



1981

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Recommended Citation

Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U. ARK. LITTLE ROCK L. REV. 485 (1981).

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GUARDIANSHIP: OVERCOMING THE LAST HURDLE TO CIVIL RIGHTS FOR THE MENTALLY DISABLED

Sheryl Dicker*

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹

Guardianship is a legal mechanism for substitute decision-making² which comes in the guise of benevolence, as it was originally intended to protect the disabled individual and his property from abuse, dissipation of resources, and the effects of designing persons.³ It is an exercise of the state's role as *parens patriae* for the mentally and physically disabled.⁴ Yet, guardianship, in reality, reduces the disabled person to the status of a child.⁵ Few incompetent persons ever truly benefit from the guardianship system as prac-

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1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. Kindred, *Guardianship and Limitations Upon Capacity*, THE MENTALLY RETARDED CITIZEN AND THE LAW 62 (1976) [hereinafter cited as Kindred].

3. Developmental Disabilities State Legislative Project, ABA Commission on the Mentally Disabled, *Guardianship and Conservatorship* 1-2 (1979) [hereinafter cited as ABA Study].

4. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); see *Mormon Church v. United States*, 136 U.S. 1 (1890); Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975) [hereinafter cited as Horstman]. See also Cohen, Dosterhout, & Levitor, *Tailoring Guardianship to Meet the Needs of the Mentally Handicapped Citizen*, 6 MD. L. FORUM 91 (1976).

5. Arkansas law treats minor and mentally incompetent persons similarly. See ARK. STAT. ANN. § 57-601 (1976); Horstman, *supra* note 4, at 231. As an attorney representing mentally disabled persons, I have often confronted the severe constraints on individual liberty imposed by guardianship. Examples of guardianship cases which my clients have presented:

A mentally disabled client whose father was guardian of his estate and forbade his son's entry into the "contract of marriage."

A wealthy institutionalized mentally retarded client whose parents had designated a prominent attorney to be his guardian. Despite his large estate, the guardian never provided necessary funds so that the ward went year after year wearing old clothes and was unable to participate in outside activities.

A young mentally retarded client who was signed into a mental institution as a "volun-

ticed in Arkansas and most other states.⁶

Under the law of Arkansas and that of most states, guardianship is an "all or nothing" proposition; either one is fully competent or fully incompetent to handle his or her affairs requiring the appointment of a guardian to control and manage his or her property and/or person.⁷ However, this "all or nothing" proposition does not comport with reality; the abilities of mentally disabled persons to manage their personal and financial affairs are diverse and amenable to growth and development.⁸ The vast majority of even the most severely handicapped persons can manage their everyday affairs.⁹

Guardianship imposes life-long constraints which result in substantial and often unnecessary forfeiture of rights.¹⁰ Under Arkansas law and the laws of most states, an incompetent's right to sell, mortgage or lease his property is removed.¹¹ He or she has no right to enter into a contract,¹² to conduct business,¹³ to borrow money and make gifts,¹⁴ to choose his or her residence,¹⁵ to agree to medi-

tary" patient by her guardian who thereafter actively prevented any efforts at community placement.

A funeral director who was appointed guardian for hundreds of indigent mental patients in order to receive their Social Security death benefits.

6. G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 136 (1972) [hereinafter cited as ALEXANDER & LEWIN].

7. ARK. STAT. ANN. §§ 57-601 to -647 (1971). Thirty-three states have "all or nothing" guardianship provisions. See ABA Study, *supra* note 3, at 4.

8. 89% of all mentally retarded persons are only mildly retarded and either blend into society or with proper habilitation (the constellation of services such as education, medical care, training necessary for mentally retarded to reach their full potential) can be independent and self-sufficient. Indeed, all mentally retarded persons are subject to growth and development. "[E]veryone, no matter the degree or severity of retardation, is capable of growth and development if given adequate and suitable treatment." *Welsch v. Likins*, 373 F. Supp. 487, 495 (D. Minn. 1974). See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *modified*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 101 S. Ct. 1531 (1981); S. HERR, *THE NEW CLIENTS: LEGAL SERVICES FOR MENTALLY RETARDED PERSONS* (1979); ROOS, *Mentally Retarded Citizens: Challenge for the 1970's*, 23 SYRACUSE L. REV. 1059 (1972).

9. Hodgson, *Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem*, 37 ALB. L. REV. 407, 408 (1973) [hereinafter cited as Hodgson].

10. ALEXANDER & LEWIN, *supra* note 6. Arkansas does have a temporary guardianship procedure which permits emergency *ex-parte* guardianship orders for a maximum of 90 days and authorizes the temporary guardian to perform specific tasks. Although this provision could be viewed as a positive short-term solution, it has often been abused. ARK. STAT. ANN. § 57-620 (1971). See, e.g., *Von Luce v. Rankin*, 267 Ark. 34, 588 S.W.2d 445 (1979); *Sparks v. First Nat'l Bank*, 242 Ark. 435, 413 S.W.2d 865 (1967).

11. ARK. STAT. ANN. § 57-639 (1971); ABA Study, *supra* note 3, at 3-8.

12. *Id.* § 57-628.

13. *Id.* § 57-629.

14. *Id.* § 57-630.

15. *Id.* § 57-625. Many of the community based programs for the mentally retarded,

cal "treatment" including sterilization,¹⁶ or to sign himself or herself into an institution.¹⁷ Therefore, a finding of incompetency and the concomitant appointment of a guardian can affect every facet of an individual's life.¹⁸ Indeed, the rights to habilitation and community services discussed in the present symposium may prove meaningless if persons have lost their freedom of choice and right to self-determination by invocation of the legal mechanism of incompetency and guardianship.

I. THE CONSTITUTIONAL RIGHTS AT STAKE IN THE GUARDIANSHIP PROCEEDING

When "the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process."¹⁹ The fact that the state is acting under its benevolent powers as *parens patriae* does not obviate the need for procedural due process when substantial interests are involved.²⁰

Throughout the nation, courts have recognized that civil commitment of the mentally ill, although based in part on a *parens patriae* rationale to protect the individual and his property, has a devastating effect on individual liberty, and therefore, stringent procedural safeguards must be applied in those proceedings.²¹ In *Wessel v. Pryor*²² Judge Eisele declared the Arkansas civil commitment statute unconstitutional as applied and established procedures for the involuntary commitment of the mentally ill, including the right to adequate prior notice of the proceeding, the right to effective assistance of counsel, the right to be present at the hearing, the right

including those funded by H.U.D., require persons themselves to enter into lease agreements which is impossible if one has been adjudicated incompetent. Conversation with Charles Elliott, Deputy Commissioner DDS (Feb. 13, 1981).

16. ARK. STAT. ANN. § 59-5012 (1971) (Arkansas sterilization law). Guardians have also consented to removal of organs for donation. *Little v. Little*, 576 S.W.2d 493 (Tex. Civ. App. 1979). See also Robertson, *Organ Donation by Incompetents and the Substitute Judgment Doctrine*, 76 COL. L. REV. 48, 53 (1976).

17. ARK. STAT. ANN. § 57-625 (1971).

18. ALEXANDER & LEWIN, *supra* note 6, at 136; Horstman, *supra* note 4.

19. *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968).

20. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 441 (1971); *In re Gault*, 387 U.S. 1 (1967).

21. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wessel v. Pryor*, 461 F. Supp. 1144 (E.D. Ark. 1978); *Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

22. *Wessel v. Pryor*, 461 F. Supp. 1144 (E.D. Ark. 1978).

to present evidence, and the right to confront and cross-examine adverse witnesses.

The United States Supreme Court has held that persons have a protected interest in not being erroneously labeled mentally ill.²³ The stigma of incompetence is comparable to that of mental illness and may be even more egregious since it implies that one is mentally defective, untrustworthy, and irresponsible.²⁴ Additionally, an adjudication of incompetency causes a multitude of legal disabilities.²⁵ The adjudication adversely affects an individual's reputation, right to contract, right to enter into chosen occupations, and right to engage in all of the other orderly pursuits of free persons held to involve protected liberty interests.²⁶ Albeit in another context, the Court has stated that "procedural due process must be satisfied when the state attaches a badge of infamy to a citizen."²⁷ Accordingly, the "stigma" of mental incompetence falls within the ambit of a protected liberty interest necessitating procedural due process.²⁸

As a result of an adjudication of incompetency, one also forfeits the right to manage money, enter into contracts, conduct business, buy, sell or otherwise alienate property.²⁹ Thus, several courts have held that the appointment of guardians or committees to manage the estate of an incompetent deprives one of substantial property interests requiring procedural due process.³⁰

23. *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441 U.S. 418 (1979).

24. R. ALLEN, E. FERSTER, & H. WEIHOFEN, *LEGAL IMPAIRMENT AND LEGAL INCOMPETENCY* 37 (1967) [hereinafter cited as ALLEN, FERSTER, & WEIHOFEN].

25. *In re Bailey*, 482 F.2d 648 (D.C. Cir. 1973).

26. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

27. *Wisconsin v. Constante*, 400 U.S. 433, 437 (1971).

28. *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361, 1369 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977); *McAuliffe v. Carlson*, 377 F. Supp. 896 (D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). Indeed, Justice Burger in his concurring opinion in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), recognized that "an inevitable consequence of exercising the *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however, the power is implemented, due process requires that it not be invoked indiscriminately." *Id.* at 583.

29. ARK. STAT. ANN. § 57-625 to -630 (1971).

30. *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971).

At stake in the petition to appoint plaintiff's committee was plaintiff's right to enter into legal relations, to control and dispose of property, to enter into contracts, and to sue and be sued—in short, at stake were all the incidents of being a competent individual which are lost when one is declared to be incompetent.

Id. at 636. See *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977); *McAuliffe v. Carlson*, 377 F. Supp. 896

As substantial property and liberty interests are at stake in the guardianship proceeding, the full panoply of procedural due process rights comparable to those present in civil commitment should be applied.³¹

II. THE OPERATION OF THE ARKANSAS GUARDIANSHIP STATUTE

The Arkansas Guardianship-Probate Code was passed in 1949 and contained, primarily, additions to prior law.³² Typical of most state guardianship laws,³³ that law defines an incompetent as any

(D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

31. See cases cited at *supra* note 21. Once the existence of a protectible property or liberty interest has been established, the Supreme Court has balanced a number of factors to determine what ingredients of procedural due process would apply.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

The application of this balancing test to guardianship makes the need for the full panoply of procedural due process rights quite clear. (1) The private interests affected are the paramount rights of the individual to liberty and property; to control every facet of his or her life including his or her reputation, his or her financial and personal affairs. (2) The risks of error are blatant under the laws of Arkansas and most states as fully discussed *infra* II and include a) vague definition of incompetency which permit a myriad of interpretations resulting in inconsistent and erroneous findings; b) lack of adequate notice which does not alert the alleged incompetent to the seriousness of the proceeding and the need to marshal his or her resources to insure a proper determination by the court; c) denial of the alleged incompetent's right to be present at the proceeding which does not permit adequate challenge to the petition or permit the court the opportunity to observe the alleged incompetent in order to make an adequate determination of competency; d) use of sworn testimony by a physician does not permit the court to inquire into the physician's expertise in the particular discipline at issue (i.e. mental illness or mental retardation), or the nature or lack of an examination or permit cross-examination; the unreliability of diagnosis of mental incompetence also raises a serious risk of error; e) no right to counsel permits little challenge to purported evidence and little chance for additional evidence, including conflicting expert testimony, to be introduced; f) lack of periodic review permits erroneous findings to last a lifetime. (3) The costs to the state for full due process are minimal as they include more time for court proceedings, and use of appointment of counsel (which can also be minimal if free legal services are fully utilized).

32. See generally *Dew v. Requa*, 218 Ark. 911, 239 S.W.2d 603 (1951); *Powers v. Chisman*, 217 Ark. 508, 231 S.W.2d 598 (1950); *Kelley v. Davis*, 216 Ark. 828, 227 S.W.2d 637 (1959). As evidenced by the committee report, most changes in the Guardianship Statute of 1949 involved the duties and powers of guardians and not the adjudication of incompetency. ARK. STAT. ANN. § 57-601 to -649 (1971).

33. ABA Study, *supra* note 3, at 3-69.

person who is: "Incapable, by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs or other mental incapacity, either of managing his property or caring for himself."³⁴ While the law retains the language of earlier Arkansas guardianship statutes, it continues to omit definitions of the terms "imbecility," "idiocy," "managing his property," or "caring for himself." Likewise, case law fails to illuminate the meaning of these terms.³⁵ Thus, these terms are elastic and subject to a myriad of interpretations. They are also subject to abuse through their use as labels.³⁶ These undefined and imprecise terms of the guardianship law are subject to varying interpretations by lay persons as well as psychiatrists.³⁷ This imprecision is particularly distressing when coupled with studies which present serious doubt as to the reliability and validity of psychiatric diagnoses.³⁸

A statute is "void for vagueness" when it fails to give warning of prohibited conduct and lacks standards restricting the discretion of the courts or governmental enforcers.³⁹ Courts have found statu-

34. ARK. STAT. ANN. § 57-601 (1971). *Keenan v. Peevy*, 267 Ark. 218, 235, 590 S.W.2d 259, 269 (1979) [The Probate Court has no jurisdiction to appoint a guardian for a person unable to care for herself because of physical incapacity only; "some form of mental incapacity" must exist for the court to have jurisdiction under the Code].

35. The Committee Comment to ARK. STAT. ANN. § 57-601 (1971), reveals that the definition of mentally incompetent persons "makes no substantial change in our present law as found in Section 7543, Pope's Digest but does introduce and sanction the term 'mental illness' which is more appropriate in many cases than the harsher terms, such as lunatic." In *Pulaski County v. Hill*, 97 Ark. 450, 457, 134 S.W. 973, 975 (1911), the Arkansas Supreme Court held that "the question in all such cases, where incapacity arising from defect of the mind is alleged, is not whether the mind is itself diseased or the person is afflicted with any particular form of insanity, but, rather, whether the powers of the mind have become so affected, by whatever cause, as to render him incapable of transacting business . . . a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing . . . to conduct ordinary affairs of life." This definition was adopted in *Parker v. Parker*, 231 Ark. 635, 331 S.W.2d 694 (1960); *Dew v. Requa*, 218 Ark. 911, 239 S.W.2d 603 (1951).

36. See Comment, *North Carolina Guardianship Laws—The Need for Change*, 54 N.C. L. REV. 389, 405-09 (1976).

37. ALLEN, FERSTER, & WIEHOFEN, *supra* note 24.

38. See, e.g., *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974) [hereinafter cited as Ennis & Litwack].

39. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972); *United States v. Robel*, 389 U.S. 258 (1967); *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 11 (1967). While the doctrine principally has been used to declare criminal statutes unconstitutional, it has also been applied to statutes involving important constitutional interests. For example, the Arkansas Supreme Court in *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979), declared a statute unconstitutionally vague which provided for the appointment of a guardian to consent to the adoption of minor children whose parents failed to provide "a proper home," an undefined term in the statute. The Arkansas Supreme Court held that since the term

tory terms in civil commitment laws which are analogous to those in the Arkansas guardianship statute to be unconstitutionally vague.⁴⁰ In *Goldy v. Beal*⁴¹ a three-judge federal district court held that the Pennsylvania statute permitting commitment of persons "in need of care and treatment for mental disability" was unconstitutionally vague since it was subject to many interpretations and failed to address how incapacitated one must be to need care. Similarly, the Arkansas statute gives no guidelines to the meaning of the terms "managing his property" or "caring for himself." The questions and the possible interpretations of these vague terms are limitless. Because of this vagueness, the sanctions of incompetency could sweep much too broadly. Such vague and overbroad standards are constitutionally impermissible and could arbitrarily deprive persons of their constitutional rights.⁴²

Notice

Under Arkansas law the only notice required to be given to an alleged incompetent is the notification of the date of the hearing⁴³ on the petition in probate court.⁴⁴ This notification does not afford the alleged incompetent person an explanation of the nature of the proceeding, its consequences, or his or her rights as required when protected liberty and property interests are at stake.⁴⁵ This is particularly egregious since these proceedings involve persons who, by reason of their disability, may be vulnerable, isolated, and without knowledge of their legal rights.⁴⁶

In commitment hearings, the Arkansas law requires that the notice apprise persons of the nature of the proceedings and their

"proper home" is subject to a multiplicity of meanings, it does not provide sufficient guidelines to meet the due process requirement of the fourteenth amendment and the Arkansas Constitution.

40. *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); *Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Finken v. Roop*, 339 A.2d 764 (Pa. 1975) *cert. denied*, 424 U.S. 960 (1976).

41. 429 F. Supp. 640 (M.D. Pa. 1973).

42. *See, e.g.*, *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); *In re Sealy*, 218 So. 2d 765 (Fla. 1969).

43. The alleged incompetent must have at least three days notice. ARK. STAT. ANN. § 57-611 (1971). But the statute is exhaustive in its coverage of other persons who may be entitled to notice. ARK. STAT. ANN. §§ 57-611 to -613 (1971).

44. ARK. STAT. ANN. § 57-604 (1971) provides that the Probate Court has exclusive jurisdiction of guardianship proceedings.

45. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *See also* *Covey v. Town of Somers*, 351 U.S. 141 (1956).

46. *See* *Dale v. Hahn*, 486 F.2d 76 (2nd Cir. 1973), *cert. denied*, 419 U.S. 826 (1974).

rights to counsel, to be present, to present witnesses, and to confront and cross-examine adverse witnesses.⁴⁷ The same notice requirements should be utilized in guardianship proceedings as well.⁴⁸

The Hearing

Under Arkansas law, the alleged incompetent does not have the right to be present at the hearing, but may be required to be present at the discretion of the court.⁴⁹ In reality, few alleged incompetents are present at guardianship proceedings in Arkansas or elsewhere,⁵⁰ and hearings are truly *ex parte* in nature with the petition treated as uncontested.⁵¹ It is axiomatic that the right to an opportunity to be heard includes the right to be present at the hearing and present evidence to the extent of one's ability.⁵²

The sole evidence specifically required by statute for determination of incompetence is the admission of sworn testimony or submission of a sworn written statement from a physician.⁵³ In the overwhelming majority of cases, the written statement of the doctor which, at best, borrows the salient phrases of the statute,⁵⁴ forms the necessary evidence. Significantly, the case law provides that the physician need not have examined the alleged incompetent, but merely must have filed a statement attesting to his or her

47. *Wessel v. Pryor*, 461 F. Supp. 1144 (E.D. Ark. 1978); ARK. STAT. ANN. § 59-1401 (Cum. Supp. 1981).

48. *Schneider v. Radack*, Yanton County Cir. Ct., 1st Jud. Cir. (July 30, 1974). See generally Horstman, *supra* note 4, at 235.

49. ARK. STAT. ANN. § 57-615 (Cum. Supp. 1981). Indeed, guardianship orders for those incarcerated in out-of-state institutions have been upheld. *Sanders v. Omohundro*, 204 Ark. 1040, 166 S.W.2d 657 (1942). Guardianship orders are not void on their face if the judge abused his discretion by not requiring the presence of the alleged incompetent. *Hyde v. McNeely*, 193 Ark. 1139, 104 S.W.2d 1068 (1937).

50. Horstman, *supra* note 4, at 235; Levy, *Protecting the Mentally Retarded: An Empirical Survey and Evaluation of the Establishment of State Guardianship in Minnesota*, 49 MINN. L. REV. 821, 881-86 (1965) [hereinafter cited as Levy].

51. Horstman, *supra* note 4, at 241; interview with the Honorable Tom Glaze of the Arkansas Court of Appeals, a former Chancellor and Probate Court Judge (April 13, 1981).

52. *Boddie v. Connecticut*, 401 U.S. 731 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

53. ARK. STAT. ANN. § 57-615 (Cum. Supp. 1981).

54. An exhaustive survey of Arkansas case law reveals no cases relying on oral testimony of physicians for initial incompetency determinations. Apparently, physicians have been required to testify only on collateral issues, such as enforcement of contracts by incompetents, *Alley v. Rodgers*, 269 Ark. 262, 599 S.W.2d 739 (1980), or efforts to quash original orders, *Parker v. Parker*, 231 Ark. 635, 331 S.W.2d 694 (1960); *Powers v. Chisman*, 217 Ark. 508, 231 S.W.2d 598 (1950). See also *Wilson v. Williams*, 215 Ark. 576, 221 S.W.2d 773 (1949); *Sanders v. Omohundro*, 204 Ark. 1040, 166 S.W.2d 657 (1942) (involving a letter from a physician written in 1912). Judge Glaze's experience confirms this, *supra* note 52.

incompetence.⁵⁵

In *Alley v. Rodgers*,⁵⁶ decided recently by the Arkansas Supreme Court, the court, in passing, referred to the one-sentence physician's statement upon which the initial guardianship order was based. This statement said only that the physician did not feel the alleged incompetent was capable of handling his personal affairs.⁵⁷ More often, the sole question at issue is whether the alleged incompetent has a specific disability.⁵⁸ Therefore, the type of conduct exhibited warranting the protection of guardianship seldom becomes the crucial factor in determining incompetence.⁵⁹ The appointment of guardians for institutionalized persons in Arkansas has been rendered routine by cursory factual determinations or virtual noninvolvement by the physicians required by the statute.⁶⁰

The use of brief and conclusive statements as the basis for a deprivation of liberty and property renders the right to confront and cross-examine the physician crucial. Nevertheless, the statute is silent on this right and, by sanctioning the affidavit procedure, insures that few physicians will testify in court and be available for cross-examination.⁶¹ Physicians may not have the necessary training or experience to diagnose the enumerated disabilities.⁶² Mental retardation, for example, is determined by tests not generally administered by physicians nor in their area of expertise.⁶³ Even psychiatrists who have special training in the treatment of mental

55. Sparks v. First Nat'l Bank, 242 Ark. 435, 413 S.W.2d 865 (1967).

56. 269 Ark. 262, 599 S.W.2d 739 (1980).

57. *Id.* at 265, 599 S.W.2d at 741.

58. Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1420 (1979) [hereinafter cited as Mitchell]. IQ is often the sole basis for incompetency. In a Minnesota study, physicians testifying in guardianship hearings routinely believed that IQ's were sufficient evidence of mental incompetency without any other proven limitations. Levy, *supra* note 50, at 884.

59. ALEXANDER & LEWIN, *supra* note 6, at 24.

60. The Arkansas Division of Developmental Disabilities Services (DDS) encourages families to seek appointment of guardians for all residents at the institutions for mentally retarded. Institutional staff routinely send a letter to the family advising them to petition for guardianship of the resident because it is mandated, allegedly, by law or federal regulation. Attached to the letter is a form affidavit signed by a staff physician which contains only two lines regarding the alleged incompetent's condition:

It is my professional opinion, based upon my personal observation and treatment of _____, that he is in fact mentally retarded. His average I.Q. is —, and it is necessary that a guardian of the person and estate be appointed to take care of his affairs as he is totally unable to do so for himself.

Letters from all the institutions are on file with the author.

61. ARK. STAT. ANN. § 57-615 (Cum. Supp. 1981).

62. See generally Levy, *supra* note 50, at 884.

63. *Id.*

diseases are notoriously poor in predicting behavior; the reliability and validity of their statements that the person is "unable to manage his property or care for himself" are, therefore, questionable.⁶⁴

While the statute allows the court to appoint a guardian ad litem, it is silent on the right to counsel.⁶⁵ In order, however, to assure that the alleged incompetent is afforded a meaningful hearing, due process guarantees the right to "the guiding hand of counsel,"⁶⁶ and, if the alleged incompetent is indigent, to the appointment of counsel or information about the availability of free legal services.⁶⁷ In the vast majority of proceedings, an attorney for the alleged incompetent seldom appears, and only the attorney for the petitioner and the judge are present at the hearing.⁶⁸ Accordingly, in states where studies have been conducted under similar statutes, the court proceedings have averaged only three minutes.⁶⁹

The statute does not address the standard of proof which is to be employed in the hearing, and, since a contested hearing is rarely held, there has been no need for articulation of the standard.⁷⁰ In the rare instance of a contested proceeding, the practice is to apply the preponderance of the evidence standard⁷¹ which inevitably re-

64. *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Ennis & Litwack*, *supra* note 38.

65. ARK. STAT. ANN. § 57-601 (1971 & Cum. Supp. 1981). Representation by a guardian ad litem charged to act in one's best interest and not necessarily to act on one's behalf is inadequate to satisfy the constitutionally mandated right to counsel. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Quesnell v. State*, 83 Wash. 2d 224, 517 P.2d 568 (1973); *State v. Mundy*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977); *Mitchell*, *supra* note 58, at 1419.

66. *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Wessel v. Pryor*, 461 F. Supp. 1144 (E.D. Ark. 1978).

67. *Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

68. *See, e.g., Lingo v. Rainwater*, 199 Ark. 618, 136 S.W.2d 161 (1940), in which the Arkansas Supreme Court affirmed a decision appointing a guardian which was made by a probate court judge while on vacation but later confirmed. The National Senior Citizens Law Center in its 1973-74 study of guardianship proceedings in California found that in 84.2% of cases only the Judge, Petitioner, and Attorney for Petitioner were present and in only 1% of cases was an attorney present to represent the alleged incompetent. Horstman, *supra* note 4, at 231. *See ALEXANDER & LEWIN*, *supra* note 6, at 1-5; *Levy*, *supra* note 50, at 881-84.

69. *Levy*, *supra* note 50, at 881-86; *ALEXANDER & LEWIN*, *supra* note 6, at 1-5; *Horstman*, *supra* note 4, at 235.

70. Interview with the Honorable Tom Glaze, *supra* note 51.

71. *See Letter to Arkansas Legislative Council from the Honorable Thomas F. Butt, Chancellor* (Sept. 3, 1980) (on file with the author).

sults in "erring on the side of caution" by finding incompetence.⁷²

In *Addington v. Texas*⁷³ the United States Supreme Court held that in view of potential serious deprivation of liberty, the adverse social consequences, and serious risk of error, the standard of proof in civil commitment cases must be by clear and convincing evidence.

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is a possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision. . . .⁷⁴

Indeed, the Supreme Court in *Addington*, by implication, may have decided the standard of proof to be employed in incompetency proceedings as well. *Addington* involved a Texas commitment law⁷⁵ which permitted indefinite involuntary hospitalization for persons found to be mentally ill, in need of hospitalization to protect themselves or others, and mentally incompetent. Thus, in Texas, in order to be involuntarily committed, one must first be found to be mentally incompetent. Since the standard of proof to be applied in this proceeding is clear and convincing evidence, the inquiry into mental incompetence should so conform.⁷⁶

Finally, since the adjudication of incompetency and appointment of a guardian infringes on a multitude of personal rights, due process requires some periodic review to determine the continued need for a guardianship.⁷⁷

72. *Parker v. Parker*, 231 Ark. 635, 331 S.W.2d 694 (1960); *Metcalf v. Nichol*, 225 Ark. 574, 283 S.W.2d 853 (1955); *Lester v. Pilkinton*, 225 Ark. 349, 282 S.W.2d 590 (1955); *Powers v. Chisman*, 217 Ark. 508, 231 S.W.2d 598 (1950); *Levy*, *supra* note 50, at 880.

73. 441 U.S. 418 (1979).

74. *Id.* at 426-27.

75. TEX. REV. CIV. STAT. ANN. art. 5547-57 (Vernon Cum. Supp. 1980-1981).

76. See also *Heap v. Roulet*, 152 Cal. Rptr. 425, 590 P.2d 1 (1979), in which the California Supreme Court held that the appointment of a conservator (who has many powers, including the power to commit) must be beyond a reasonable doubt.

77. *Jackson v. Indiana*, 406 U.S. 715, 734 (1972); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1391 (1974). This is particularly significant since the abilities of disabled persons are not static but subject to change. Roos, *The*

The Order

The court may find either that the person is fully competent or that the person is fully incompetent and requires a guardian.⁷⁸ If the probate court finds a person to be incompetent, a guardian of the estate and/or the person is appointed.⁷⁹ Upon appointment, the guardian is required to issue letters of guardianship to the public, advising that he or she has been appointed the guardian for the incompetent person.⁸⁰ The guardian of the estate must make an annual accounting to the court; however, the guardian of the person is required to make a report on the condition of the ward only at the direction of the court.⁸¹

Orders finding a person to be partially incompetent or authorizing the guardian to manage only specific areas are not permitted under Arkansas law nor the law of thirty-three other states.⁸² This contravenes the Supreme Court directive that the state must achieve its legitimate goals by methods that least intrude on fundamental rights.⁸³

[E]ven though the governmental 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. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.⁸⁴

Law and Mentally Retarded People: An Uncertain Future, 31 STAN. L. REV. 613 (1979) [hereinafter cited as Roos].

78. ARK. STAT. ANN. § 57-615 (1971).

79. It is the duty of the guardian of the person "to care for and maintain the ward." ARK. STAT. ANN. § 57-624(a) (1971). It is the duty of the guardian of the estate "to exercise due care to protect and preserve it, to invest it and apply it as provided in this code, to account for it faithfully." ARK. STAT. ANN. § 57-624(b) (1971). Of the approximately 2,000 guardianship petitions filed last year in Arkansas, *Report of the Justice Department, 1980*, there are no statistics on the number of appointments of guardians of estate and/or person. A survey of the case law reveals that most procedures result in the appointment of both the guardian of the person and the estate, however, a corporation cannot be a guardian of the person. *Bogan v. Arkansas First Nat'l Bank*, 249 Ark. 840, 462 S.W.2d 203 (1971).

80. ARK. STAT. ANN. § 57-618 to -619 (1971). This process of issuing letters further substantiates the presence of a stigma of incompetence.

81. ARK. STAT. ANN. §§ 57-624(a), -642 (1971).

82. ABA Study, *supra* note 3, at 4. The abilities of an individual disabled person may, for example, enable the person to manage money under \$500.00 but not larger amounts, pay his or her rent but not be able to fulfill duties of property ownership, or make everyday decisions but be unable to give informed consent to medical treatment. See *Kindred*, *supra* note 2; *Roos*, *supra* note 77.

83. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

84. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

This concept of least restrictive alternative has been applied to civil commitments, thereby requiring an exploration of the least restrictive environment for the provision of treatment prior to the imposition of involuntary commitment to an institution.⁸⁵ Similarly, because the finding of incompetency affects fundamental constitutional rights, the right to an exploration of least restrictive alternatives to provide necessary protection to the incompetent should attach.⁸⁶ The application of the concept to guardianship proceedings requires an exploration of the specific interests to be protected and the specific needs and deficiencies of the alleged incompetent so that the methods utilized can achieve the desired protection with the least infringement on fundamental rights.⁸⁷

If it is shown, however, that the desired protection cannot be achieved short of appointment of a guardian, the court should continue to apply this concept by authorizing limited guardianships with the guardian having the power to perform only specific, definable tasks.⁸⁸ The Arkansas guardianship statute does not provide for such less restrictive orders. Therefore, the statute subjects persons to needless infringements of their rights in violation of due process.⁸⁹

III. THE FAILURE OF PIECEMEAL LITIGATION

Despite these serious constitutional infirmities there has been a dearth of challenges to guardianship statutes.⁹⁰ Many challenges

85. ARK. STAT. ANN. §§ 59-1401 to -1428 (Cum. Supp. 1981); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974), vacated, 414 U.S. 473 (1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), partially vacated on other grounds, 550 F.2d 1122 (8th Cir. 1977); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated, 421 U.S. 957 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976); Chambers, *Alternative to Civil Commitment of the Mentally Ill: Practical Guide and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972).

86. Vecchione v. Wohlgemuth, 80 F.R.D. 32 (E.D. Pa. 1978); *In re Guardianship of Shaw*, 87 Wis. 2d 503, 275 N.W.2d 143 (1979); Lippman, *The Right to Least Restrictive Alternatives in Guardianship*, MENTALLY RETARDED CITIZENS AND THE LAW 520 (1976) [hereinafter cited as Lippman].

87. *Id.*

88. Lippman, *supra* note 86, at 520; President's Panel on Mental Retardation, *Report of Task Force on Law* 213 (1963); 1 MENTAL DISABILITY LAW REPORTER 454 (1978).

89. Smith v. Goguen, 415 U.S. 566 (1974); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976).

90. Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978); Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971); Schultz v. Borradaile, Civ. App. No. 74-40123 (E.D. Mich. June 8, 1979); Tod v. Smith, Civ. App. No. 75-10024 (E.D. Mich. June 8, 1979); Snyder v. Altman, 444 F. Supp. 1269 (C.D. Cal. 1977); Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd*,

have been dismissed on procedural grounds.⁹¹ There have been two challenges to the Arkansas statute, both of which resulted in withdrawal of the original petitions, rendering the challenges moot.⁹²

Only one statute, the South Dakota law, has been declared unconstitutional.⁹³ There, the court was presented with a challenge to the civil commitment process and analyzed the guardianship procedure which permitted voluntary commitment by a guardian. The court held that the ward is entitled to adequate notice and an opportunity to be heard, including the right to appointment of counsel, the right to periodic review, and the application of standards of incompetency that are not vague.⁹⁴ The few other successful cases have cured only specific defects of a particular law or practice.⁹⁵

In *Dale v. Hahn*⁹⁶ a former mental patient filed an exhaustive due process challenge to the New York incompetency statute. While Ms. Dale was a mental patient, the state filed a petition alleging her incompetence and requesting the appointment of a committee to manage her funds. The petition was granted and a committee

558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977); *McAuliffe v. Carlson*, 377 F. Supp. 896 (D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

91. *Rud v. Dahl*, 578 F.2d 674 (7th Cir. 1978); *Schultz v. Borradaile*, Civ. App. No. 74-40123 (E.D. Mich. June 8, 1979); *Tod v. Smith*, Civ. App. No. 75-10024 (E.D. Mich. June 8, 1979); *Snyder v. Altman*, 444 F. Supp. 1269 (C.D. Cal. 1977). In all four cases, the court invoked the doctrine of abstention.

92. Griffin Stockley of Central Arkansas Legal Services and the author have been counsel in both abated challenges. In *In re Alphonso McLeash*, No. 6634, Pulaski County Probate Court, the son of an elderly resident of a VA hospital sought to be appointed the guardian of his father's person and estate. After oral argument and submission of briefs on the constitutional issues, the petitioner withdrew his petition. In *In re Lee Ann Ueckert*, No. 81-1, Miller County Probate Court, the father of a 17 year old mildly mentally retarded girl sought appointment as guardian of his daughter's person and estate on the grounds of mental incompetence, essentially as an effort to continue control over her life after she reached majority. After the submission of the respondent's Motion for Declaratory Judgment seeking a declaration of the statute's unconstitutionality and application of constitutional procedures in the instant case, the court refused to address the mental incompetence issue choosing, instead, to appoint a guardian for the remaining period of minority only. (Interestingly, some states have laws dealing with precisely this question and permit continuation of parental authority over the mentally retarded. *E.g.*, N.Y. Surr. Ct. Proc. Act §§ 1750-1755 (McKinney Supp. 1981).

93. *See Schneider v. Radack*, Yankton County Cir. Ct., 1st Jud. Cir. (S.D. July 30, 1974).

94. *Id.*

95. *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971); *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977); *McAuliffe v. Carlson*, 377 F. Supp. 896 (D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

96. 440 F.2d 633 (2d Cir. 1971).

was appointed. The committee spent \$5,686.00 of the total assets of \$8,000.00 for mental hospital bills and committee expenses during her hospitalization. The court, however, avoided the issue of the statute's constitutionality and, instead, held only that Ms. Dale had been denied adequate notice of the incompetency proceeding.⁹⁷ In the aftermath of that decision, the New York incompetency statute has remained intact and only the notice provisions have been altered.⁹⁸

Several cases have attacked the automatic practice, as illustrated by *Dale v. Hahn*, of stripping mental patients of the use and control of their property in order to gain payment of hospital bills.⁹⁹ In *Vecchione v. Wohlgemuth*¹⁰⁰ a class of institutionalized persons challenged the Pennsylvania statute¹⁰¹ which authorized the revenue agent of each institution to appropriate, without court intervention, the assets of mental patients with total assets under \$2,500.00. The seized assets were to be used to pay hospital bills. In contrast, persons with assets over \$2,500.00 could not lose the use and control of their funds except through institution of the Pennsylvania incompetency proceeding.¹⁰² The district court found the procedure to be

97. *Id.* at 638. The case was originally dismissed in the lower court for failure to state a claim upon which relief could be granted. The Second Circuit reversed and remanded that decision, holding that a cause of action had, indeed, been stated and further holding that there may have been deprivations of liberty or property interests. *Id.* at 633. Subsequently, the Second Circuit held that the plaintiff did not receive constitutionally adequate notice of the proceeding. *Dale v. Hahn*, 486 F.2d 76 (2d Cir. 1973), *cert. denied*, 419 U.S. 826 (1974).

98. The New York incompetency statute was amended in 1978 to provide that service of process must be made upon the official in charge of the institution as well as the Mental Health Information Service, the legal representative for New York mental patients. N.Y. MENTAL HYG. LAW § 78.03 (McKinney 1978).

99. *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977); *McAuliffe v. Carlson*, 377 F. Supp. 896 (D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). Arkansas has a similar procedure authorizing payment to an institution for an incompetent with assets under \$100 without the formal appointment of a guardian. ARK. STAT. ANN. § 57-646.1 (1971). It is estimated that over 100 petitions to dispense with guardianship were filed under that provision for residents of the Arkansas Children's Colony system. The petitions and court orders refer to the subject of the proceeding at all times as an incompetent although no separate proceeding to declare the person incompetent was held. Conversations with Robert Fortner, M.A. and David Maxwell, M.S.W. of Human Development Center at Booneville (June 4, 1981). It may be that a situation similar to *Vecchione* has occurred in Arkansas warranting scrutiny.

100. 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977).

101. 50 PA. CONS. STAT. ANN. §§ 3201-3202 (Purdon 1969) (current version at 20 PA. CONS. STAT. ANN. § 5505 (Purdon 1975)).

102. 50 PA. CONS. STAT. ANN. § 3301 (Purdon 1969) (current version at 20 PA. CONS. STAT. ANN. § 5511 (Purdon 1975)).

unconstitutional under the equal protection¹⁰³ and due process¹⁰⁴ clauses of the fourteenth amendment. The court ordered the institution of incompetency proceedings and court appointment of a guardian prior to the seizure and use of all institutionalized persons' funds.¹⁰⁵

Pursuant to the 1974 court order in *Vecchione*, a consent decree was adopted by the parties but later repudiated by the state defendants. This consent decree permitted over \$9,000,000.00 wrongfully withheld to be repaid to the patients.¹⁰⁶ After protracted litigation concerning the enforcement of the consent decree, a new consent decree was agreed upon by the parties in 1978.¹⁰⁷

The new decree set up a new procedure authorizing the appointment of "guardian officers" at each institution for mentally ill and mentally retarded persons.¹⁰⁸ Additionally, the consent decree required that the competency of all present patients and future patients must be assessed within thirty days of admission.¹⁰⁹ If the institutional director issued an opinion assessing the patient to be incompetent, the guardian officer would refer the matter to the State Department of Justice for the commencement of incompetency proceedings, and if no alternative guardians could be found, the guardian officer could be appointed guardian to manage the funds of the incompetent patient.¹¹⁰ The guardian officer might also be appointed the representative payee for SSI or Social Security benefits if no acceptable non-institutional person or agency existed. For Social Security benefits this representative payee status could not exceed six months.¹¹¹ Social Services staff at each institution were also charged with advising and assisting patients in safeguarding and

103. The court held that the statute created two classes of mental patients similarly situated, one afforded prior notice and hearing before they lost control and use of their property, and the other denied that right.

104. The court held that the right to prior notice and hearing was essentially a due process right guaranteed by the 14th Amendment to the Constitution. 43 *FORD. L. REV.* 624 (1975).

105. 377 F. Supp. at 1372.

106. Approximately \$250,000.00 of that money has remained unclaimed and the court is considering whether it has the power under the doctrine of *cypres* to order its expenditure. Letter from Terry Roth, Esq. of the Pennsylvania Legal Services Center to the author (May 12, 1981) (on file with the author) (hereinafter cited as Roth letter).

107. 80 F.R.D. 32 (E.D. Pa. 1978).

108. *Id.* at 62. Most often the guardian officers were the former revenue agents who enforced the prior statute.

109. *Id.* at 59.

110. *Id.*

111. *Id.* at 58.

managing their property. This included patient money management training to the end that a guardian would not be required in the future.¹¹² Finally, the procedure stated that the guardian officer should act independently of the institution and in conformity with the patient's best interest, while being permitted to raise issues challenging hospital bills and seeking abatement of those bills.¹¹³

In essence, the *Vecchione* consent decree designed procedures to be instituted before and after an incompetency proceeding. The statute governing the declaration of incompetence was left intact. Because of that glaring problem, several organizations filed objections to the *Vecchione* consent decree warning that it would result in a declaration of incompetence for thousands of mental patients and institutionalized mentally retarded persons.¹¹⁴ The court, however, rejected these objections and held that the settlement was fair.¹¹⁵

The objectors' fears were well grounded. Like the Arkansas statute, the Pennsylvania statute contains vague and overbroad lan-

112. *Id.* at 67-68.

113. *Id.* at 62-65.

114. The Pennsylvania Association for Retarded Citizens (PARC), the Berks County Mental Health Association, and the American Bar Association Mental Health Legal Advocacy Project all filed objections to the settlement. (Indeed, PARC filed a motion to alter or amend the class certification issued in 1977 which included mental patients and mentally retarded persons within the same class. PARC objected to mentally retarded persons being treated in the same class because none of the named plaintiffs were mentally retarded and no evidence on mental retardation had been presented to the court.) The objections of all three parties, however, focused on the failure of the consent decree to permit less restrictive methods to govern money management matters for institutionalized persons. PARC suggested, for example, that the common-law theory of agency be applied and that agents be recruited and paid a small stipend. These agents would assist the institutionalized person in the management of money but would allow the person to retain the power of a principal under agency law, thereby allowing them the ultimate decision on how their money should be spent. They also alleged that the guardianship proceedings may be abused and that a greater chance of mistake is present for the retarded. They further objected to the use of the guardian officers as institutional employees and warned that such guardian officers would not be independent or immune from institutional pressures. Additionally, PARC contended that the mechanical skills of money management are improperly treated as indices of competence and noted that without such skills, most mentally retarded people are likely to be adjudicated incompetent. The ABA alleged that a guardian ad litem should be provided at competency hearings and a bond should be required of guardian officers. Also, the Mental Health Association objected to the following: that no provision was present for patient preference in the choice of a representative payee; that there was no provision for patients to deal with abuse by institutional staff in making determinations or by the guardian officer in handling funds; that there was no indication that patients would receive clear notice that they might challenge the billing of the revenue agent; and that the guardian office should be open for deposit and withdrawal of funds of residents. *Id.* at 41-50; Briefs of PARC, ABA and Berk County Mental Health Association (on file with the author).

115. 80 F.R.D. at 57.

guage,¹¹⁶ does not require adequate notice of the nature and effect of the incompetency hearing, permits the court to waive the right of the alleged incompetent to be present upon "positive testimony" that due to his physical or mental condition his welfare would not be promoted by his presence, and does not grant a right to counsel or the right to confront and cross-examine adverse witnesses.¹¹⁷

The result of *Vecchione* has been the reassessment or examination of every institutionalized mentally ill and mentally retarded person. Each institution has designed its own assessment tools or methodology designed to label persons as competent or incompetent.¹¹⁸ Efforts to find alternative representative payees have varied from institution to institution.¹¹⁹ In the years since the *Vecchione* consent decree, over 5,000 "Vecchione" incompetency petitions have been filed. Approximately 500 of these petitions were withdrawn because the patient died, was discharged, or a representative payee was found to handle his or her Social Security checks. Of the 4,500 petitions that were presented to the court, virtually all have resulted in the appointment of the guardian officer as the guardian.¹²⁰ Of the petitions filed pursuant to the Pennsylvania statute, the vast majority of proceedings have been conducted without the alleged incompetent's presence, without adequate notice, without knowledgeable counsel,¹²¹ without the right to confront and cross-

116. 20 PA. CONS. STAT. ANN. § 5501 (Purdon 1975) defines "incompetent" as "a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety: (1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or (2) lacks sufficient capacity to make or communicate responsible decisions concerning his person." See also Comment, *An Assessment of the Pennsylvania Estate Guardianship Incompetency Standard*, 121 U. PA. L. REV. 1048 (1976).

117. 20 PA. CONS. STAT. ANN. § 5511 (Purdon 1975).

118. According to American Bar Association Mental Health Legal Advocacy Project data, some institutions had written evaluation tools and others did not. For example, at Wernersville State Hospital a written evaluation tool was utilized by staff psychiatrists to assess incompetency while at Haverford State Hospital there was no formal method of assessing incompetency and, instead, assessment was based solely on the judgment of the examining psychiatrist.

119. There has been no guidance given to guardian officers on the sort of effort that must be made to locate representative payees and, thus, their efficiency has varied from institution to institution. However, in the limited places where advocates have been active, representative payees have often been found. Interview with Judy Greenwood, Community Legal Services of Philadelphia, attorney for plaintiffs in *Vecchione* (February 26, 1981).

120. See Roth letter, *supra* note 106.

121. In "*In re Appointment of Special Masters*," No. 1 Alleged Incompetent Special Docket, Pa. Sup. Ct. (Oct. 1, 1979), the Pennsylvania Supreme Court mandated appointment of counsel in all *Vecchione* incompetency proceedings. But, unfortunately, because of serious constitutional defects in the statute and the unfamiliarity of appointed counsel with the

examine witnesses,¹²² without the right to periodic review, and orders have not been permitted that are least restrictive of the ward's rights. The hearings have averaged three minutes and almost always result in a finding of incompetency.¹²³ Few appeals of these hearings have been filed.¹²⁴ Additionally, efforts to utilize procedures for abatement of hospital bills have also remained largely unsuccessful.¹²⁵ Upon the patient's discharge, the guardian officer has often remained the guardian.¹²⁶

Thus, the cure in *Vecchione* may have been worse than the disease. If the procedures under *Vecchione* were allowed to work fully so that money management training occurred, representative payees were appointed, and abatement procedures were permitted, the system would still result in a serious loss of rights because of the nature of the guardianship statute.¹²⁷ Before *Vecchione*, persons could lose

statute or the nature of incompetency, the presence of counsel has not made a substantial difference. See also Comment, *Mandatory Appointment of Counsel in Pennsylvania Guardianship Proceedings*, 84 DICK. L. REV. 97 (1979).

122. Mandating the presence of the examining physician and counsel at the hearings has resulted in a decreased number of petitions filed. See, e.g., ABA data on Haverford State Hospital on file with the author.

123. The appeals filed to date on post-*Vecchione* competency proceedings have demonstrated the brevity of proceedings and their failure to permit less restrictive orders. For example, in *In re Nogay*, #428 to 433 (1978 Term), sixty persons were declared incompetent in only two days of proceedings. None of the persons were present in any of these hearings. In *In re Appointment of Guardians for Buska* #87-96 (March Term 1978) before the Supreme Court of Pennsylvania, ten persons were declared incompetent. This case further documents that of the first 187 post-*Vecchione* hearings, all persons were declared incompetent.

124. Pursuant to an appeal challenging the constitutionality of the Pennsylvania statute, the Pennsylvania Supreme Court has mandated the appointment of counsel in all *Vecchione* incompetency proceedings, *supra* note 121. As a result, knowledgeable and aggressive counsel have at times been present at these hearings, have subjected examining physicians to vigorous cross-examination, and have introduced expert testimony to counter the testimony of the State's expert. Yet, because of the slippery and opaque definition of incompetence and the prohibition of flexible guardianship orders, most of these cases have resulted in appointment of guardians. The only appeals filed to date are listed at *supra* note 123. Series of correspondence with Robert Manara, Esq., counsel in *In Re Appointment of Guardians for Buska* and many other *Vecchione* guardianship proceedings, on file with the author.

125. *Tartandra v. Commonwealth*, 52 Pa. Commw. Ct. 579, 416 A.2d 608 (1980); *Edwards v. Commonwealth*, 34 Pa. Commw. Ct. 622, 384 A.2d 293 (1978).

126. Interview with Judy Greenwood, *supra* note 119.

127. The *Vecchione* plaintiffs have filed interrogatories in anticipation of filing a motion for contempt. Their allegations include: (1) no training in money management has occurred for patients; (2) the guardian officers have not been permitted to raise objections to hospital bills, thus resulting in no efforts at abatement; (3) guardian officers are not advising the court of patients' discharges, resulting in non-institutionalized persons with institutional guardians, or money being returned to Social Security or another agency and awaiting a new appointment of a representative payee; and (4) the guardian officers and other institutional

up to \$2,500.00 during institutionalization but would retain all other rights. Now with the court mandated right to "prior notice and hearing," persons are stigmatized as incompetent and have a guardian managing every aspect of their property and financial affairs without their knowledge and without their consent.¹²⁸

Despite the serious repercussions of the *Vecchione* decision, one should not lose sight of the reason for the original filing of the action—to stop the seizure by the state of mental patients' assets in order to pay hospital costs.¹²⁹ The lawsuit's focus on due process infractions was the obvious means to attack this onerous process. The result, mandating prior notice, a hearing, and the appointment of a guardian if a person were found incompetent, was hailed as a victory for mental patients' rights.¹³⁰ Yet, as we have seen, this proclamation of victory was short sighted. Now the state can utilize court sanctioned procedures to obtain the same result—payment of hospital bills.

Some state statutes use the determination of incompetency to limit the rights of mental patients.¹³¹ Other recent cases have also used legal incompetency as a short sighted solution to redress serious deprivations of the rights of mentally disabled persons. In *Rogers v. Okin*,¹³² *Rennie v. Klien*,¹³³ and *In re K.K.B.*,¹³⁴ the courts addressed the pressing problem of the forced medication of mental patients. These decisions have held that legally competent mental patients may refuse medication except in emergencies, and guardians for legally incompetent patients may refuse or consent to treatment. Thus, legally incompetent mental patients do not have the

officials have not made sufficient attempts to find representative payees prior to institution of guardianship proceedings. *Id.*

128. *Vecchione v. Wohlgemuth*, 80 F.R.D. 32 (E.D. Pa. 1978).

129. *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977).

130. *Vecchione v. Wohlgemuth*, 80 F.R.D. 32, 36 (E.D. Pa. 1978).

131. *E.g.*, DEL. CODE ANN. tit. 16 § 5161 (Supp. 1980) (no surgery or ECT without competent patient's consent); IND. CODE § 16-14-1.6-4 (Supp. 1980); MONT. REV. CODE ANN. §§ 38-1227 to -1228 (Supp. 1977) (right of competent patient to refuse electric shock); NEB. REV. STAT. §§ 83-1066 to -1067 (1976) (guardian can force treatment on ward); NEV. REV. STAT. § 433.484(1) (1979) (no treatment without consent of competent patient); N.C. GEN. STAT. § 122-55.6 (1981) (competent patient has right to refuse treatment); OHIO REV. CODE ANN. § 5122.301 (Page 1981) (a person may exercise all civil rights despite hospitalization unless adjudicated incompetent); S.D. CODIFIED LAWS ANN. § 27A-12-2(1) (rev. 1976) (competent patient has right to refuse electric or insulin shock).

132. 478 F. Supp. 1342 (D. Mass. 1979), *vacated and remanded*, 634 F.2d 650 (1st Cir. 1980).

133. 462 F. Supp. 1131 (D.N.J. 1979).

134. 4 M.D.L.R. 72 (Okla. 1980).

right to determine what substances will violate their bodily integrity. Based on the *Vecchione* experience and the controversies surrounding the right of mental patients to refuse treatment, it is quite foreseeable that many more mental patients will be declared legally incompetent in order for hospitals to exercise total control over treatment. The only insurance against this occurrence is the presence of a constitutionally viable incompetency statute.¹³⁵

IV. CONCLUSION

The attempts at reform must go to the heart of the problem—the nature of guardianship itself. Neither procedural cures nor other piecemeal attempts at reform will suffice. Without a complete revision, guardianship remains “a dangerous statute easily capable of abuse . . . to accomplish the very wrong to be guarded against.”¹³⁶ In almost every case discussed in studies and case law the incompetent was placed in a worse position after the adjudication of incompetency.¹³⁷ Like *Vecchione*, other “reform” efforts have only created additional problems.¹³⁸

There is no doubt that many mentally disabled persons require assistance in money management or other personal affairs largely because of lack of habilitation and the isolating results of institu-

135. For a discussion of this problem, see Plotkin, *Limiting the Therapeutic Orgy: Mental Patients Right to Refuse to Treatment*, 72 NW. U.L. REV. 461 (1977).

136. *In re Bryden's Estate*, 211 Pa. 633, 637, 61 A. 250, 251 (1905).

137. ALEXANDER & LEWIN, *supra* note 6, at 136.

138. Public guardianship systems have been used in several states, including California and Minnesota. These systems have been disastrous, as they have proven to be both costly and riddled with conflicts of interest. Indeed, their primary function appears to be commitment rather than the provision of protective and counseling services. Hodgson, *supra* note 9; Levy, *supra* note 50. The Report of the Task Force on Law of the President's Panel on Mental Retardation (1963) advises that no person should be appointed as guardian who is responsible for rendering a direct service to the person since incompetent persons require outside guardians to check on services. To remedy the conflict of interest and the problem of high bureaucratic costs, voluntary measures have been adopted by some consumer groups and national organizations, including Massachusetts Association for Retarded Citizens Retardate Trust, Inc., the British Paid Visitor Program, the British Columbia Lifetime Friend Plan, but these measures have been unsuccessful because of lack of interest, inadequate funding, and insufficient legal authority. Hodgson, *supra* note 7. These proposals for public guardians and voluntary measures are also antiquated since they were developed primarily to protect institutionalized persons. But today, as discussed in this symposium, a growing majority of mentally disabled persons are living in the community and the necessity of lifelong assistance and protection by guardians or agencies clashes with this trend and the embracement of normalization theory. Controller General Summary Report to the Congress—*Returning the Mentally Disabled to the Community: Government Needs to do More* 1 (1977); President's Commission on Mental Health Report to the President at 43 (1978); Kindred, *supra* note 2, at 65.

tionalization.¹³⁹ This necessary assistance can be provided in such a way as to be least restrictive of the rights of the individual and to maximize self-reliance and independence.¹⁴⁰

In 1962 the President's Panel on Mental Retardation proposed:

Mentally retarded adults be allowed freedom, even freedom to make their own mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.¹⁴¹

All subsequent studies and commissions have reiterated that call for limited guardianship procedures.¹⁴² Yet only seventeen states have enacted laws permitting limited guardianship and/or conservatorship, and eleven of these have enacted separate provisions outlining the power of limited guardians.¹⁴³ Unfortunately, however, the co-existence of both limited and plenary guardianship statutes has caused the limited guardianship statutes to be rarely used.¹⁴⁴

The only effective approach, therefore, is the comprehensive adoption of a limited guardianship concept as the sole legal procedure for guardianship. The statutory aim must be the benefit of the

139. *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); Herr, *Civil Rights, Uncivil Asylums and the Retarded*, 43 CIN. L. REV. 679 (1974).

140. ABA Report to the House of Delegates by the Commission on the Mentally Disabled on Guardianship (1979).

141. Presidential Panel on Mental Retardation, *Report of the Task Force on Law* 42 (1963).

142. *E.g.*, President's Commission on Mental Health, Report to the President (1978); Report of the Task Force on Law of the President's Panel on Mental Retardation (1975); American Association on Mental Deficiency Position Paper on Guardianship for Mentally Retarded Persons (1973).

143. ABA Study, *supra* note 3, at 4. Many states, such as Arkansas, have enacted conservator statutes allowing persons to consent to the appointment of a conservator to manage their funds. ARK. STAT. ANN. §§ 57-701 to -709 (Supp. 1981). The Arkansas conservatorship statute permits a person suffering from advanced age or physical disability to consent to the appointment of a conservator to manage his or her estate. The conservator has the same powers as the guardian of the estate. This statute, however, has been rarely used.

144. An ABA study found 10% of petitions in Washington resulted in limited guardianships and no petitions filed in Milwaukee sought limited guardianships. Vargyas, *Guardianship*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 339, 343-49 (1979). Similarly, the North Carolina limited guardianship statute is seldom used. Conversation with H. Rutherford Turnbull, III (Oct. 13, 1980). The Arkansas conservatorship law is also seldom used. One can only speculate about the cause of the failure to use the limited guardianship provisions. This may be caused by lack of knowledge on the part of counsel and court of the limited provision, over-cautious courts trying to provide maximum protection to petitioners and alleged incompetent persons, or merely reluctance of counsel to provide the increased efforts necessary to fulfill the requisites of limited guardianship procedures.

alleged incompetent person and not the convenience of the bureaucracy or the protection of heirs.¹⁴⁵ Unlike the *Vecchione* proposal, which first evaluated the individual's competency, the first inquiry must be whether an individual mentally disabled person requires any assistance at all. If an individual has few assets and no medical problems requiring hospitalization or treatment, protective assistance may be wholly unnecessary. This is especially true for institutionalized persons who rarely have assets and receive only small sums of money.¹⁴⁶ These persons may require advocates to assist them in insuring that they receive adequate treatment and habilitation in the least restrictive settings, but certainly do not need persons to act as their substitute decision-makers.¹⁴⁷

If specific needs actually exist, then an exploration of alternatives to resolve the problem should be undertaken by interested family, friends, or governmental agencies.¹⁴⁸ Often, problems of money management for a mentally disabled person involve only relatively small sums composed of Social Security or Veterans Administration benefits. Both the VA and Social Security have systems which permit the appointment of representative payees to manage funds on the individual's behalf without any stigma of incompetency.¹⁴⁹ Additionally, creative trust arrangements can be developed to handle larger sums of money.¹⁵⁰ Power of attorney provisions or other common-law agency concepts can also resolve almost any problem.¹⁵¹ As in civil commitment proceedings, a person should not be deprived of fundamental rights if he could function effectively with the assistance of friends or relatives.¹⁵² A friend or relative can act as an agent to manage and invest funds or consent to medical treatment while the mentally disabled person retains

145. Alexander and Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA LAW. 537 (1973). See, e.g., MICH. COMP. LAWS ANN. §§ 330.1600-.1642 (1980).

146. For example, SSI benefits for institutionalized mentally retarded persons are only \$25.00 per month.

147. As evidenced by *Vecchione*, the role of a guardian cannot be expected to be synonymous with that of an advocate. Of course, some family members and friends have so acted, but this is quite rare. See, e.g., ALEXANDER & LEWIN, *supra* note 6; U.S. Senate Special Committee on Aging, Protective Services for the Elderly—A Working Paper, 39-40 (July 1977); Kindred, *supra* note 2, at 69.

148. It has been the common practice of courts to deduce that because a person has a disability, then the person requires assistance. This is the basis of our present disastrous system of guardianship. See Mitchell, *supra* note 58.

149. 20 C.F.R. §§ 404.1601-.1610 (1980); 38 C.F.R. §§ 13.1-.500 (1980).

150. ALEXANDER & LEWIN, *supra* note 6.

151. ARK. STAT. ANN. § 50-422 (1971).

152. O'Connor v. Donaldson, 422 U.S. 563, 577 (1975).

the right to revoke the appointment at any time.¹⁵³ These methods would maximize the person's independence while providing the necessary protection and assistance. Indeed, the agency concept is embedded in the popular and growing program of citizen advocacy.¹⁵⁴

Only if no less restrictive alternative exists should court intervention be considered.¹⁵⁵ In such rare instances, the petitioner must demonstrate to the court's satisfaction that an exploration of least restrictive alternatives has occurred and proved unsuccessful. Prior to the court procedure, an independent multi-disciplinary evaluation should be ordered by the court and paid for by the petitioner.¹⁵⁶ This multi-disciplinary evaluation should be performed by a team of experts who will assess the person's present functional capabilities and limitations and identify the specific areas where the person requires the special assistance of a guardian.¹⁵⁷

A full court hearing must be held on the petition for appointment of a limited guardian and all due process protections of civil commitment should apply.¹⁵⁸ The alleged incompetent person should be provided with adequate prior notice which apprises him or her of the nature of the hearing as well as his or her rights to counsel, to present evidence, and to confront and cross-examine adverse witnesses.¹⁵⁹ The hearing itself should provide a meaningful opportunity for the alleged incompetent person to be heard. If counsel is not present, counsel should be appointed for the alleged incompetent person at the earliest possible date.¹⁶⁰ A member of the evaluation team should present the team's findings and recommendations; he or she should be available for full and rigorous cross-

153. ALEXANDER & LEWIN, *supra* note 6. As an attorney representing mentally disabled persons, I have seldom been faced with a money management problem that could not be resolved by these methods.

154. Citizen advocacy is "advocacy in which a competent citizen volunteer represents—as his very own—the interests of a person who is in some way impaired." Wolfseberger, *Advocacy*, in *MENTALLY RETARDED CITIZENS AND THE LAW* 619. See also *CITIZEN ADVOCACY AND PROTECTIVE SERVICES FOR THE IMPAIRED AND HANDICAPPED* (W. Wolfseberger & H. Zauha eds. 1973).

155. An example of a good blueprint for an equitable guardianship law is the Michigan statute, MICH. COMP. LAWS ANN. §§ 330.1600-.1642 (1980).

156. *Id.*; ABA Study, *supra* note 3, at 93. Under the Michigan law the multi-disciplinary team includes a psychologist; both the Michigan law and ABA proposals recognize that a doctor is not necessarily qualified to perform evaluations on a mentally retarded or other developmentally disabled person. Thus, the multi-disciplinary team approach helps eliminate the specific limitations of any given discipline.

157. *Id.*

158. ARK. STAT. ANN. §§ 59-1401 to -1428 (Cum. Supp. 1981).

159. *Id.*

160. ABA Study, *supra* note 3, at 76, 95.

examination.¹⁶¹ Additionally, the petitioner must demonstrate by clear and convincing evidence that the alleged incompetent requires the proposed protections.¹⁶² A jury trial might also be provided if requested by the alleged incompetent.¹⁶³ The court's inquiry should focus on the specific area or areas in which the alleged incompetent person requires assistance because his or her capacities are so limited that he or she is unable to manage his or her person or property in the specifically designated areas. At the conclusion of the hearing, the court will only have the power to declare the person partially incompetent and to appoint a limited guardian. An order should specify the areas in which the individual is functionally incompetent and appoint a guardian to act in only the designated areas.¹⁶⁴ The guardianship order should be limited in time so that periodic review is mandated.¹⁶⁵

Limited guardianship operating as a last resort only should, properly, encompass very few mentally disabled persons. These persons should receive only the minimum assistance necessary in order to maximize independence and self-realization. Only under such a system will mentally disabled persons be able to fully participate in American society as citizens with full civil rights.

161. *Id.*

162. *Addington v. Texas*, 441 U.S. 418 (1979).

163. ABA Study, *supra* note 3, at 76.

164. *Id.* at 96. The role of counsel should be more active. Under such a system, counsel at the outset would be able to question whether an actual need for assistance exists, and whether an exhaustion of less restrictive alternatives has actually occurred. Additionally, counsel will be able to challenge the evaluators' determination and recommendations and the specific areas designated by the petitioner or the evaluators as those in which the assistance of a guardian is requested. Most importantly, the guardianship order will be open to challenge to assure that it is the least restrictive alternative possible to maximize the individual's self-reliance and independence.

165. Ten states already require periodic review. ABA Study, *supra* note 3, at 5.

