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## GROUP HOMES IN OKLAHOMA: DOES JACKSON V. WILLIAMS OFFER NEW HOPE FOR THE MENTALLY RETARDED?\*

### I. INTRODUCTION

Should property owners seeking to enforce single-family zoning and covenant restrictions be able to prevent five mentally retarded adult women from living in a supervised neighborhood home?<sup>1</sup> Restrictive covenants are valuable property rights that are subject to judicial protection.<sup>2</sup> However, there is a growing national movement away from housing the retarded in large institutions and toward their placement in an environment that emulates "conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."<sup>3</sup> Neighborhood group homes provide that environment.<sup>4</sup>

Community opposition, evidenced by exclusionary zoning laws,<sup>5</sup> has been a major obstacle to establishing group homes in single-family neighborhoods. In 1985, the Oklahoma Supreme Court in *Jackson v. Williams*<sup>6</sup> was faced with balancing the rights of property owners against the rights of the mentally retarded to establish a neighborhood group home.

The *Jackson* court literally interpreted the single-family dwelling restrictions imposed by zoning and covenant, and thereby allowed the group home to be located in a residential neighborhood. Had the court

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1. *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985).

2. See *Malcolm v. Shamie*, 95 Mich. App. 132, 133, 290 N.W.2d 101, 102 (1980).

3. Nirje, *The Normalization Principle*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 231 (R. Kugel & A. Shearer eds. 1976). Nirje explains the concept of normalization, its practical application to all retarded adults, and how it can serve as a guide for medical, educational, psychological, and political work on behalf of the retarded. *Id.*

4. See Schonfeld, *Not in My Neighborhood: "Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State"*, 13 FORDHAM URB. L.J. 281 (1985) (examining laws and lawsuits in New York affecting establishment of community residences for the mentally disabled); Comment, *Is the Group Home "Like a Pig in the Parlor?"*, 62 Neb. L. Rev. 742 (1983) (examining the rationales underlying decisions concerning group homes for the mentally retarded, and arguments on behalf of the mentally retarded as well as the opposing homeowners).

5. See Comment, *Recent Zoning Cases Uphold Establishment of Group Homes for the Mentally Disabled*, 18 CLEARINGHOUSE REV. 515 (1984) (overview of methods used to exclude group homes by zoning; constitutional challenges to exclusionary ordinances; and recent state court decisions favoring group homes).

6. 714 P.2d 1017 (1985).

been unable to fit the group home within the restrictions, it could have declared them void as against public policy;<sup>7</sup> voiding the restrictions would support both the unencumbered use of property<sup>8</sup> and the rights of the mentally retarded to "establish a home."<sup>9</sup> Alternatively, the court could have circumvented the restrictive covenant by invoking the fourteenth amendment prohibition against discriminatory classifications, as the Supreme Court did in *Shelley v. Kraemer*.<sup>10</sup> The *Jackson* court would have reached the same conclusion using any of these approaches.

## II. DEINSTITUTIONALIZATION

### A. Normalization and Group Homes

Because they are mentally retarded,<sup>11</sup> many people require care in an environment outside their family home. Large public treatment facilities have long been the repository for these individuals, where little was done to habilitate them. Separation from the community and exclusive confinement with other mentally retarded persons actually perpetuated dependence<sup>12</sup> and deviant behavior.<sup>13</sup> However, during the preceding twenty years there has been a shift in philosophy resulting in deinstitutionalization: moving the mentally retarded from institutions to small, community-based, residential facilities.<sup>14</sup>

The goal of deinstitutionalization is "normalization," which is enhanced by using group homes of normal family size, in residential neigh-

7. See *id.* at 1021.

8. Oklahoma case law supports the unencumbered use of property. See *Pirtle v. Wade*, 593 P.2d 1098, 1099-1100 (Okla. Ct. App. 1979); see *infra* note 78.

9. Justice Marshall's concurring opinion in *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3266 (1985), calls the right to "establish a home" a fundamental liberty embraced by the due process clause of the fifth amendment.

10. 334 U.S. 1 (1948).

11. "As defined by the American Association of Mental Deficiency, mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with defects in adaptive behavior and manifested during the developmental period." *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 453 (M.D.N.C. 1976). Mildly retarded individuals constitute 89% of the number of mentally retarded in the United States and their IQ's range from 50-70. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3256 n.9 (1985).

12. Sorgen, *Labeling and Classification*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 214, 218-19 (M. Kindred ed. 1976) [hereinafter cited as *CITIZEN AND THE LAW*].

13. Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in *CITIZEN AND THE LAW* 499.

14. The deinstitutionalization movement gained impetus in 1963 when Congress passed the Community Mental Health Centers Act, Pub. L. No. 88-164, § 200, 77 Stat. 282, 290 (1963). President Kennedy urged the American people to "return to the community the mentally ill and mentally retarded . . . to restore and revitalize their lives." President's Message to Congress on Mental Illness and Mental Retardation, U.S. CODE CONG. & AD. NEWS 1466, 1477 (Feb. 5, 1963), quoted in Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853, 853 (1979).

borhoods which provide social interaction for mentally retarded individuals.<sup>15</sup> The normalization process was enhanced by federal legislation in 1975<sup>16</sup> providing the mentally retarded the right to assistance in maximizing their individual developmental potential in an environment that is "least restrictive of . . . personal liberty."<sup>17</sup> Additionally, legislation enacted in thirty-four states and the District of Columbia<sup>18</sup> mandates, in various ways and to varying degrees, the location of community homes for the retarded in residential areas.<sup>19</sup> Oklahoma is among those states with no enabling legislation for the mentally retarded. Despite authority favoring community group homes, there is an insufficient number of community-based homes in most states to accommodate the mentally retarded.<sup>20</sup>

Although the national resident population in institutions for the mentally retarded was reduced thirty percent between 1970 and 1982,<sup>21</sup> the majority of Oklahoma's mentally retarded are still being institutionalized.<sup>22</sup> Oklahoma ranks fiftieth in the nation in providing care for the retarded outside of institutions.<sup>23</sup> Despite the plan developed in 1983 by the Oklahoma Department of Human Services for moving the retarded from institutions to group homes and nursing homes with specialized programs,<sup>24</sup> only sixty group homes have been established.<sup>25</sup> An esti-

15. *Nirje*, *supra* note 3, at 232.

16. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended at 42 U.S.C. §§ 6001-6083 (1982 & Supp. III 1985)).

17. 42 U.S.C. § 6009(2) (Supp. III 1985). "[I]t is in the national interest to strengthen specific programs . . . that reduce or eliminate the need for institutional care, to meet the needs of persons with developmental disabilities." *Id.* § 6000(a)(5).

18. M. Bates, *State Zoning Legislation: A Purview 2* (Dec. 1985) (Wisconsin Council on Developmental Disabilities, Madison, Wis.) (unpublished manuscript).

19. *Zoning for Community Homes Serving Developmentally Disabled Persons*, 2 MENTAL DISABILITY L. REP. 794, 797 (1978) [hereinafter cited as *Zoning for Community Homes*].

20. *Id.* at 795.

21. *See Comment*, *supra* note 5, at 515.

22. In 1984, 1,600 mentally retarded individuals were housed in Oklahoma's three institutions. Special Report: *Wasting Away in Oklahoma*, The Tulsa Tribune (reprint of series published Oct. 1-10, 1984), at 8, col. 2 [hereinafter cited as *Tribune Special Report*].

23. *Id.* at 2, col. 1. Lack of community programs in Oklahoma prevent many retarded individuals from being released from institutions. *Id.* at 2, col. 3.

24. *Id.* at 2, col. 2. In addition to the Department of Human Services [DHS] plan, Governor George Nigh commissioned The Task Force on Mental Retardation on October 5, 1984, to consider problems of the retarded and of existing programs, to identify gaps, and offer solutions by November 1986. Exec. Proclamation, signed Oct. 5, 1984 (on file with Oklahoma Secretary of State). Additionally, First Lady Donna Nigh has lobbied the Oklahoma legislature for money to start group homes. *Tribune Special Report*, *supra* note 21, at 20.

25. Telephone interview with Deborah S. Karns, executive director of Homelife Association for the Handicapped, Inc. (Aug. 8, 1986). Homelife presented the Amicus Curiae Appellants' Supplemental Brief in *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985).

mated 500 are needed.<sup>26</sup>

### B. Zoning Barriers

Public opposition is the most significant factor leading to the shortage of group homes. Concerns that property values, safety, traffic, and noise levels will be adversely affected are offered as justification for opponents' hostility<sup>27</sup> despite evidence that the concerns lack validity.<sup>28</sup>

The major deterrent to community-based group homes is local governmental zoning.<sup>29</sup> Residential zoning ordinances generally specify the type of permissible structure and the specific permissible use.<sup>30</sup> The two types of zoning ordinances which have hindered group home development most often are the "single-family dwelling" ordinance and the less common "exclusionary" ordinance.<sup>31</sup> The "single-family dwelling" ordinance usually restricts family composition by one of three types of ordinances.<sup>32</sup> The most restrictive ordinances limit "family" to categories of related persons.<sup>33</sup> Less restrictive ordinances limit the number of unrelated persons who may live together — usually five or less.<sup>34</sup> The least restrictive ordinances consider a single housekeeping unit within the definition of single-family dwelling.<sup>35</sup>

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26. Tribune Special Report, *supra* note 22, at 4, col. 1. Oklahoma's statistics contrast sharply with Nebraska's where 2,000 retarded citizens benefit from community care programs and only 460 people are housed in its single institution. *Id.* at 18, col. 1.

27. Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STANFORD L. REV. 767, 769 (1979) (citing D. LAUBER & F. BANGS, ZONING FOR FAMILY AND GROUP CARE FACILITIES 8-10 (Am. Society of Planning Officials Planning Advisory Serv. Rep. No. 300, 1974)).

28. See *Zoning for Community Homes*, *supra* note 19, at 796 n.10 (empirical studies show no basis for the apprehension regarding diminished property values); *The Effects of Group Homes on Property Values*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 309 (1985); see also J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, —, 274 S.E.2d 174, 178 n.7 (1981) (study showing property values had increased in neighborhoods where group homes for the mentally retarded had been located).

Safety fears are likewise unfounded because aggressive residents are not placed in group homes absent supervision. See *Zoning for Community Residences*, 2 MENTAL DISABILITY L. REP. 316, 320 (1977).

29. *Zoning for Community Homes*, *supra* note 19, at 795 (zoning ordinances regulate land use by dividing cities into commercial, industrial, and residential areas).

30. *Disabled Citizens in the Community: Zoning Obstacles and Legal Remedies*, 3 AMICUS, Mar.-Apr. 1978, at 30.

31. *Id.* at 30-31 (an exclusionary ordinance specifically excludes individuals with certain identifiable characteristics); see also Comment, *A Review of the Conflict Between Community-Based Group Homes For the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV., 669, 670 (1980).

32. See Comment, *Zoning the Mentally Retarded into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 ARIZ. ST. L.J. 385, 390.

33. *Id.*

34. *Id.*

35. *Id.*; see also *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, —, 84 A.2d 687, 690 (1951)

In some municipalities, zoning confines community group homes to certain areas by designating them according to "use."<sup>36</sup> "Use" designations include: (1) a "conditionally permitted use" in specific residential areas, (2) a business or boarding house use in a commercial zone, or (3) a use only in an area of hospitals and nursing homes.<sup>37</sup> These types of restrictions impede normalization by excluding the retarded from homogeneous neighborhood settings, and may create community group home "ghettos."<sup>38</sup>

In the absence of legislation supporting group homes, exclusionary methods are generally challenged on a case by case basis.<sup>39</sup> Whether the challenge fails or succeeds depends on the jurisdiction and the facts of each case.<sup>40</sup>

### III. STATEMENT OF THE CASE

The dispute in *Jackson* arose when the Williams, parents of a twenty-one year old mildly mentally retarded daughter, attempted to lease their home in Tulsa, Oklahoma, to the non-profit Oil Capital Association for the Handicapped, Inc., "Association."<sup>41</sup> The house was to be used as a residence for the daughter and four other "mildly retarded" adult women;<sup>42</sup> it was placed in a revocable inter vivos trust with Mr. Williams as trustee.<sup>43</sup> The trust would receive \$1,000 per month rent from the Association. In turn, the Association would receive rent from the handicapped women to defer household expenses and a housekeeper's salary.<sup>44</sup> The housekeeper would reside in the home, supervise the household, and maintain a life-style similar to other subdivision

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(single housekeeping unit definition of family met where four families used a 14-room house and shared cooking and eating facilities); "A definition of 'family,' in an ordinance, may be in terms of a housekeeping unit, and . . . it is not necessary that the persons . . . be related by blood." 101A C. J. S. *Zoning & Land Planning* § 119 (1979). Individual restrictive deed covenants may also exclude community group homes much the same as zoning ordinances. Comment, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 WAYNE L. REV. 1349, 1360 (1982).

36. See Commentary, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 OHIO N.U.L. REV. 64, 69 (1980).

37. *Id.*

38. *Id.* at 69-70.

39. See *id.* at 83.

40. *Id.*

41. See *Jackson v. Williams*, 714 P.2d at 1017, 1019 (Okla. 1985). The home is in the Park Plaza South III Subdivision. *Id.*

42. *Id.* Testimony indicated the women's mental capacity ranged from the age of eight to twelve. *Id.* at n.1.

43. *Id.* at 1019.

44. *Id.*

residents.<sup>45</sup>

Homeowners in the Williams' subdivision, claiming a violation of the single-family zoning ordinance, secured a temporary injunction that prevented the women from occupying the home.<sup>46</sup> They also claimed violations of Covenant A, which specified residential lots and single-family dwelling structures, and Covenant E, which prohibited noxious or offensive uses.<sup>47</sup> Additionally, at the permanent injunction hearing, homeowners testified that the group home would create traffic congestion, decrease property values in the neighborhood, and be a nuisance because of the daughter's occasionally annoying conduct.<sup>48</sup> The trial court found the proposed group home incompatible with the zoning ordinances and restrictive covenants and issued a permanent injunction.<sup>49</sup>

#### IV. THE JACKSON DECISION

On appeal, the Oklahoma Supreme Court concluded that the operation of the proposed group home was not prohibited by the zoning ordinance or the restrictive covenants.<sup>50</sup> In reaching this conclusion, the court considered three questions: (1) whether the group home constituted a "single-family dwelling" within the Tulsa zoning ordinance, (2) whether it violated the deed restriction limiting use and purpose, and (3) whether it violated the noxious or offensive trade restriction.<sup>51</sup>

By strictly construing the ordinance's own definition of "family,"

45. Appellant's Brief in Chief at 2, *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985) [hereinafter cited as Appellant's Brief].

46. *Jackson*, 714 P.2d at 1019.

47. *Id.* at 1020. Relevant portions of the restrictive covenants at issue are:

Covenant A

"All lots in the tract shall be known and described as *residential lots*. . . . No structure shall be erected, altered, placed or permitted to remain on any building plot other than one detached *single-family dwelling*." [Emphasis added].

Covenant E

"No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood."

*Id.* at 1021.

48. *See id.* at 1019.

49. *Id.* The trial judge based his conclusion on factors that included: (1) payment of rent for room and board by five unrelated individuals, (2) transient-type residents could live in the home for six months to an indefinite time, (3) the presence of Williams' daughter in the home would not guarantee her permanency or that of other residents, (4) the home would be operated by the board of a non-profit organization and not by the head of a household, (5) the presence of hired help on the premises, (6) the girls would need guidance beyond that needed by normal persons of the same age, and (7) outside financial assistance would be required for necessities. *Id.* at n.6.

50. *Id.* at 1024-25.

51. *Id.* at 1018-19.

the *Jackson* court held that the proposed group home was a "single-family" dwelling for zoning purposes.<sup>52</sup> In finding no violation of restrictive Covenant A, the court utilized the same "family" definition found in the zoning ordinance, due to the absence of relevant Oklahoma case law.<sup>53</sup> It also noted a marked difference between the "use" of the property for residential purposes and the "character of the structure" as a single-family dwelling.<sup>54</sup> The court declined to construe the two components of Covenant A together in order to find a violation of the ordinance.<sup>55</sup>

Competing public policies were also considered as the court balanced homeowners' rights against constitutional rights of the group home members. The court found no violation of Covenant E prohibiting noxious trade or activity because homeowners' claims were not substantiated, and occupancy of the home by five mentally retarded persons did not amount to "an annoyance or nuisance per se."<sup>56</sup>

With both covenants, the court followed Oklahoma procedure in strictly construing "all ambiguities . . . in favor of the unencumbered use of the property."<sup>57</sup> It also indicated a willingness to void the restrictions for violating the mentally retarded women's fundamental rights.<sup>58</sup>

## V. ANALYSIS

### A. Zoning and the Single-Family Dwelling

Although the constitutionality of zoning ordinances has been upheld by the United States Supreme Court,<sup>59</sup> a zoning restriction cannot be imposed unless it bears a "substantial relation to the public health, safety, morals or general welfare."<sup>60</sup> Wording of an exclusionary zoning ordinance may be critical, because ordinances run the gamut from very vague to very specific.<sup>61</sup> Thus, the wording often determines how the

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52. *Id.* at 1020-21; see *infra* note 64 and accompanying text.

53. *Jackson*, 714 P.2d at 1021-23.

54. *Id.* at 1021.

55. *Id.* at 1024.

56. *Id.*

57. *Id.* at 1021.

58. See *id.* at 1023 n.24.

59. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). More specific authority for neighborhood zoning was granted in *Belle Terre v. Boraas*, 416 U.S. 1 (1974) enabling municipalities to create a "quiet place where yards are wide, people few, and motor vehicles restricted," by laying out "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9.

60. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

61. See Comment, *supra* note 4, at 754-56 (the outcome of many community group home cases



court will rule on a particular set of facts.

The zoning ordinance in *Jackson* sought to exclude by its definition of "family"; however, the definition was susceptible to a broad interpretation.<sup>62</sup> In examining the zoning ordinance in *Jackson*, the court followed its prior rule of strictly construing zoning ordinances. It refused to extend the ordinance by implication, and it resolved ambiguities in favor of the property owner whose use was in dispute.<sup>63</sup>

The zoning code referred to in *Jackson* states that when a term is defined, definition controls interpretation.<sup>64</sup> The subdivision at issue was zoned a RS-3 Residential Single-Family High Density District.<sup>65</sup> Terminology in the code is explained in the definitions section,<sup>66</sup> where "single-family dwelling" prohibits occupancy by more than one family. "Family" is defined as: "One or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage, or adoption, no such family shall contain over five persons, but further provided that domestic servants may be housed on the premises without being designated as a family."<sup>67</sup>

The court referred to case law in Oklahoma and other states where definition controlled. In *Dolese Bros. Co. v. Privett*,<sup>68</sup> statutory intent was ascertained by definition and found "applicable to the same word or phrase whenever it occurs, except where a contrary intention plainly appears."<sup>69</sup> Definition was also key in *Oliver v. Zoning Commission of Chester*,<sup>70</sup> where a controversy developed over a proposed group home for eight or nine mentally retarded adults supervised by a married couple acting as houseparents.<sup>71</sup> Local zoning regulations defined family as: "One or more persons occupying the premises as a single housekeeping unit, as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel."<sup>72</sup> The *Oliver* court concluded that the

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is based on the definitional aspect of single "family" homes); 3 R. ANDERSON, AMERICAN LAW OF ZONING § 18.01 (1986).

62. See *Jackson*, 714 P.2d at 1021.

63. See *Cauvel v. City of Tulsa*, 368 P.2d 660, 661 (Okla. 1962).

64. TULSA, OKLA., CHARTER AND REV. ORDINANCES tit. 42, § 110.2(c) (Supp. 1986).

65. *Id.* § 200. Residential single-family districts are "designed to permit the development and conservation of single-family detached dwelling in suitable environments in a variety of densities to meet the varying requirements of families." *Id.* § 400.2.

66. *Id.* § 1800.

67. *Id.*

68. 622 P.2d 1080 (Okla. 1981).

69. *Id.* at 1083-84.

70. 31 Conn. Supp. 197, 326 A.2d 841 (Conn. C.P. 1974).

71. *Id.*

72. *Id.* at \_\_\_, 326 A.2d at 845.

use of the dwelling as “a single housekeeping unit” controlled the definition, but did not control the mutual relationship of the occupants.<sup>73</sup>

The definition of family contained in an ordinance was also controlling in *Carroll v. City of Miami Beach*.<sup>74</sup> The *Carroll* court rejected the city’s attempt to construe the word “family” according to the meaning usually ascribed by the general public. Instead, the *Carroll* court held that the city was bound by the express terms of its own ordinance in defining family.<sup>75</sup>

In *Jackson*, the supreme court determined that the group home was within the single-family definition in the zoning code. The court stated that the group would live in a one family dwelling unit. Furthermore, five women would not exceed the quota of unrelated persons, and the housekeeper was allowed as an additional person. The court found no requirement or even implication that the home need be jointly owned by the residents, as the appellees argued.<sup>76</sup>

The arguments in the *Jackson* controversy apply generally to both municipal zoning and covenant restrictions. Because the objectives of both types of restrictions are analogous,<sup>77</sup> the remainder of the discussion will treat them collectively.

## B. *The Restrictive Covenants*

The law generally does not favor restrictive covenants. The *Jackson* court adheres to the rule construing covenants strictly and resolving ambiguities in favor of the unrestricted use of property.<sup>78</sup> The North Carolina Supreme Court took a similar view in *J.T. Hobby & Son, Inc. v.*

73. See *id.* at \_\_\_, 326 A.2d at 841 (the court allowed the group home as a permitted single-family use).

74. 198 So. 2d 643 (Fla. Dist. Ct. App. (1967); see also *Linn County v. City of Hiawatha*, 311 N.W.2d 95, 99 (Iowa 1981) (ordinance did not limit the number of allowable persons nor require a biological or legal relationship).

75. *Carroll*, 198 So. 2d at 645.

76. See Brief for Appellees at 7, *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985); *Jackson*, 714 P.2d at 1021.

77. See Comment, *supra* note 35, at 1360.

78. *Jackson*, 714 P.2d at 1021; see also *Pirtle v. Wade*, 593 P.2d 1098, 1099-1100 (Okla. Ct. App. 1979). A ham radio operator sought to erect a radio antenna on his home lot and neighbors sought to enjoin its erection. The court noted the basic principle in our society is for the unencumbered use of real property and cautioned, “[t]oo great a willingness by a court to imply restrictions on the use of real property may diminish property rights beyond that intended by the grantor.” *Id.* at 1100; see also *Public Service Co. v. Home Builders Ass’n of Realtors, Inc.*, 554 P.2d 1181, 1185 (Okla. 1976) (PSO sought to restrain Home Builders from placing a driveway and parking lot over PSO’s right of way; the court did not find that the improvements were within the structural restriction, thereby upholding the unencumbered use of the property).

*Family Homes of Wake County, Inc.*<sup>79</sup> Hobby states: "The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent."<sup>80</sup>

The Oklahoma Supreme Court, in *Jackson*, finds a "use" restriction (residential) and a structural restriction (single-family dwelling) in Covenant A of the deed of dedication of the neighborhood.<sup>81</sup> The court's differentiation between the two restrictions was crucial to the decision.<sup>82</sup>

### 1. Residential Use Restriction

The initial sentence in Covenant A<sup>83</sup> requires that the lots be residential, and the *Jackson* court interprets this as restricting the use of the home.<sup>84</sup> This use restriction requires that the lots be used for residential purposes, while the rest of Covenant A requires that the structure be a single-family dwelling.<sup>85</sup>

If the use of a home is to be considered residential, the atmosphere must be that of a family.<sup>86</sup> Other factors determining residential use are the purpose of the home and its non-institutional quality.<sup>87</sup> A treatment facility or a commercial venture would not be considered residential uses.

The *Jackson* court's recognition of the group home's use as residential was strengthened by the fact that no educational training, nursing, or medical care would be provided by the housekeeper or anyone else in the home.<sup>88</sup> The five women in *Jackson* were to function as a housekeeping unit and share in household duties while pursuing employment outside the home.<sup>89</sup> The housekeeper was to function as head of the household, supervising and guiding the group. The group's daily activities appeared

79. 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 179 (1981); accord *Knudtson v. Trainor*, 216 Neb. 653, \_\_\_, 345 N.W.2d 4, 6 (1984) (restrictive covenants, if ambiguous, should be construed to allow maximum unrestricted property use).

80. *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 179 (1981).

81. *Jackson*, 714 P.2d at 1021. Covenant E is analyzed at pp. 218-19 *infra*.

82. See *supra* note 47 for pertinent text of Covenant A.

83. *Id.*

84. *Jackson*, 714 P.2d at 1021.

85. *Id.* at 1021-22.

86. *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 180-81 (1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 23 (Minn. 1981).

87. *Hobby* at \_\_\_, 274 S.E.2d at 180.

88. *Jackson*, 714 P.2d at 1022; see also *Crowley v. Knapp*, 94 Wis. 2d 421, \_\_\_, 288 N.W.2d 815, 821 (1980) (eight mentally retarded residents lived voluntarily in the house and no professional care or therapy was available. The home's purpose was to provide a residential living environment to integrate retarded citizens into the community.).

89. *Jackson*, 714 P.2d at 1022.

similar to that of other families in the neighborhood.<sup>90</sup>

The court distinguished *Jackson* from *Garcia v. Siffrin Residential Association*,<sup>91</sup> where the primary purpose of the proposed residential treatment facility for mentally retarded persons was not to provide the family atmosphere of a group home, but was to provide training and educational opportunities. The facility proposed in *Garcia* was to be corporately owned, and operated by a director who would bring in a married couple to reside on the premises, two full time female workers, and other staff needed to provide the "habilitation services" and "personal care" required by Ohio statute under the "family home" definition.<sup>92</sup> Applicants for residency were to sign month-to-month contracts and were to be charged according to their physical or educational needs.<sup>93</sup>

Residential use has also been denied when a group home was equated with a boarding house providing food and lodging for independent boarders.<sup>94</sup> The *Jackson* court distinguished the group home from a boarding house because the five women would live as an integrated unit comparable to a family. Although the housekeeper was paid to supervise and the women paid rent to the association, the court declined to construe the use as commercial because financial gain was not the motivation for operation of the home.<sup>95</sup> The *Jackson* court is supported by the *Hobby* court's reasoning that an economic exchange for the rent and a housekeeper's salary was an insubstantial consideration that failed to alter the character of the residential situation.<sup>96</sup>

The *Jackson* court found that the purpose of the group home was to allow the occupants to function as a family unit, and that the method of operation was noninstitutional.<sup>97</sup> Therefore, the *Jackson* court distinguished the group home from a commercial venture, and brought it

90. *Id.*

91. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981).

92. *Id.* at \_\_\_, 407 N.E.2d at 1372-73.

93. *Id.* at \_\_\_, 407 N.E.2d at 1373.

94. *Jackson*, 714 P.2d at 1022; *see also Hobby*, 302 N.C. at \_\_\_, 274 S.E.2d at 180 (surrogate parents and retarded adults living under their supervision were seen as an integrated unit, as opposed to independent persons merely sharing the place they eat and sleep as "boarders in a boarding house").

95. *Jackson*, 417 P.2d at 1022.

96. *Hobby*, 302 N.C. at \_\_\_, 274 S.E.2d at 180; *accord Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 25 (Minn. 1981) ("Although Caromin House receives compensation for its services, the home does not thereby become commercial in nature . . . . The profit nature alone would not alter the objective of providing noninstitutional living for mentally retarded persons; the home still serves a residential purpose.").

97. *Jackson*, 714 P.2d at 1022.

within the parameters of residential usage.<sup>98</sup>

## 2. Structural Restriction

The court interpreted the remainder of the covenant as requiring that any structure in the neighborhood be a single-family dwelling limited in size and style.<sup>99</sup> Family and type of dwelling were therefore examined as components of structural use.

### a. Definition of "family" in "single-family dwelling"

The interpretation of "family" may be expressly defined in a restrictive covenant or zoning ordinance,<sup>100</sup> or may be provided by case law or state legislation. "Family" may include a stable housekeeping unit or a group resembling a family by its permanent nature.<sup>101</sup> In the absence of Oklahoma precedent, of an express definition in the covenant,<sup>102</sup> and of relevant state legislation,<sup>103</sup> the *Jackson* court adopted a liberal interpretation of "family" similar to the zoning definition.<sup>104</sup>

The *Jackson* court distinguished the traditional consanguineous definition of family from the less restrictive definition.<sup>105</sup> Less restrictive family definitions given by the court are: (a) a "nuclear family" which

98. For other cases supporting the proposition that a group home is a residential purpose see *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Crowley v. Knapp*, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

99. *Jackson*, 714 P.2d at 1021-22.

100. *Zoning for Community Residences*, *supra* note 28, at 317.

101. *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 304, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974).

102. *Jackson*, 714 P.2d at 1022-23. Where "family" was not defined in a deed restriction, group of adults unrelated by blood or marriage did not violate restrictive covenant. *Crowley v. Knapp*, 94 Wis. 2d 421, —, 288 N.W.2d 815, 823-24 (1980).

103. *Jackson* notes *Concord Estates Homeowners Ass'n, Inc. v. Special Children's Found., Inc.*, 459 So. 2d 1242 (La. Ct. App. 1984). The *Concord Estates* court allowed the group home for mentally retarded under Louisiana's Mental Retardation and Development Disability Law. The law allowed community homes providing for six mentally retarded individuals, and no more than two live-in staff to be "considered single-family units having common interests, goals, and problems." *Id.* at 1245.

104. The dissenting justice in *Jackson* claims the term "single-family dwelling" in the covenants should be interpreted by ordinary meaning and not according to the zoning ordinance. *Jackson*, 714 P.2d at 1025. *But see* *Craig v. Bossenberry*, 134 Mich. App. 543, —, 351 N.W.2d 596, 599 (1984) (where there is an absence of a definition of "family" in a covenant, there is an "ambiguity open to judicial interpretation"); *City of Livonia v. Department of Social Servs.*, 423 Mich. 466, —, 378 N.W.2d 402, 430 (1985) ("Family" was not defined in the covenant and the court construed the term to include more than just a nuclear or extended family); *cf.* *Missionaries of Our Lady of La Sallette v. Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954) (court finds violation of zoning ordinance only when express limitations are disregarded). "[T]he ordinary concept of that term [family] does not necessarily imply only a group bound by ties of relationship." *Id.* at —, 66 N.W.2d at 630.

105. *Jackson*, 714 P.2d at 1023 n.23.

includes parents, children, and domestic servants, and (b) an "extended family" which "consists of a nucleus group of persons related by blood, marriage or adoption which may include parents, children and other kinsmen . . . such as grandchildren, uncles, aunts, nieces and the like and even lodgers and boarders."<sup>106</sup>

The Oklahoma Supreme Court, however, finds even an "extended family" definition too restrictive for a single-family dwelling structural restriction.<sup>107</sup> The *Jackson* court quotes the concurring justice's definition of family in *Shaver v. Hunter*<sup>108</sup> as "a stable housekeeping unit of two or more persons who are emotionally attached to each other and share a relationship that emulates traditional family values, promotes mutual protection, support, happiness, physical well-being and intellectual growth."<sup>109</sup>

The *Jackson* group home arrangement would more closely resemble the extended family in *Moore v. City of East Cleveland*,<sup>110</sup> where a mother, her son, and two grandsons lived together,<sup>111</sup> than a group of college students living together temporarily.<sup>112</sup> The ordinance<sup>113</sup> in *Moore* restricting certain relatives from living together was struck down as violating the "freedom of personal choice in matters of marriage and family life,"<sup>114</sup> recognized by the Supreme Court as a liberty protected by

106. *Id.* The Texas Supreme Court in 1959 added boarders to the nuclear family definition, and adopted an "extended family" view. *Southampton Civic Club v. Couch*, 159 Tex. 464, —, 322 S.W.2d 516, 518 (1958) (renting of a room must be "incidental to its use as a family residence"). However, the Texas Appellate Court in *Shaver v. Hunter*, 626 S.W.2d 574, 578 (Tex. Ct. App. 1981), *cert. denied*, 459 U.S. 1016 (1982), was unwilling to extend the definition to include four unrelated single adults, including three severely handicapped persons and a health care provider.

107. *See Jackson*, 714 P.2d at 1023 n.23(3) (the extended family definition was "unrealistic and unduly restrictive") (quoting *Shaver v. Hunter*, 626 S.W.2d 574, 579 (Tex. Ct. App. 1981) (Countiss, J., concurring), *cert. denied*, 459 U.S. 1016 (1982)). The extended family definition is not "the only societal arrangement entitled to be recognized as a family." *Shaver*, 626 S.W.2d at 579.

108. 626 S.W.2d 574 (Tex. Ct. App. 1981).

109. *Jackson*, 714 P.2d at 1023 n.23 (quoting *Shaver*, 626 S.W.2d at 579). *Jackson* also relies on *Knudtson v. Trainor*, 216 Neb. 653, —, 345 N.W.2d 4, 7 (1984):

To suggest that "families" composed of residents of group homes are to be distinguished from natural families in determining which single-family districts will be considered open to them is to confuse the power to control physical use of premises with the power to distinguish among occupants making the same physical use of them.

(quoting *Y.W.C.A. v. Board of Adjustment*, 134 N.J. Super. 384, 341 A.2d 356 (1975), *aff'd*, 141 N.J. Super. 315, 358 A.2d 211 (1976)).

110. 431 U.S. 494 (1977).

111. *Id.* at 496-97.

112. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (transient college students not permitted to share a house in a "single-family" neighborhood).

113. 431 U.S. at 496. In *Moore*, the ordinance defined family so that certain relatives could not live together. *Id.* at n.2.

114. *Id.* at 499.

the fourteenth amendment.<sup>115</sup> *Moore* authorizes granting single-family residence status to a group home meeting an extended family definition. *Jackson* therefore rejects the reasoning of other jurisdictions which have defined family narrowly.<sup>116</sup>

Using a more liberal definition of "family," the *Jackson* court found the group home to be a permanent arrangement intended to create a normal family atmosphere akin to a traditional family.<sup>117</sup> Indeed, a group home is often the sole family for many mentally retarded individuals who have no natural families and little likelihood of ever marrying and forming independent families.<sup>118</sup> To residents, a group home becomes a substitute family, allowing them to lead "more normal and meaningful lives within the community" than would be possible in an institution.<sup>119</sup> Therefore, a narrow definition of family would cause an injustice.<sup>120</sup>

For these reasons, the court recognizes that "single-family dwelling" structural provisions do not limit the use of the property to a single-family residence;<sup>121</sup> such provisions may include a group home as a single family unit.

#### b. *Physical structure of the residence*

The *Jackson* court found that the structural requirement in Covenant A generally controls the type of building that may be constructed, and does not refer to the type of persons who might occupy it.<sup>122</sup> Although the character of the structure allowed on a lot may be restricted by covenant to a single-family residence, the premises are not necessarily restricted to use by a single consanguineous family.<sup>123</sup> Con-

115. *Id.*

116. *Jackson*, 714 P.2d at 1023 n.23. The court contrasted *London v. Handicapped Facilities Bd.*, 637 S.W.2d 212, 215 (Mo. Ct. App. 1982) (term "family" used in the deed and restrictions found intended to refer to blood, marriage, or adoptive relationships, thereby excluding residential group homes); *Omega Corp. v. Malloy*, 228 Va. 12, \_\_\_, 319 S.E.2d 728, 732 (1984), *cert. denied*, 469 U.S. 1192 (1985) (the Virginia Supreme Court favored a broad interpretation of "family" but stated that the presence of counselors who are publicly employed in a group home would change a single-family use into a facility use); *Shaver v. Hunter*, 626 S.W.2d 574, 578 (Tex. Ct. App. 1981) *cert. denied*, 459 U.S. 1016 (1982) (four unrelated single adults found excluded from the extended family definition of parents, children, servants, lodgers and boarders).

117. *Jackson*, 714 P.2d at 1022. Justice Wilson, dissenting, favored limiting "single-family dwelling" to its more narrow definition. *Id.* at 1025.

118. *Malcolm v. Shamie*, 95 Mich. App. 132, \_\_\_, 290 N.W.2d 101, 103 (1980).

119. *Id.* at \_\_\_, 290 N.W.2d at 103.

120. *Id.*

121. *Jackson*, 714 P.2d at 1023. However, more than one family unit per dwelling would be prohibited. *Id.*

122. *See id.* at 1022-23. *See supra* note 47 for covenant text.

123. *See id.* at 1023. A restriction on the character of the structure which may be located on the

versely, when the restrictive covenant limits the *use* of property to a single-family *residence* instead of only prescribing the *structural* form or character, courts may enjoin the group home arrangement<sup>124</sup> and any other arrangement not a single-family residence, often by using the nuclear or extended family definition.<sup>125</sup>

Based on this distinction between a single-family building restriction and the use of property for a single-family residence, the *Jackson* court factually distinguished *Shaver*.<sup>126</sup> In *Jackson*, the covenant restricted the house to a single-family building;<sup>127</sup> in *Shaver*, the covenant restricted use of the house to a residential purpose.<sup>128</sup> The *Shaver* covenant provided that "all lots shall be used for residential purposes only" and "a residence shall be construed to be a single family dwelling."<sup>129</sup> The *Shaver* court used the wording of the covenant combined with a narrow interpretation of the word "family" to exclude the three handicapped women and their health-care provider from the neighborhood.<sup>130</sup>

The *Jackson* court also rejected *Omega Corp. v. Malloy*.<sup>131</sup> In *Omega*, the court held that an arrangement of four unrelated mentally retarded adults and their counselor violated a restrictive covenant nearly identical to the covenant in *Jackson*.<sup>132</sup> The *Jackson* court interpreted the two part covenant in *Jackson* as a use (residential) and a structural requirement (single-family).<sup>133</sup> The Virginia Supreme Court in *Omega*, however, construed the *Omega* covenant in its entirety, and placed a use requirement on the second sentence which made the covenant read: "only dwellings designed structurally for single-family occupancy may be erected and . . . the buildings may be used only for single-family residen-

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lot does not restrict the premises to a particular use. *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 181 (1981).

124. *See Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978); *Omega Corp. v. Malloy*, 228 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985).

125. *Jayno Heights*, 85 Mich. App. at \_\_\_, 271 N.W.2d at 270. The dissenting justice favored using the basis of affiliation of the six elderly adult women to include them within the restrictive covenant definition of "one single family unit," rather than the extended family definition which the majority used to exclude the group. *Id.* at \_\_\_, 271 N.W.2d at 272.

126. *Shaver v. Hunter*, 626 S.W.2d 574, 576 (Tex. Ct. App. 1981), *cert. denied*, 459 U.S. 1016 (1982), *noted in Jackson*, 714 P.2d at 1023 n.23(3).

127. *See supra* note 46.

128. *Shaver*, 626 S.W.2d at 576.

129. *Id.*

130. *Id.* at 578.

131. 228 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985).

132. *See id.* at 729. The pertinent portion of the covenant reads: "No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single-family dwelling not to exceed two stories in height." *Id.*

133. *Jackson*, 714 P.2d at 1021-22.



tial purposes."<sup>134</sup> The *Omega* court ruled that "single-family nature of a use is destroyed when the element of supervision by counselors is added to the occupancy of unrelated persons."<sup>135</sup> Consequently, the restrictive covenant was violated.<sup>136</sup>

The Oklahoma court refused to deviate from its strict construction rule and interpreted each sentence of Covenant A independently, and thereby kept the single-family residential "use" restriction separate from the "structural" restriction.<sup>137</sup> The court concurred with jurisdictions that refused to enjoin group living arrangements where the covenant restricts the form or character of the structure as a single family residence, rather than limiting property use to a single-family residence.<sup>138</sup>

A structural restriction has been satisfied when, despite any alterations, the appearance of a house remains similar to a typical American suburban family home.<sup>139</sup> Accordingly, the *Jackson* court found the integrity of the structure was not violated by the addition of a full bathroom, three closets, an additional rear door, and a fire ladder at the rear of the house.<sup>140</sup> Similarly, the Supreme Court of Nebraska in *Knudtson v. Trainor*<sup>141</sup> found no problem meeting the structural requirement when a wood deck was added to serve as a fire escape for a house where five mentally retarded women and their houseparents lived.<sup>142</sup>

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134. *Omega*, 228 Va. at \_\_\_, 319 S.E.2d at 731. In 1947, the Virginia Supreme Court held that "dwelling" when used alone refers to both use and structure. *Schwarzschild v. Welborne*, 186 Va. 1052, 45 S.E.2d 152 (1947). The dissent in *Omega* calls the majority's reliance on *Schwarzschild* misplaced as an attempt to utilize a portion of it while "distinguishing the great bulk of opinion which runs counter to the majority's rationale." *Omega*, 228 Va. at \_\_\_, 319 S.E.2d at 734 (Thomas, J., dissenting).

135. *Omega*, 228 Va. at \_\_\_, 319 S.E.2d at 731. A further distinguishing factor was the court's rejection of the appellant's definition of "family" as "the collective body of persons who live in one house." *Id.* at \_\_\_, 319 S.E.2d at 731-32.

136. *Id.* at \_\_\_, 319 S.E.2d at 732.

137. *Jackson v. Williams*, 714 P.2d 1017, 1022-23 (1985). The court in *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.* 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 181 (1981), concurs that each part of a covenant which contains a restriction must be interpreted in such a manner that each portion of the covenant is given the effect that was fair and reasonably intended.

138. See *Jackson*, 714 P.2d at 1022 (citing *Hobby*, 302 N.C. at \_\_\_, 274 S.E.2d at 180-81; *Knudtson v. Trainor*, 216 Neb. 653, \_\_\_, 345 N.W.2d 4, 6 (1984) ("a limitation on a lot is not also a limitation on its use") (construing *Sissel v. Smith*, 242 Ga. 595, 250 S.E.2d 463 (1978) (beauty shop operation allowed in a single-family dwelling in a residential neighborhood)); see also *Bellarmino Hills Ass'n v. Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978) (group of six mentally retarded children and their foster parent living in single-family home was held to be a "family" per the covenant restricting structures to single-family residences).

139. *Crowley v. Knapp*, 94 Wis. 2d 421, \_\_\_, 288 N.W.2d 815, 821 (1980).

140. *Jackson*, 714 P.2d at 1022.

141. 216 Neb. 653, \_\_\_, 345 N.W.2d 4, 8 (1984).

142. *Id.*; see also *Crowley v. Knapp*, 94 Wis. 2d 421, \_\_\_, 288 N.W.2d 815, 821 (1980) (court allowed an attached garage to be converted into two bedrooms when the exterior structure was unchanged).

The structural requirement was met in *Jackson* because the home was designed for a single family, the character of the structure was unchanged, and the court qualified the group living together as an integrated unit within its definition of family.<sup>143</sup> The court ultimately found the group home was not in violation of Covenant A. The composition of the group brought it within the single-family zoning definition. The use of the home as a stable housekeeping unit with no extraneous care or treatment functions made it a residential usage under Covenant A. The broad definition the court afforded "family" and the unchanged appearance of the house brought it within the parameters of Covenant A.

### C. *Balancing Competing Interests*

Although the *Jackson* court's analysis focused on the literal interpretation of the zoning ordinance and restrictive covenant, there was an obvious underlying concern for individual rights in balancing the competing public policies embodied in the dispute. On one hand, property owners were concerned about their contractual rights<sup>144</sup> which are afforded protection under the law by enforcement of restrictive covenants the owner relied upon when investing in land and a home.<sup>145</sup> Provided that restrictive covenants do not offend substantive law or public policy considerations, they are legitimate aids to developers and owners to control use of property and regulate activities on land.<sup>146</sup>

On the other hand, the mentally retarded not only have the right to live as normally as possible, but are also entitled to develop to their utmost potential.<sup>147</sup> They also have the right to establish a home in a residential neighborhood.<sup>148</sup>

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143. *Jackson*, 714 P.2d at 1024.

144. U.S. CONST. art. I, § 10, cl. 1 provides: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." The Constitution prohibits states from impairing private contracts. Therefore, a restrictive covenant, as a contract, should be upheld if it is clear, unambiguous, and constitutional. See *Shaver v. Hunter*, 626 S.W.2d 574, 577-79 (Tex. Ct. App. 1981), *cert. denied*, 459 U.S. 1016 (1982).

145. *Crowley v. Knapp*, 94 Wis. 2d at 421, \_\_\_, 288 N.W.2d 815, 828 (1980) (Coffey, J., dissenting). "[C]ovenant restricting land to residential use . . . constitutes a valuable property right . . ." *Id.* at \_\_\_, 288 N.W.2d at 818 (quoting *Hall v. Church of the Open Bible*, 4 Wis. 2d 246, 248, 89 N.W.2d 798, 799 (1958)).

146. See *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 179 (1981).

147. See Developmentally Disabled Assistance and Bill of Rights Act, *supra* note 16, §§ 6009(1)(2), which gives the retarded the right to receive habilitation in a setting that is "least restrictive of [their] personal liberty."

148. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3266 (1985) (Marshall, J., concurring in part and dissenting in part).

## 1. Public Policy

Restrictive covenants are valuable property rights encompassing not only monetary value but also the aesthetic characteristics of a family environment.<sup>149</sup> Failure to enforce them may work an injustice to the property owners.<sup>150</sup> However, establishing group homes for the mentally retarded is supported by several public policy arguments. In general, public policy supports the free and unrestricted use of property. This requires strict construction of deed restrictions to promote "unencumbered and free use of property."<sup>151</sup> The *Jackson* court acknowledges that although intentions of the parties to restrictive covenants usually control their construction, such covenants are, nevertheless, not favored by law.<sup>152</sup>

Accordingly, "the right to contract is subject to the restriction that any agreement 'which contravenes public policy' is void."<sup>153</sup> Oklahoma case law also declares contracts "which . . . undermine security of individual rights, whether of personal liability or private property" to be against public policy.<sup>154</sup> More specifically, public policy supporting the mentally handicapped is embodied in federal law<sup>155</sup> and state law<sup>156</sup> which encourage maintenance and development of programs to assist the mentally handicapped.<sup>157</sup> Although Oklahoma has neither passed any enabling legislation for group homes nor articulated any public policy supporting rights of the mentally retarded to live in group homes, a DHS plan calls for moving the retarded to homes in the community.<sup>158</sup> Addi-

149. *Malcolm v. Shamie*, 95 Mich. App. 132, 137, 290 N.W.2d 101, 104 (1980).

150. *Id.* (construing *Wood v. Blancke*, 304 Mich. 283, 8 N.W.2d 67 (1943)). This was the position taken by the dissenting Justice in *Jackson*. *Jackson*, 714 P.2d at 1025.

151. *See Crowley v. Knapp*, 94 Wis. 2d 421, —, 288 N.W.2d 815, 822 (1980).

152. *See Jackson*, 714 P.2d at 1021.

153. Amicus Curiae Appellant's Supplemental Brief at 11, *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985) (quoting 12 AM. JUR. *Contracts*, § 167 (1938); 17 C.J.S. *Contracts* § 211 (1963)).

Since the "Gold Clause" case in 1935, it has been established that contracts against the express public policy of the United States established by congressional act are void as against public policy. *Crooks, The Racial Covenant Cases*, 37 Geo. L.J. 514, 523 (1949) (citing *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935) (gold clauses in private contracts calling for payment in gold coin could be set aside as interfering with Congressional authority to regulate currency)).

154. *Anderson v. Reed*, 133 Okla. 23, 26, 270 P. 854, 856 (1928).

155. *See supra* note 16; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 701 (1982 & Supp. III 1985). (Act promotes coordination of rehabilitative and independent living programs).

156. *See supra* note 16. Oklahoma established the Office of Handicapped Concerns to identify and meet the needs of the handicapped and to implement the Rehabilitation Act of 1973. *See OKLA. STAT.* tit. 74, §§ 9.21-24 (Supp. 1985).

157. *See City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3255-58 (1985) (the state's interest in providing for the mentally retarded is plainly legitimate; national and state legislative responses demonstrate that lawmakers have been addressing their unique problems).

158. *See supra* note 24 and accompanying text.

tionally, there is a growing statewide group home network supporting community placement and facilities for the mentally retarded.<sup>159</sup>

The Oklahoma court, in *Jackson*, gave credence to the policy supporting the reform efforts by referring to case law in states with enabling legislation.<sup>160</sup> *Jackson* cited the *Hobby* decision favoring group homes, which was based not only on state rules and procedures, but also on the established common law principles it found "appropriate to apply to a contemporary concept of care for the handicapped."<sup>161</sup>

Furthermore, public policy against state enforcement of discriminatory agreements was established in *Shelley v. Kraemer*<sup>162</sup> by the Supreme Court which denied enforcement of a racially discriminatory restrictive covenant.<sup>163</sup> Extending this reasoning, covenants restricting property use to single-family residential usage could be declared against public policy if they discriminate by excluding the mentally retarded.

In considering whether neighboring homeowners' property rights would be violated by the presence of the group home, the *Jackson* court determined whether Covenant E, which prohibits "noxious or offensive activities creating a nuisance or annoyance," had been violated.<sup>164</sup> Again, the court narrowly construed the Covenant as prohibiting commercial activity, and declared that the same reasoning used under Covenant A to determine a residential usage would allow the group home.<sup>165</sup> The court found no support for the charge of possible increased neighborhood traffic, or that any increased service personnel would create a nuisance in the subdivision.<sup>166</sup> The court found that the group home would not constitute a nuisance or annoyance, despite appellee's testimony,<sup>167</sup> nor would the resident's behavior be different from that of a

159. Telephone interview with Don Anderson, Okla. State Repr. (Sept. 20, 1986). See *supra* notes 24-25 (organizations supporting mentally retarded, such as Homelife Assoc. for the Handicapped, Inc., are gaining strength).

160. *Jackson*, 714 P.2d at 1022 n.22. Louisiana, Michigan, Minnesota, Nebraska, North Carolina, and Wisconsin all have enabling legislation for mentally retarded group homes. See M. Bates, *supra* note 17.

161. *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, \_\_\_, 274 S.E.2d 174, 182 (1981), cited in *Jackson*, 714 P.2d at 1022 n.22; see also *Bellarmino Hills Ass'n v. Residential Systems Co.*, 64 Mich. App. 554, \_\_\_, 269 N.W.2d 673, 676 (1978) ("[t]he associational nexus of the group clearly occupies a favored position in our state's public policy").

162. 334 U.S. 1, 14 (1948).

163. *Id.* at 20.

164. *Jackson*, 714 P.2d at 1024; see *supra* note 47 for Covenant E text.

165. *Jackson*, 714 P.2d at 1024; see *supra* notes 83-93 and accompanying text (residential use was determined because there would be no training, nursing, or education provided in the home, and the group would live as a stable housekeeping unit within a family atmosphere).

166. *Jackson*, 714 P.2d at 1024.

167. *Id.* at 1019; see also *Pirtle v. Wade*, 593 P.2d 1098 (Okla. Ct. App. 1979) where there was a

child.<sup>168</sup> Had the court addressed the competing public policy interests, it would arguably have found that the policy favoring the group home supported the narrow construction of the Covenant.<sup>169</sup>

## 2. Constitutionality of the Ordinance

The *Jackson* court acknowledged that enforcement of a discriminatory ordinance may be declared an unconstitutional violation of fourteenth amendment equal protection rights.<sup>170</sup> A restrictive covenant was struck down by the U.S. Supreme Court in the leading case of *Shelley v. Kraemer*,<sup>171</sup> where a neighborhood covenant prevented selling homes to blacks. The Court recognized that discriminatory acts of private individuals, such as race restrictive agreements, could be converted into state action by judicial enforcement of a private contract.<sup>172</sup> Therefore, racially restrictive agreements and covenants were held unenforceable by state and federal courts.

*Shelley* applies to rulings where judicial enforcement of restrictive covenants have caused denial of property rights, on the grounds of race or color, which are available to other community members for full enjoyment of their equal rights.<sup>173</sup> The issue is not as clear, however, when the restrictive covenant is non-discriminatory on its face,<sup>174</sup> as in *Jackson*, where a covenant restricted neighborhood residency to single-family dwelling use. Nevertheless, by its enforcement, a facially non-discriminatory covenant could exclude a minority, such as a group of mentally retarded individuals seeking to establish a group home.<sup>175</sup> Enforcement

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similar covenant against noxious or offensive trade. The court did not find that the existence of the radio antenna violated the restriction even though the neighbors expected it to be unsightly and to have a negative effect on surrounding property values. The court again emphasized its intent to resolve all doubts in favor of the unencumbered use of property. *Id.* at 1099-1100.

168. *Jackson*, 714 P.2d at 1024.

169. See *Craig v. Bossenberry*, 134 Mich. App. 543, 351 N.W.2d 596 (1984). After analyzing the competing public policy factors supporting property owners' rights to enforce restrictive covenants versus the public policy factors supporting community placement of the retarded, the court said: "Thus, we hold that the restrictive covenant which . . . bars the placement of a small group home for . . . mentally retarded adults is unenforceable as violative of our public policy." *Id.* at 601; accord *McMillen v. Iserman*, 120 Mich. App. 785, 795, 327 N.W.2d 559, 563 (1982) (court concluded that the deed restriction "specifically prohibiting . . . facilities for the mentally handicapped, is manifestly against the public interest and thus unenforceable on public policy grounds").

170. *Jackson*, 714 P.2d at 1023 n.24.

171. 334 U.S. 1 (1948).

172. *Id.* at 14-24; see *Crooks*, *supra* note 153, at 522.

173. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

174. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (municipal ordinance regulated public laundries by requiring consent of board supervisors without consideration for competency of applicant or propriety of location).

175. The result follows the rationale of *Yick Wo*, where the effect of enforcing the San Francisco

of discriminatory restrictions which exclude group homes forces the mentally retarded into confinement in institutions and violates their right to liberty.<sup>176</sup> Therefore, if challenged, the covenant could be declared unconstitutional and consequently unenforceable.

The *Jackson* court notes that the Supreme Court has not presently expanded *Shelley* beyond restrictive covenants with racial qualifications.<sup>177</sup> The *Jackson* court indicated that had it excluded the group home from the neighborhood by narrowly interpreting the restrictive covenant, *Shelley* may have been invoked to bar enforcement of the covenant.<sup>178</sup>

In addition to *Shelley*, the *Jackson* court noted the fourteenth amendment challenge of a zoning ordinance<sup>179</sup> in the recent Supreme Court decision, *City of Cleburne v. Cleburne Living Center*.<sup>180</sup> In *Cleburne*, a city ordinance expressly required "hospitals for the feeble-minded" to apply for a special use permit in an area designated R-3, high-density, multi-use.<sup>181</sup> A permit was subsequently denied for a

ordinance, rather than the wording, was held violative of the equal protection clause guarantee of the fourteenth amendment.

176. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) recognizes a constitutional right not to be confined simply because of mental disability.

Isolating the retarded into institutions subjects them to separate treatment. The adequacy and availability of incommunity resources "is central to the inquiry into whether separate treatment for the mentally retarded person is not inherently unequal just as racially segregated education was found inherently unequal in *Brown v. Board of Education*," 347 U.S. 483 (1954), construed in *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1321 (E.D. Pa. 1977) (subsequent history omitted). See *Halderman v. Pennhurst State School & Hosp.*, 610 F. Supp. 1221 (D.C. Pa. 1985) for review of the 10 year litigation brought on behalf of institutionalized retarded persons regarding alleged violation of constitutional and statutory rights to adequate habilitation in least restrictive environments. The final settlement provided for community living arrangements for those residents for whom such placement is deemed appropriate. The settlement confirmed that the retarded have a right to community care and training. *Id.* at 1233.

177. *Jackson v. Williams*, 714 P.2d 1017, 1024 n.24.

178. *Id.* As indicated in *Jackson*, *Shelley* has been applied by some state courts in contexts other than racial discrimination. *Id.* Compare *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977), *aff'd*, 379 So. 2d 346 (Fla. 1979). The court found the condominium article prohibiting children under age 12 from living on condominium premises an unconstitutional violation of apartment purchaser's rights to marry and have children. Condominium association allowing certain families with children under 12 living on premises and allowing children as guests made enforcement of the restriction a violation of equal protection, because it was arbitrary and unreasonably selective. *Id.* at 1087-88; see also *West Hill Baptist Church v. Abbate*, 24 Ohio Misc. 66, 261 N.E.2d 196 (1969) (enforcement of covenants which would prohibit erection of houses of worship by property owner and religious organization deemed state action violative of First Amendment, comparable provisions of Ohio Constitution, and public policy). *But see* *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974) (enforcement of zoning ordinance which restricted occupancy of lots in mobile home park to persons over 21 years of age did not deprive defendants of their constitutional rights).

179. *Jackson*, 714 P.2d at 1023 n.24.

180. 105 S. Ct. 3249 (1985).

181. *Id.* at 3252 n.3.

group home for thirteen mildly to moderately retarded adults.<sup>182</sup>

Proponents of the Texas group home claimed the combination of historical prejudice, political powerlessness, and immutable characteristics called for heightened scrutiny of any legislation that discriminated against the mentally retarded residents.<sup>183</sup> The Supreme Court, however, used a rational basis standard of review,<sup>184</sup> indicating that if quasi-suspect status was given to the mentally retarded it would be difficult to distinguish other groups who may possess similar characteristics, such as "the aging, the disabled, the mentally ill, and the infirm."<sup>185</sup>

The Court held the ordinance invalid as applied to the group home and found the city's refusal to grant a "special use permit" not even rationally related to any legitimate purpose.<sup>186</sup> Requiring the permit was based on "irrational prejudice against the mentally retarded"<sup>187</sup> and "depriv[ed] them of the equal protection of the laws."<sup>188</sup>

The *Jackson* court avoided deciding whether the restrictions, which included the requirement of securing a variance for a group home, had even a rational relationship to a legitimate purpose. By qualifying the group home within its single-family definition, the court stated application for a variance was unnecessary.<sup>189</sup>

Because the retarded have a substantial interest in establishing group homes enabling them to become integrated into community life,<sup>190</sup> Justice Marshall,<sup>191</sup> in dissent, espoused a heightened standard of

182. *Id.* at 3252-53.

183. Motion and Brief Amicus Curiae for the Association for Retarded Citizens/USA at 2, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). The Court has held that only classifications infringing upon certain fundamental constitutional rights or classifications that disadvantage "discrete and insular minorities" will be subjected to strict scrutiny. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (dictum).

Under a strict scrutiny standard, the city would be required to show the zoning regulation was necessary to promote a compelling government interest. Under the rational basis standard it is only necessary for the zoning ordinance to be rationally related to the city's legitimate interest. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 590-99 (2d ed. 1983).

184. *Cleburne*, 105 S. Ct. at 3252 (1985). The Court found the states interest in dealing with and providing for the mentally retarded legitimate, and that the national and state legislative response to the retarded negated any claim that the retarded are politically powerless and in need of a higher standard of review. *Id.* at 3256-57. The rational basis standard gives government the latitude to pursue policies to assist the retarded although the activities incidentally burden them. *Id.* at 3258.

185. *Id.* at 3257-58.

186. *Id.* at 3259.

187. *Id.* at 3260.

188. *Id.* at 3258-59.

189. *Jackson v. Williams*, 714 P.2d 1017, 1021 (Okla. 1985). To obtain a variance or special use permit, an operator must prove the home meets certain requirements. This usually requires a public hearing. See Comment, *supra* note 5, at 516.

190. *Cleburne*, 105 S. Ct. at 3266. "Classifications based on mental retardation must be carefully

review when a zoning ordinance excludes the retarded from all residential areas.<sup>192</sup> Justice Marshall stated that the "right to establish a home" was a fundamental liberty deserving due process protection from ordinances denying the retarded this right.<sup>193</sup> He decried the court's "narrow, as-applied remedy"<sup>194</sup> that fails to provide a "principled foundation" for determining when a higher level of inquiry would be invoked, thereby leaving courts without clear precedent.<sup>195</sup>

Although the *Jackson* court noted the constitutional issues and potential application to zoning and covenant restrictions that discriminate "by application" against the mentally retarded, the court's decision was based on a strict interpretation of the restriction.<sup>196</sup> Many courts, including the *Jackson* court, attempt to avoid the constitutional issues and concentrate on "drafting their orders narrowly according to the facts of each case."<sup>197</sup> This is largely the result of the lack of clear precedent on the issues and on the degree of scrutiny that will be invoked.<sup>198</sup> A broad-stroke decision by the Supreme Court in *Cleburne* would have offered greater acknowledgement of mentally retarded persons' rights to equal protection, and afforded lower courts more definitive guidance in making constitutionally based decisions invalidating discriminatory ordinances.

## VI. FUTURE IMPLICATIONS

The *Jackson* decision will hasten the establishment of the 500 group homes needed in Oklahoma.<sup>199</sup> The Oklahoma Supreme Court has now

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examined to assure they do not rest on impermissible assumptions of false stereotypes regarding individual ability or need." *Id.* at 3275.

191. Justice Marshall concurred in part and dissented in part. He was joined by Justice Brennan and Justice Blackburn.

192. *Cleburne*, 105 S. Ct. at 3265. The class of mentally retarded persons needing group homes fits precisely within criteria established by the Supreme Court for demonstrating the need for constitutional protection. "The mentally retarded are a class saddled with such disabilities, or subjected to such history of purposeful unequal treatment or relegated to . . . political powerlessness as to command extraordinary protection from the majoritarian political process." Amicus Brief, *supra* note 153, at 23-24 (construing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

193. *Cleburne*, 105 S. Ct. at 3266; *see also* *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("When the government intrudes on choices concerning family living arrangements, . . . the Court must examine carefully the importance of the governmental interests advanced.").

194. *Cleburne*, 105 S. Ct. at 3275.

195. *Id.* at 3265.

196. *See supra* notes 59-142 and accompanying text.

197. *See* Commentary, *supra* note 36, at 71. "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

198. *See* Commentary, *supra* note 36, at 71.

199. *See supra* notes 21-26 and accompanying text.



established that "family" will be liberally defined; this will allow group homes to be located where zoning laws and restrictive covenants similar to those in *Jackson* exist.<sup>200</sup>

Progress has already occurred since *Jackson*. Tulsa has added a specific definition that permits group homes for the mentally retarded in single-family neighborhoods.<sup>201</sup> Proponents of group homes no longer have to appear before the zoning board of adjustment requesting an "exception" to allow a home each time one is proposed.<sup>202</sup> Zoning has also been liberalized in Oklahoma City allowing up to eight mentally retarded individuals to live in a group home in a single-family neighborhood.<sup>203</sup> Reducing zoning restrictions aimed at group homes in itself serves to accelerate acceptance of group homes by neighborhood residents. Exposing neighborhood residents to well-run facilities educates them and reduces prejudice and hostility.<sup>204</sup> As a result, future opposition to group homes or related enabling legislation is reduced.<sup>205</sup>

To date, however, the progress of deinstitutionalization has been agonizingly slow. This is evidenced by a recent federal judge's ruling in *Homeward Bound, Inc., v. Hissom Memorial Center*.<sup>206</sup> In *Hissom*, a DHS official indicated it might take the state five to ten years to develop a viable community group home program,<sup>207</sup> therefore, the judge ordered

200. *Jackson v. Williams*, 714 P.2d 1017, 1022-23 (Okla. 1985).

201. See *Definitions*, *supra* note 64 (*Neighborhood Group Home* added to section). A neighborhood group home is now defined as a home for independent living with support personnel that provides for room and board, personal care, and habilitation services in a family environment as a single-housekeeping unit for not more than five resident mentally retarded and/or physically limited persons with at least one but not more than two resident staff persons. Personal care and habilitation services excludes on-site institutional type educational training, medical, or nursing care. For other changes, see TULSA, OKLA., CHARTER AND REV. ORDINANCES, tit. 42, ch. 12, § 1206 (1981) (amended May, 1986). A Neighborhood Group Home section is added to single-family dwelling and also to multi-family dwelling uses. *Id.* at § 1208.2.

202. Under § 1206.3, Use Conditions, a group home must be licensed by the state, obtain a Zoning Clearance Permit, display no signs, make no exterior alterations, and avoid clustering by allowing one-quarter mile between group homes. This facilitates keeping a normal neighborhood and benefits neighbors and the retarded.

203. OKLAHOMA CITY, OKLA., MUNICIPAL CODE ch. 59, §§ 2304.15, 3200.3B(2)(c) (1980) (amended 1985).

204. *Zoning for Community Residences*, *supra* note 28, at 321.

205. *Id.*

206. No. 85-C-437-E (E.D. Okla. filed May 2, 1985). Institution for mentally retarded children charged by parents with abuse, neglect, unnecessary restraints, and denial of adequate care and habilitative services. Plaintiffs seek declaration and enforcement of constitutional and statutory rights of retarded persons to meaningful and integrated community services. *Id.* at 3. However, the parents of 100 Hissom residents are in opposition, fearing that a successful lawsuit will close the institution, thereby denying parents a choice of where to place their children. Peterson, *Heartbreak Over Hissom*, Tulsa Tribune, Nov. 24, 1986, at 1, col. 1.

207. Tulsa World, July 30, 1986, at 1A, col. 3.

both parties to submit a comprehensive plan<sup>208</sup> within two months “regarding the implementation of establishing community group homes.”<sup>209</sup>

If the *Hissom* case were to culminate in a federal judge’s mandate to deinstitutionalize most or all of the 500 mentally retarded residents, major questions would arise. Eighty to one hundred group homes could be needed in a relatively short time. Will group homes for the severely and profoundly retarded be afforded protection, or only group homes for the mildly retarded, as in *Jackson*? Accommodating the profoundly retarded would require more services, increased personnel and traffic in the neighborhood, and possible structural changes to the house and grounds. Would this combination of factors cause their exclusion on the basis that the group home was institutional in nature rather than residential? Even though the individuals could not be excluded as a family, a group home could be excluded because of its institutional character.<sup>210</sup> Moreover, because the *Jackson* decision was based on a narrow interpretation of the specific zoning law and restrictive covenants, the question arises whether group homes may be successfully challenged by neighborhoods with different types of zoning and covenants. Would the combination of a federal mandate and the *Jackson* decision ensure the successful integration of retarded individuals into neighborhoods, or would new cases be allowed to be raised in the courts?

Had the decision in *Jackson* been based on public policy and the constitutional issues of discrimination against a suspect group resulting in deprivation of the rights of the mentally retarded to community integration,<sup>211</sup> the questions may have been answered with greater certainty. This would have reduced future litigation, and aided deinstitutionalization of all three state institutions.

However, a constitutional decision also may have increased the possibility that the same reasoning used in deciding mentally retarded group home cases would be applied in other types of group home cases, such as half-way houses, where restrictive zoning has been an exclusionary fac-

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208. *Homeward Bound v. Hissom Memorial Center* (E.D. Okla. Aug. 1, 1986) (order granting class action determination).

209. *Id.* at 2. In response to the judicial order, the DHS Commission for Human Services consented on September 23 to begin a five-year plan to move 500 of the state’s institutionalized mentally retarded into community group homes. *Tulsa Tribune*, Sept. 25, 1986, at 1D, col. 1. Attorneys for *Homeward Bound* announced their deinstitutionalization plan at an October 15 news conference. The plan requires a minimum 450 positions to be made available in group homes within three years. *Tulsa Tribune*, Oct. 15, 1986, at 1D, cols. 2-3. Most of the Hissom residents are included in the plan which would locate half the residents in Tulsa county homes. *Id.* at 3.

210. *See Jackson v. Williams*, 714 P.2d 1017, 1022 (Okla. 1985).

211. *See supra* notes 144-98 and accompanying text.

tor.<sup>212</sup> The degree of success of such efforts would necessarily be a matter for judicial determination.

To further reduce zoning barriers, enabling legislation is needed in Oklahoma. Legislation is the most effective way to insure placement of group homes in the community because it is not subject to the veto of local subdivisions.<sup>213</sup> To eliminate opposition, statutes must be explicitly tailored to meet the needs of all concerned state and local governments, and the mentally retarded individuals.<sup>214</sup> For example, a statute may expressly mandate that community residences for the developmentally disabled are a permitted use in all residential districts.<sup>215</sup> Skillfully drafted legislation eliminates the litigation that occurs when group homes are proposed in new areas with unchallenged zoning.

Legislation proposed in Oklahoma in 1984 is gaining strength, garnering thirty-seven of the fifty-one votes necessary for passage when again introduced in March, 1986, in the House of Representatives.<sup>216</sup> The proposed legislation has been limited to address zoning that singularly benefits the mentally retarded to minimize prejudice and fears that passage of this bill would also allow other types of group homes.<sup>217</sup> Group homes for other unrelated persons, such as half-way houses for ex-convicts, the mentally ill, drug rehabilitation, or communal living sit-

212. The dissenting Justice in *Jackson* expressed concern that the decision could lead to "selective enforcement of restrictive covenants . . . against all non-single family residence uses *except* for mentally handicapped persons." *Jackson*, 714 P.2d at 1025 (Wilson, J., dissenting). A half-way house would likely be included under § 1205 of the Tulsa Zoning Code which includes transitional living centers. Property uses listed under § 1205 are permitted in residential zoning districts only by special exception from the Board of Adjustment and could be excluded by protesting neighborhood residents. See TULSA, OKLA., CHARTER AND REV. ORDINANCES, tit. 42, ch. 12, § 1205 (1986).

213. R. ANDERSON, 1 AMERICAN LAW OF ZONING § 2.02 (3d ed. 1986). However, in at least one case, a state statute allowing group homes was successfully challenged by a municipality having a restrictive zoning ordinance. *Garcia v. Siffran Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 711 (1981).

214. See *Model Statute: An Act to Establish the Right to Locate Community Homes for Developmentally Disabled Persons in the Residential Neighborhoods of This State*, 2 MENTAL DISABILITY L. REP. 806 (1978), for a general explanation of model legislation enabling group home placement.

215. See M. Bates, *supra* note 18, at 16 (describing a New Jersey statute enacted in 1978). Legislation was effective September 1, 1985, in Texas that allows a "family home" in all residential zones or districts in the state. Family home includes up to six disabled persons, regardless of their legal relationship, and two supervising personnel. The home must provide food, shelter, guidance, habilitation services, and meet licensing requirements. Disabled person includes many physical ailments, mental retardation, and emotional illnesses. See *id.* at 21.

216. H.R. 1124, 40th Okla. Leg., 1st Sess., (1985). The bill specifies a group home for the developmentally disabled admitting up to eight persons. "[Section] 4 . . . A group home is a residential use of property . . . and shall be treated as a permitted use in all residential zones . . ." *Id.* at 3; 46 Okla. Legis. Rep. 41 (daily ed. Mar. 6, 1986) (vote call report).

217. Legislators' and constituents' fears are embodied in the old Oklahoma political saying, "Once a camel gets his nose in the tent you're looking at the whole camel." Telephone interview with the author of H.R. 1124, Don Anderson, Okla. State Rep. (Sept. 20, 1986).

uations have often elicited strong opposition.<sup>218</sup> Therefore, states that have given priority to normalization of life for the mentally retarded have passed legislation expressly excluding half-way houses<sup>219</sup> so that community placement of the retarded would not be jeopardized by general opposition to group homes.

Passage of the enabling legislation to be re-introduced in early 1987 is enhanced due to the awareness generated by the *Jackson* decision. The statement by Oklahoma's highest court favoring the mentally retarded group home should influence legislators to vote for the proposed bill.<sup>220</sup> Publicity has also brought the plight of the retarded to the attention of constituents who may increase pressure on legislators to support the bill.<sup>221</sup>

## VII. CONCLUSION

Although the *Jackson* decision does not provide easy answers to all the questions arising about group homes, it is nevertheless significant.

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218. Many such groups have been found to violate covenants when defendant groups were clearly identified. See *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974) (members of communal group found violating single-family ordinance); *Planning and Zoning Comm'n v. Synanon Found.*, 153 Conn. 305, 216 A.2d 442 (1966) (large house used by Foundation (drug rehabilitation program) for 11-34 persons violated zoning regulation of "one family" per lot). *Contra*, *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1979) (communal living of several religiously affiliated families in one dwelling unit allowed when ordinance found to violate constitutional rights of privacy and due process).

219. MICH. COMP. LAWS ANN. § 125.286a(3) (Supp. 1981-1982); TENN. CODE ANN. § 13-24-101(b) (1980) *cited in* Comment, *supra* note 35, at 1387 n.278. Even the ABA Model Legislation Statute demonstrates the option to single out and explicitly define the developmentally disabled. See *Model Statute*, *supra* note 214.

220. The report of the Governor's Task Force, which is expected to favor group homes, would serve as an additional positive influence on legislators. See *supra* note 24.

221. See Pruitt, *On Their Own*, *Tulsa World*, Sept. 21, 1986, (OK Magazine), at 11. Publicity concerning Homeward Bound, Inc., v. Hissom Memorial Center, highlights the disproportionately higher cost of institutionalization. See *Tulsa Tribune*, Oct. 15, 1986, at 4D, col. 5. The cost of institutionalizing a mentally retarded child in Oklahoma is \$85 per day, compared with an estimated \$36 in a private facility. In 1985, Oklahoma spent \$45 million to care for 1,600 mentally retarded in institutions, compared to Nebraska which spent \$17.4 million for institutional care of 460 persons and \$33 million for group homes, sheltered workshops and other programs for 2,000 mentally retarded citizens. *Tribune Special Report*, *supra* note 22, at 17, col. 3.

Hampering legislative efforts is the potential turnover of one-third of the representatives in this election year, some of whom supported the bill. Another deterrent is the national impetus toward states assuming more funding of programs for the handicapped, and the uncertainty of Oklahoma's economy, which could increase the chance that legislation affecting the handicapped will be dropped until public policy articulates the demand for change. Telephone interview with Don Anderson, Okla. State Rep. (Sept. 20, 1986).

The state's economic condition, however, could spur group home development in Oklahoma. The *Homeward Bound* plan to move Hissom residents into group homes estimates savings of \$30 million within three years because of cheaper costs of providing community care, savings from operating the institution, and additional federal funding. *Tulsa Tribune*, Oct. 15, 1986, at 4D, col. 5.

The decision has increased publicity, and therefore awareness, of the plight of the mentally retarded. It demonstrates to property owners that the retarded have received favorable attention by Oklahoma's highest court and gives the retarded a strong legal defense. Due to the court's comment on the constitutional issues, it may also be seen as a warning that a future decision would be made on a constitutional basis. In addition, the decision spurred the major cities in Oklahoma to focus on their zoning codes and make changes beneficial to the retarded.

*Jackson*, therefore, represents a major building block in the attempt to build a more normal, integrated life for the retarded in Oklahoma. The decision also helps provide the mentally impaired a way out of institutions. More importantly, it may prevent them from ever experiencing the de-normalizing effect of an institution.

Admittedly, not all of the mentally retarded or their parents may choose group homes as a way of living; but those who do now have greater access to that option. In the past, the only options in Oklahoma were care in one's home, with the attendant difficulties and future uncertainties, or institutionalization. Now, the possibility for a normal life in a group home, and the achievement of one's greatest potential, could become a reality for many Oklahomans.

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