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# Guardianship of Adults With Mental Retardation: Towards A Presumption of Competence

Amie L. Bruggeman

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Bruggeman: Guardianship of Adults With Mental Retardation

# GUARDIANSHIP OF ADULTS WITH MENTAL RETARDATION: TOWARDS A PRESUMPTION OF COMPETENCE

## I. INTRODUCTION

**D**URING the past twenty years, society has become more aware of the capabilities of people with mental retardation and their entitlement to basic human and legal rights. With the growth of knowledge in the field of mental retardation and the development of advocacy groups, the public awakened to the fact that people with mental retardation have long been denied full citizenship status guaranteed them by the Constitution. This awareness has resulted in judicial decisions and legislative mandates which seek to correct past deficiencies. There are still, however, areas of the law which require revision to reflect the change in attitudes and to insure that theoretical legal victories are established in practice.<sup>1</sup>

Statutes should be revised so that people with varying levels of mental retardation are allowed to live as independently as they are able. To achieve this goal, legislators and members of the legal community must become aware of the nature of mental retardation, consider the individual personhood of one having this condition, and devise a legal framework with enough flexibility to accommodate both the individual and society. Ohio's guardianship laws<sup>2</sup> and their relationship to adults with mental retardation require analysis. Although progress has been made in Ohio towards the goal of facilitating maximum enjoyment of independence,<sup>3</sup> the present guardianship laws still allow for the unnecessary removal of guaranteed rights. The purpose of this comment is to explore the advantages of a more limited form of guardianship as a means of determining a balance between the freedom of the adult with mental retardation and the duties and responsibilities of the state.<sup>4</sup>

## II. THE PERSON

The person with mental retardation has historically lost his individual identity to the generalizations of the condition. Once a person is known to have mental retardation, general incompetency has been assumed with little or no investigation of his actual capabilities. A change in thinking has evolved among professionals in the field of mental health and retardation based on an increase in knowledge and the development of advocacy groups

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<sup>1</sup> Roos, *Basic Facts about Mental Retardation*, in *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* 25-26 (1973).

<sup>2</sup> OHIO REV. CODE ANN. ch. 2111 (Page 1976; Supp 1979).

<sup>3</sup> OHIO REV. CODE ANN. § 5119.85(D) (Page Supp. 1979) defines a protectorship, a less restrictive alternative to guardianship.

<sup>4</sup> Kindred, *Guardianship and Limitations Upon Capacity*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 66 (PRESIDENT'S COMMITTEE ON MENTAL RETARDATION (1976)).

such as the National Association for Retarded Citizens. It is now believed that assessment should begin with actual capabilities of the person with mental retardation before consideration of any of the general manifestations of the condition.<sup>5</sup> This is required because there is a wide range of abilities within this condition which will be affected by individual personality traits. Although mental health professionals are most directly involved, the activities of other professions (including the legal profession) impact on the daily lives of people with mental retardation. Greater awareness of the range and nature of mental retardation is required by all these professions to insure that the treatment or services provided are based on the needs of the individual and not diluted by generalities of the condition.<sup>6</sup>

Mental retardation is difficult to define since it reflects a societal label rather than a medical fact.<sup>7</sup> The criteria for calling a person "retarded" is subject to change as society becomes more complex and fewer people are able to adapt.<sup>8</sup> Generally, the term refers to the result of a multitude of possible conditions, all of which have the common effect of significantly reducing an individual's intellectual functioning.<sup>9</sup> The most widely accepted definition currently encompasses the developmental or behavioral approach.<sup>10</sup>

<sup>5</sup> PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *MENTAL RETARDATION: PAST AND PRESENT* 137-44 (1977) [hereinafter cited as *MENTAL RETARDATION: PAST AND PRESENT*].

<sup>6</sup> Kay, Farnham, Karren, Knakal & Diamond, *Legal Planning for the Mentally Retarded: The California Experience*, 60 CAL. L. REV. 438, 442 (1972); Haggerty, Kane & Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 FAM. L.Q. 59, 60 (1972).

<sup>7</sup> Seeley, *The Law of the Retardate and the Retardation of the Law*, in *MENTAL RETARDATION: THE BULL. OF THE CANADIAN ASS'N FOR RETARDED CHILDREN 6-7* (1964), quoted in Wald, *Basic Personal and Civil Rights, Principal Paper*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 5, n.6 (PRESIDENT'S COMMITTEE ON MENTAL RETARDATION (1976)) states:

A retardate is merely (a) a person classified as belonging to that X% of the population who (b) do certain defined things worse, because (c) they *cannot* do them any better. I put the matter so because I want it to be clear (a) that it is a social classification we are dealing with, and not a "natural fact" like, say, the taste of salt; (b) that the X% is or can be 1%, 2%, 5% or 25% . . . according to social convenience; (c) that the social test depends on what things are socially defined (like schoolwork, say) to be peculiarly important; and (d) that the test that distinguishes those who *cannot* from those who *will not* is itself a very subtle social test. . . . The whole question of who is or is not "retarded" depends on social desire (or "need") to classify in this way at all; it depends on the percentage arbitrarily chosen; on the tasks held to be sufficiently vital to justify the discrimination; and on the techniques accredited for distinguishing between "won'ts" and "can'ts."

These points may seem primarily "philosophical" but, as with all well-taken points, they are pre-eminently practical. For "retardation" cannot be "wiped-out," because it is defined in relative terms. If all those presently defined as retarded were washed out of sight tomorrow, then society would simply turn its attention to a new group to whom it would give the same label, the same worry, the same treatment—or neglect.

We must recognize the damage that is done by the defining process itself, in which a human being becomes very largely what he is said to be as a consequence of what is said about him.

<sup>8</sup> Roos, *supra* note 1, at 20.

<sup>9</sup> *Id.* at 19.

<sup>10</sup> *MENTAL RETARDATION: PAST AND PRESENT*, *supra* note 5, at 147. The factors used in this approach are intellectual functioning, adaptive behavior and age of onset.

This approach considers the individual's ability to adapt in relation to society's expectation of his peers rather than just looking at his intellectual capacity as measured by standardized intelligence quotient (I.Q.) tests. The theory underlying the developmental approach is that the individual is a changing, developing person within his particular limitations, and that every person, regardless of impairment, is capable of learning throughout life.<sup>11</sup> The term "mental retardation" should not be confused with the term "mental illness" which implies a curable condition. The condition of mental retardation may be improved with treatment but is permanent and not subject to cure. People with mental retardation may become mentally ill with the same frequency and for the same reasons as society in general.<sup>12</sup>

Four levels within the range of mental retardation have been identified by the American Association on Mental Deficiency: mild, moderate, severe and profound.<sup>13</sup> 89% of those having mental retardation are considered mildly retarded while 6% are considered moderately retarded and only 5% are in the severe and profound levels.<sup>14</sup> The 95% functioning within the mild or moderate level are considered capable of economic self-sufficiency.<sup>15</sup> It is generally said that 3% of the population of the United States will function within the range of mental retardation at some time during their lives.<sup>16</sup> Mental retardation is most often identified during early school age years when educational needs are being determined. After leaving school, many previously identified as having mental retardation "disappear" into society and no longer carry that label.

The term "mental retardation covers a large human territory."<sup>17</sup> The variations of traits, personalities, talents and abilities within that territory are as wide as in any given cross-section of society. Use of the term "mentally retarded" as a legal definition is, therefore, overbroad and useless. Laws must be structured for an individual determination of capabilities, especially when a denial of rights is involved.<sup>18</sup>

### III. HISTORICALLY: BECOMING A CITIZEN

In colonial America the moral life was one of hard work and industry.

<sup>11</sup> PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *MENTAL RETARDATION: CENTURY OF DECISION* 20 (1976) [hereinafter cited as *MENTAL RETARDATION: CENTURY OF DECISION*].

<sup>12</sup> Interview with Ray Thomas, Executive Director, Summit County Association for Retarded Citizens in Tallmadge, Ohio (Sept. 9, 1980).

<sup>13</sup> Roos, *supra* note 1, at 20.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Persons in the moderate range of mental retardation are capable of economic independence in a sheltered environment. Those considered mildly retarded are capable of working in jobs in existing societal structures.

<sup>16</sup> *Id.* at 21.

<sup>17</sup> Wald, *supra* note 7, at 5.

Laws reflected this attitude and showed little concern for providing for the needs of others.<sup>19</sup> Early community action statutes were enacted to aid the family of a person with mental retardation in his support, not for his direct benefit.<sup>20</sup> If the person was considered violent or dangerous, there was statutory authority to forcibly restrain him for the protection of the community.<sup>21</sup> Commitment under these statutes could often be accomplished merely upon certification by one physician.<sup>22</sup> These statutes reflected a lack of medical knowledge that people with mental retardation could become productive citizens with treatment. They also exhibited a level of community development which concerned itself primarily with protection of the working people.<sup>23</sup> The first statutory protection of the committed person came in the early 1800's when laws were enacted to provide for the safekeeping of his property.<sup>24</sup> Protection of the person was longer in coming. The first record of the need to show reasons for detention was in 1845 when a Massachusetts court allowed the elderly and respectable Joseph Oakes to exercise his right of habeas corpus to challenge his commitment by his children after he had married a younger woman of questionable character very soon after the passing of his first wife.<sup>25</sup>

By the mid-nineteenth century, advancements in medical knowledge (including the development of psychiatry) were beginning to impact on judicial decision-making. The influence of individual advocates during this period also resulted in statutory changes in the area of commitment procedures.<sup>26</sup> However, there was little effort to legally distinguish between the mentally ill and persons with mental retardation and no effort to habilitate either group. Although society advanced in assuming responsibility for its less able, commitment to one of a growing number of institutions continued to be the only form of discharging such responsibility until the mid-twentieth century. Only limited constitutional rights were extended to those so confined, and the conditions in which they were forced to live were often intolerable.<sup>27</sup>

Two developments which contributed to public information campaigns

<sup>19</sup> AM. BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* (rev. ed. S. Brackel & R. Rock 1971) [hereinafter cited as *MENTALLY DISABLED AND THE LAW*].

<sup>20</sup> *Id.* Allowance would be made to the provider to build a "stone house" to keep the person confined, and the community would collectively aid in future support. This was a more practical solution than the alternative of having the person free to beg.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 8.

to change societal attitudes<sup>28</sup> were the formation of the National Association of Retarded Citizens<sup>29</sup> and later, the President's Committee on Mental Retardation.<sup>30</sup> Increased awareness and understanding were reflected in legislation<sup>31</sup> and judicial decisions.<sup>32</sup> Advances in medical and educational knowledge and the 1960's Civil Rights Movement also aided in establishing for the person with mental retardation the rights guaranteed him under the Constitution.<sup>33</sup> In theory, it was said "that under the Constitution he enjoys equal protection of the laws, and that any diminution of his rights must be through a due process procedure which establishes the legality and necessity of the restriction."<sup>34</sup> Similar advances were apparent in many countries around the world and were supported by the United Nations Declaration of the Rights of Mentally Retarded Persons in 1971.<sup>35</sup> Although advances have been made, full citizenship for people with mental retardation has not yet been attained.

While increasing awareness of mental retardation was being reflected in greater declared rights, another change was developing which

<sup>28</sup> PUBLIC ATTITUDES REGARDING MENTALLY RETARDED, a survey prepared for the President's Committee on Mental Retardation by the Gallup Organization, Inc., December 3, 1974, indicated that the public was far more willing to live and work in the community with the mildly and moderately retarded than had been the case in a 1969 study. The term "retarded" continued to be stigmatizing.

<sup>29</sup> This organization was formed by parent advocates. Formerly "The Association for Retarded Children," the organization's name was changed to reflect the concept of the mentally retarded person as a citizen in the community and to dispel the myth of the "eternal child."

<sup>30</sup> In 1963, President Kennedy formed this body as a means of bringing professionals from various fields together to address problems and suggest means of improving the quality of life for the nation's mentally retarded.

<sup>31</sup> Statutes began to reflect changed attitudes by eliminating common and demeaning terminology such as "lunacy," "idiot," and "feeble mindedness." In addition to remedial changes in existing statutes, affirmative legislation was also enacted including the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6001 (1976) and the Education for All Handicapped Children Act, 20 U.S.C. § 1401 (1976).

<sup>32</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972) (indefinite commitment of a mentally retarded person until he becomes competent to stand trial on criminal charges held to be a denial of equal protection and due process); *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977) (the only justifiable purpose for commitment of the retarded is habilitation, if habilitation is not provided the commitment bears no reasonable relation to its purposes and the individual's due process rights are thereby violated); *Wyatt v. Adderholt*, 368 F. Supp. 1383 (M.D. Ala. 1973) (upheld the right of persons with mental retardation to procreate and found unconstitutional Alabama's compulsory sterilization law); *Souder v. Brennan*, 362 F. Supp. 808 (D. D.C. 1973) (established the right to be free from institutional peonage and involuntary servitude); *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971) and 344 F. Supp. 387 (M.D. Ala. 1972) (established the right to treatment in the least restrictive environment); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972) (the state must establish educational programs for all children).

<sup>33</sup> MENTAL RETARDATION: PAST AND PRESENT, *supra* note 5, at 100.

<sup>34</sup> *Id.*

<sup>35</sup> G.A. Res. 2856, 26 U.N. GAOR, Supp. (No. 3) 73, U.N. Doc. A/8588 (1971). The first right listed states that people with mental retardation have, "to the maximum degree of feasibility, the same rights as other human beings."

affected the living patterns of adults having this condition. The concept of "normalization" was being forwarded by leaders in the field of mental retardation. The concept is premised on "making available to all mentally retarded people patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."<sup>36</sup> This is not an effort to "make retarded people normal" but to allow them to live under conditions as normal as their handicap will allow.<sup>37</sup> Although the normalization principle can be applied within institutions, the recent trend has been towards community-based housing and local programming.<sup>38</sup> It is in this context that the legal victories in declared rights will be tested. While society may have been willing to afford equality of rights when mentally retarded people were in institutions, old prejudices have not yet yielded to the view of him as a community participant.<sup>39</sup> The issues are not purely legal but include moral and ethical considerations. Society establishes its laws on the basis of minimum morality, on a level where there is general agreement. Thus, more complicated moral decisions are left to the individual conscience.<sup>40</sup> The actual delivery of the right won, therefore, depends on the acceptance of the person as a citizen by his neighbors, employers, professionals and others having an impact on his exercise of those rights.<sup>41</sup> The principle of "normalization," which seeks to allow the person with mental retardation to lead a "normal" life, cannot work without the awareness of those around him that he not only has the basic human right to such a life within his capabilities, but also that with proper support systems he can be a functioning asset to society.

#### IV. A LEGAL FRAMEWORK FOR THE EXERCISE OF RIGHTS BY THE CITIZEN

##### A. Guardianship Historically

Guardianship in the United States developed on the English model with emphasis primarily on preserving the property of wealthy families from mismanagement and waste.<sup>42</sup> By the early 1800's procedural safeguards existed for securing the property of a person who was mentally ill or retarded, but guardianship of the person was usually performed by his family and specific duties for his protection were not as well defined.<sup>43</sup> Most early statutes provided for a general guardianship which placed both the

<sup>36</sup> Nirje, *The Normalization Principle*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 231 (PRESIDENT'S COMMITTEE ON MENTAL RETARDATION (1976)).

<sup>37</sup> *Id.* at 232.

<sup>38</sup> *Id.*

<sup>39</sup> MENTAL RETARDATION: CENTURY OF DECISION, *supra* note 11, at 16.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> *Id.* at 20.

<sup>42</sup> Kindred, *supra* note 4, at 64.

person and the property under the management of the guardian.<sup>44</sup> The duties of the guardian regarding the estate of his ward were usually stated specifically and included management of the ward's property, purchasing and selling goods on his behalf, and making contracts for him. Statutory provision was made for periodic accounting and some transactions by the guardian required special court approval.<sup>45</sup> The duties of the guardian of the person were often simply stated as caring for the general welfare of his ward.<sup>46</sup> The effect of placing a person under general guardianship was to place all of the ward's decision-making power in the guardian who was empowered to act on his behalf. Even if the ward was incompetent in only one area, there were no legal mechanisms under general guardianship statutes to preserve his decision-making ability in the areas in which he was capable. He legally became an eternal child, deprived of the rights which usually accompany adulthood. Of greater significance than the loss of his ability to make any of his own decisions was the fact that the guardian could make such vital decisions for him as "voluntary" commitment<sup>47</sup> and, in some states, "voluntary" sterilization.<sup>48</sup> When these procedures were pursued on a "voluntary" basis, the due process safeguards that were required to carry them out on an involuntary basis did not attach.<sup>49</sup>

"[P]roceedings to establish guardianship have not attracted the attention their importance to individual liberties warrants, and they have too often been conducted without nominal safeguards."<sup>50</sup> Adjudications of general incompetency have often been done at very brief and informal hearings where the alleged incompetent, if present, was not represented by counsel.<sup>51</sup> Courts have used various methods to determine "feble-mindedness" including physical appearance, opinions of relatives and community members, behavioral testing and I.Q. tests.<sup>52</sup> Usually there have been only two methods for terminating a guardianship: (1) on the petition of the guardian to be

<sup>44</sup> Kindred, *supra* note 4, at 72.

<sup>45</sup> MENTALLY DISABLED AND THE LAW, *supra* note 19, at 260.

<sup>46</sup> *Id.*

<sup>47</sup> OHIO REV. CODE ANN. § 5123.69 (Page Supp. 1979).

<sup>48</sup> VT. STAT. ANN. tit. 18, § 8702(c) (1968). See *In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974). Ohio's statute does not provide for consent by the guardian to voluntary sterilization of the ward. *C.f. Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971) where a probate judge was held liable to a mentally retarded person for ordering her sterilization without statutory authority.

<sup>49</sup> MENTALLY DISABLED AND THE LAW, *supra* note 19, at 260.

<sup>50</sup> Levy, *Protecting the Mentally Retarded: An Empirical Survey and Evaluation of the Establishment of State Guardianship in Minnesota*, 49 MINN. L. REV. 821, 823 (1965).

<sup>51</sup> MENTALLY DISABLED AND THE LAW, *supra* note 19, at 258.

<sup>52</sup> Levy, *supra* note 50, at 842. Today professionals in the field of mental retardation are using a developmental approach. This is considered a more useful indicator of ability than I.Q. scores alone. See also *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) which suggests that I.Q. scores alone may not be reliable enough to satisfy due process when a person is labeled "mentally retarded" in a racially mixed school setting.



relieved because his ward's assets are reduced; or (2) upon application of the ward (or other interested party) because competence is restored.<sup>53</sup> Although guardianships were subject to continuing supervision of the court, they were commonly reviewed only upon petition for removal.<sup>54</sup> The total effect of these practices is that guardianships are established and allowed to continue with few required protections. Greater due process safeguards must attach to guardianship proceedings because a finding of incompetency based on mental retardation is not only stigmatizing<sup>55</sup> but also amounts to a serious deprivation of liberty.<sup>56</sup>

Guardianship may be viewed as a mechanism of control or as a device to support the individual. The way it is viewed is significant when the adult with mental retardation is given more opportunity to make choices. If society deals with mental retardation by broad institutionalization, it exercises maximum control in that form and guardianship, if used at all, is often invoked only when there are considerable assets to manage.<sup>57</sup> "In contrast, social integration of mentally retarded citizens into society, or normalization, is characterized by choices and opportunities for mentally retarded citizens and presents more significant and difficult questions concerning the proper use of guardianship."<sup>58</sup> If community-based services are available to assist him, guardianship should be viewed as a mechanism of support for the individual in making his own choices. A totally supportive structure of community-based services would drastically reduce the need to use guardianship at all.<sup>59</sup> In our present society, however, guardianship is indispensable in the process of normalization. It enables the person with mental retardation to be guided in areas where he is truly incapable and would otherwise be unable to participate due to his inability to contact and evaluate existing community services.

Guardianship is a useful alternative, but only when it is carefully limited to actual incapacities and viewed as a support rather than a control mechanism. The role of the guardian in this context, however, may become more complicated than under the plenary authority of general guardianship. He must facilitate decision-making by his ward rather than merely substituting his own judgment.<sup>60</sup>

<sup>53</sup> Guardianship of children and all incompetencies of adults (mental illness, mental retardation, and alcoholism) are usually included in the same statute even though adults with mental retardation may not be able to show a "restoration" to competence. This burden was impossible before there were educational training programs to develop competencies.

<sup>54</sup> Fraser, *Guardians of the Person*, 45 IOWA L. REV. 239, 248 (1960).

<sup>55</sup> P. FRIEDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS* 23-25 (1976).

<sup>56</sup> *In re Gamble*, 118 N.H. 771, 394 A.2d 308, 309-10 (1978).

<sup>57</sup> Kindred, *supra* note 4, at 67.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* See also *id.* at 68 n.22

<sup>60</sup> *Id.* at 67.

### B. *Guardianship and the Least Restrictive Alternative*

The state may intrude upon constitutionally protected rights of an individual under its police power in order to protect the public health, safety, welfare and morals.<sup>61</sup> A traditional use of police power to protect society was the statutory allowance for commitment of mentally handicapped persons considered dangerous.<sup>62</sup> When a person is limited in the exercise of his rights through guardianship, the state is said to be acting in its *parens patriae* capacity in order to protect the welfare of one deemed incompetent.<sup>63</sup>

A question might be raised as to the constitutional basis of the rights of persons with mental retardation. To answer this question one must begin by examining the rights intruded upon when a person is placed under guardianship. Many are considered fundamental: the rights to marry, to have and raise children, to make contracts and engage in business, to hold a job, to vote and to bring suit<sup>64</sup> in a court of law. These rights are so important that they should not be denied to *anyone* without a showing of extraordinary circumstances. People with mental retardation do not need a special set of laws under a double-tracked legal system even though the aim of such a system may be to help and protect.<sup>65</sup> Every citizen should be presumed to have fundamental rights unless it can be shown that disastrous consequences will result from their exercise.<sup>66</sup> People with mental retardation, no less than other citizens, should come under this test.

"Legally and constitutionally, it must be presumed that all citizens are equal before the law. The Bill of Rights does not speak of competents and incompetents."<sup>67</sup> Before the state deprives any citizen of a fundamental right, a "compelling state interest" must be shown.<sup>68</sup> If the state cannot justify the intrusion, the due process rights of the person or class are violated. Even if the state can justify the intrusion under its police power, a court may employ the doctrine of the "least restrictive alternative." The United States Supreme Court stated in *Shelton v. Tucker* that "even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>69</sup>

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<sup>61</sup> Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 65, 72 (1975).

<sup>62</sup> MENTALLY DISABLED AND THE LAW, *supra* note 19, at 39.

<sup>63</sup> FRIEDMAN, *supra* note 55, at 72 n.165.

<sup>64</sup> Wald, *supra* note 7, at 4.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>69</sup> 364 U.S. 479, 488 (1960). Although *Shelton* concerned employment in public education, its precautionary statement has been applied in the civil commitment process.

Some courts<sup>70</sup> and legislatures<sup>71</sup> have begun to use the "least restrictive alternative" doctrine in the area of mental retardation as a method of resolving the tension between the state's interest in protecting the mentally retarded person and minimum intrusion on constitutionally protected rights.<sup>72</sup> The doctrine is usually available for this purpose only when there are existing alternatives from which to select. When there have been no other alternatives, however, courts have declared an affirmative duty to develop them.<sup>73</sup>

The alternatives available to the state acting in its *parens patriae* capacity to protect persons with mental retardation may be placed on a continuum of restrictiveness. Institutionalization effectuates the purposes of the state in a manner that is most intrusive on the liberty of the person. General guardianship of both the person and the estate would be a less intrusive form of protection. A guardianship limited to areas of incompetency as determined by the court is a lesser intrusion than general guardianship. Alternatives that do not involve a finding of incompetency but which utilize community supportive services to facilitate maximum choice by the person are minimally intrusive.<sup>74</sup> To comply with the "least restrictive alternative" doctrine and due process, competency (instead of incompetency) should be presumed and proof of actual incapacities should be required.<sup>75</sup> An individual determination of areas of incompetency would enable the court to properly decide which point on the continuum is the best balance between the per-

<sup>70</sup> See *Wyatt v. Stickney*, 344 F. Supp. 387, 396 (M.D. Ala. 1972), *aff'd in part sub. nom.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) where the court ruled that there must be a prior determination that an institution is the least restrictive habitation for that person; and *Davis v. Watkins*, 384 F. Supp. 1196, 1203-04 (N.D. Ohio 1974) where the court required patients at Lima State Hospital to be placed in the least restrictive confinement. *Accord*, *Covington v. Harris*, 419 F.2d 657 (D.C. Cir. 1969).

<sup>71</sup> OHIO REV. CODE ANN. §§ 5123.76(E)-.76(F) (Page Supp. 1979) requires the judge to determine what setting would be least restrictive before committing a person found to have mental retardation. The statute allows the director of the facility where the person is committed to take action when that setting is no longer the least restrictive available. Federal legislation regarding persons with mental retardation requires use of the least restrictive alternative. The Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6001 (1976) and the Education for all Handicapped Children Act, 20 U.S.C. § 1401 (1976).

<sup>72</sup> See Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1111 (1972) stating that the principle of the least restrictive alternative would require courts to insure that the state imposes no greater restriction on freedom than necessary to serve its objectives.

<sup>73</sup> *Dixon v. Weinberger*, 405 F. Supp. 974 (D. D.C. 1975) (requiring the federal and District of Columbia governments to jointly fund extra-institutional facilities for the mentally ill under the Hospitalization of the Mentally Ill Act).

<sup>74</sup> FRIEDMAN, *supra* note 55, at 45.

<sup>75</sup> MENTAL RETARDATION: CENTURY OF DECISION, *supra* note 11, at 59.

son's interests in liberty and the state's duty of protection. This type of balancing impacts on the role of the attorney<sup>76</sup> as well as the court.

### C. *Guardianship in Ohio*

Ohio's guardianship law provides authority to appoint a guardian for the person, for the estate or for both.<sup>77</sup> If the probate judge fails to limit the appointment in his order, however, the guardian will be considered a general guardian of both the person and the estate.<sup>78</sup> Reflecting the historical beginnings of guardianship, the Ohio statutory scheme focuses on protection of the estate<sup>79</sup> rather than the person. The court may assign an individual to manage an incompetent person's estate without appointing a guardian if it involves less than \$10,000.<sup>80</sup> A guardianship may be terminated under the same provision if the value of the estate falls below \$10,000.

Upon appointment of a guardian, the ward is considered legally incompetent. The exact effect of this status is not clear. The appointment of a guardian is generally considered conclusive evidence in Ohio that the ward is incapable of doing those acts which conflict with the guardian's authority; in those matters not statutorily defined and collateral to the guardian's duties, however, the adjudication of incompetency is only prima facie evidence of incompetence.<sup>81</sup> Without specific judicial determination of the limits of the guardian's power, uncertainty arises as to what decision-making capability the ward retains in these collateral areas. While the Chapter on Guardians deals specifically with the guardian's powers in various aspects of managing the estate,<sup>82</sup> the guardianship of the person of the incompetent is only vaguely described as to "have custody and provide for the maintenance of the ward."<sup>83</sup> This vague grant of power causes difficulties. For example, informed medical consent may be deemed impossible after a guardian is assigned. The incompetency adjudication may lead to the conclusion that the ward is

<sup>76</sup> See Andolman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic and A Proposal*, 45 MISS. L. REV. 43, 72-75 (1974). The authors discuss the effectiveness of counsel in the commitment setting. They suggest that there be a statutory outline (at 84-85 and Appendix, section 4) of the attorney's duties to compensate for the general lack of knowledge of mental health issues and the fact that attorneys usually suffer from the same misconceptions as the general public.

<sup>77</sup> OHIO REV. CODE ANN. § 2111.06 (Page Supp. 1979).

<sup>78</sup> *Id.*

<sup>79</sup> OHIO REV. CODE ANN. § 2111.03 (Page 1976) requires that a financial statement of the ward's assets be submitted with the application for guardianship; section 2111.04 states that once notice has been sent to the persons concerned and until the hearing, the financial transactions of the incompetent are invalid as to persons who are aware of the filing for guardianship.

<sup>80</sup> OHIO REV. CODE ANN. § 2111.05 (Page Supp. 1979). This change raised the statutory amount from \$3,000 in the previous statute.

<sup>81</sup> Dewey, *Civil Incompetence in Ohio*, 34 U. OF CIN. L. REV. 417, 446 (1965).

<sup>82</sup> OHIO REV. CODE ANN. §§ 2111.14, 2111.19, 2111.20, 2111.21, 2111.22, 2111.25, 2111.26, 2111.33 (Page 1976).

<sup>83</sup> OHIO REV. CODE ANN. § 2111.06 (Page Supp. 1979).

an "imbecile" for the purpose of applying for a marriage license and result in a denial of the license.<sup>84</sup> A driver's license may not be issued if a person has been found to be incompetent and subject to court-ordered institutionalization.<sup>85</sup> The ward's ability to sign a lease or make purchases on credit may be lost after guardianship is established.<sup>86</sup> Such uncertainties as these could, of course, be eliminated if the court were to delineate in its order precisely what functions the guardian is to assume.

Awesome consequences to the ward may also result in those areas where the statute positively requires the guardian to exert control but offers no prophylactic language to prevent that control from becoming unnecessarily intrusive. A guardian's duties, for example, include guardianship over the minor children of an incompetent ward.<sup>87</sup> Such a provision has the potential of permitting the ward's emotional ties to his children to be needlessly jeopardized. More significantly, a guardian may make the decision to "voluntarily" commit the ward to an institution; this may be accomplished merely upon application to and acceptance by the managing officer of the institution.<sup>88</sup>

In *Minnesota v. Probate Court*,<sup>89</sup> the United States Supreme Court reviewed the due process provisions of a Minnesota statute under which people could be labeled insane. Although finding that the due process aspects of the statute were adequate, the Court recognized the importance of carrying statutory safeguards into practice:

We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.<sup>90</sup>

Recently, the Court addressed due process requirements in juvenile delinquency proceedings and stated that "the admonition to function in a par-

<sup>84</sup> OHIO REV. CODE ANN. § 3101.06 (Page 1980).

<sup>85</sup> OHIO REV. CODE ANN. § 4507.08 (Page Supp. 1979).

<sup>86</sup> *Hosler v. Beard*, 54 Ohio St. 398, 43 N.E. 1040 (1896).

<sup>87</sup> OHIO REV. CODE ANN. § 2111.02 (Page 1976).

<sup>88</sup> OHIO REV. CODE ANN. § 5123.69 (Page Supp. 1979). The legislature created a Legal Rights Service for people in institutions under § 5123.94 (Page Supp. 1979). One duty of this service might be to inform a person "voluntarily" committed that he may seek court review under § 5123.69(C) (whether commitment is in his best interest). This protective device is only triggered, however, after the person has already been deprived of his liberty through commitment.

<sup>89</sup> 309 U.S. 270 (1940).

<sup>90</sup> *Id.* at 276-77.

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ental relationship is not an invitation to procedural arbitrariness."<sup>91</sup> The concept of guardianship is based on the need for protection of those who are unable to protect themselves. If there are inadequate procedural safeguards or the courts ignore statutory protections,<sup>92</sup> the entire legal concept is reduced to a farce.<sup>93</sup>

Ohio's present statutory scheme is "fair on its face and impartial in appearance."<sup>94</sup> However, broad treatment of due process requirements invites abuse and does not insure protection. Application for guardianship may be made by any interested party or by the court itself "when found necessary."<sup>95</sup> In one case,<sup>96</sup> it was held that an attorney was "an interested party" within the meaning of the statute even though he had never met or seen the ward but had been notified of the need by the superintendent of a county home. The statute's only requirement for being an interested party is that he be a resident of the state.<sup>97</sup> In practice, probate courts usually try to appoint someone acceptable to the ward's next of kin, but there is very little statutory guidance in this area.<sup>98</sup>

Before the probate court may appoint a guardian, it must first make a determination of general incompetency at a hearing.<sup>99</sup> The flexibility of allowing any interested party to apply for guardianship would be a more positive feature of this statutory scheme if there were more specific due process protections required at the hearing. Notice to the alleged incompetent is absolutely required,<sup>100</sup> yet his next of kin must be notified only if known to live in the county where the application is filed.<sup>101</sup> If the person is indeed incompetent, the mere delivery of notice may be completely ineffectual.<sup>102</sup> There is no requirement for the appointment of a *guardian ad litem* for this proceeding. The alleged incompetent may be represented by counsel;<sup>103</sup> he

<sup>91</sup> *In re Gault*, 387 U.S. 1, 30 (1967). See generally *In re Winship*, 397 U.S. 358 (1970).

<sup>92</sup> See *Michigan Ass'n for Retarded Citizens v. Wayne County Probate Judge*, 79 Mich. App. 487, 261 N.W.2d 60 (1977) where the appeals court remanded for consideration by the circuit court the question of whether the hearings to appoint guardians for mentally retarded persons in institutions complied with a recent statutory enactment. The plaintiffs were among 100 residents who were assigned guardians in a one hour and fifteen minute court session.

<sup>93</sup> *In re Guardianship of Evans*, 587 P.2d 372, 376 (Mont. 1978).

<sup>94</sup> *Minnesota v. Probate Court*, 309 U.S. at 277.

<sup>95</sup> OHIO REV. CODE ANN. §§ 2111.02-.03 (Page 1976).

<sup>96</sup> *In re Titington's Guardianship*, 82 O.L.A. 563, 162 N.E.2d 628 (1958). In this proceeding Mr. Titington was seeking to have the guardianship terminated.

<sup>97</sup> *In re Hill's Guardianship*, 29 Ohio Op. 2d 60, 62, 196 N.E.2d 816, 818 (1963).

<sup>98</sup> *Id.* at 63, 196 N.E.2d at 819.

<sup>99</sup> *Id.* at 62, 196 N.E.2d at 818.

<sup>100</sup> OHIO REV. CODE ANN. § 2111.04(B)(1) (Page 1976).

<sup>101</sup> OHIO REV. CODE ANN. § 2111.04(B)(2) (Page 1976).

<sup>102</sup> *Dewey*, *supra* note 81, at 434.

<sup>103</sup> OHIO REV. CODE ANN. § 2111.02 (Page 1976).

is usually informed of this at the time he receives notice of the hearing. Notice of this right may be equally ineffective if the alleged incompetent is unable to read and comprehend.<sup>104</sup> There is no statutory requirement that the alleged incompetent be present at the hearing and often he is not, although the person applying to be guardian is always present and may himself be an attorney.<sup>105</sup> Although this hearing is designed to determine incompetence,<sup>106</sup> there is no statutory requirement for the use of medical reports or other professional evaluations.<sup>107</sup> It has been held that the court does have discretionary power to order reports.<sup>108</sup>

Ohio allows for a corporation to be appointed as a guardian of the estate.<sup>109</sup> A non-profit corporation under contract with the Department of Mental Health and Mental Retardation may be appointed guardian of the person.<sup>110</sup> The problem with this type of appointment is a possible conflict of interest since the Department of Mental Health and Mental Retardation is the main provider of services in Ohio communities.<sup>111</sup>

There is no statutory requirement for periodic review of the status of the guardianship; the presumption is that incompetency continues.<sup>112</sup> The statutory method is the exclusive manner of terminating the guardianship<sup>113</sup> with the burden of showing that the need for it no longer exists placed on the ward.<sup>114</sup> In *In re the Guardianship of Breece*,<sup>115</sup> the Ohio Supreme Court reversed the finding of the probate court that Mrs. Breece was still incompetent. The probate court had ruled that Mrs. Breece had not met her burden even though she had presented four competent witnesses, including three doctors and the person who had contracted to care for her, to testify that she was not senile. In view of the fact that this is a continuing condition, placing this type of proof burden on the person with mental retardation may foreclose any possibility of terminating the guardianship. This is especially true when there is no affirmative duty placed on the guardian to aid his ward in improving in the areas in which he is incompetent.

<sup>104</sup> Dewey, *supra* note 81, at 434.

<sup>105</sup> *Id.*

<sup>106</sup> OHIO REV. CODE ANN. § 2111.01(D) (Page Supp. 1979) defines an incompetent as one who "is incapable of taking care of himself or his property or fails to provide for his family."

<sup>107</sup> Dewey, *supra* note 81, at 434.

<sup>108</sup> *In re Joyce*, 19 Ohio Op. 506, 509 (P. Ct. 1940).

<sup>109</sup> OHIO REV. CODE ANN. § 2111.10 (Page Supp. 1979). *See also* § 5123.93 (Page Supp. 1979) which forbids anyone affiliated with direct service agencies to be a guardian for an institutionalized person.

<sup>110</sup> OHIO REV. CODE ANN. § 2111.10 (Page Supp. 1979).

<sup>111</sup> OHIO REV. CODE ANN. § 5126.06 (Page Supp. 1979).

<sup>112</sup> Dewey, *supra* note 81, at 447.

<sup>113</sup> *In re Clendenning*, 145 Ohio St. 82, 60 N.E.2d 676 (1945).

<sup>114</sup> OHIO REV. CODE ANN. § 2111.47 (Page 1976).

<sup>115</sup> 173 Ohio St. 542, 184 N.E.2d 386 (1962).

## D. *Less Restrictive Alternatives in Ohio*

### 1. Statutory Interpretation

The easiest and most expeditious approach to finding less restrictive alternatives in Ohio's present law is for the probate courts to interpret the statutes as allowing for the appointment of limited guardians based on specific findings of incompetence.<sup>116</sup> This interpretation is supportable by the law in its present form. A guardianship limited only to the management of Veterans Administration benefits is statutorily allowed.<sup>117</sup> Since this allowance is already built into the statute, probate courts could reasonably infer that a limited form of guardianship may be employed in other areas. Limiting the guardian's duties to areas in which the court has made a specific determination of incompetency may be based on the advances in knowledge and thinking in the area of mental retardation. Legislative awareness of advances may be found in the stated purposes of a recent enactment regarding mentally retarded persons:

- (A) To promote the human dignity and to protect the constitutional rights of mentally retarded persons in the state;
- (B) To encourage the development of the ability and potential of each mentally retarded person in the state to the fullest possible extent, no matter how severe his degree of disability;
- (C) To promote the economic security, standard of living, and meaningful employment of the mentally retarded;
- (D) To maximize the assimilation of mentally retarded persons into the ordinary life of the communities in which they live;
- (E) To recognize the need of mentally retarded persons, whenever care in a residential facility is absolutely necessary, to live in surroundings and circumstances as close to normal as possible.<sup>118</sup>

Under these provisions, it may fairly be said that Ohio's legislature is promoting the concepts of choice and least restrictive alternatives for persons with mental retardation in normalized settings.

The problem with depending on statutory interpretation to insure greater protections through least restrictive alternatives, however, is obvious. There would be little consistency if each probate court used its discretion when interpreting the statutory requirements. With no additional funding for

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<sup>116</sup> See *Guardianship of Bassett*, 385 N.E.2d 1024 (Mass. App. 1979) where the court interpreted the Massachusetts statute providing for appointment of a guardian for the person or estate to also allow for limited guardianships. *But see In re Fabre*, 371 S.2d 1322, 1326 (La. 1979) where the court refused to so interpret and deferred to the need for legislative change. The Louisiana statute, however, is a general incompetency statute which requires that a person be incompetent as to his person and estate before a guardian may be appointed.

<sup>117</sup> OHIO REV. CODE ANN. § 2111.02 (Page Supp. 1979).

<sup>118</sup> OHIO REV. CODE ANN. § 5123.67 (Page Supp. 1979).



evaluations and periodic follow-ups of limited guardianships, this approach would depend on the philosophical benevolence of each probate judge. The probable result would not be an increase in the use of limited guardianships.

## 2. Statutory Provision for Limited Guardianship

There are statutory patterns developing in other states that provide more due process protection for the guardianship proceeding and focus on limitation of the appointment to only those areas where the person is proven incompetent.<sup>119</sup> The trend is to view guardianship of adults with mental retardation as a supportive device confined to areas where the person requires assistance. The person is considered competent until specific incompetencies are shown.<sup>120</sup> This approach leaves the person under no legal disabilities except for those specifically stated in the order.

To reach the point where a court is able to itemize the areas of disability, statutes should provide for a comprehensive evaluation of the alleged incompetent by trained professionals. Evaluations are already used by courts in Ohio prior to involuntary hospitalization,<sup>121</sup> and when a guardian is named under Ohio's protective service statute.<sup>122</sup> Thus, the utilization of professional evaluations would not require great organizational change. Limiting a person's liberty based on evaluations would assure that the state's goal of protection under its *parens patriae* power could be more narrowly achieved.

Since guardianship does involve restrictions on rights, statutory revision must provide adequate due process safeguards. In addition to provisions for notice, the person alleged to be incompetent should be represented by counsel at a full evidentiary hearing. If the person is indigent, counsel should be appointed. The duty of counsel in this procedure would be to "expose all reasons militating against the guardianship appointment."<sup>123</sup> Competent evidence, including complete evaluations by professionals and witnesses, should be the basis for the appointment of a guardian and the guardian's power should be limited to the areas of incompetency proved at the hearing. Jury trials should be provided as an option to the alleged

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<sup>119</sup> See, e.g., IND. CODE ANN. § 29-1-18-21(C) [8-121] (Burns Supp. 1980); MASS. GEN. LAWS ANN. ch. 201 § 6A (West 1979) (advances many due process safeguards and has been interpreted by the courts as allowing for limited guardianship); MICH. COMP. LAWS ANN. §§ 330.1600-330.1640 (1979); N.Y. Surr. Ct. Proc. Act § 1751 (McKinney Supp. 1979); S.D. COMPILED LAWS ANN. §§ 27B-6A-15, 27B-6A-17 (Supp. 1980); TENN. CODE ANN. §§ 34-12-103, 34-12-110, 34-12-111 (Supp. 1980); VT. STAT. ANN. tit. 14 §§ 3068(f), 3070 (Supp. 1980); WASH. REV. CODE ANN. §§ 11.88.005-11.88.090 (Supp. 1980).

<sup>120</sup> See, e.g., MICH. COMP. LAWS ANN. § 330.1602(2) (1979) (partial guardianship shall be the preferred form of guardianship); WASH. REV. CODE ANN. §§ 11.88.005, 11.88.010(2) (Supp. 1980).

<sup>121</sup> OHIO REV. CODE ANN. §§ 5123.68(C), 5123.71(B) (Page Supp. 1979).

<sup>122</sup> OHIO REV. CODE ANN. § 5119.87 (Page Supp. 1979).

<sup>123</sup> Kindred, *supra* note 4, at 75.

incompetent. Once appointed, the guardian should be placed under an affirmative statutory duty to assist his ward to improve his functioning in areas of incompetency so that the need for the guardianship may be reduced or eliminated in the future.<sup>124</sup> Periodic review of the guardianship must be statutorily required.<sup>125</sup>

Termination of guardianships for mentally retarded persons should not be based on "restoration of competence" but upon a showing that the person's training in the areas originally found to be deficient has improved his ability to the point where he is capable of independent choice. With periodic review and judicial emphasis on fostering such improvement, the burden on the ward that presently exists in restoration proceedings would no longer be based on the presumption of continuing incompetency, but be more fairly directed at changes in the areas originally found deficient.

In any legislative change of this scope, it is important that adequate funding be provided to carry out the mandates. The added congestion and financial burden it would create for the courts should be considered and resolved by the legislature. These problems cannot, however, be used as an obstacle to the delivery of due process rights.<sup>126</sup> Additionally, it is imperative that the judiciary and the legal community be exposed to changes in attitudes and advances in the area of mental retardation so that the full realization of declared rights is not impeded by misconceptions of the past.

### 3. Alternatives Less Restrictive than Limited Guardianship

#### a. Trusts

The use of a trust is an effective method of managing the assets of a person with mental retardation and involves no finding of legal incompetency. The trustee may use various forms of limited control and protection such as the establishment of an allowance system. The trustee aids the person in the management of his funds while allowing for his individual needs and choices.<sup>127</sup>

#### b. Protectorships

In Ohio, the Division of Mental Retardation or an agency contracting with the division may act as a protector of a person with mental retarda-

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<sup>124</sup> This could be considered analogous to the duty of habilitation when people are institutionalized.

<sup>125</sup> Kindred, *supra* note 4, at 76.

<sup>126</sup> See the concurring opinion of Riley, J. in Michigan Ass'n for Retarded Citizens v. Wayne County Probate Judge, 79 Mich. App. at 494, 261 N.W.2d at 63.

<sup>127</sup> Eiland, TRUSTS AND ESTATE PLANNING, in THE MENTALLY RETARDED CITIZEN AND THE LAW 115 (PRESIDENT'S COMMITTEE ON MENTAL RETARDATION (1976)).

tion.<sup>128</sup> This role may be assumed with or without court appointment and involves no determination of incompetency.<sup>129</sup> The duty of the protector is "to provide guidance, service, and encouragement in the development of maximum self-reliance to a mentally retarded or other developmentally disabled person."<sup>130</sup>

### c. Legal Advocates from Community Organizations

The role of the legal advocate is to create pressure for better services as well as to insure that his client has full access to existing services.<sup>131</sup> Appointment of legal advocates is completely outside of the court system. Local branches of the National Association for Retarded Citizens usually have advocacy programs to assist persons in their communities.

### d. Placing a Higher Burden of Care on Society in Dealing With Adults with Mental Retardation

In the commercial area, placing a higher burden on a seller to be sensitive to a buyer's potential for exploitation is a useful alternative to denying persons with mental retardation the right to transact business.<sup>132</sup>

A very troublesome area which often results in the appointment of a guardian is consent for medical procedures. Unless the guardianship is strictly confined to that particular need, the result is a determination of incompetence and the subsequent limitation of rights. It has been suggested that some medical procedures (*i.e.*, sterilization and abortion) are too personal to allow one person to make a decision for another.<sup>133</sup> Even in non-controversial areas, there are problems when one substitutes his judgment for another who is incapable of informed consent.<sup>134</sup> The court in *Wyatt v. Aderholt*<sup>135</sup> issued orders regarding the sterilization of residents in institutions that included an interdisciplinary review committee when it was unclear whether a person was capable of making an informed decision. The use of such committees in the community has potential as a protective device if the committee is not a part of a hospital or service delivery agency.

<sup>128</sup> OHIO REV. CODE ANN. §§ 5119.85(D), 5119.86(C) (Page Supp. 1979). Section 5119.86 (C) also allows for service delivery agencies or those contracting with them in the community to be appointed guardian of the person. The conflict of interest this may cause is obvious and this subsection should be eliminated from the statute.

<sup>129</sup> OHIO REV. CODE ANN. § 5119.85(D) (Page Supp. 1979).

<sup>130</sup> *Id.*

<sup>131</sup> FRIEDMAN, *supra* note 55, at 47.

<sup>132</sup> Wald, *supra* note 7, at 6.

<sup>133</sup> Kindred, *supra* note 4, at 76.

<sup>134</sup> See Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417, (Mass. 1977) where the court accepted the guardian's recommendation not to submit his 60-year-old mentally retarded ward to chemotherapy.

<sup>135</sup> 368 F. Supp. 1383, 1384-86 (M.D. Ala. 1973).

## V. CONCLUSION

The use of a guardianship is a viable method of assisting people with mental retardation to live as independently as possible. However, because guardianship involves an adjudication of incompetence with resulting limitations on guaranteed rights, careful attention must be given to the protection of the ward's due process rights. The guardianship order should be limited to areas of proven incompetency. Persons with mental retardation have differing abilities and personalities and must be individually evaluated before a court can make a specific order. Ohio does not presently provide for a limited form of guardianship and analysis by the legislature is required in this area. Attorneys should be sensitive to less restrictive means of assisting people (with or without the use of guardianship) whenever possible.

More adults with mental retardation reside and work in Ohio communities today as local services improve and normalization efforts center on deinstitutionalization. Legal awareness and frameworks must keep pace with developments so that people with mental retardation may enjoy maximum independence.

AMIE L. BRUGGEMAN

