

GUARDIANSHIP FOR MENTALLY RETARDED PERSONS

I. Introduction

In its basic policy statement on the "Rights of Mentally Retarded Persons," the American Association on Mental Deficiency recognized that some retarded individuals will require the assistance of a guardian in order to exercise and enjoy fully their legal and human rights. That statement says, in part, that "...a retarded individual who may not be able to act effectively in his or her own behalf has a right to have a responsible impartial guardian or advocate appointed by the society to protect and effect the exercise and enjoyment of his or her rights..."

Guardianship is a legal relationship whose essential purpose is to replace the disabled individual's legal authority to make personal decisions in his or her own self-interest when the individual does not have adequate natural capacity to make such decisions for himself or herself. At the same time within the guardianship process the first basic right of the mentally retarded person would be honored. This is "the right to freedom of choice within the limitations imposed on all persons."¹ To the maximum extent of their capabilities, retarded persons, whether under guardianship or not, should be permitted to participate as fully as possible in all decisions which will affect them.

Guardianship can be compared to a physical prosthesis which replaces a naturally functioning member. Excising the member (in this case the legal right of the individual to certain elements of self-determination) should not be undertaken until it is clear that a substitute member, in fact, will give the individual a fuller functional capacity for social living. Like an artificial leg, guardianship necessarily operates in a manner somewhat different than the function it replaces and may even have some advantages which partially compensate for the basic loss of the natural function. In fitting a prosthesis the surgeon makes every effort to conserve the remaining natural functions.

Similarly, in appointing a guardian the responsible body ideally should seek to preserve for the ward the opportunity to exercise those rights which are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not retarded.

In the past, American society has failed to take full cognizance of the special needs of retarded persons in the establishment of guardianship systems. Thus, the guardianship statutes of most states and provinces are designed with emphasis on safeguarding the ward's property. Only recently have the peculiar needs of retarded adults for personal and social supervision begun to be recognized.

Those whose incompetence is due to mental retardation have certain characteristics which tend to differentiate them from persons who become senile or suffer an episode of mental illness. Some of these characteristics are the following:

- Having grown into adulthood without experiencing a normal childhood or normal adult independence, the retarded person tends to accept continuation of the status of dependence.

¹ See Rights of Mentally Retarded Persons.

- The adult whose retardation is manifest in a significant degree of social incompetence can expect to continue to develop and mature, but at the same time to require continued assistance in decision making and protection from exploitation; this prospect is of very long duration.
- The retarded person is likely to have relatively low, if any, earnings and consequently is unlikely to accumulate the assets which in the past have given rise to the appointment of a guardian of both the person and property.
- The incompetent retarded adult is likely to remain single and hence less likely to have a spouse or children to attend to his or her needs; thus he is more vulnerable as his parents become older.

The purpose of this statement is to articulate a set of principles upon which an improved guardianship system can be based - one which takes into account the special needs of retarded persons in an affirmative manner.

In order to have an improved guardianship system it is necessary to have:

- (1) reform of procedures which assure "due process" in a manner which is both responsive and practical;
- (2) substantive machinery to assure that any person who needs guardianship will in fact have the continuing assistance of a conscientious well-oriented individual.

The National Conference of Commissioners on Uniform State Laws and the American Bar Association recently developed a proposed Uniform Probate Code² which, in Article V, covers "Protection of Persons Under Disability and Their Property." These recommendations, if followed, would effect many of the procedural changes necessary to implement the principles proposed in this position statement. In particular, the Uniform Probate Code would:

- (1) distinguish more clearly between guardianship of the person and conservatorship (of the property) both as to functions and as to the degree and character of disability which justifies their use;
- (2) place reliance on the discretion of the guardian or conservator unless expressly limited by the court;
- (3) emphasize provisions designed to avoid the necessity of guardianship or protective proceedings; for example, the proposed language expressly permits the court to intervene directly in short term or one time decisions affecting property where the appointment of a conservator would be unduly cumbersome;
- (4) expressly authorize testamentary nomination of a guardian or conservator by a spouse or parent;

² Joint Editorial Board for the Uniform Probate Code. Uniform Probate Code. St. Paul, Minnesota: West Publishing Company, 1974 Edition.

(5) permit a guardian who is not also a conservator to receive and dispense moderate amounts of income, etc., used for the benefit of the ward.

(6) consolidate "regular" guardianship with "veterans" guardianship.

II Definitions

A. Advocate. A person who promotes the interests of another.

B. Beneficiary. The person who benefits from an established trust.

C. Conservator. A person who is appointed by a court to manage the estate of a protected person.

D. Fiduciary. A general term for a person entrusted with the property or interests of another. It includes conservators, guardians, trustees, etc.

E. Guardianship.³ A legally recognized relationship between a competent adult (the guardian) and a minor child or incapacitated adult which lays upon the guardian the duty and right to act on behalf of the ward in making decisions affecting his or her life.

F. Incapacitated person.⁴ Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advance age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person.

G. Legal guardianship. Guardianship established by a court (or other authorized administrative body) after a determination that the ward is incapacitated.

H. Minor ward. A minor for whom a guardian has been appointed solely because of minority.

I. Natural guardianship. The relation of a parent to his or her minor child.

J. Protected person.⁵ A minor or other person for whom a conservator has been appointed or other protective order has been made as a result of a disability.

³ Traditionally guardianship has included guardianship of the person and guardianship of the property. All states have guardianship statutes; however, terminology differs; many still use "guardian" to include "conservator." Other terms used in some states include "curator," "committee," etc. In this statement the Uniform Probate Code usage which defines "guardian" so as to equate it to "guardianship of the person" will be followed.

⁴ The Uniform Probate Code discontinues the use of "incompetence" as a legal term and uses instead the concepts of "incapacitated person" and "protected person."

⁵ See footnote 4.

K. Protective proceeding.⁶ A proceeding to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief.

L. Trustee. One entrusted with managing assets for another under the terms of a trust. The trust may be established by the donor for the benefit of himself or someone else.

M. Visitor. With respect to guardianship proceedings, a person who is trained in law, nursing or social work and who is an officer, employee or special appointee of the court with no personal interest in the proceedings.

N. Ward. A person for whom a guardian has been appointed as a result of an incapacity.

III General Principles

A. Since conservatorship or guardianship necessarily denies an individual the right to exercise freely certain personal liberties, every effort should be made through the use of social counseling services to prevent the need for appointment of a guardian or conservator (or both).

B. No mentally retarded adult should have a guardian appointed unless (1) he or she is found to be significantly lacking the social competence necessary to make critical decisions respecting the conduct of his or her life; (2) the appointment of such a guardian will be in the best interest of the person and the community, and (3) procedural due process has been observed in reaching these findings.

C. To the maximum extent of their capabilities, retarded persons, whether under guardianship or not, should be permitted to participate as fully as possible in all decisions which will affect them.

D. Retarded adults who cannot assert their own rights should have individual guardians appointed, regardless of the setting in which they are living.

E. Retarded children who lack parental supervision or support should have guardians appointed in the same manner as similarly situated minor children who are not retarded.

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

⁶ Section 5-401 of the Uniform Probate Code provides that "appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage his property and affairs effectively for reasons such as mental illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds."

G. Particular care should be taken that retarded adults are treated like adults, and not like children, even when they are under guardianship.

H. All clinical judgements as to an individual's competence should be based on a careful evaluation conducted by a multi-disciplinary team. In no event should an evaluation of social competence be based on the judgement of a single professional.

IV Powers, Duties and Qualifications of the Guardian or Conservator

The specific duties of a particular guardian will vary according to the individual competencies and limitations of the ward (see III, F, above) and the capacities of the guardian. Duties of guardianship and conservatorship may be separated or assigned to the same fiduciary.

A. Powers of the guardian. Although the powers of the guardian may be limited by the appointing authority in order to permit the ward to exercise his residual capacities to make his own decisions, the powers accorded to the guardian in the area of his responsibility should be sufficiently inclusive to enable him to act promptly and effectively and "normally" in the interest of his ward. He should therefore, in general, have authority to expend funds for routine purposes beneficial to the ward, to give informed consent for medical and surgical care, and to apply for admission of his ward to those community and residential services which, after professional consultation, he deems most appropriate, provided such facilities meet certain standards which assure appropriate independent evaluation of the need for such admission, and the quality of care.

The following criteria apply to the guardian's exercise of his major powers:

1. Admission to facilities

- a) If the facility is of a type which is subject to licensure it should be licensed, and preferably accredited.
- b) If the facility is of a type which could be certified for care of persons who are eligible for federal support under such programs as "Medicaid" and "Medicare", it should be so certified even though the ward may not himself be eligible for these benefits.
- c) If the facility is a residential facility it should have policies and procedures relative to admission which meet the criteria of Accreditation Council for Facilities for the Mentally Retarded, Joint Commission of Accreditation of Hospitals, or its equivalent for admission and release.⁷ Such policies and procedures are designed to assure (1) that a comprehensive evaluation of the retarded person's needs and the alternatives for meeting them has been made and (2) that the placement is considered to afford the optimum available program plan for the individual. This includes the concept of "least drastic alternative."

⁷ See Section 1.3, Standards for Residential Facilities for the Mentally Retarded (as revised), Joint Commission of Accreditation of Hospitals, 1971.

2. Informed consent

- a) In giving informed consent on behalf of his ward, the guardian should be entitled to full information, including information on care, treatment and training alternatives. Informed consent by the guardian to experimental procedures should be subject to the restrictions established by the United States Public Health Service regardless of whether federal funds are involved.

3. Expenditure of funds

The Uniform Probate Code calls for appointment of a conservator when the ward's property requires "management" or when the ward has dependents, but states that if none have been appointed the guardian may receive money and tangible property and will apply them to the ward's needs. If there is a conservator the guardian still has responsibility for decisions regarding "current expenses."

When a disabled or incapacitated person's assets are held in trust it may not be necessary to appoint a conservator; on the other hand, it may prove useful to appoint the trustee as conservator if the beneficiary also has property not in trust. Where the trustee is an individual and the beneficiary is incapacitated it may be desirable for the trustee also to seek the status of guardian; where the trustee is a bank, it will usually be desirable to have an individual appointed to serve as guardian of an incapacitated beneficiary.

4. Court review

A decision of a guardian on behalf of his ward may be reviewed by the appointing court on its own initiative or on petition of a near relative of the ward, or on petition or recommendation of a qualified mental retardation professional or public interest attorney.

The above criteria are consonant with the Uniform Probate Code.

B. A guardian (of the person) should

1. interact regularly with the ward;
2. allow the ward to make as many decisions as possible and participate as meaningfully as possible in other decisions affecting his or her life;
3. serve as an intermediary or interpreter for the retarded person in his or her interaction with social institutions;
4. enlist professional expertise where necessary (physician, lawyer, etc.);
5. assure that the ward fulfills all civil duties;
6. act on behalf of the ward in securing personal and civil rights;

7. select and mobilize needed community resources on behalf of the ward;
8. keep track of the ward's progress in service programs and assure that his or her civil liberties are being adequately safeguarded;
9. conform to all requirements of the appointing court.

C. A conservator should

1. oversee the handling of any financial assets the ward may have and assure that all financial decisions are made in the best interest of the ward;
2. cooperate with the guardian (of the person) providing funds needed to pay for appropriate services, etc.

D. Prerequisites for guardianship appointments

To be selected as a guardian, an individual should possess the following qualities;

1. should be able and willing to perform the duties specified above;
2. should be able to maintain the best interests of the retarded ward as the paramount consideration in all decisions made on his or her behalf;
3. should have no conflict of interest; individuals who have personal-financial interest in the ward or are professionally responsible for providing or supervising his or her care or treatment should not be appointed guardians under any circumstance; however, this consideration should not preclude appointment of parents, natural or adoptive, or other close family members where otherwise suitable;
4. should be accessible - i.e., in close enough physical proximity and not so overburdened with other duties that he or she is unable to interact regularly with his or her ward;
5. should be in a position to serve as guardian over a reasonable period of years.

E. Recall statutes should include provisions for recall for non-feasance, malfeasance, death, incapacity, etc., and for expeditious appointment of successor guardians (see Uniform Probate Code).

V. Determination of Need for Guardianship

"Due Process" in determining the need for guardianship requires that this need be reviewed by a judicial body or by a designated administrative tribunal or panel which observes due process and whose findings are subject to appeal to a court. If a court is given the responsibility directly, preference should be given to a family court. In either case the body (court or tribunal) should have its own resources for obtaining advice and information which will permit its members (1) to develop an informed opinion as to the social characteristics of the mentally

retarded subject and the nature of his need for legal enablement through guardianship, and (2) to select an appropriate person to serve in the capacity of guardian. If the tribunal consists of several persons drawn from the fields of behavioral science and law, with experience in mental retardation, then the need for back-up staff will be less than if the body is a court of general or probate jurisdiction.

The basic responsibility of the court or tribunal is:

- A. To determine the extent of the prospective ward's impairment in adaptive behavior ("incapacity") and his consequent need for a surrogate decision maker and advocate to act on his behalf in respect to some or all major decisions affecting his life.
- B. To select and appoint an appropriate guardian from among possible guardians, private or public.
- C. To describe (in a written charge) the extent and scope of the guardian's duties and authority vis-a-vis the particular ward.

As a general principle, the charge to the guardian should respect the discretion of the guardian in those areas not reserved to the ward, with a minimum of detailed review (other than periodic review) by the guardianship agency or the court or tribunal (see IV above).

The general functioning of guardians and the guardianship system should be evaluated and monitored by the guardianship agency as described in VI below.

In the process of determining the need for guardianship, the court or tribunal should assure the prospective ward the right to:

- (1) have a full, fair and impartial hearing;
- (2) have independent legal representation during all stages of all proceedings;
- (3) have access to all records and documents presented to the tribunal or court which bear on his case;
- (4) receive an explanation in clear, nontechnical language, of his or her rights and the purpose of the hearing;
- (5) be present at the hearing and be heard;
- (6) appeal the tribunal or court's decision to a court of higher jurisdiction;
- (7) have his or her need for continuing guardianship reviewed periodically by the court or tribunal. Prior notice of such proceedings should be sent to all interested parties and cross-examination should be permitted.

VI. Guardianship Agency

In order to facilitate the recruitment, training, appointment and supervision of individual guardians, a guardianship agency should be established in each state of the United States and province of Canada. The general functions and organizational prerequisites of this agency are provided below:

A. Functions of the Guardianship Agency

1. Recruitment, training and submittal of recommendations on potential guardians;
2. Supervision and monitoring of guardians;
3. Review of the reports filed by guardians (in accordance with rules set out by the court or agency) and taking all necessary actions based on an analysis of such reports;
4. Investigation of individual cases, either in response to complaints or on a random sample basis, to determine the adequacy of existing guardianship arrangements;
5. Conduct outreach activities (e.g., community education, identifying retarded persons who may be in need of guardianship, etc.)
6. Furnish necessary technical assistance and back-up services to guardians;
7. Assure that individual counseling services are provided through existing service agencies in order to minimize the number of persons requiring guardianship services;
8. Gather information on the overall guardianship system and evaluate its effectiveness;
9. Provide personnel to the courts, as requested, to serve as "visitors". (Section 5-308, Visitor in Guardianship Proceeding, Uniform Probate Code.)

B. Organization of the Guardianship Agency

1. The agency should be administratively and fiscally independent of any public or private agency responsible for the delivery of direct services to mentally retarded persons.
2. The agency should be adequately financed and staffed (both qualitatively and quantitatively) to carry out its functions. The agency's permanent staff should be drawn from a variety of professional disciplines.
3. The responsibilities of the agency should be sufficiently decentralized so that agency representatives can interact directly with individual guardians and have an opportunity to observe, first-hand, the day-to-day operation of the guardianship system throughout the state or province.

VII. Support Activities

- #### A. Schools of Law throughout the country should be encouraged to:

1. Include more social scientific information about mental retardation in their curricula;
 2. Foster activities in which law students come into direct contact with a diversity of mentally retarded persons and with professionals who work with them;
 3. Cooperate in research related to methods for determining and validating relative social competencies among mentally retarded individuals; and
 4. Undertake comparative analyses of various guardianship systems, both nationally and internationally.
- B. Schools of Social Work, Medicine, Education and other appropriate university units, including University Affiliated Facilities, should include additional curricular material relative to rights of minors and incompetent persons and on the constitutional basis for due process procedures, family law and related legal principles. Students in human services should be brought in contact with law students and faculty in "real life" situations.