the petition, or modify or revoke the guardianship, as warranted. If such issues do exist, the court shall cause to be served upon the service, the guardian, the ward and the ward's attorney notice of a hearing to be conducted within five to fifteen days after such notice. At the hearing, the ward shall have the burden of going forward with the evidence, but, if the ward presents a *prima facie* case for modification or revocation of the guardianship, the burden

of proof by clear and convincing evidence shall be upon the party or parties opposing the modification or revocation. Otherwise, the hearing shall be

In accordance with subsection 9(c) of this act except the right to a jury shall not apply.

### §13. Expiration and Renewal of Guardianship Orders

(a) An initial guardianship order shall expire six months from the date of the order unless the guardian files a petition for renewal, together with proof of service upon the guardianship evaluation service, the ward and the ward's attorney, twenty or more days prior to the expiration date.

(b) If a renewal petition is filed in a timely manner, the then current period of guardianship shall not expire until the court takes final action thereon. Upon receipt of a petition for renewal, the court shall direct a guardianship evaluation and report to be accomplished in accordance with subsections 4(b) and (c) and 5(b) and (c) of this act. The evaluation report shall be filed, together with proof of service thereof upon the guardian, the ward and his attorney within fourteen days of the

date on which the renewal petition was filed with the court. Hearings on renewal petitions shall comply with section 9 of this act.

(c) The first renewal of guardianship shall be for a period of one year from the date on which the initial order would have expired in the absence of a timely petition for renewal. All subsequent renewal periods shall be for no longer than one year from the date on which the preceding renewal would have expired in the absence of a timely petition for renewal.

(d) Second and subsequent petitions for renewal must be filed twenty or more days prior to the expiration date of the then current period of guardianship.

### §14. Emergency Powers

(a) Notwithstanding the limits of any temporary guardianship or guardianship order, temporary guardians and guardians shall at all times have the right to authorize the provision of emergency life-saving services. This shall include the power to authorize hospitalization without advance court approval.

(b) In the event of the exercise of emergency powers under subsection (a) of this section 14, the

temporary guardian or guardian shall provide immediate notice thereof to the court, the ward and the ward's attorney. If hospitalization is involved, the court shall, upon receipt of such notice, schedule a hearing on the continuing need for and appropriateness of hospitalization within seventy-two hours unless it clearly appears that the ward is to be discharged from the hospital within seven days of admission.

### §15. Right to Services

(a) Each ward shall have the right to prompt and adequate personal and medical care, treatment and rehabilitative services for the purposes both of meeting his needs for protection from physical injury, illness or disease and restoring him to the abilities to care for himself and to make his own informed decisions about care and treatment services.

(b) In the event that the guardian is unable to provide such services out of funds available from the ward's estate and income and other private and governmental benefits to which the ward is entitled, the guardian or ward may petition the court for an order requiring the [state and/or county] to provide such funds as are necessary to provide services that would implement the ward's right to services. Such petition shall provide complete details with regard to funds and other benefits at the guardian's disposal and justification

for the necessity and appropriateness of the services for which finances are unavailable. Upon receipt of the petition, the court shall schedule the matter for a hearing within twenty days and cause the petition and notice of the hearing to be served upon the guardian, the ward and the ward's attorney, the guardianship evaluation service and [appropriate state and/or local officials]. In preparation for the hearing, the guardianship evaluation service and [appropriate state and/or local officials] shall have access to relevant care and treatment records of the ward.

(c) At the hearing conducted pursuant to subsection (b) of this section 15, the burden of proof by a preponderance of the evidence shall be upon the petitioning party. Otherwise the hearing shall be in accordance with subsection 9 of this act except that the right to a jury shall not apply.

(d) At the conclusion of the hearing, the court