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North Carolina Guardianship Laws -- The Need for Change

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COMMENT

North Carolina Guardianship Laws—The Need for Change

The following facts from *In Re Propst*[1] illustrate the fundamental unfairness of North Carolina's antiquated guardianship laws. Upon the death of her father, Mrs. Laura Carswell inherited an undivided one-fifth interest in a tract of land in Burke County, North Carolina. A widow with two children, Mrs. Carswell apparently spent some time "in the country," because, on one outing, she received a notice "at about 11 o'clock to appear at 12 o'clock, on the same day, at Morganton, for some purpose she did not understand."[2] Since she was in the country, she "could not attend," but she later discovered that "some proceeding was had in which she was adjudged to be an idiot . . . ."[3] A Mr. Propst had been appointed her guardian, and, a few days after his appointment, he promptly sold Mrs. Carswell's inheritance to his wife, Mrs. Gertrude Propst. Mrs. Carswell received no compensation for the lost property.[4]

The laws under which this proceeding was conducted have been only slightly amended since their enactment in the late 1800's.[5] Whatever their merits at the time they first appeared, it is clear that, by today's standards, these statutes are unconstitutional and inadequate. Not only do they fail to provide due process protections, but they also fail to provide appropriate guardians for persons in need of guardianship services, such as the mentally handicapped.

The need for revising North Carolina's guardianship laws becomes urgent in view of the fact that one of every twelve persons born in the United States will receive treatment in a mental institution at some point during his life.[6] The great majority of these persons can function outside of an institution if they receive minimal guidance from someone

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1. 144 N.C. 562, 57 S.E. 342 (1907).
2. *Id.* at 563-64, 57 S.E. at 343.
3. *Id.* at 564, 57 S.E. at 343.
4. *Id.* at 565, 57 S.E. at 343.
5. *Compare* N.C. CODE ch. 54 (1868-69).
6. *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 1 (1969), *cited in* Comment, *North Carolina's New Mental Health Laws: More Due Process*, 52 N.C.L. REV. 589 (1973).

such as a guardian.[7] In recognition of these facts, several states, whose statutes suffered from inadequacies similar to those found in the North Carolina statutes, have taken action to improve their laws. This comment will identify the shortcomings of the North Carolina provisions and then evaluate the legislation recently adopted by other states. This process can aid lawmakers in devising a guardianship system free of the defects that currently plague North Carolina's statutes.[8]

NORTH CAROLINA GUARDIANSHIP LAW

Four chapters of the North Carolina General Statutes affect guardianship of mentally disabled persons. Chapter 33[9] prescribes the manner in which most guardians are appointed and defines many of their powers and responsibilities. Chapter 35[10] sets forth the procedures whereby persons may be judicially declared incompetent and requires the appointment of guardians for such incompetent persons. Chapter 122[11] deals with hospitalization of mentally disabled persons for whom guardians may be appointed. And finally, chapter 1A[12] provides that whenever an incompetent person is the plaintiff or defendant in a civil action, a guardian ad litem must be appointed to protect that person's interests.[13] These chapters will be discussed and criticized separately.

Chapter 33

Section 33-1 grants the clerks of superior court[14] the power to appoint guardians for "infants, idiots, lunatics, [and] inebriates."[15] The

7. "Eighty-five percent of all mentally retarded persons, however, are capable, with proper training, of becoming productive, self-supporting citizens in either competitive or sheltered employment." Hodgson, *Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem*, 37 ALBANY L. REV. 407, 408 (1973).

8. The Developmental Disabilities Council, organized under the Department of Human Resources, is presently engaged in an attempt to draft new guardianship statutes for the mentally handicapped in North Carolina.

9. N.C. GEN. STAT. ch. 33 (1966), *as amended*, (Supp. 1974).

10. *Id.* ch. 35, *as amended*, (Supp. 1974).

11. *Id.* ch. 122, *as amended*, (Supp. 1974).

12. *Id.* ch. 1A (1974), *as amended*, (Supp. 1974).

13. N.C.R. CIV. P. 17(b).

14. The assistant clerks may also appoint guardians. *In re* Barker, 210 N.C. 617, 188 S.E. 205 (1936).

15. N.C. GEN. STAT. § 33-1 (1966). This section also gives the clerks power to appoint "trustees" who are subject to the laws governing guardians for "any adult person [who] is declared incompetent in connection with his commitment to a mental hospital [under chapter 122] or . . . found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities [under chapter 35] . . . ." While the term "trustee" in

terms "idiots," "lunatics," and "inebriates" are not defined in chapter 33. Since neither a declaration of incompetency nor a certificate of lunacy under chapter 35, nor a judicial hospitalization ordered pursuant to chapter 122 is required for the appointment of a guardian, it is unclear how a clerk determines who is an "idiot, lunatic, or inebriate."

Not only does chapter 33 fail to define those persons for whom a guardian may be appointed under its provisions; but, it also neglects to describe the qualifications of a guardian. Chapter 33 does provide, however, that clerks must remove guardians who (1) waste the ward's estate or convert it to their own use; (2) mismanage the estate of the ward; (3) "neglect to educate or maintain the ward or his dependents in a manner suitable to their degree"; (4) could not legally qualify to be an administrator of a decedent's estate or, (5) "are likely to become insolvent or nonresidents of North Carolina."[16] It is difficult to determine whether a person who is not a resident of North Carolina may be a guardian since the fourth and fifth conditions for removal of a guardian are inconsistent. Section 28A-4-2 permits a nonresident to be an administrator if he has "appointed a resident agent to accept service of process,"[17] whereas section 33-9(5) implies that a nonresident may not serve in any event. Furthermore, section 28A-4-2 allows a resident who has moved from the state to continue to serve as an administrator by appointing a process agent, while section 33-9(5) requires clerks to remove a person who is likely to become a nonresident of North Carolina.

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section 33-1 refers to guardians of persons who are subject to chapters 35 and 122, these two chapters use the term "guardian" instead of "trustee." *Id.* §§ 35-2, 122-36(n).

16. *Id.* § 33-9.

17. *Id.* § 28A-4-2(4) (Supp. 1974). *Id.* § 28A-4-1(6) provides that any person "of good character not disqualified under G.S. 28A-4-2" may serve as an administrator. Section 28A-4-2 provides that the following persons may not serve as administrators: (1) a person under eighteen years of age; (2) a person who has been adjudged incompetent under chapter 35 and who remains under "such disability"; (3) a convicted felon; (4) a nonresident of this State "who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court; or who is a resident of this State who has, subsequent to appointment as a personal representative, moved from this State without appointing such process agent"; (5) a corporation "not authorized to act as a personal representative" in this State; (6) an alien disqualified by law; (7) a person "who has lost his rights" pursuant to chapter 31A (which deals with acts barring property rights, *e.g.*, husbands who kill their wives and thus are barred from receiving any interest in their wives' estates); (8) an illiterate; (9) a person whom the clerk finds "unsuitable"; or, (10) a person who has renounced his interest in the estate of the decedent. Note that under subsection (10), one who renounces his interest in the estate of the parent of the ward cannot thereafter serve as the guardian of the ward. Your authors can perceive no justification for this result.

The procedure for appointing a guardian under chapter 33 begins with a petition for "custody and guardianship" filed with the clerk of superior court.[18] Neither the statutes nor the cases limit the persons who may bring this petition, although in practice the petitioner is often a relative or friend of the person alleged to need guardianship services. If no relative of the prospective ward is present when the petition is filed, the clerk is required to assign a day for a hearing; otherwise, he "may" conduct a hearing "for any other good cause."[19] If, however, the clerk determines that a hearing is unnecessary, the statutes fail to provide a procedure for him to follow in appointing a guardian. Assuming that he decides to conduct a hearing, the clerk "notifies" those persons "whom he may deem it proper to notify" of the hearing date; he is not statutorily *required* to give notice to anyone. In the event notice is given, however, the statutes do not require the notice to contain any information other than the date of the hearing, nor do they require that the petitioner have advance notice of the hearing. Therefore, these provisions do not meet the due process requirements of adequate and timely notice.[20]

At the hearing, the clerk is required to determine whether a guardian should be named and, if so, who the guardian should be. Instead of choosing one guardian for the general supervision of the ward, the clerk may appoint one guardian to care for the person of the ward and another to manage the ward's estate.[21] Chapter 33 does not require the presentation of any medical evidence at the hearing even when guardians are appointed for "idiots, lunatics, and inebriates."

Chapter 33 does not grant the prospective ward a right of appeal from the holding of the clerk of court: any review of the clerk's ruling derives from the power of the judges of superior court to review matters of probate.[22] According to the North Carolina Supreme Court, "the clerk 'performs duties pertaining to judges of probate' "[23] whenever he

18. *Id.* § 33-7 (1966).

19. *Id.*

20. The due process requirements of adequate and timely notice are discussed in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The Court stated: "An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. . . . and it must afford a reasonable time for those interested to make their appearance . . . ." *Id.* at 315.

21. N.C. GEN. STAT. § 33-6 (1966).

22. *In re* Simmons, 266 N.C. 702, 707, 147 S.E.2d 231, 237 (1966). Apparently this applies to all guardians, even those who are not appointed pursuant to a will.

23. *Id.*

appoints or removes guardians. Significantly, the clerk's findings of fact are not subject to challenge; thus any review of the clerk's order is limited to a consideration of his compliance with the few procedural requirements of the the statutes.[24]

In addition to establishing a procedure for the appointment of a guardian by the clerk of court, chapter 33 provides an alternative method by which a guardian may be appointed for a minor. Section 33-2 states that the father may, by will, appoint a guardian to serve upon the death of both parents, for any unmarried minor children who, at the father's death, are either born or are "in ventre sa mere."[25] Chapter 33 also provides that if the father is dead and has not exercised his power of appointment or if he has abandoned his wife, the mother may appoint a guardian in her will.[26]

Both a testamentary [27] and a clerk-appointed guardian of a minor may serve only until the ward becomes eighteen years of age. *In re Simmons*[28] involved a guardian of a mentally retarded child who continued to serve as guardian after the child reached his majority. Because the guardian was appointed on the basis of the child's minority, rather than the child's mental retardation, the court held that the authority of the guardian ended when the child came of age. Since parents can testamentarily appoint guardians only on the basis of their childrens' minority,[29] *Simmons* prevents the parents of a mentally retarded child from appointing a testamentary guardian who may serve after the child becomes an adult. In order to avoid this problem, parents of mentally handicapped children often use trust agreements designating as trustee the person they want to serve as a guardian.[30] These agreements, however, can only grant a trustee control over the estate of the ward;[31] thus, if the trustee needs power over the person of the ward (to authorize medical treatment, for example), the trustee must resort to court proceedings to be appointed the legal guardian of the ward.

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24. *In re* Michal, 273 N.C. 504, 507, 160 S.E.2d 495, 498 (1968); *In re* Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966). *But see, In re* Lowther, 271 N.C. 346, 156 S.E.2d 693 (1967).

25. N.C. GEN. STAT. § 33-2 (Supp. 1974).

26. *Id.*

27. *Id.*

28. *In re* Simmons, 256 N.C. 184, 123 S.E.2d 614 (1962).

29. N.C. GEN. STAT. § 33-2 (Supp. 1974).

30. Hodgson, *supra* note 7, at 424.

31. *See generally* N.C. GEN. STAT. ch. 36 (1966), *as amended*, (Supp. 1974), which defines the various permissible activities of trustees.

If the parents of a child die without appointing a guardian, chapter 33 provides that the director of public welfare will be appointed to serve as guardian of the person of any child who requires services from the department of public welfare until such time as a private guardian can be appointed.[32] Chapter 33 does not state who has the obligation to serve as guardian of abandoned adults in need of guardianship services.

Section 33-20 provides that "[e]very guardian shall take possession" of all of his ward's estate,[33] but, the guardian must post a bond as security before receiving the property of his ward.[34] The amount of the bond is statutorily determined according to the value of the estate of the ward.[35] Chapter 33 does not state the amount of the bond when there is no estate, but in such circumstances, the clerks of court commonly require a 1,000 dollar bond.[36] If the clerk does not require a bond, or if 1,000 dollars is inadequate, the resources of the guardian may not be sufficient to compensate the ward for an injury to his person inflicted by the guardian. A possible justification for this omission in the statutes is that, if a bond were required from the guardians of wards having no estates, it might be difficult to find persons willing to serve as guardians. Unlike guardians of wards who have estates, these guardians receive no compensation for their services since compensation, if any, is awarded from the ward's estate.[37]

Sections 33-12 through 33-77 define the guardian's powers over the estate of his ward. Briefly, the guardian has plenary power over his ward's estate, subject only to certain fiduciary duties and, in some instances, the approval of the clerk of court or the judge of the district or superior court.[38] The guardian's only responsibility with respect to the

32. *Id.* § 33-1.1 (1966). This agency has been replaced by the Department of Social Services. *See* M. THOMAS, A GUIDE TO SOCIAL SERVICES IN NORTH CAROLINA 5 (1975).

33. The statute's reference to "every guardian" is certainly incorrect where guardians of the "person" are concerned. According to N.C. Gen. STAT. § 33-6 (1966), the guardian of the person receives only "yearly sums of money . . . for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate . . . ." Apparently the guardian of the person can receive no monies for the *education* of a mentally retarded adult.

34. *See generally id.* ch. 33, art. 2, *as amended*, (Supp. 1974).

35. *Id.* §§ 33-13, -15 (1966).

36. Conversation with Frank Frederick, Clerk of Superior Court of Orange County, in Hillsborough, N.C., May 12, 1975.

37. N.C. GEN. STAT. § 33-43 (1966).

38. It is unclear why a rental or lease of the ward's lands must be approved by the clerk of superior court, *id.* § 33-21, when the "enlargement" of the guardian's powers to cultivate the land of the ward or to "continue" the ward's business must be approved by the district court judge. *Id.* § 33-24. Furthermore a sale of the ward's lands must be approved by the judge of the superior court. *Id.* § 33-31.

"person" of his ward is to "educate and maintain" the ward and the ward's dependents in a "manner suitable to their degree."[39] Although the North Carolina Supreme Court criticized one guardian for failing to visit his hospitalized ward,[40] North Carolina case law has not otherwise defined a guardian's authority over and responsibilities to the "person" of his ward.

Chapter 35

Chapter 35 establishes the judicial procedure whereby a person may be declared incompetent and provides that when a person is found to be incompetent, the clerk *must* appoint a guardian for him.[41] Since chapter 35 does not require a public agency to assume the guardianship functions if no individual is willing to serve as a guardian of the incompetent person, it is unclear how a clerk is to fulfill his statutory obligation to appoint a guardian when no one is willing to assume this responsibility.

Section 35-2 provides that any "mentally defective," "mentally disordered," "inebriate," or "incompetent" person may be adjudicated incompetent; and, unlike chapter 33, chapter 35 defines the terms used to refer to those persons.[42] Irrespective of the term used to define the

39. *Id.* § 33-9(3).

40. *In re* Simmons, 266 N.C. 702, 706, 147 S.E.2d 231, 233 (1966).

41. N.C. GEN. STAT. § 35-2 (Supp. 1974).

42. *Id.* § 35-1 defines an "inebriate" as "[a]ny person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupify his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life. . . . [P]rovided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing." Apparently, the family of the "addict" must suffer along as best it can during the first year of the addiction. *Id.* § 35-1.1 (enacted in 1945) defines "mental disease," "mental disorder" and "mental illness" as "an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include 'lunacy,' 'unsoundness of mind,' and 'insanity.'" Section 35-1.1 continues by defining "mental defective" as "a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others, supervision, guidance, care, or control is necessary or advisable. The term shall be construed to include 'feebleminded,' 'idiot,' and 'imbecile.'" Although the 1945 amendment to chapter 35 attempts to replace the old pejorative language with modern terms, the legislators did not bother to remove the old language from the statutes and it still appears in the court proceedings and other provisions of the General Statutes. *See, e.g., id.* ch. 33.

person's mental inadequacy, the North Carolina Supreme Court has ruled that before a person can be declared incompetent under chapter 35, there must be a finding that the person lacks "understanding to manage his affairs."[43] In *Hagins v. Redevelopment Commission* the court held that "it is not enough to show that another might manage a man's property more wisely" or that the alleged incompetent was merely eccentric or held "particular beliefs."[44] Rather, the alleged incompetent must be "incapable of transacting the ordinary business involved in taking care of his property, . . . [and] incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate . . . ."[45] Furthermore, the court has stated that this inadequacy must affect the person's "entire property and business—not just one transaction or one piece of property."[46] Although *Hagins* thus demands an evaluation of the mental capacity of a person, it does not require that medical evidence be presented to aid in the determination of mental incapacity.

Upon a determination of incompetency, the clerk names a guardian for the incompetent.[47] Guardians appointed under chapter 35 are "vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents."[48] Both chapter 33 and chapter 35 fail to provide who may serve as a guardian; unlike chapter 33, however, chapter 35 does not contain grounds for removal of a guardian. Arguably, the grounds set forth in chapter 33 apply also to the removal of guardians appointed under chapter 35.

The chapter 35 procedure for an adjudication of incompetency differs from the procedure for appointing a guardian in chapter 33. The incompetency proceeding begins when a petition is filed with the clerk of superior court requesting that the prospective ward be declared incompetent.[49] The statute permits anyone to file this petition, but it does not designate a public official legally responsible for doing so. Because a petitioner would be liable for malicious prosecution if a court found that the petition was filed in bad faith,[50] a private individual

43. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 104, 165 S.E.2d 490, 499 (1969).
44. *Id.* at 105-06, 165 S.E.2d at 500.
45. *Id.* at 106, 165 S.E.2d at 500.
46. *Id.* at 104, 165 S.E.2d at 499.
47. N.C. GEN. STAT. § 35-2 (1966).
48. *Id.*
49. *Id.*
50. The elements of malicious prosecution were set out in Fowle v. Fowle, 263

might be reluctant to file the petition. As a result, many mentally handicapped persons are never declared incompetent and consequently never receive the protection of a guardian.[51]

The petition required by section 35-2 must "set forth the facts" leading to the petition and must be verified by the oath of the petitioner. Although the statute does not specify the "facts" to be "set forth," the petition generally will contain allegations of all evidence tending to show that the prospective ward is incompetent.[52] Often, otherwise confidential results of a physician's examination are found in these petitions, making this information available for public inspection at the clerk's office.

Upon receipt of the petition, the clerk is required to "notify" the alleged incompetent.[53] As in chapter 33, the statutes specify neither the contents of the notice nor the time within which notice must be delivered. The North Carolina Supreme Court has stated that "it would be prudent" to provide "such notice as will give information of the proposed action in ample time [for the alleged incompetent] to be present"; yet, a clerk's failure to give such notice does not constitute grounds for overturning an adjudication of incompetency.[54]

Also, as in chapter 33, the clerk of court conducts the hearing. However, unlike chapter 33, chapter 35 provides for a jury of twelve men, and it is the jury, not the clerk, which determines the mental capacity of the alleged incompetent.[55] There is no requirement that the alleged incompetent be present at the hearing, be represented by an attorney, or have the right to present evidence and cross-examine witnesses, notwithstanding the fact that many civil rights and privileges are lost to a person who has been declared incompetent. The person

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N.C. 724, 140 S.E.2d 398 (1965) where a husband conspired with two of his friends (who were physicians) and had his wife committed to an insane asylum in order to "get rid" of her. (The husband finally obtained a divorce and remarried.) The court required three elements: (1) malice; (2) want of probable cause; and (3) the commencement and prosecution of a judicial proceeding against the plaintiff. *Id.* at 729, 140 S.E.2d at 402. It was held that the wife's successful use of the habeas corpus proceeding to be released from the insane asylum satisfied the third requirement. *Id.* at 729, 140 S.E.2d at 401.

51. For a discussion of this problem in another context, see NATIONAL COUNCIL ON AGING, THE LAW AND THE IMPAIRED OLDER PERSON: PROTECTION OR PUNISHMENT? (1966).

52. Discussion with Frank Frederick, Clerk of Superior Court of Orange County, in Hillsborough, N.C., May 12, 1975.

53. N.C. GEN. STAT. § 35-2 (Supp. 1974).

54. *In re* Propst, 144 N.C. 562, 566, 57 S.E. 342, 343 (1907).

55. N.C. GEN. STAT. § 35-2 (Supp. 1974).

declared incompetent cannot marry,[56] execute or revoke a will,[57] or serve on a jury.[58] Moreover, few persons will contract with someone who has been adjudicated incompetent because all agreements executed by persons deemed incompetent to contract are voidable at the option of the incompetent party[59] and an adjudication of incompetency under chapter 35 is presumptive evidence of incapacity to contract.[60] Finally, the Department of Motor Vehicles may revoke the driver's license of any person who has been adjudicated incompetent.[61]

Furthermore, the drawbacks of chapter 35 proceedings often preclude its use by relatives or friends who may want to be declared guardians of a mentally handicapped person. Many people object to the contents of the notice given to the alleged incompetent. The notice usually follows the statutory language, stating: "You are hereby notified that (X) has filed a petition before the — Court of — County alleging that you are incompetent from want of understanding to manage your affairs . . . ."[62] This notice would be devastating to a person who is

56. *Id.* § 51-3 (1966) provides that all marriages between persons, either of whom is "incapable of contracting from want of will or understanding, shall be void . . . ."

57. *Id.* § 31-1 (Supp. 1974); *In re* Will of Shute, 251 N.C. 697, 111 S.E.2d 851 (1960).

58. N.C. GEN. STAT. § 9-3 (Supp. 1974). Until 1974 persons who had been adjudicated mentally incompetent could not vote in North Carolina, but this restriction has been deleted. See *id.* § 163-55. A New Jersey court has held that it is unconstitutional for a state to deprive residents of a school for the mentally retarded of the right to vote. Carroll v. Cobb, Civil No. L-6585-74-P.W. (N.J. Super. Ct., November 1974), *cited in*, HEW, MENTAL RETARDATION AND THE LAW 31 (June 1975).

59. Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966). Note also that N.C. GEN. STAT. § 8-51 (1969) (the "dead man's" statute) provides that an interested party cannot be a witness in his own behalf against the "committee of a lunatic" unless the lunatic also testifies. Thus, one who contracts with a "lunatic" may not be able to testify in court proceedings as to the contents of that contract. Note, too, that since section 8-51 uses the term "lunatic" and since chapter 35 apparently defines "lunatic" as a mentally "ill" person and not a mentally "retarded" person, *id.* § 35-1.1, section 8-51 does not apply to people who contract with mentally retarded persons. Furthermore, neither section 8-51 nor chapter 35 defines the term "committee" of a lunatic.

60. Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966). See text accompanying note 65 *infra*.

61. N.C. GEN. STAT. § 20-17.1(a) (1975) provides that the Commissioner of the Department of Motor Vehicles "upon receipt of notice that any person has been legally adjudicated incompetent or has been involuntarily admitted to an institution for the treatment of alcoholism or drug addiction, shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle. Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person's driving privilege." *Id.* § 20-17.1 also provides for a hearing if the incompetent requests one in writing.

62. Conversation with Frank Frederick, Clerk of Superior Court of Orange County, in Hillsborough, N.C., May 12, 1975.

able to understand its meaning. In addition, a jury trial may prove embarrassing, especially in small communities where the jurors are likely to be friends and neighbors of the alleged incompetent. Finally, although a mentally handicapped person may need only limited restraints, the adjudication of incompetency unnecessarily results in a substantial loss of civil rights.[63]

In view of these factors, one may wonder why chapter 35 proceedings are ever brought. Typically, two reasons are advanced for their use. First, an incompetent person may be unable to manage his estate and could be tricked into agreements that are to his disadvantage.[64] Petitioners seek the adjudication of incompetency in order to safeguard the incompetent's property by preventing him from entering into such agreements. While it is true that an adjudication of incompetency will discourage many persons from contracting with the incompetent person, the adjudication is not conclusive evidence on the question of competency to contract. In *Medical College of Virginia v. Maynard*[65] a man who had been declared incompetent signed a contract that was not in the best interests of his estate. His wife sought to have the agreement nullified on the ground of her husband's incapacity to contract. The court held that parties to the contract who were not also parties to the incompetency proceedings are not bound by the adjudication of incompetency. The implications of *Maynard* are that whenever a person who has been declared incompetent enters into an agreement, the issue of competency may have to be relitigated and the chapter 35 proceeding will offer little protection to the ward.

The second reason for initiating chapter 35 proceedings is to enable a guardian to control the person or estate of the ward.[66] For example, a hospital may require a patient's consent before it will allow its doctors to provide certain types of medical treatment. If the doctors have actual notice that the patient is incompetent, his consent is voidable; therefore, the consent of someone who is legally responsible for the patient is required.

It is not necessary, however, to undergo the trauma of a chapter 35 proceeding in order to control the person or estate of an incompetent. A guardian appointed pursuant to chapter 35 is not the only person who

63. See text accompanying notes 56-61 *supra*.

64. For a discussion of this problem, see Hagins v. Redevelopment Comm'n, 275 N.C. 90, 103, 165 S.E.2d 490, 499 (1969).

65. 236 N.C. 506, 73 S.E.2d 315 (1952).

66. Conversation with Frank Frederick, Clerk of Superior Court of Orange County, in Hillsborough, N.C., May 12, 1975.

can assume the legal responsibility for an incompetent: a guardian appointed under chapter 33 or a person named as the incompetent's attorney in fact by a power of attorney has the same authority as that of the chapter 35 guardian.

The power of attorney is preferable to either the chapter 33 or the chapter 35 guardian because the attorney in fact can be given all of the powers granted to these guardians[67] without having all of their responsibilities. An attorney in fact is not required to post a bond before acquiring the property of the grantor of the power. Also, while guardians appointed pursuant to chapters 33 and 35 must make several accountings to the clerk of court, such accountings by an attorney in fact may be dispensed with if the power of attorney so provides.[68] Furthermore, the power of attorney is drafted in the privacy of a lawyer's office and neither a chapter 33 proceeding nor a chapter 35 jury trial is required. Although the power of attorney is filed in the office of the register of deeds and is a matter of public record,[69] it does not contain the results of a physician's examination nor does it imply that the grantor is incompetent. Finally, unlike an adjudication of incompetency, the execution of a power of attorney does not cause the grantor to forfeit any civil rights.

There are, however, two disadvantages to the power of attorney. A power of attorney is valid only when the grantor of the power is competent to contract,[70] and any person who can prove that the grantor was incompetent when the power was executed can cause the power to be invalidated. Second, it may be unethical for a lawyer to draft a power of attorney knowing that the grantor is mentally incompetent to execute the instrument. The Disciplinary Rules of the American Bar Association prohibit a lawyer fron intentionally misrepresenting any "matter of fact or law"[71] to the court. Drafting a power of attorney could be viewed as a representation to the court that the grantor is competent to execute the document—a representation that the lawyer

67. N.C. GEN. STAT. § 47-115.1(i) (1966) states that a power of attorney may contain any provisions, "not unlawful" relating to the "rights, powers, duties and responsibilities of the attorney in fact." Of course, the statutes do not disclose what provisions would be considered "unlawful."

68. *Id.* § 47-115.1(h).

69. *Id.* § 47-115.1(d) (Supp. 1974).

70. *Id.* § 47-115.1(a).

71. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION, DEFENSE FUNCTION STANDARD 1.1(d) (1971). For corresponding sections in the North Carolina Code, *see* NORTH CAROLINA DISCIPLINARY RULE 7-102(A)(6) (1974) which states that a lawyer shall not "[p]articipate in the creation or preservation of evidence when he knows . . . that the evidence is false."

knows is not true. In spite of these two drawbacks, the power of attorney offers the only alternative to a declaration of incompetency under chapter 35 or a guardianship proceeding under chapter 33, and many lawyers use the power of attorney to avoid subjecting their client to either of these statutory proceedings.

Chapter 35 also provides that a guardian *may* be appointed when a certificate of lunacy has been issued stating that the prospective ward is a "lunatic."[72] The certificate, which has the same effect as the adjudication of incompetency,[73] may be issued by the superintendent of any governmentally operated[74] insane asylum or training school located in any state or territory or in Washington, D.C. It may also be issued by the superintendent of any licensed hospital in North Carolina. The person certified to be a "lunatic" must be "confined" in the institution at the time of issuance, but neither the statutes nor the cases define the term "confined." Moreover, the statutes do not require that the person be confined in the hospital because of a mental handicap. Conceivably, any person who is hospitalized for any purpose, *e.g.*, a tonsillectomy, is not immune from the issuance of a certificate of lunacy. Chapter 35 does not require that anyone be given notice of the superintendent's intention to issue a certificate or of the fact that a certificate has been issued. There is no hearing, no right to counsel, and no provision for appeal if the certificate is issued.

Once a certificate of lunacy has been issued with respect to a person who is a patient of a hospital (even if the person voluntarily admitted himself), the person may not leave the hospital of his own volition; indeed, he can be discharged only if the director of the hospital decides to release him or if a court orders his discharge pursuant to a habeas corpus proceeding.[75] Furthermore, since there are no require-

72. N.C. GEN. STAT. § 35-3 (1966).

73. *See, id.* § 35-3.

74. Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921) reiterates that these superintendents must be employed by governmentally operated institutions.

75. N.C. GEN. STAT. § 131-137 (1966) gives the power to discharge patients to the superintendent of the hospital involved. If the patient is adjudicated to be mentally incompetent or is the subject of a certificate of "lunacy," he is not competent to sign discharge papers where required. See text accompanying note 60 *supra*. *See also* N.C. GEN. STAT. § 122-58.13 (Supp. 1974) addressing administrators of mental institutions for the "insane" and, *id.* § 122-71.1, addressing administrators of mental institutions for the "retarded." For a case authorizing the use of the habeas corpus remedy in instances where the petitioner is admitted to a mental institution under chapter 122, see *In re* Harris, 241 N.C. 179, 84 S.E.2d 808 (1954). Supposedly the habeas corpus remedy would be available for any patient held against his will in a hospital of any kind. N.C. GEN. STAT. § 17-3 (1974) provides that the writ is available to "[e]very person imprisoned

ments that a guardian be appointed for a patient for whom a certificate has been issued, and since the patient himself may be unaware of his legal remedies, the habeas corpus option could be illusory. Thus, a person could, without any due process protections, be confined in a mental institution until the hospital director decides to release him.

Chapter 122

Chapter 122 provides for judicial hospitalization of mentally disabled persons. The chapter can conveniently be treated as consisting of three sections. The first defines the rights of the patients in mental institutions;[76] the second provides a procedure for admitting mentally ill persons to mental institutions;[77] and the third deals with the admission of mentally retarded persons to mental retardation treatment centers.[78] The first and third sections also specify the duties of guardians of mentally disabled persons who are subject to the provisions of chapter 122.

The first section, defining patients' rights, contains two parts: one addressing adult patients,[79] and the other, minor patients.[80] Each part enumerates the civil rights of patients of North Carolina's institutions and hospitals, including the right to communicate with their legal counsel. No right of adult patients may be "limited or restricted" unless the next of kin or guardian is given written notice of the restriction and of the "reason therefor."[81] Furthermore, section 122-55.6 of the

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or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on *any pretense whatsoever* . . . ." (emphasis added).

76. N.C. GEN. STAT. §§ 122-1 to -35.27 (1974), *as amended*, (Supp. 1974) deal only with the organization and management of the hospitals so they are not spoken to in this comment. *Id.* §§ 122-36 to -55.7 (1974), in particular sections 122-55.1 to -55.7 address patients' rights. For a discussion of the constitutionality of chapter 122, see Comment, 52 N.C.L. REV., *supra* note 6.

77. N.C. GEN. STAT. §§ 122-56.1 to -65.9 (1974).

78. *Id.* §§ 122-69 to -71.3.

79. *Id.* §§ 122-55.1 to -55.7.

80. *Id.* §§ 122-55.13 to -55.14 (Supp. 1974).

81. *Id.* § 122-55.2(d) (1974). This section also provides that, "[n]o right enumerated in subsection (b) above may be limited or restricted without a written statement in the patient's treatment or habilitation plan which indicates the detailed reason for such a restriction or limitation. No restriction of rights shall be made except by mental health or mental retardation professionals responsible for the formulation of the patient's treatment or habilitation plan." These restrictions are valid only for sixty days and after that time they must be reviewed. The treatment plan referred to is defined in *id.* § 122-36(j) as "the individual plan of treatment to be undertaken by the treatment facility for a patient's restoration to health." *Id.* § 122-55.14(c) (Supp. 1974) is the provision which mirrors section 122-55.2(d) and applies to minor patients.

General Statutes, which grants all patients a "right to treatment," provides that the consent of the patient if competent, otherwise of the guardian, must first be obtained before electroshock treatment, the administration of certain drugs, and any surgery other than "emergency surgery" may legally be performed on the ward.[82]

The third section, which deals with the admission of mentally retarded persons to mental retardation treatment centers, states that a person may be admitted to an institution for treatment of mental retardation upon the application of his parents or guardian.[83] Although chapter 122 grants several due process protections to persons involuntarily committed to hospitals for the mentally ill,[84] it grants no protections to persons admitted on application of their guardians or parents to mental retardation treatment centers. The only requirement for admission to these treatment centers is that the application for admission be signed by the parent or guardian of the person alleged to be mentally retarded. This statute results in the "warehousing" of children and wards who are not wanted by their parents and guardians.[85]

Chapter 1A

Chapter 1A (the North Carolina Rules of Civil Procedure) provides that whenever the plaintiff or defendant in a civil action is an incompetent person who does not have a guardian or a guardian ad litem, the court must appoint a guardian ad litem to represent the person in the litigation.[86] The distinction between a guardian and a guardian ad litem is that the guardian ad litem is an attorney who represents the ward during the litigation; his powers and duties terminate when the suit is ended.[87] The ad litem provisions of chapter 1A do not, however, apply to chapters 33, 35 and 122 (which do not provide for the protection of the right to counsel), since chapter 1A states that its provisions are not controlling when a "procedure" different from that established therein is statutorily provided.[88]

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82. *Id.* § 122-55.6 (1974).
83. *Id.* § 122-70.
84. See Comment, 52 N.C.L. REV., *supra* note 6.
85. For examples of this type of warehousing of people see, Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).
86. N.C.R. CIV. P. 17(b).
87. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 101, 165 S.E.2d 490, 497 (1969).
88. N.C.R. CIV. P. 1 provides "[t]hese rules shall govern the procedure in the

The provisions of chapter 1A apply to "infant, insane, or incompetent" persons.[89] As in chapter 33, these terms are not defined, and chapter 1A is not limited in its coverage to persons who have been declared incompetent under chapter 35 or judicially hospitalized under chapter 122.[90]

The ad litem proceedings may be initiated by either a friend or a relative of the incompetent by any party to the litigation, or by the judge presiding over the civil action or special proceeding in which the incompetent is a plaintiff or defendant. The friend or relative is permitted to file a written application requesting the appointment of a guardian or a guardian ad litem. The statutes do not specify the contents of the application nor do they state with whom the application must be filed. If a judge, on his own motion, takes notice of the fact that the plaintiff or defendant is incompetent, he may appoint a guardian or guardian ad litem for that person. In *Hagins v. Redevelopment Commission*[91] the trial judge took notice of the fact that the plaintiff was incompetent and appointed a next friend[92] for her. The plaintiff received no notice of the impending appointment and there was no judicial determination of her mental capacity. The supreme court invalidated the appointment, stating that if a person's mental capacity is questioned and the person has not previously been adjudicated incompetent, that person is entitled to notice of the application or court-proposed action and an opportunity to be heard before a guardian ad litem may be appointed. Thus, under the *Hagins* doctrine, if a person files an application alleging that a plaintiff or defendant in a civil suit is mentally incompetent, or if a judge takes notice that the person may need a guardian ad litem, the alleged incompetent must be notified and given an opportunity to be heard before the guardian ad litem may be appointed. The notice must be "as in the case of an inquisition of lunacy under chapter 35."[93] As pointed out earlier, chapter 35 does not define the contents of the notice referred to under its provisions, nor has case law addressed the issue. The court in *Hagins* did state, however, that the notice required by its holding must be served

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superior and district courts . . . except when a differing procedure is prescribed by statute."

89. *Id.* 17(b) addresses "infants and incompetents" while Rule 17(c) addresses "infants, insane or incompetent" persons. The discrepancy is inexplicable.

90. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

91. *Id.*

92. The 1974 version of Rule 17 makes no reference to a next friend and only guardians ad litem may now be appointed.

93. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 102, 165 S.E.2d 490, 498 (1969).

ten days prior to the guardianship proceeding;[94] the notice apparently is required to be timely, if not adequate. If, at the hearing, the alleged incompetent objects to the appointment of a guardian ad litem, chapter 35 proceedings are initiated to determine the person's competence.

The due process protections mandated by *Hagins* will in all likelihood be judicially extended to proceedings under chapters 33, 35, and 122. In *Hagins* the court held that the due process protections were necessary to safeguard the plaintiff's right to retain a lawyer of her choice, to conduct her litigation, and to settle her case on terms that she would find acceptable.[95] The rights at stake in chapters 33, 35, and 122 are at least as worthy of protection as those described in *Hagins*.

Summary

Many of the North Carolina statutes dealing with guardianship are clearly unconstitutional on procedural due process grounds. For example, chapter 33 does not require the clerk to notify a potential ward of the petition for guardianship nor to conduct a hearing prior to the appointment of a guardian. Similarly, section 35-3 grants no due process protection with regard to the issuance of certificates of lunacy. Chapter 122 provides no due process protection before a person may be committed to an institution for the mentally retarded, and chapter 1A does not provide for adequate notice before the appointment of a guardian ad litem.

The present statutes not only have constitutional defects, but many other infirmities as well. One major fault is their terminology. The words used by the statutes to refer to persons in need of a guardian are not only pejorative but are also confusing. Such crude terms as "idiots," "imbecile" and "lunatic" permeate the statutes;[96] furthermore, only chapters 35 and 122 define the terms used. Moreover, when undefined terms are employed, they are not used consistently; thus, their meaning cannot be determined from the context in which they appear. For example, "ward" in section 33-30 apparently means any person for whom a guardian has been designated; whereas in section 33-26,

94. *Id.* However, Rule 6(d), upon which the court relied to arrive at its ten-day figure, has been amended to provide for a five-day notice requirement. This five-day requirement has been noted by the court of appeals in Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

95. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 102, 165 S.E.2d 490, 498 (1969).

96. *See, e.g.*, N.C. GEN. STAT. § 33-1 (1966).

"ward" refers only to a minor for whom a guardian has been chosen. The following terms also appear in the statutes and cases, usually without definition: "non compos mentis,"[97] "insane,"[98] "incompetent,"[99] "unsoundness of mind,"[100] "feeble-minded,"[101] "mentally retarded,"[102] "mentally sick,"[103] "mentally ill,"[104] "mentally diseased,"[105] "mental defective,"[106] and "mental disorder."[107]

A second flaw is the lack of a statutory provision whereby a parent may provide in his will for the appointment of a guardian to serve when a mentally retarded son or daughter reaches majority. Thus, another guardianship proceeding must be held when the ward attains the age of eighteen.

In addition, there are no provisions restricting or defining a guardian's powers over the person of his ward. All of the statutes in chapter 33, save one, apply only to the control of the ward's estate. Consequently, a guardian may exercise plenary control over the person of his ward when only minimal control is desirable. Also, because of the present bonding provisions, a ward who possesses no estate might never be compensated for an injury inflicted by his guardian. Further, many of the civil rights of a person who has been adjudicated incompetent are restricted, in spite of the fact that the person may be capable of exercising these rights. Thus, the adjudication provisions of the General Statutes often unnecessarily withdraw certain rights from persons subject to guardianship orders and often fail to provide the means to protect the wards of "overreaching" guardians.

The procedures of chapters 33 and 35 are inadequate in other respects, as well. For example, no one is responsible for initiating guardianship procedures, and, in view of possible civil liability for doing so, interested persons may be reluctant to petition for the appointment of a guardian for an individual who desperately needs one. No provision in chapters 33, 35 or 1A requires that any medical evidence be presented prior to a finding of incompetency. Finally, if a private indi-

97. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).
98. N.C. GEN. STAT. § 35-2.1 (1966).
99. *Id.* § 35-1.
100. *Id.* § 35-1.1.
101. *Id.*
102. *Id.* § 122-69 (1974).
103. *Id.* § 122-92.
104. *Id.* § 35-1.1 (1966).
105. *Id.*
106. *Id.*
107. *Id.*

vidual cannot be found to serve as a guardian, there is no provision for a public or private agency to assume guardianship responsibility for handicapped adults.

Other states have resolved the problems evident in the North Carolina statutes. They have responded in many different ways to correct the inadequacies in their statutes: some of their solutions may be instructive to North Carolina lawmakers.

RECENT STATE STATUTES AND OTHER AUTHORITIES ON GUARDIANSHIP

The recent experiences of various state legislatures, as well as guidelines from other authorities, provide valuable insights and possible solutions to the complex problems involved in the formulation of an effective system of guardianship. This survey of current trends in state legislation and information from other authoritative sources will consider: (1) the questions involving potential wards, (2) the problems concerning prospective guardians, and (3) the role of courts in guardianship proceedings.

Considerations Involving Potential Wards

The first question to be considered in developing an improved system of guardianship law is for whom should a guardian be provided. The policy statement on guardianship issued by the American Association on Mental Deficiency (AAMD) defines a person in need of a guardian as one "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."[108] Although this definition covers both the mentally retarded and the mentally ill, the policy statement addresses itself almost exclusively to the mentally retarded.[109] Thus, it is difficult to determine whom the AAMD would include as potential wards in a guardianship program. Nevertheless, the AAMD would no

108. "Guardianship of Mentally Retarded Persons," an official AAMD policy statement published in the April, 1975, issue of MENTAL RETARDATION, at C-5. This policy statement was approved by the AAMD Council in March, 1975.

109. The title of the statement itself is "Guardianship for Mentally Retarded Persons," and the statement is clearly directed toward persons "whose incompetence is due to mental retardation" because such persons "have certain characteristics which tend to differentiate them from persons who become senile or suffer an episode of mental illness." *Id.*

doubt endorse a system that provides guardians for both mentally ill and mentally retarded persons, as well as persons suffering from the other disabilities it enumerates, as long as the "special needs of retarded persons" are taken into account.[110]

Several state legislatures have recently enacted guardianship statutes which deal exclusively with mentally "retarded" or "deficient" persons. Article 17A of New York's Surrogate's Court Procedure Act establishes a procedure for the appointment of guardians for the mentally retarded.[111] The Article was enacted at the request of the Joint Legislative Committee on Mental and Physical Handicap in order to avoid the situation in which a guardian, appointed during the minority of a mentally retarded person, loses his authority to act upon the child's reaching majority.[112] New Jersey,[113] West Virginia[114] and Louisiana[115] have also recently enacted guardianship statutes that are designed solely to benefit the mentally retarded person.

Maine represents a jurisdiction that has two separate statutes, one providing guardians for mentally retarded persons and the other for those who are mentally ill.[116] Usually, such a statutory scheme results from the existence of two distinct departments within state government, providing services to the mentally ill and to the mentally retarded.[117]

A statute designed to provide guardians for the mentally retarded must identify the persons who fall within that category. The Developmental Disabilities Services and Facilities Construction Act of 1970[118] provides the broadest definition of who should be considered mentally retarded.[119] The Act uses the term "developmental disabilities," which it defines as mental retardation and other neurological conditions "closely related to mental retardation or [requiring] treatment similar to that required for most mentally retarded individuals."[120] While this definition has the advantage of defining potential wards in terms of the

110. *Id.*
111. N.Y. SURR. CT. PRO. §§ 1750-55 (McKinney Supp. 1975).
112. A. Lipman, "Practice Commentary," printed in *id.* § 1750.
113. N.J. STAT. ANN. § 30:4-165.1 (Supp. 1974).
114. W. VA. CODE ANN. §§ 44-10A-1 to -5 (Supp. 1975).
115. LA. CIV. CODE ANN. arts. 336-40, 354-62 (West Supp. 1975).
116. ME. REV. STAT. ANN. tit. 18, §§ 3621 to -37, 3638 to -50-E (Supp. 1975).
117. *E.g.*, in Maine, guardianship of the mentally retarded is under the Bureau of Mental Retardation (*id.* §§ 3621-37), whereas guardianship of incapacitated adults is under the Department of Health and Welfare (*id.* §§ 3638 to -50-E).
118. Pub. L. No. 91-517, Title II, 84 Stat. 1325 (1970). *See also* 36 Fed. Reg. 25084 (1971).
119. OHIO REV. CODE ANN. § 5119.85(A) (Page Supp. 1975).
120. 37 Fed. Reg. 18425 (1972).

services they require, its suggestion of such broad application of guardianship protection has not been received without criticism. The Act's definition has been viewed as logically including persons suffering from cerebral palsy, epilepsy, and, by analogy, even deafness, blindness, or other physical handicaps.[121] Indeed, in adapting this definition of the developmentally disabled to its statutory scheme, Ohio extended the coverage of its guardianship laws to persons afflicted by cerebral palsy, epilepsy, and "other neurological conditions."[122]

Thus, various states have devised guardianship provisions that cover several categories of disabled persons, including the mentally retarded, the elderly, and others without capacity to make responsible decisions for themselves. In establishing broad guardianship coverage, however, state legislatures will want to assure that the different needs of each group are accommodated adequately.

Related to the question of which persons are to be provided guardians is the problem of choosing appropriate terms to be used in describing these persons. Such words as "imbeciles," "idiots," "mentally defective," "incompetents," "lunatics," "feebleminded," and "persons of unsound mind," found in North Carolina's present statutes,[123] are not only pejorative but are also too vague to convey an accurate idea of the meaning intended. Moreover, the social stigma involved in the oral and written publication of such terms in court proceedings and documents tends to discourage the use of the existing guardianship procedures in North Carolina altogether.[124] Several recent statutes in other states are addressed to the "mentally retarded,"[125] but equally common are the terms "developmentally disabled,"[126] "mentally ill,"[127] "mentally deficient,"[128] or "incapacitated."[129] In selecting the proper statutory terminology for guardianship provisions, the most important considerations are that the words chosen be socially neutral in connotation, descriptively accurate, and clearly distinguishable from other terms of legal significance so as to avoid any possible confusion.[130]

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121. Hodgson, *supra* note 7, at 418-20.
122. *Id.* at 417.
123. *See* notes 97-107 *supra.*
124. *See* text accompanying note 62 *supra.*
125. ME. REV. STAT. ANN. tit. 18, § 3623 (Supp. 1975); N.Y. SURR. CT. PRO. §§ 1751-55 (McKinney Supp. 1975).
126. Hodgson, *supra* note 7.
127. N.J. STAT. ANN. § 30:4-165.7 (Supp. 1975).
128. MINN. STAT. ANN. § 253A.02 (Cum. Supp. 1975).
129. ME. REV. STAT. ANN. tit. 18, § 3640 (Supp. 1975).
130. *E.g.*, Louisiana's statutes refer to "tutorships" and speak of "trustees" instead of guardians, which might cause confusion in a variety of different situations. LA. CIV.

Considerations Involving Prospective Guardians

Before considering what powers are to be vested in guardians and which persons are to fulfill the role of guardians, lawmakers must determine what the ultimate goal of the guardianship legislation is to be. The AAMD policy statement makes the following declaration as its first principle: "Since . . . guardianship necessarily denies an individual the right to exercise freely certain personal liberties, every effort should be made through the use of social counseling services to prevent the need for appointment of a guardian . . . ."[131] The Uniform Probate Code also emphasizes the need for "[p]rovisions designed to avoid the necessity of guardianship or protective proceedings . . . ."[132] These statements reflect the view that retarded and other disabled persons, "[w]hether under guardianship or not, should be permitted to participate as fully as possible in all decisions which will affect them."[133] In situations in which guardians must be appointed, several state legislatures have enacted laws delineating and limiting the powers and functions of guardians.

One of the most innovative and flexible statutory schemes for limiting the guardian's powers exists as a pilot program in Colorado,[134] providing "protective services" for approximately four hundred mentally retarded adults. The Colorado statutes require that the court's order in guardianship proceedings "specify any legal disabilities to be imposed on the ward";[135] the statutes further outline specific provisions that the order "may" contain "concerning the right to operate a motor vehicle, . . . enter into contracts, or any other civil, political, personal, or property right."[136] The ward retains any legal right not specifically limited by the court's order.[137] The Colorado Department of Social Services is required to provide assistance which "the . . . department believes necessary to help the ward function, to the extent of his capabilities, as an independent, self-sufficient member of society."[138] These provisions thus embody the sentiments expressed in the Uniform Probate Code and

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CODE ANN. arts. 336-40, 354-62 (West Supp. 1975). Another consideration which might enter into the choice of terms is that the federal government allocates funds to state programs through the Developmental Disabilities Program to aid developmentally disabled persons. Hodgson, *supra* note 7, at 419.

131. "Guardianship of Mentally Retarded Persons," *supra* note 108, at C-6.
132. *Id.* at C-5.
133. *Id.* at C-4.
134. COLO. REV. STAT. ANN. §§ 26-3-101 to -114 (1973).
135. *Id.* § 26-3-104(4).
136. *Id.*
137. *Id.*
138. *Id.* § 26-3-105(1).

the AAMD policy statement; yet they are flexible enough to permit a wide range of powers in the guardian.

New York[139] and West Virginia[140] have recently enacted statutes that offer a limited form of guardianship for those retarded adults who have an occupation and are "wholly or substantially self-supporting."[141] The court is authorized "to appoint a limited guardian of the property" who may "receive, manage, disburse, and account for only such property" as the ward receives from sources other than his employment.[142] The mentally retarded person has the right to retain and spend all of his wages and may contract for any sum of money not in excess of one month's wages.[143] These limited guardianship statutes represent a practical means by which a ward may be placed under the supervision of a guardian without losing the independence and self-reliance that comes from being able to spend his earnings as he chooses.

More common than the limited guardianship statutes described above are guardianship provisions that give a guardian the power to exercise "general supervisional authority"[144] over such matters as the ward's residence, education, employment, power to contract, and other facets of his daily life. Under Minnesota's new Mental Retardation Protection Act, for example, the guardian has the power to give or withhold consent to the ward's marriage, to the performance of sterilization or other surgery upon the ward (subject to certain limitations), and to the adoption of the ward.[145] The Act does, however, permit the appointment of a conservator if the court finds that the ward requires less than the full protection provided by a guardian; moreover, the 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."[146]

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139. N.Y. SURR. CT. PRO. §§ 1751-55 (McKinney Supp. 1975).
140. W. VA. CODE ANN. §§ 44-10A-1 to -5 (Cum. Supp. 1975).
141. N.Y. SURR. CT. PRO. § 1751 (McKinney Supp. 1975).
142. *Id.*
143. According to the New York law, the ward may "bind himself for any sum of money not exceeding one month's wages or earnings from such employment or $300, whichever is *greater*." *Id.* According to West Virginia's limited guardianship provision, however, the ward may "bind himself for any sum of money which in the aggregate shall not exceed one month's wages or earnings from such employment or the sum of three hundred dollars, whichever is *less*, in any one month." W. VA. CODE ANN. § 44-10A-2 (Cum. Supp. 1975) (emphasis added).
144. MINN. STAT. ANN. § 252A.11 (Cum. Supp. 1975).
145. *Id.* There is a separate section in the Minnesota Act which sets out in detail the conditions under which a guardian may give consent to sterilization. *Id.* § 252A.13.
146. *Id.* § 252A.11.

Thus, even a broad legislative delegation of powers to the guardian may be designed to accommodate the needs of individual wards.

Another method for delineating the guardian's powers is found in Maine's statutes, which provide guardians for both mentally retarded persons and incapacitated adults.[147] Maine's laws give broad powers to the guardian: for the mentally retarded, the duties are "to care for and maintain [the] ward . . . , to obtain for the ward . . . education, training, treatment, employment or care";[148] for both the retarded person and the incapacitated adult, the guardian has "custody of the person of the ward and . . . determine[s] the ward's place of residence."[149] Furthermore, the guardian "may apply for, and effect the placement of, any ward . . . , in an appropriate home, hospital or institution . . . ."[150] Although there are no provisions for appointment of a conservator or other protector with limited powers, the statutes provide a means by which the powers of the guardian may be tailored to meet the particular requirements of each ward.[151] At the close of the hearing on the appointment of the guardian, the court must adopt a guardianship plan "in accordance with the individual and specific needs" of the protected ward.[152] The public guardian is required to act within the confines of this "detailed written guardianship plan";[153] consequently, its actions will be limited to fit the needs of its ward. Thus Maine's law presents another statutory alternative for reaching the goal of encouraging self-reliance in the protected ward through limitations on the powers of the guardian.

Several state legislatures[154] have enacted directives to the guardian that further this goal of fostering independence on the part of the wards. Both California and Minnesota, for example, direct their public guardians to "permit and encourage maximum self-reliance on the part of the developmentally disabled person under [their] protection."[155] As suggested above, this approach reflects the policies of such organizations as the AAMD by recognizing that many developmentally disabled persons

147. ME. REV. STAT. ANN. tit. 18, §§ 3621-37, 3638-50-E (Supp. 1975).
148. *Id.* § 3628.
149. *Id.* §§ 3628, 3646.
150. *Id.*
151. *Id.* §§ 3621-37, 3638-50-E. See especially sections 3627 and 3645.
152. *Id.* § 3625.
153. *Id.* §§ 3625, 3627, 3642, and 3645.
154. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 416 (West Supp. 1975); COLO. REV. STAT. ANN. §§ 26-3-101 to -114 (1973); MINN. STAT. ANN. §§ 252A.01 to -.21 (Cum. Supp. 1975).
155. CAL. HEALTH & SAFETY CODE § 416.17 (West Supp. 1975); MINN. STAT. ANN. § 252A.15 (Cum. Supp. 1975).

can, with a minimum of restraints and assistance, function effectively in society.

In addition to determining which powers should be delegated to prospective guardians, legislators must decide whether to provide for a public guardian or to depend upon private persons and organizations to volunteer their services as guardians. Several jurisdictions have chosen the former alternative: public guardianship powers are vested in California's Division of Health,[156] Colorado's Department of Social Services,[157] Maine's Bureau of Mental Retardation,[158] Minnesota's Commissioner of Public Welfare,[159] and the Divisions of Mental Retardation of New Jersey[160] and Ohio.[161] The establishment of public guardianship, however, has been criticized on several grounds; the principal criticism has been of the potential conflict between the interests of the public guardian and those of the ward. The President's Panel on Mental Retardation issued a Report of the Task Force on Law which stated in part:

> We believe that all retarded persons living in institutions, but not admitted on their own application, should have outside guardians who could check on the ward's treatment, care, and release possibilities. . . . The guardian should remain throughout the spokesman for his ward, the lay interpreter of his needs, the partisan who watches over him and his interests, his alter ego in the assertion of legal rights.[162]

Other criticisms of public guardianship focus on the cost of such programs to the state and the paucity of qualified persons available to render adequate services to all wards.[163]

A successful alternative to public guardianship is the private or voluntary system established in New York[164] and later adopted in West Virginia.[165] In addition to providing a limited guardianship, the New York statutes provide that the appointment of the guardian is to remain

156. CAL. HEALTH & SAFETY CODE § 416 (West Supp. 1975).
157. COLO. REV. STAT. ANN. § 26-3-106 (1974).
158. ME. REV. STAT. ANN. tit. 18, § 3621 (Supp. 1975). Note that with respect to incapacitated adults, Maine's Department of Health and Welfare acts as the public guardian. *Id.* § 3638.
159. MINN. STAT. ANN. § 252A.02 (Cum. Supp. 1975).
160. N.J. STAT. ANN. § 30:4-165.4 (Supp. 1975).
161. OHIO REV. CODE ANN. § 5119.86 (Page Supp. 1975).
162. HEW, THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 27 (1963), *cited in* Hodgson, *supra* note 7, at 422.
163. Hodgson, *supra* note 7, at 421-23.
164. N.Y. SURR. CT. PRO. §§ 1750-55 (McKinney Supp. 1975).
165. W. VA. CODE ANN. §§ 44-10A-1 to -5 (Cum. Supp. 1975).

effective during the ward's lifetime.[166] They also allow for the nomination of a standby guardian empowered to act immediately upon the death of the ward's parents.[167] New York's laws further authorize any "non-profit corporation organized and existing under the laws of the state of New York" to act as the guardian of a mentally retarded person; however, the corporation has the authority to act only in the capacity of a guardian of the *person*.[168] Since adoption of the New York system in 1969, "a substantial number of guardians have been appointed" for mentally retarded persons;[169] the continuing increase in the number of people using these provisions indicates that the flexibility offered by the available options enhances the appeal of this type of voluntary guardianship statute.

However, the availability of a public guardian program need not preclude the use of an independent private scheme of guardianship; recent legislation in some states employs both public agencies and private persons to serve as guardians.[170] In those states, the statutes occasionally specify which type of guardian is preferred. For example, one section of the Maine guardianship law for incapacitated adults states that "the public guardian shall be ineligible if it is determined by the probate judge that a suitable private guardian is available and willing to assume responsibilities for such service."[171] Maine's statutes further provide that, if a public guardian has been appointed by the court, "no other guardian shall be appointed for the same ward during the continuation of such guardianship";[172] therefore, the guardian, whether public or private, must serve its appointment exclusively. A combination of the public and private forms of guardianship seems more desirable than North Carolina's present system of private guardianship[173] because of the flexibility it offers and the need it answers in providing guardians for persons unable to obtain this protection from private sources.

166. N.Y. SURR. CT. PRO. § 1752 (McKinney Supp. 1975).
167. *Id.* § 1753.
168. *Id.* § 1754.
169. Hodgson, *supra* note 7, at 434.
170. *See* CAL. HEALTH & SAFETY CODE § 416.10 (West Supp. 1975); ME. REV. STAT. ANN. tit. 18, § 3649 (Supp. 1975); N.J. STAT. ANN. § 30:4-165.5 (Supp. 1974).
171. ME. REV. STAT. ANN. tit. 18, § 3649 (Supp. 1975). There is no similar provision in the statutes affecting the mentally retarded.
172. *Id.* § 3650-D. See a similar provision relating to the mentally retarded in section 3636.
173. Although North Carolina has a system related to a public guardian, it appears to be rarely used. Furthermore, the public guardian may act only when "a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without a guardian," or when a private guardian requests the public guardian to serve. N.C. GEN. STAT. § 33-47 (1966).

Role of the Courts in Guardianship Proceedings

After the powers of the guardian and the form of guardianship have been determined, considerations of the due process and administrative safeguards required in guardianship proceedings remain. Many state legislatures have enacted new procedures for the appointment of guardians, ensuring that due process is afforded to wards through guarantees of notice, hearing, appointment of counsel, opportunity to be present and be heard, and periodic review of the guardianship appointment.[174] The pilot program initiated in Colorado is but one example of a comprehensive approach to ensuring full due process protection for potential wards.[175] The Colorado statutes require that the hearing take place within fourteen days of the filing of the petition; an attorney must automatically be appointed to fulfill the duties of guardian ad litem; the ward must be advised of his right to appear and be furnished with the address and phone number of his attorney; and personal service must be made within a specified time on the participants in the proceedings.[176] Colorado's statutes thus provide an ordered process in which the ward's interests are carefully protected.

Other states have chosen to secure further the interests of potential wards. For example, under the California Guardianship Act, "[i]f the alleged developmentally disabled person is within the state and is able to attend, he *shall* be present at the hearing."[177] Thus, in the absence of a physician's affidavit stating that the ward is physically unable to attend, the ward must appear at the guardianship hearing.[178] The Act also provides that before the public guardian is appointed for a developmentally disabled person, "the court shall inform such person of the nature and purpose of the guardianship . . . proceedings, that the appointment of a guardian . . . is a legal adjudication of his incompetence, and the effect of such an adjudication on his basic rights . . . ."[179] Moreover, the court is required to "consult with such person to determine his opinion concerning the appointment."[180]

If a primary goal of the guardianship program is encouragement of self-reliance and independence on the part of the ward, then these

174. See text accompanying notes 175-94.
175. COLO. REV. STAT. ANN. §§ 26-3-101 to -114 (1973).
176. *Id.* § 26-3-104(2).
177. CAL. HEALTH & SAFETY CODE § 416.7 (West Supp. 1975) (emphasis added).
178. *Id.*
179. *Id.* at § 416.95.
180. *Id.*

statutory provisions requiring the presence of the ward at the hearing and direct consultation with the ward have much to recommend them. Through his active participation in the proceedings, the ward has an opportunity to view first hand the legal process that will so directly affect his life, to express his opinions concerning this process, and to exercise a degree of control—however small—over his own destiny. Presence of the ward, appointment of counsel, and consultation with the ward at the hearing are not, however, clearly required under the due process guarantees of the Constitution; whereas notice, hearing, and opportunity to be heard do constitute the minimum elements of due process which must be provided in any system of guardianship.[181]

In addition, several states attempt to protect the ward after the guardian's appointment by requiring a periodic review of the ward's progress, and by enabling the ward to obtain a reexamination of his need for a guardian's protection.[182] Under Minnesota's Mental Retardation Protection Act,[183] for example:

> 252A.16 Annual Review Subdivision 1. The [public guardian] shall provide an annual review of the physical, mental and social adjustment and progress of every ward. . . . Sub. 2. The [public guardian] shall annually review the legal status of each ward in light of the progress indicated in the annual review. If the [public guardian] determines the ward is no longer in need of guardianship . . . or is capable of functioning under a less restrictive conservatorship, the [public guardian] shall petition the court . . . to restore the ward to capacity or for a modification of the court's previous order.[184]
>
> 252A.19 Modification of Conservatorship; Restoration to Legal Capacity Subd. 2. The [public guardian], ward or any interested person may petition the appointing court . . . for an order to remove the guardianship . . . or to restore the ward . . . to full legal capacity or to review de novo any decision made by the public guardian . . . for or on behalf of a ward . . . or for such other order as the court may deem just and equitable.[185]

181. *See* Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

182. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 416.18 (West Supp. 1975); COLO. REV. STAT. ANN. § 26-3-111 (1973); ME. REV. STAT. ANN. tit. 18, §§ 3634, 3650-C (Supp. 1975); MINN. STAT. ANN. § 252A.16 (Cum. Supp. 1975); OHIO REV. CODE ANN. § 5119.87 (Page Supp. 1975); New Jersey Division Circular No. 6, issued Feb. 1, 1967 by the Department of Mental Retardation (wherein the frequency of review varies according to the I.Q. of the ward). As to the right of appeal, *see* N.Y. SURR. CT. PRO. § 1752 (McKinney Supp. 1975).

183. MINN. STAT. ANN. §§ 252A.01-.21 (Cum. Supp. 1975).

184. *Id.* § 252A.16.

185. *Id.* § 252A.19.

These provisions for periodic review and appeal are consistent with Minnesota's stated policy "to provide a coordinated approach to the supervision, protection and *habilitation* of its mentally retarded citizens";[186] through these sections, the Act furnishes valuable tools for continually adapting the role of the guardian to the changing needs of the ward.

After these due process considerations have been addressed, the procedure for the appointment of a guardian must be formulated. The legislature must determine who may initiate the proceedings, what investigations (if any) will be required before the hearing can take place and who will conduct them, and whether the ward will have the right to take his case to a jury. Maine's statutory scheme of guardianship for mentally retarded persons and incapacitated adults resolves most of these issues and provides a comprehensive model for the administration of guardianship proceedings.

The nomination of the public guardian in Maine may be made in writing by a parent, relative or friend of the ward, by the commissioner of any state department or certain other government officials, or (for mentally retarded persons only) by the present guardian or conservator. Following its nomination, the public guardian must petition in the probate court for its appointment to act as guardian.[187] The petition must be accompanied by a medical certificate of mental retardation or incapacitation and "a detailed written guardianship plan," the contents of which vary according to whether the prospective ward is a mentally retarded person or an incapacitated adult.[188] Finally, in the case of guardianship proceedings for an incapacitated adult, the court names an attorney immediately after the petition is received to act as guardian ad litem, to represent the prospective ward until the public guardian is appointed.[189] Thus, Maine's guardianship statutes clearly enumerate the persons who may nominate a guardian, authorize the public guardian to file the petition, specify the documents to be submitted with the petition, and provide a guardian ad litem for the prospective ward.

The required medical certificate must state that the prospective ward is "mentally retarded" or impaired; "a licensed physician and a

186. *Id.* § 252A.01 (emphasis added).

187. ME. REV. STAT. ANN. tit. 18, §§ 3624, 3625, 3641, 3642 (Supp. 1975).

188. *Id.* §§ 3625, 3642. Note that the guardian must act according to his duties spelled out in the guardianship plan. *Id.* §§ 3627, 3645.

189. *Id.* § 3643. It is unclear why similar protection is not afforded to mentally retarded persons.

licensed psychologist" are required to examine the ward in order to issue the certificate.[190] This medical certificate must be accompanied by a guardianship plan defining the "individual and specific needs of the [prospective ward]," but the statutes do not state who is responsible for preparing the plan.[191] Presumably, the persons who prepare the certificate also prepare the guardianship plan since they have examined the prospective ward and are familiar with his "individual and specific needs."

With respect to the right to a jury trial, Maine's statutes are silent. New York, however, provides that when a minor ward for whom a guardian has been appointed reaches the age of 18, he may petition the surrogate court to have his guardian discharged and may request a jury trial.[192] Upon receipt of the petition, the court conducts a hearing at which the ward has the right to appear. The statutes further provide that the right to a jury trial is waived by the ward if he fails to make a demand for a jury trial. Such a provision is at best curious. The ward (who has no right to a guardian ad litem) may be legally unable to waive the jury trial if he is indeed mentally disabled. In order to be effective, a waiver must be made knowingly.[193] It is doubtful that a person with a mental handicap can be presumed to understand the significance of his right to a trial by jury.

There is one consideration that may persuade lawmakers not to provide for a jury trial. If the jury's function is to determine the mental capacity of the prospective ward, then a situation could arise in which the jury disagrees with the findings of a medical evaluation team. In such instances, a jury of twelve persons with no medical training would be able to overrule the findings of the medical specialists.[194]

Summary

Guardianship statutes vary among the states according to the relative values that each legislature places on the factors affecting the decisions to be made. While some states address only the mentally

190. *Id.* §§ 3623, 3625, 3640, 3642.

191. *Id.* §§ 3625, 3642.

192. N.Y. SURR. CT. PRO. § 1752 (McKinney Supp. 1975).

193. *See, e.g.*, Burke Grain Co. v. St. Paul-Mercury Indem. Co., 94 F.2d 458 (8th Cir.), *cert. denied*, 303 U.S. 661 (1938); Hager v. Pacific Mut. Life Ins. Co., 43 F. Supp. 22, 27 (E.D. Ky. 1942).

194. *See* Hodgson, *supra* note 7, at 432. For a North Carolina case where the jury did in fact disagree with the physician's statement see Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966).

retarded, others include all mentally handicapped persons in their statutes; while some states provide for public guardians, others provide only for private guardians to fulfill the guardianship needs of their citizens. Still other states rely on both the public and the private sectors to answer the need for guardians. Some states afford the prospective ward the rights to counsel, to be present and to participate in the guardianship hearing, to have a multi-disciplinary evaluation both before and after the appointment of a guardian, and to have a jury determination of the need for a guardian. Other states provide for some, but not all, of these procedural safeguards.

One problem encountered in attempting to evaluate the differing guardianship statutes is that most of these programs have been instituted only recently; their long-term performance is therefore difficult to determine. However, by examining the issues addressed by other lawmakers, those who would draft new statutes for North Carolina can at least identify the problems to be resolved.

CONCLUSION

North Carolina's legislators must correct the inadequacies of the state's guardianship statutes. The pejorative language should be replaced by terms that are better defined and less crude than those presently used to describe the mentally handicapped. Moreover, the courts can be expected to strike down North Carolina's guardianship statutes if the legislature does not also guarantee the due process rights mandated by the federal and state constitutions.

North Carolina presently allocates responsibility for mentally ill and mentally retarded persons to two different agencies under the supervision of the Department of Human Resources;[195] therefore, the creation of a public guardianship could follow the pattern established in Maine. Provisions similar to a limited guardianship plan exist already in North Carolina's Patients Rights Act of chapter 122 of the General Statutes, under which certain civil rights may be limited or restricted only after a prior medical determination that such action is in the best interests of the ward. The treatment plan under the Patients Rights Act must specify all rights to be taken away. Therefore, a similar procedure for persons who have guardians appointed for them would not be foreign to North Carolina law.

195. N.C. GEN. STAT. § 143B-138 (1973).

Only when the recent changes made by other states are incorporated into North Carolina's statutes will this state's guardianship laws provide "responsible impartial guardian[s] . . . to protect and effect the exercise and enjoyment"[196] of the rights of their wards.

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196. "Guardianship of Mentally Retarded Persons," *supra* note 108, at C-4.

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