# PLENARY GUARDIANSHIP: AN ANALYSIS, A CRITIQUE AND A PROPOSAL FOR REFORM

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## INTRODUCTION

A fundamental concern to any civilized society is the question of how to care for its members who, because of a mental disability,[1] are unable to care for themselves or their property. In the extreme cases, the preferred solution may be civil commitment or institutionalization in an appropriate environment.[2] Another, often overlapping, solution is to have the mentally disabled person declared incompetent[3] and to have a guardian[4] appointed to assume responsibility for the disabled individual and his property.

Recent years have seen a growing interest in guardianship and a corresponding demand for modification and reform.[5] Among the goals

1. Mental disability refers to any physical or emotional condition that interferes with an individual's ability to care for himself or his financial affairs. Chief among the categories of mental disabilities are mental illness, mental retardation, and senility. Other causes include autism, cerebral palsy, epilepsy, alcoholism, and drug addiction. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW XV (rev. ed. S. Brakel & R. Rock 1971).

2. For a comprehensive discussion of the civil commitment of the mentally ill, see *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter *Developments*]. For a discussion of many aspects of mental disability, including institutionalization, see A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1976).

3. An individual is incompetent if he lacks the mental capacity to care responsibly for his person and property. *See* text & notes 30-42 *infra*.

4. A guardian is the person or corporate entity who has been entrusted to care for the person or property of an adjudicated incompetent or of a minor. *See* text & notes 18-29 *infra*.

5. *See generally* AMERICAN BAR FOUNDATION, note 1 *supra*; Kindred, *Guardianship and Limitations Upon Capacity*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 62 (1976); Hodgson, *Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem*, 37 ALB. L. REV. 407 (1973); Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975); Mesibov, Conover & Saur, *Limited Guardianship Laws and Developmentally Disabled Adults: Needs and Obstacles*, 17 MENTAL RETARDATION 221 (1980); Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405 (1979); Morris, *Conservatorship for the "Gravely Disabled": California's Nondeclaration of Nonindependence*, 15 SAN DIEGO L. REV. 201 (1978); Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 N.D. LAW. 132 (1972); Pickering, *Limitations on Individual Rights in California Incompetency Proceedings*, 7 U. CAL. D.L. REV. 457 (1974); Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives*, 13 WM. & MARY L. REV. 569 (1972); Comment, *Guardianship of Adults with Mental Retardation: Towards a Presumption of Competence*, 13 AKRON L. REV. 321 (1980); Comment, *Mandatory Appointment of Counsel in Pennsylvania Guardianship Proceedings*, 84 DICK. L. REV. 1 (1979); Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341; Comment, *Limited Guardianship for the Mentally Retarded*, 8 N. M. L. REV. 231 (1978); Comment, *Constitutonal Deficiencies in Oklahoma Guardianship Law*, 13 TULSA L.J. 579 (1978); Comment, *Guardianship for the Adult: A Need for Due Process Protections in Vermont*, 4 VT. L. REV. 94 (1979); Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676 (1964); NATIONAL CENTER FOR LAW AND THE HANDICAPPED, GUARDIANSHIP OF THE MENTALLY IMPAIRED: A CRITICAL ANALYSIS (May, 1977) [hereinafter NATIONAL CENTER FOR LAW AND THE HANDICAPPED]; SENATE SPECIAL COMMITTEE ON AGING, 95TH CONG., 1ST SESS., PROTECTIVE SERVICES FOR THE ELDERLY: A WORKING PAPER 75 (Comm. Print 1977) [hereinafter SPECIAL COMMITTEE ON AGING]. Representative model legisla-

of the reformers are changes in the procedure,[6] modification of the definition of a mental incompetent[7] reduction in the power of the guardian,[8] and the establishment of public guardians.[9] This article contends that although the proposed reforms are well motivated, they are seriously deficient in many respects. Moreover, the reformers often fail to appreciate that they do not necessarily share common ideals. Thus, many of the reform efforts must inevitably come into conflict, either legislatively, as various statutory reforms are proposed, or in the courts, as guardianship issues become the subject of litigation.

Moreover, many of the guardianship reform proposals would continue some of the more undesirable aspects of guardianship. In particular, plenary guardianship is an outmoded and unnecessary concept, and it would be most unfortunate if it would survive the best efforts of the reformers. This article will attempt to demonstrate that as part of a comprehensive reform effort, plenary guardianship should be abolished, and all guardianships should be fixed and limited by court order.

## I. GUARDIANSHIP POWERS AND MODELS

Guardians have long been a part of our Anglo-Norman legal tradition.[10] Under the theory that the king was the protector of the people, the sovereign has for centuries acted under the doctrine of parens patriae[11] to protect the person and estate of minors, lunatics and idiots:[12] a lunatic being an individual who had lost his senses,[13] and an idiot being one, who for lack of intelligence, never had his senses.[14] Under common law, the emphasis was on the mental status of the individual. It was assumed that the condition of lunacy or idiocy prevented a person from making reasonable decisions about his person or property, therefore, he required the sovereign's protection.[15] Individuals in possession of their senses, no matter how foolish they might behave,

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tion includes: Guardianship and Conservatorship: Statutory Survey, ABA COMMISSION ON MENTALLY DISABLED, MODEL STATUTE (1979) [hereinafter ABA MODEL STATUTE]; *Legal Issues in State Mental Health Care Proposals for Change*, 2 MENTAL DISABILITIES L. REP. 443 (1978); NATIONAL COUNCIL OF SENIOR CITIZENS, LEGISLATIVE APPROACH TO THE PROBLEMS OF THE ELDERLY: A HANDBOOK OF MODEL STATE STATUTES 117 (1971); UNIFORM PROBATE CODE [hereinafter UPC].

6. *See* text accompanying notes 257-60 *infra*.
7. *See* text subsection following note 210 *infra*.
8. *See* text section following note 350 *infra*.
9. *See* text section following note 288 *infra*.
10. 1 W. BLACKSTONE, COMMENTARIES § 460 (Chitty 1889).
11. *Id.* § 304.
12. *Id.*
13. *Id.* In other words, a "lunatic" is someone who is mentally ill.
14. *Id.* § 302; that is, an idiot is someone who is mentally retarded.
15. *Id.* § 304.

were not thought to be proper wards of the king.[16] Today, the law looks more to the quality of the individual's decisions, rather than at a label or status, *e.g.*, mentally retarded, to determine whether a person is, in fact, capable of handling his own affairs.[17]

## A. *Mental Incapacity*

Over time, guardianship evolved into three forms: guardians of the estate,[18] guardians of the person,[19] and guardians of the estate and person (plenary guardian).[20] Adopting the nomenclature currently in vogue, a guardian of the person or guardian of the person and estate will be referred to as a "guardian" and a guardian of the estate as a "conservator."[21] The term "ward" will be used to describe any adjudicated incompetent.[22]

State law authorizes the appointment of a guardian for individuals who lack the capacity to care for themselves or their property.[23] Tradi-

16. *Id.* § 306. "When a man on an inquest of idiocy hath been returned an unthrift and not an idiot, no further proceedings have been had." *Id.*

17. *See, e.g.*, UPC § 5-101(1): " 'incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced 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 person."

Although the UPC language is typical, it should be noted that some statutes retain status definitions. For example, LA. CIV. CODE ANN. art. 389 (West 1952), provides: "No person above the age of majority who is subject to an habitual state of imbecility, insanity or madness, shall be allowed to take care of his own person . . . although such person shall, at times, appear to have the possession of his reason."

18. *E.g.*, CAL. PROB. CODE § 2400 (West 1980); CONN. GEN. STAT. ANN. § 45-70(a) (West Supp. 1981); N.H. REV. STAT. ANN. § 464-A:2 (IX) (Supp. 1979).

19. *E.g.*, CAL. PROB. CODE § 2350 (West 1980); CONN. GEN. STAT. ANN. § 45-70(b) (West Supp. 1981); N.H. REV. STAT. ANN. § 464-A:2 (VIII) (Supp. 1979).

20. N.J. STAT. ANN. § 3A:6-16.10(b) (West Supp. 1980-81).

21. UPC § 1-201(6), (15).

22. *Id.* § 5-101(4).

23. *See* ALA. CODE tit. 26 § 26-2-40, § 26-2-1 (1975); ALASKA STAT. §§ 13.26.165, 13.26.095 (1972); ARIZ. REV. STAT. ANN. § 14-5301 *et seq.* § 36-547 (1974 & Supp. 1980); ARK. STAT. ANN. § 57-601 (Supp. 1981); CAL. PROB. CODE §§ 1405, 1435.2-1460 (West Supp. 1980); COLO. REV. STAT. § 15-14-101 *et seq.* (1973 & Supp. 1979); CONN. GEN. STAT. ANN. § 45-70 (West Supp. 1981); DEL. CODE ANN. tit. 12, § 3914 (1979); FLA. STAT. ANN. § 744.101 *et seq.* (West Supp. 1980); GA. CODE ANN. § 49-601 *et seq.* (Supp. 1980); HAWAII REV. STAT. § 560:5-101 *et seq.* (1976); IDAHO CODE § 15-5-101 *et seq.* (Supp. 1980); ILL. ANN. STAT. ch. 110 1/2 §§ 11a-1 *et seq.* (Smith-Hurd Supp. 1980); IND. CODE ANN. § 29-1-18 (Burns Supp. 1980); IOWA CODE § 633.552 *et seq.* (1964 & Supp. 1980); KAN. STAT. ANN. § 59-3002 (1976); KY. REV. STAT. ANN. §§ 202.230, 203.010 *et seq.* (Baldwin 1977); LA. CIV. CODE ANN. art. 389 *et seq.* (West 1952); ME. REV. STAT. ANN. tit. 18, § 3601 *et seq.* (1964 & Supp. 1980); MD. EST. & TRUSTS CODE ANN. § 13-101 *et seq.* (1974 & Supp. 1980); MASS. GEN. LAWS ANN. ch 201, § 6 *et seq.* (West 1954 & Supp. 1979); MICH. COMP. LAWS ANN. § 330.1600 *et seq.* (1974 & Supp. 1979); *id.* § 700.8 (1980); MINN. STAT. ANN. § 525.54 *et seq.* (West Supp. 1980); MISS. CODE ANN. § 93-13-121 *et seq.* (1972 & Supp. 1980); MO. ANN. STAT. § 475.010 *et seq.* (Vernon 1956 & Supp. 1980); MONT. REV. CODES ANN. § 72-5-101 *et seq.* (1979); NEB. REV. STAT. §§ 30-2601, 30-2617 *et seq.* (1979); NEV. REV. STAT. § 159.013 *et seq.* (1979); N.H. REV. STAT. ANN. § 464-A:1 *et seq.* (Supp. 1979); N.J. STAT. ANN. § 3A:6-35 *et seq.* (West 1953 & Supp. 1979); N.M. STAT. ANN. § 45-5-301 *et seq.* (1978); N.Y. MENTAL HGY. LAW 78.01 *et seq.* (McKinney 1978); N.C. GEN. STAT. § 35-1 *et seq.* (1976 & Supp. 1979); N.D. CENT. CODE § 30.1-26-01 *et seq.* (1976); OHIO REV. CODE ANN. § 2111.01 *et seq.* (Page 1976 & Supp. 1980); OKLA. STAT. ANN. tit. 58, § 851 *et seq.* (West 1965 & Supp. 1979); OR. REV. STAT. § 126.003 *et seq.* (1979); PA. STAT. ANN. tit. 20, § 5501 *et seq.* (Purdon 1975 & Supp. 1980); R.I.

tionally, a guardian may be appointed when an individual is mentally incapacitated by reason of mental illness,[24] mental retardation,[25] senility,[26] old age,[27] or drug or alcohol conditions[28] and consequently is unable to "make or communicate responsible decisions . . ."[29] concerning his person or property.

Mental incapacity is evidenced by the individual's inability "to understand and appreciate the facts necessary to reach an informed decision and to convey that decision."[30] As a result, the individual is unable to "protect his or her physical health or safety and/or manage his or her financial resources."[31] Mental incapacity and mental incompetency are not to be confused with unreasonable, foolish or even "crazy" behavior, for it is not the wisdom of the decision but rather the quality of the thought process that is at issue.[32] The concept of mental incapacity serves to insure that guardianship is not applied as a broad form of legal paternalism; it is therefore not an available remedy even if an individual's activities entail substantial likelihood of self-harm.[33]

Although most states continue to use mental incapacity as the test

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GEN. LAWS § 33-15-1 *et seq.* (1979 & Supp. 1980); S.C. CODE § 21-19-200 *et seq.* (1977); S.D. COMP. LAWS ANN. § 30-26-1 *et seq.* (1976 & Supp. 1980); TENN. CODE ANN. § 34-12-102 *et seq.* (Supp. 1980); TEX. PROB. CODE, tit. 5, §§ 130A *et seq.*, 415 (Vernon 1980); UTAH CODE ANN. § 75-5-301 *et seq.* (1978); VT. STAT ANN. tit. 14, § 3060 *et seq.* (1980); VA. CODE § 37.128.01 *et seq.* (1976 & Supp. 1980); WASH. REV. CODE ANN. § 11.88.010 *et seq.* (Supp. 1980); W. VA. CODE § 27-11-1 *et seq.* (1980); WIS. STAT. ANN. §§ 880.01 *et seq.* (West Supp. 1980); WYO. STAT. § 3-2-301 *et seq.* (1977).

24. ALA. CODE tit. 26 -§ 26-2-1 (1975); CONN. GEN. STAT. ANN. § 45-70a (West Supp. 1981); PA. STAT. ANN. tit. 20 § 5501 (Purdon 1975).

25. ALA. CODE tit. 26-§ 26-2-1 (1975); ARK. STAT. ANN. § 57-601 (Supp. 1981); PA. STAT. ANN. tit. 20 § 5501 (Purdon 1975).

26. IND. CODE ANN. § 29-1-18-1 (Burns Supp. 1981); MO. ANN. STAT. § 475.010 (Vernon Supp. 1980).

27. CONN. GEN. STAT. ANN. § 45-70a (West Supp. 1981); PA. STAT. ANN. tit. 20 § 5501 (Purdon 1975).

28. CONN. GEN. STAT. ANN. § 45-70(a) (West Supp. 1981); MO. ANN. STAT. § 475.010 (Vernon Supp. 1980); PA. STAT. ANN. tit. 4.20, § 5501 (Purdon 1975).

29. *See* the UPC definition at note 17 *supra*. Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, Nebraska, New Mexico, North Dakota, Oregon, and Utah have adopted the UPC statute. The UPC differs from tradition by adding "or other cause" to the list of conditions that may trigger the appointment of a guardian.

30. ABA MODEL STATUTE, *supra* note 5, § 3(1) Comment.

31. *Id.* Incapacity has also been defined as when an "individual . . . may lose his power to make choices or become so confused as to no longer have the capacity to make a decision having any relation to the factors bearing on his hospitalization." NATIONAL INSTITUTE OF MENTAL HEALTH AND THE OFFICE OF THE GENERAL COUNSEL, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL § 1 (Public Health Service Pub. No. 51, 1952), *reprinted in* AMERICAN BAR FOUNDATION, *supra* note 1, at 454-63, 469.

32. *See, e.g., In Re* Waite's Guardianship, 14 Cal. 2d 727, 728, 97 P.2d 238, 240 (1939); Lane v. Candura, Mass. , 376 N.E.2d 1232 (1978); Partello v. Holton, 9 Mich. 372, 378 (1890) ("Moreover, there must be something more than poor business judgment to establish incompetency."). W. VA. CODE § 27-11-1(a) (1980), provides that poor judgment or a different lifestyle is not competent evidence in a guardianship proceeding. *See also* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 632-34 (1978); Regan, *supra* note 5, at 604; *Developments*, *supra* note 2, at 1217.

33. Gelfand, *Authority and Autonomy: The State, the Individual and the Family*, 33 U. MIAMI L. REV. 125, 151-57 (1978).

of incompetence, it has been argued that a determination of incapacity is in reality little more than a "label" based upon the behavior of the individual.[34] That is, incapacity is not a condition, but a judgment about the quality of an individual's decisions or behavior.[35] For example, because a finding of mental illness is based in part upon the analysis of a person's behavior, it is misleading to claim that we sequentially discover that the individual: (1) suffered mental illness; (2) which was severe enough to cause him to be incapacitated; and (3) which incapacity prevented the individual from making rational decisions. Arguably, the process is just the opposite. The quality and effect of the individual's decisions and behavior result in a determination of incapacity, which, in turn, leads to a finding of mental illness[36] and the consequent need for a guardian.[37] If, indeed, it is the quality of decisions or the irrational behavior that is the root source of guardianship, then arguably guardianship should be available whenever a person's decisionmaking capacity seems to have deteriorated or be so lacking as to expose him to potential harm. A finding of incapacity, being conclusory, should be unnecessary. Hence, the decision whether to approve the guardianship should be based upon the quality of the individual's decisions and behavior rather than on identifying the cause of the erratic decisionmaking or behavior.

Nevertheless, the need for a finding of incapacity still holds sway in most jurisdictions,[38] even if in actual practice it is little more than a

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34. *E.g.*, ABA MODEL STATUTE, *supra* note 8, § 3(1), Comment.

35. *See, e.g.*, Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 276 (1944); Wesson, *Substituted Judgement: The Parens Patriae Justification for Involuntary Treatment of the Mentally Ill*, 8 J. PSYCH. & L. 147, 152-55 (1980); Note, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation*, 18 STAN. L. REV. 1119, 1126 (1966).

36. Morse, *supra* note 32, at 648.

37. *In re* Guardianship of Swain, 199 So. 2d 736, 737 (Fla. 1967); Warlick v. Stevenson, 571 P.2d 843, 846 (Okla. 1977); Cornia v. Cornia, 546 P.2d 890, 892 (Utah 1976); Morse, *supra* note 32, at 559. *Contra* Fazio v. Fazio, 375 Mass. 394, 399-400, 378 N.E.2d 951, 954-55 (1978). It should be noted that the trial court decision is usually given great deference because the trial judge had the opportunity to observe the alleged incompetent on the witness stand. Mitchell, *supra* note 5, at 1425.

38. Twenty-six states use the word "incapacity" or "capacity" in definitions of persons for whom guardians may be appointed. ALASKA STAT. § 13.26.005 (1972); ARIZ. REV. STAT. ANN. § 14-5101(1) (1975); ARK. STAT. ANN. § 57-601(c)(2) (Supp. 1981); COLO. REV. STAT. § 15-14-101 (1973); FLA. STAT. ANN. § 744.102(5) (West Supp. 1981); GA. CODE ANN. § 49-601(a) (Supp. 1980); HAWAII REV. STAT. § 560:5-101(2) (1976); IDAHO CODE § 15-5-101(a) (1979); IND. CODE ANN. § 29-1-18-1(c)(2) (Burns Supp. 1980); KAN. STAT. ANN. § 59-3002 (1976); ME. REV. STAT. ANN. tit. 18-A, § 5-101(1) (1964); MICH. COMP. LAWS ANN. § 700.8(2) (1974) & Supp. 1979); MINN. STAT. ANN. § 525.54 (West Supp. 1981); MO. ANN. STAT. § 475.010(3) (Vernon Supp. 1981); MONT. REV. CODES ANN. § 72-5-101(1) (1979); NEB. REV. STAT. § 30-2601 (1979); N.H. REV. STAT. ANN. § 464-A:2 (Supp. 1979); N.M. STAT. ANN. § 45-5-101(F) (1978); N.C. GEN. STAT. § 35-1.711 (Supp. 1979); N.D. CENT. CODE § 30.1-26-01(1) (1976); OR. REV. STAT. § 126.003(4) (1979); PA. STAT. ANN. tit. 20 § 5501 (Purdon 1975); TENN. CODE ANN. § 34-12-102(1) (Supp. 1980); UTAH CODE ANN. § 75-1-201(18) (Supp. 1979); VT. STAT. ANN. tit. 14, § 3601(1) and (5) (Supp. 1980); WASH. REV. CODE ANN. § 11.88.010(1)(b) (Supp. 1981). The following six states use the word "incapable" in defining persons for whom guardians are appointed. CONN. GEN. STAT. ANN. § 45-70a (West Supp. 1981); IOWA CODE ANN. § 633.552 (West Supp.

legal fiction.[39] If one observes hearings on petitions for adjudications of incompetency, one is struck by the rote recital of the finding of incapacity based upon a mental condition while the judge concentrates on the description of the behavior of the individual.[40] Perhaps this is desirable given the rather unscientific state of the art of diagnosing either mental illness[41] or mental retardation,[42] two significant causes of mental incapacity.

## B. *Models Of Guardianship*

It should be kept in mind that the theory and proper function of guardianship differs depending on the particular commentator.[43] Those concerned with the elderly emphasize the protective nature of guardianship for both the person and the property of the ward.[44] Commentators concerned with the retarded often fear the oppressive nature of the "protective" aspects of guardianship and would curb the power of the guardian to allow greater autonomy for the ward.[45] Other commentators concentrate on the substituted judgment[46] aspect of guardianship and debate the right of the guardian to consent to various medical procedures.[47] Still others voice their concern for the preceived lack of procedural due process surrounding the appointment of a guardian.[48] Although no formal divisions exist, it is helpful to group the differing views of guardianship into three categories.[49] The three

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1980); MASS. GEN. LAWS ANN. ch. 201 §§ 6, 6A (West 1981); OHIO REV. CODE ANN. § 211.01(D) (Page Supp. 1980); TEX. PROBATE CODE ANN. art. 5 § 130G(3) (Vernon 1980); WIS. STAT. ANN. § 880.01(4) (West Supp. 1980).

39. In finding Walter Tyrell, 85, incompetent, the trial judge noted, "[H]is smile is at times not normal; his eyes do not focus properly at all times; his gait and reflexes are not normal; and . . . he is not laying his cane aside but dropping it." *In re* Tyrell, No. 20467, P. Ct., Preble Co., Ohio, at 4, *quoted in*, Comment, *The Disguised Oppression of Involuntary Guardianship*, *supra* note 5, at 677.

40. SPECIAL COMMITTEE ON AGING, *supra* note 5, at 36-37.

41. Morse, *supra* note 32, at 554-60.

42. Mental retardation is not a precise term, for it describes a complex of symptoms and, therefore, includes a group of widely varying individuals. R. WOODY, LEGAL ASPECTS OF MENTAL RETARDATION: A SEARCH FOR RELIABILITY 3 (1974).

43. For example, Mitchell, *supra* note 5, at 1431, 1449, sees guardianship as a form of oppressive intrusion by the state into the lives of the helpless or disadvantaged which should be severely restricted. Regan, *supra* note 5, at 605, on the other hand, criticizes current statutes because of the stigma of mental illness which attaches to a finding of incompetency. He feels adoption of the UPC would have the benefit of making guardianship available "to a wider group of disabled persons." *Id.*

44. E. FERGUSON, PROTECTING THE VULNERABLE ADULT: A PERSPECTIVE ON POLICY AND PROGRAM ISSUES 14 (1978).

45. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 27-28.

46. *See* text section beginning at note 140 *infra*.

47. *See* Symposium, "*Mental Incompetents and the Right to Die*," 11 SUFFOLK U.L. REV. 919 (1977).

48. Pickering, note 5 *supra*.

49. Although the names of the categories are the invention of the author, and somewhat arbitrary, they are accurate insofar as they identify divisions among those concerned with the issues of guardianship.

groups are: 1) "The Parent-Child Model", or the "Developmental Model."[50] 2) "The Therapeutic State Model;"[51] and 3) "The Substituted Judgment Model."[52]

(1) *"Parent-Child Model"*

The "Parent-Child Model" of guardianship reflects the view that the functional relationship between a guardian and a ward is somewhat analogous to that between a parent and a child.[53] For example, an aged senile adult is commonly referred to as having completed the cycle of life and returned to a stage of helplessness associated with infancy.[54] Similarly, the mentally retarded are often thought of as oversized children who need protection from a world that they will never comprehend.[55]

Moreover, a parent is a guardian, albeit a natural one, for his mi-

50. Representative examples include: Dussault, *Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens*, 13 GONZ. L. REV. 585 (1978); Herr, *From Rights to Realities: Advocacy by and for Retarded People in the 1980's*, U.S. Department of Health, Education, and Welfare Office of Human Development Services, The President's Committee on Mental Retardation (1980); Hodgson, *supra* note 5; Langen, *Public Guardianship—Protecting the Interests of the Ward*, 2 L. & HUMAN BEHAVIOR 267 (1978); Mitchell, *supra* note 5; Morris, *supra* note 5; Morris, *The Use of Guardianships to Achieve—Or to Avoid—The Least Restrictive Alternative*, 3 INT'L J. L. & PSYCH. 97 (1980) [hereinafter *The Use of Guardianship*]; NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5; Comment, LIMITED GUARDIANSHIP FOR THE MENTALLY RETARDED. 8 N. M. L. REV. 231 (1978).

51. Representative examples include: A. STONE, note 2 *supra*; Regan, note 5 *supra*; SPECIAL COMMITTEE ON AGING, note 5 *supra*; Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341.

52. Representative examples include: Atkinson, *Towards A Due Process Perspective in Conservatorship Proceedings for the Aged*, 18 J. FAM. L. 819 (1979-80); Gauvey, Leviton, Shuger, Sykes, *Informed and Substitute Consent to Health Care Procedures: A Proposal for State Legislation*, 15 HARV. J. LEGIS. 431 (1978); Horstman, *supra* note 5; Schoenfeld, *Human Rights for the Mentally Retarded: Their Recognition by the Providers of Service*, 4 HUMAN RIGHTS 31 (1974); Committee on Legal Incapacity, *Guardianship of Property of Incompetents*, 9 REAL PROPERTY PROB. & TR. J. 535 (1974); Comment, *Mandatory Appointment of Counsel in Pennsylvania Guardianship Proceedings*, 84 DICK. L. REV. 97 (1979); Note, *Constitutional Law: Substantive Due Process and the Incompetent Organ Donor*, 33 OKLA. L. REV. 126 (1980); Comment, *Constitutional Deficiencies in Oklahoma Guardianship Law*, 13 TULSA L.J. 579 (1978); Comment, *Guardianship for the Adult: A Need For Due Process Protections in Vermont*, 4 VT. L. REV. 94 (1979); Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?* 73 YALE L.J. 676 (1964).

53. In some cases, the analogy is made explicit. ARIZ. REV. STAT. ANN. § 14-65312(A); UPC § 5-312(a); *The Use of Guardianships*, *supra* note 50, at 98.

54. All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances,
And one man in his time plays many parts,
His act being seven ages. . . .
Last scene of all,
That ends this strange eventful history,
Is second childishness, and mere oblivion,
Sans teeth, sans eyes, sans taste, sans everything.

W. SHAKESPEARE, AS YOU LIKE IT, Act II, Scene vii, l. 139 *et seq.* (1558-1600).

55. *See* W. FAULKNER, THE SOUND AND THE FURY 8, 344 & generally 1-96 (1946).

nor child,[56] so it is natural to reason that an adult ward stands in relationship to his guardian as a child does to his parent.[57] Both suffer from an incapacity: the child's is legal;[58] the adult ward's is physical.[59] Both the minor child and the adult ward are seen as potentially dangerous to themselves because they lack the ability to act according to their own best interests or because they lack an appreciation of the consequences of their actions.[60] Someone, therefore, must intervene into their lives for their own best interests. The intervention is not condoned because it suits the parent or the guardian, or because the intervention by guardianship serves some third party or societal interest, but only because the interests of the child or ward are thereby best served.[61]

The best interest standard encourages the belief that a guardian is something akin to a caretaker. As such, the guardian's primary duty is to preserve the person or property of the ward until he has regained his competence.[62] In the case of the child, that would be at the age of majority, but in the case of the adult incompetent that time is most uncertain and, in fact, may never arrive prior to the death of the ward. Yet, because the guardian may be only a temporary caretaker, there is a traditional belief that a "good" guardian is one that acts conservatively and maintains the status quo.[63] Guardians are not encouraged to be imaginative or creative.[64] Hence, at common law, a guardian could

56. *See* Daniels v. Metropolitan Life Ins. Co., 135 Pa. Super. Ct. 450, 5 A.2d 608 (1939); Petition of Loudin, 101 R.I. 35, 38, 219 A.2d 915, 917 (1966).

57. *See* ARIZ. REV. STAT. ANN. § 14-6312(A) "A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child. . . ."; UPC § 5-312(a).

58. *E.g.*, GA. CODE ANN. § 20-201 (1965); MONT. REV. CODES ANN. § 28-2-201 (1979); S.D. CODIFIED LAWS ANN. §§ 53-2-1, 53-2-2 (1980); J. MURRAY, MURRAY ON CONTRACTS § 12 (1974).

59. *See* note 19 *supra*.

60. *In re* Pernell, 92 N.M. 490, 497, 590 P.2d 638, 645 (Ct. App. 1979); *In re* Frick, 49 N.C. App. 273, , 271 S.E.2d 84, 86 (1980); *In re* Collins, 49 N.C. App. 243, , 271 S.E.2d 72, 76 (1980); *In re* Monroe, 49 N.C. App. 23, , 270 S.E.2d 537, 540 (1980); Commonwealth *ex rel.* Platt v. Platt, 266 Pa. Super. Ct. 276, 290, 404 A.2d 410, 417 (1979); Commonwealth *ex rel.* Gibson v. DiGiacinto, 261 Pa. Super. Ct. 53, 67, 395 A.2d 938, 945 (1978); *The Use of Guardianships*, *supra* note 50, at 100.

61. *See* Lausier v. Pescinski, 67 Wis. 2d 4, 7, 226 N.W.2d 180, 181 (1975) (court refusal to allow kidney transplant by ward because surgery not in ward's best interests). *See also* Little v. Little, 576 S.W.2d 493 (Tex. Civ. App. 1979).

62. *See In re* Michelson's Guardianship, 8 Wash. 2d 327, 335, 111 P.2d 1011, 1015 (1941). The court said: "It must be borne in mind that the real object and purpose of a guardianship is to preserve and conserve the ward's property for his own use, as distinguished from the benefit of others." *Id.* at 1015. The court in *Ex parte* Whitebread, 35 Eng. Rep. 878 (1816), said: "The Court does nothing want only or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it." *Id.* at 879.

63. *See* Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 292-94 (1960); Comment, *The Effect of Guardianship on Estate Plans*, 65 MICH. L. REV. 1613, 1614 (1967). Note that the UPC, §§ 5-424 *et. seq.* has conferred upon the conservator all the powers of a trustee.

64. The strategy of giving away of funds during the life of the ward to minimize the impact of estate taxes is one example of creativity which has been discouraged by some courts. *In re* Neal, 406 S.W.2d 496, 502 (Tex. Civ. App. 1966), *aff'd in part, rev'd in part*, 407 S.W.2d 770 (Tex. 1966). *See generally In re* DuPont, 41 Del. Ch. 300, 194 A.2d 309 (1963).

not make a valid lease of the ward's real property that extended beyond the ward's minority.[65] In some cases, the guardian could not tie-up the ward's property past the age of minority even with prior court approval.[66] Even a parent, acting as guardian, could not necessarily approve nonlife threatening surgery for his child against the child's wishes if such an act would have had significant and irreversible consequences for the child.[67]

The view of guardian as caretaker may be the genesis of the idea that there are limits to the power of the guardian and that certain acts are beyond his power. The absolute limits of the power of the guardian are in dispute,[68] but agreement exists that there is *some* limit.[69] Even within the "zone of authority," the guardian may be subject to the check of prior court approval, particularly if the action by the guardian would cause a significant change in the life of the ward.[70] For example, a guardian of an aged, senile ward is likely to request prior court approval before placing the ward in a nursing home even though the need for such action may be apparent.[71] In short, the acts of a guardian should be so conservative and so commonplace as to be beyond reproach. Any change in the status of the ward can only be justified under a rigorous best interests test, or so the "Parent-Child Model" would have it.[72]

Guardianship, which began as a power vested in the king, came to

65. Gaines v. Gaines, 116 Ark. 508, 513, 173 S.W. 410, 411 (1915); Nawohi v. Hakalau Plantation Co., 14 Hawaii 460, 462 (1902); Jackson v. O'Rorke, 71 Neb. 418, 422, 98 N.W. 1068, 1070 (1904).

66. Haddock v. Bronaugh, 92 Okla. 197, 198, 218 P. 848, 848 (1923).

67. *See, e.g.*,Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *In re* Phillip B, 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48, 50 (1979); *In re* Weberlist, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 783, 786 (1974); *In re* Sampson, 65 Misc. 2d 658, 671, 317 N.Y.S.2d 641, 654 (1970); *In re* Green, 448 Pa. 338, 348, 292 A.2d 387, 392 (1972). For a discussion of judicial handling of medical treatment situatons see Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645 (1977).

68. Notable areas of dispute are kidney transplants: *Compare* Lausier v. Penscinski, 67 Wis. 2d 4, 7, 226 N.W.2d 180, 181 (1975) *with* Hart v. Brown, 29 Conn. 368, 375-76, 289 A.2d 386, 269-70 (1972); sterilization of incompetents: *Compare* North Carolina Assoc. for Retarded Children v. North Carolina, 420 F. Supp. 451, 457 (N.C. 1976) and *In re* AD, 394 N.Y.S.2d 139, 140 (1977) *with In re* Grady, 170 N.J. Super. 98, , 405 A.2d 851, 865 (1979); and voluntary commitments of wards to mental hospitals; Von Luce v. Rankin, 267 Ark. 34, 38-39, 588 S.W.2d 445, 448 1979); *In re* Hiatt, 45 N.C. App. 318, , 262 S.E.2d 685, 686 (1980), *In re* Anderson, 17 Wash. App. 690, 692, 564 P.2d 1190, 1192 (1977).

69. *See*, ABA MODEL STATUTE, *supra* note 5, § 17(5).

70. For example, doctors commonly seek court approval before surgery on an incompetent, since civil liability will result if "informed consent" is not given. Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), *overruled on other grounds*, Bing v. Thunig, 163 N.Y.2d 3 (1957); Note, *Addressing the Consent Issue Involved in the Sterilization of Mentally Incompetent Females*, 43 ALB. L. REV. 322 (1979). In addition, statutes may mandate prior court approval for particular actions. 20 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1980-81) requires prior court approval before a ward may be placed in a nursing home; *cf.* UPC § 5-312(a)(1) (guardian may establish ward's place of abode).

71. 20 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1980-81).

72. Estate of Brown, 16 Cal. 3d 326, 334, 546 P.2d 298, 303 (1976); Lausier v. Pescinski, 67 Wis. 2d 4, 7, 226 N.W.2d 180, 181 (1975).

be thought of as a private, often familial activity, subject only to the supervision of the courts.[73] Guardianship came to be seen less as a delegation of state authority and more of an example of the state monitoring the activities of private citizens.[74] The state interest is to insure that the assets of the ward are protected so that he does not dissipate them and consequently become a public charge.[75] The appointment of the guardian often serves to forestall the need for more drastic state intervention[76] by providing for supervised care of the individual and his property.[77]

Because guardianship was thought to serve the bests interests of the ward, there was traditionally a lack of concern for procedural formalism or due process.[78] Perhaps motivated by the same concerns that arose in the context of juvenile law,[79] guardianship hearings tended toward a nonadversarial style with the judge cast in the role not as the arbitrator between opposing litigants but as an inquisitor in search of the truth.[80] Hence, guardianship hearings often lack adequate notice,[81] are often held ex parte,[82] and the alleged ward often lacks counsel.[83] A guardianship hearing under the traditional view had no opposing sides because there was only one person's interest to be served: the alleged incompetent.[84] The petitioner who filed for the guardianship could not "win" because he had nothing to gain (in the sense that litigants "win" a trial). Even if the alleged incompetent "lost" the hearing, he in real-

73. 20 PA. CONS. STAT. ANN. § 5531 (Purdon Supp. 1980-81).

74. Although the court retains *parens patriae* jurisdiction over guardianships, the only significant state involvement occurs when incompetency is adjudicated or when the guardian wants to alter significantly the ward's life. *See* note 70 *supra*. Frequently, however, a guardianship is established so that an individual can be moved to a nursing home, *In re* Adams, 209 So. 2d 363, 367-68 (La. Ct. App. 1968); or so that she may be sterilized, *In re* Null, 70 Pa. D. & C. 2d 270, 273, 25 Pa. Fiduc. 1, 4 (1974); or so that medical treatment can commence, *In re* Schiller, 148 N.J. Super. 168, 185-86, 372 A.2d 360, 369-70 (1977).

75. AMERICAN BAR FOUNDATION, *supra* note 1, at 252.

76. Note, *Guardianship of Property of Incompetents*, 9 REAL PROP., PROB. & TR. J. 535, 537 (1974).

77. *See* Mitchell, *supra* note 5, at 1415-18.

78. *See* Prokosch v. Brust, 128 Minn. 324, 328, 151 N.W. 130, 132 (1915); Wismer Estate, 15 Pa. Fiduc. 308 (1965) "[a]n incompetency matter . . . is closer in substance to an ex parte matter which, though initiated by a second party, does not in any way affect or operate upon such party's own legal rights." *Id.* at 310.

79. *See* H. LOU, JUVENILE COURTS IN THE UNITED STATES 1-21 (1927) for an analogous discussion of why serving the best interests of the juvenile negates the need for procedural formality.

80. Thus, the court on appeal in *In re* Swain, 199 So. 2d 736, 737 (Fla. Dist. Ct. App. 1967), held that notice of the proceeding was not properly given to the alleged incompetent but let the adjudication of incompetency stand "[b]ecause of the age and apparent infirmities of the appellants. . . ." *See also* Wismer's Estate, 15 Pa. Fiduc. 308, 310 (1965).

81. *See* text accompanying notes 257-60 *infra*.

82. *See* text accompanying notes 264-66 *infra*.

83. *See* text following note 228 *infra*.

84. One commentator concluded that the lack of due process at New York petition hearings "[r]eflects, perhaps, a view that guardianships would only be instituted for benevolent purposes." Dussault, *supra* note 50, at 620.

ity "won." by gaining the protection of a guardian. In fact, not to have had the guardian appointed would have been a "loss" to the incompetent.[85] The strict procedures required at a criminal trial, for example, were not thought necessary nor desirable at a hearing on a guardianship petition, because traditional guardianship law did not equate the loss of liberty attendant with the declaration of incompetency with the loss of liberty arising from a guilty finding in a criminal trial.[86]

The more prevalent the view that guardianship is a significant benefit to the ward, the more likely it is that due process concerns may be subordinated to the desire to avoid unnecessary impediments that might bar or delay assistance to an incompetent individual.[87] Since due process presumably exists primarily to benefit the alleged incompetent, it is not irrational to believe that due process values should be subservient to the larger benefits sought to be achieved by the appointment of the guardian. Under such a theory, due process is not an end unto itself, but must give way if it proves to interfere with the best interest of the alleged incompetent.

The "Parent-Child Model" could be subtitled "The Developmental Model" to reflect the growing belief that in addition to providing protection, the guardian must also assist in developing the ward's abilities and capabilities.[88] The ultimate goal of such assistance is to allow the ward to overcome his handicap and thereby eliminate or minimize the need for the guardian.[89] The "Developmental Model" expands the role of the guardian by emphasizing the guardian's responsibility to assist in the development and maturation of the ward. The "Developmental Model" implicitly assumes that the ward is capable of development, except in those cases where such assumption would be manifestly

85. *See* Mitchell, *supra* note 5, at 1432.

86. Rud v. Dahl, 578 F.2d 674, 679 (7th Cir. 1978). *Contra*, Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) which held "fundamental rights are at stake" when it set aside involuntary guardianship proceedings brought by the parents of five young adults who had joined the Unification Church. *Id.* at 968, 141 Cal. Rptr. at 243. The parents had hoped to be named guardian of their children and then have them "deprogramed." *Id.*

87. Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978) held that the "costs associated with . . . counsel will undermine one of the essential purposes of the proceeding itself—protection of the . . . incompetent's estate. . . ." *Id.* at 679.

88. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 2, refers to this function of the guardian as the "supportive role."

89. Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training: that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971).

untrue.[90] There are, however, many wards who do possess the capability to grow and develop if proper opportunities are provided. The best examples are the retarded.

Perhaps the greatest change in society's attitude toward the retarded is the realization that every retarded individual, no matter how severe the handicap, is capable of learning some skill. Moreover, habilitation[91] and training need not and should not cease merely because the retarded individual is too old to qualify for free education from the state.[92] Therefore, chief among the duties of a guardian of an adult retardate is to insure the provision of individualized habilitation and education.[93] But, it is argued, traditional plenary guardianship is at odds with the goal of maximizing the development of the ward, because the guardian, by definition, prempts all decisional responsibility.[94]

Believing that a plenary guardian interferes with the personal growth and development of the ward, proponents of the "Developmental Model" advocate the the use of limited guardianship which would grant the guardian only as much power and authority as is necessary to insure the well-being of the ward.[95] A pure "Developmental Model" of guardianship would divide power over the ward's person between the ward and the guardian, with the guardian's power subject to modification in light of the changing abilities of the ward.[96] Just as a parent may gradually relax his control over his growing child, so should the guardian retreat into an ever smaller sphere of authority. The "Developmental Model" of limited guardianship envisions a flexible zone of authority and power that contracts, expands, and adapts to the particular developmental status of the ward.

### (2) *"Therapeutic Model"*

The "Therapeutic Model" of guardianship also has its origins in the responsibility of the state, acting under its parens patriae power, to protect orphans and incompetents.[97] Parens patriae was thought to be a burden borne by the state and, as such, represented a morally respon-

90. The model is obviously not applicable to a severely brain-damaged, comatose ward.

91. Habilitation means the acquisition of life skills that enable the individual to deal with his environment. It includes, but it is not limited to, formal education. Murdock, *supra* note 5, at 153.

92. Hodgson, *supra* note 5, at 437; NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 2.

93. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 10.

94. Regan, *supra* note 5, at 608; NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 9.

95. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 39.

96. *Id.* at 30.

97. Coleman & Solomon, *Parens Patriae 'Treatment'—Legal Punishment in Disguise*, 23 HASTINGS CONST. L. Q. 345 (1976).

sible attitude.[98] Of course, it was never quite that simple or altruistic. A strong economic interest promoted the king's activity as protector, for by protecting the ward, the king protected revenue accruing to him from the estate of the ward.[99]

Over time, protection developed into intrusive attempts to "cure" or "reform" the incompetent. The nineteenth century saw the growth of the asylum as the logical end-point of the doctrine of parens patriae: the desire to protect led to a desire to reform, which led to the desire for control, which in turn led to the development of the asylum.[100] The goal of promoting the interests of the ward gradually became juxtaposed with the goal of promoting the interests of the sovereign to "cure" the ward. Thus, orphans were not merely to be sheltered until they reached majority, but were to be raised in a manner designed to mold them into respectful, diligent and moral citizens.[101] Over time, the insane came to be considered "mentally ill," and restrictive chains were replaced by therapy.[102] Similarly, guardianship began to attract advocates of the therapeutic state who saw in its control of the ward the opportunity for the state to assist the ward beyond merely providing protection for his person and property.[103] Therapeutic state advocates began to press for guardianship to be integrated into a total system of the delivery of state services[104] that would assure adequate legal consent even if the ward, because of his incompetency, either could not or would not allow the state to help him.[105]

The view that guardianship provides a vehicle for the delivery of state assistance to the disabled has led proponents of the "Therapeutic Model" to the belief that guardianship should be more widely available. To that end, they advocate a broadening of the definition of those eligible for a guardian to accommodate everyone who might benefit

98. Developments, *supra* note 2, at 1207-08.

99. Regan, *supra* note 5, at 570.

100. D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971). *Contra* M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1965).

101. D. ROTHMAN, *supra* note 100, at 210.

102. Kittrie, *The Flowering and Decline of the Therapeutic State?*, in MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE 80, 86-89 (1974). Of course, the movement away from warehousing to treatment and therapy is the "official" explanation and defense of the commitment of the mentally ill. Another view is that:

> [t]he mental hospital is neither exclusively a tool of community defense against the dangerously insane nor primarily a dispenser of therapy for those who require it. Commitment serves to prevent breaches of the peace and harm to persons or property but also to provide treatment and cure, to relieve the family of the burden of a disabled member, and to provide care and custody for the miscellaneous groups of problematic and maladjusted indigent misfits.

N. KITTRIE, THE RIGHT TO BE DIFFERENT 80 (1971).

103. Regan, *supra* note 5, at 602 (the author places guardianship in the larger context of protective services); Coleman & Salaman, *supra* note 97, at 347.

104. E. FERGUSON, *supra* note 44, at 48-49.

105. *Id.* at 49.

from having a one.[106] Thus, they would eliminate the traditional requirement that the ward lack mental capacity or that the individual suffer from an identifiable disorder; instead, the need for a guardian, it is felt, should be based solely upon the behavior of the alleged incompetent. Any individual who demonstrates by his behavior that he cannot make or communicate reasonable decisions would be a candidate for a guardian.[107]

California, for example, defines incompetency as a legal disability which "shall be measured by functional disabilities" and means any adult who cannot "properly . . . provide for his own personal needs."[108] The statute does not denominate the possible cause of the disability; nor does the statute require the court to find the cause of the disability, or even to determine whether it was either a physical or mental illness or deficiency.[109]

New Hampshire provides for the appointment of a guardian for an incapacitated individual and defines incapacity as a legal disability measured by "functional disabilities" and an "inability to provide for his personal needs."[110] The need to identify the mental or physical basis for the disability has been eliminated. Evidence of a disability rests solely upon behavior of the alleged incompetent. Unlike California, however, New Hampshire has specifically attempted to distinguish poor judgment from disability. To that end, the statute provides:

> All evidence of inability must have occurred within 6 months prior to the filing of the petition and at least one incidence of such behavior must have occurred within 20 days of the filing of the petition for guardianship. Isolated instances of simple negligence or improvidence, lack of resources or any act, occurrence or statement if that act, occurrence or statement is the product of an informed judgment shall not constitute evidence of inability to provide for personal

106. A. STONE, *supra* note 2, at 169 says:

> A true public guardianship system would be available to anyone substantially deprived of his capacity to manage his affairs, without the stigma of mental illness criteria. It would seek out private guardians, and where necessary, itself provide such services. It would view its role as, at the least, that of aiding the individual in personal and financial matters, seeking benefits, investigating service alternatives and supervising the delivery of institutional, out-patient, or home care. It should not view the problem of the marginally competent or incompetent aged person as just a mental health problem. Rather, it should serve to coordinate available services with respect to income, housing, health care, nutrition, companionship, and so on.

107. Axilbund, *Substituted Judgment for the Disabled* ABA COMM. ON THE MENTALLY DISABLED 136-37 (1979); UPC § 5-101(8), adopted by Council of the American Association on Mental Deficiency, (AAMD) *Guardianship for Mentally Retarded Persons*, Position Papers of the AAMD, 16 (1975)); *contra* ABA MODEL STATUTE, *supra* note 5, § 3(1) Comment ("Individuals with disabilities should have no less a right to be wrong than those without disabilities. Hence there is no requirement that decisions regarding person or property be 'responsible' ones").

108. CAL. PROB. CODE § 1435.2 (West).

109. *Id.*

110. N.H. REV. STAT. ANN. § 464-A: 2, XI (Supp. 1979).

needs or to manage property.[111]

The Uniform Probate Code (UPC), whose definition of guardianship has been adopted by several states,[112] is another example of a "Therapeutic Model" of guardianship. The UPC defines an incapacitated person (one for whom a guardian can be appointed) as a: [P]erson who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced 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 to communicate responsible decisions concerning his person. . . .[113]

Although the UPC seems to retain the test of mental capacity, a close reading indicates that it has been severely undercut. The definition of causes of the impairment modestly expands the list of specific illnesses, *e.g.*, physical illness, but more significantly it includes the phrase "or other cause." One wonders what possible additional cause could be meant by the generalized reference. It would seem that "mental illness, mental deficiency, and physical illness or disability," cover every possible cause except possibly drugs and alcohol, but the latter two are specifically enumerated. The insertion of "or other cause" seems suspiciously as if the drafters of the Code wanted to insure that the *cause* of the impairment would not be relevant to the determination of the incapacity. Armed with the possibility of ascribing the cause of the impairment to "or other cause," the court is relieved of the need to specifically find the source of the impairment. For example, if the alleged incompetent is acting oddly, the court does not need to find that he is mentally ill. It is enough for the court to conclude that "something" is wrong and that as a consequence the individual "lacks sufficient . . . capacity to make . . . responsible decisions."[114]

How is the court to conclude that the individual, lacks, "sufficient capacity?" If it is not necessary to identify the cause, then the *behavior* of the individual will be the basis of the determination. The primacy of behavior over the diagnosis of the cause of the behavior as the basis of the finding of incapacity is buttressed by Section 5-303 of the UPC. That section provides that the alleged incapacitated person shall be examined by a physician appointed by the court *and* be interviewed by a

111. *Id.*

112. ALASKA STAT. § 13.26.005(1) (1972); ARIZ. REV. STAT. ANN. § 14-5301 (1975); COLO. REV. STAT. § 15-14-304 (Supp. 1980); HAWAII REV. STAT. § 560:5-101(2) (1976); IDAHO CODE § 15-5-101(a) (1979); ME. REV. STAT. ANN. tit. 18(a), § 5-101(1) (1981); MICH. COMP. LAWS § 700.443; MONT. REV. CODES ANN. § 91-5-101; NEB. REV. STAT. § 30-2601(1) (1979); N.M. STAT. ANN. § 32-5-101; N.D. CENT. CODE § 30.1-26-04 (1976); OR. REV. STAT. § 126.003 (1979); UTAH CODE ANN. § 75-1-201(18) (Supp. 1979).

113. UPC § 5-101(1).

114. *Id.*

"visitor" who, as the Comment to that section points out, need not be a physician.[115] Not only is the visitor to interview the alleged incapacitated person, but also he is to interview the person seeking appointment as guardian and to visit the abode of the alleged incapacitated person and proposed place that he will be detained or reside if the guardian is appointed.[116]

The requirement that the alleged incompetent be interviewed by a physician appears to be an attempt to gain diagnostic information as to the mental or physical state of the alleged incapacitated person, (although the lack of use of a psychiatrist or psychologist is a glaring ommission). The interview by a so-called "visitor" who is not medically qualified would not, however, yield reliable information as to the medical condition of the alleged incompetent. The visitor presumedly will report what his interview revealed, but this information will be based upon observation of the behavior of the person rather than upon diagnostic analysis. The purpose of the visitor appears to be to provide the court a fuller, more graphic, view of the total circumstances and choices that are at issue. This may explain why the visitor is required to visit not only upon the alleged incompetent, but also the proposed guardian and even the proposed abode of the incompetent. The latter visits could not speak at all to the capacity of the would-be ward but rather speak to the relative improvement in the life of the ward that could be expected if the guardianship were approved. Hence, the decision to appoint a guardian is linked to the benefit arising to the ward rather than being based strictly upon the mental incompetence of the ward.[117]

In describing the duties and qualifications of the visitor, the Comment to Section 5-303 states, "In urban areas, the visitor may be a social worker capable of determining the needs of the person for whom the appointment is sought."[118] But why are the "needs of the person" relevant in the determination of incapacity? Arguably they are not, unless it is anticipated that the benefits of the proposed guardianship play a role in the determination of whether to appoint the guardian. The relevance of a benefit to the ward in the decision whether to appoint a guardian is made explicit by the requirement of Section 5-304 that the court may appoint a guardian if "satisfied that the person . . . is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person . . . ."[119]

Measurement of the benefit of guardianship to the ward as a factor

115. *Id.* § 5-503, Comment.
116. *Id.* § 5-303(b).
117. *Id.* § 5-304.
118. *Id.* § 5-303, Comment.
119. *Id.* § 5-304.

in determining whether a guardian may be legally appointed means that the determination of legal incapacity varies according to the relative value of the proposed guardianship. The term incapacitated thus has no fixed meaning outside the context of the particular set of circumstances. This flexible definition represents a marked change from the common law which perceived incompetency as a permanent point on the spectrum of mental ability.[120] Under common law, one either was or was not competent (in a factual sense), and at a hearing on a petition for guardianship the only issue was the mental capacity of the alleged incompetent, not the benefit of the guardianship to the ward.[121] Under the UPC (an example of the "Therapeutic Model" reasoning), the rigid binary analysis of the common law is rejected as unrealistic and counterproductive because it reduces the decision whether to appoint a guardian to mere classification and fails to consider the potential benefit (or lack thereof) of a guardian.

By emphasizing the benefit of guardianship in the determination of the appropriateness of the appointment of a guardian, the "Therapeutic Model" relies upon a medical approach to decisionmaking. The medical approach departs from the common law in that the latter used the identification of the status of the individual as the means of identifying an appropriate response, *i.e.*, if incompetent, then appoint a guardian. Medicine, on the other hand, selects a response based upon the potential benefit to the patient even though the cause of the ailment is unknown.[122] The medical model, with its emphasis on professional authority and benefit analysis, is strongly favored by the social service providers who long for the respect and automony granted to doctors.[123] The legal profession advocates of the "Therapeutic Model" are, in turn, strongly influenced by the social service providers and view guardianship as a means of providing a benefit rather than as a response to a legalistic categorization.[124] The UPC is a monument to the merging of law and social service views in the form of a therapeutic definition of incompetency and guardianship.

Other, more extreme, examples of the "Therapeutic Model" are the Protective Service Programs which incorporate guardianship into the delivery of a broad spectrum of state provided services. One definition is that:

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120. *See* text following note 22 *supra*.

121. *Id.*

122. Advising aspirin for a headache is a classic example of symptomatic relief when neither the cause of the headache nor the process of relief is understood. It is enough that the patient obtains relief.

123. E. FERGUSON, *supra* note 44, at 75-76.

124. Hodgson, *Guardianship, Mentally Retarded Persons: Three Approaches to a Long Neglected Problem*, *supra* note 5, at 410; Regan, *supra* note 5, at 608-09.

> Adult protective services is one level of a comprehensive adult services system. It is a full-access service that is distinguished by the "protective" characteristics of the person served and uniquely, but not in every instance, involves a modulated substitution of the client's decision-making power by that of another person who is willing to use professional authority as well as legal and judicial authority to secure or to provide necessary medical, social, or legal services, based on the principles of the least restrictive alternative and gradualism.[125]

Protective service concepts were initially developed and promoted by those concerned with the problems of the elderly. The focus of whose concerns was that self-destructive, deviate behavior of the elderly should be countered by coordinated state action.[126] Current proposals, however, explicitly include as potential beneficiaries all adults who are, "in danger of harm or threatened with harm, who are unable to protect themselves, and who have no one able effectively to assist them . . . ."[127] In short, they are a "person-at-risk."[128]

Protective service programs attempt to eliminate risk of harm to the client by providing or securing a range of services tailored to the particular needs of the individual.[129] While protective service advocates claim a desire to promote the individual's independence and "self-discretion,"[130] they also admit that, what distinguishes these "protective services" from other social services is the potential for legal intervention which is understood as part of any protective service program.[131] "Legal intervention" is a euphemism for guardianship (as well as civil commitment) since that may be the only way to insure that the social services may be forced upon the unwilling client, or as it is put, "[G]uardianship . . . enables the agency or individual to assist the person without his consent."[132]

Merely because the protective service advocates support the use of guardianship to deliver nonconsensual services, however, does not mean that they are crypto-authoritarians. On the contrary, protective service advocates often emphasize the need and desirability of allowing

125. E. FERGUSON, *supra* note 44, at 8.
126. SPECIAL COMMITTEE ON AGING, *supra*, note 5. A variety of federal programs provide funding for various aspects of protective service programs including: title XIX (Medicare and Medicaid) of the Social Security Act, 42 U.S.C. § 1395, 1396 (1976); title XX of the Social Security Act, the Community Mental Health Centers Act, 42 U.S.C. § 2689 (1976); title III of the Older Americans Act, 42 U.S.C. § 3001 *et seq.* (1978). Another seminal source is THE NATIONAL COUNCIL ON THE AGING, *Overcoming Barriers to Protective Services for the Aged* (Hall & Mathisen ed. 1968).
127. E. FERGUSON, *supra* note 44, at 18.
128. *Id.* at 18, 29.
129. *Id.* at 31.
130. *Id.*
131. SPECIAL COMMITTEE ON AGING, *supra* note 5, at 4.
132. *Id.*

the client to participate in decisions taken in regard to the delivery of the social services.[133] Moreover, such advocates recognize that guardianship creates and encourages dependency.[134] Their response is to rely on the principle of the least restrictive alternative: that is, while protecting the client, the state must select means which least restrict the client's independence and freedom.[135] Intervention, therefore, is to be tailored to produce the least amount of change required to overcome specific client problems. Nevertheless, "if the person repeatedly rejects assistance,"[136] the parens patriae power of the state should be invoked. Guardianship becomes the "device of the agency to achieve the same end sought earlier on a voluntary basis."[137] On a flow chart of protective services, the appointment of a guardian is a minor detour on the path to the "solution" of the client's problem and is used to obtain consent from an otherwise hostile client.[138] In the end, guardianship is merely a tool of the professional service providers, who in turn are a "social mechanism for resolution of conflicting social values."[139] It is resorted to whenever "consent" cannot be obtained, even by social workers backed by the authority of the state and armed with "benefits" freely available to a cooperating client. To be sure, guardianship must serve the best interest of the ward, but best interest is defined by society's view, rather than by individual idiosyncratic values.

(3) *"Substituted Judgment Model"*

The "Substituted Judgment Model" of guardianship takes its name from the legal doctrine that the court, acting in equity, has the right to substitute its judgment and to act for an incompetent in all matters "touching on the well-being"[140] of the incompetent. The doctrine first arose in the 1816 English case of *Ex parte Whitbread*,[141] where the court authorized expenditures from the estate of an incompetent in order to provide for his needy relatives.[142] The court justified granting allowances to the relatives because it felt that is "what the

133. E. FERGUSON, *supra* note 44, at 31-32.

134. *Id.* at 31, Parmelee, *Protective Services for the Elderly—Do We Deal Competently with Incompetence?*, 2 L. & POL. Q. 397, 398 (1980).

135. E. FERGUSON, *supra* note 44, at 28; *The Use of Guardianships*, *supra* note 50, at 114-15.

136. E. FERGUSON, *supa* note 44, at 49.

137. SPECIAL COMMITTEE ON AGING, *supra* note 5, at 22.

138. E. FERGUSON, *supra* note 44, at 68. If the client is merely quiet, the professional social worker may well read consent into the silence. "What are the limitations for receiving a client's consent to a course of action by implication or lack of objection when the person is unable . . . to make an affirmative decision?" The answer is that the professional authority of the social worker must decide when to act and to "balance relevant conflicting individual interests and state interests" *Id.* at 97.

139. *Id.*

140. Hart v. Brown, 29 Conn. Supp. 368, 369-70, 289 A.2d 386, 387 (1972).

141. *Ex parte* Whitbread, 35 Eng. Rep. 878 (1816).

142. *Id.* at 879.

Lunatic would probably do and what it (sic) would be beneficial to him should be done."[143] The court felt that the payment of allowances to the relatives of the incompetent out of the latter's estate benefited him because the relatives would not "be sent into the world to disgrace him as beggars."[144] A modified form of the rule first appeared in America in 1844 in *In re Willoughby*,[145] where the court held that it had the power to deal with the estate of an incompetent in the manner that the incompetent "as it supposes the lunatic himself would have acted if he had been of sound mind."[146] The court refused to approve gifts from the estate of an incompetent to his stepdaughter on the basis that the ward, had he been restored to reason, would not have considered his stepdaughter as "having such a claim upon his bounty. . . ."[147] This conclusion was based upon evidence which indicated that prior to his incompetency, the ward "did not consider her as entitled to a support from him. . . ."[148]

The case established two principles that remain valid even after 130 years. First, the assets of the ward may be used for the benefit of someone other than the ward; therefore, the conservation aspect of guardianship must be tempered by other considerations.[149] Second, the court should apply the assets of the ward in a manner consistent with evidence of the ward's intent.[150] But if the court could act only if, prior to the onset of the incompetency, the ward had expressed his intent on the matter at issue, the court would be powerless to act in a great many instances. Thus, to act in those instances where no prior competent intent was expressed, the court came to rely upon a reasonable man standard, *i.e.*, what a reasonable man would do under the particular circumstances.[151]

In reliance upon the doctrine of substituted judgment, courts were able to approve actions by guardians that were not based upon the expressed intent of the ward.[152] Although the initial cases concerned the

143. *Id.*
144. *Id.*
145. *In re* Willoughby, 11 Paige 257 (N.Y. Ch. 1844).
146. *Id.* at 258.
147. *Id.* at 260.
148. *Id.*
149. *Id.* at 257.
150. *Id.* at 258.
151. Thompson & Hale, *The Surplus Income of a Lunatic*, 8 HARV. L. REV. 472, 475 (1895). Recent cases that uphold the reasonable man standard include, Harris v. Harris, 57 Cal. 2d 367, 370, 19 Cal. Rptr. 793, 795 (1962); *In re* Du Pont, 41 Del. Ch. 300, 312-13, 194 A.2d 309, 316 (1963); Ford v. Security Nat. Bank, 249 N.C. 141, 144, 105 S.E.2d 421, 424 (1958).
152. Rohan, *Caring for a Person Under a Disability: A Critique of the Role of the Conservator and the Substitution of Judgment Doctrine*, 52 ST. JOHN'S L. REV. 1 (1977). See collection of cases cited therein, *id.* at 29-38; Wormser, *The Doctrine of Substituted Judgment*, 9 INST. EST. PLAN. 15-1 (1974).

right of the court to apply the assets of the ward to aid a third party,[153] over time the doctrine expanded to encompass a court-approved kidney transplant from a severely retarded adult incompetent to his brother.[154] In that case, the court did not even attempt to infer the consent of the incompetent by the analogy of whether a reasonable man would consent to the transplant. Rather, the court found that the survival of the ward's brother would serve the best interests of the ward,[155] thereby merging the doctrine of substituted judgment with the best interests test.

Less dramatically, but more commonly, courts have relied upon the substituted judgment doctrine to justify the approval of gifts from the estate of the ward.[156] Generally, the cases involve a guardian who has requested the right to grant an allowance to a wife, children, or other relatives, even though the ward had no legal obligation to support.[157] The power to make gifts from the incompetent's estate is incorporated into Section 5-408 of the UPC, which allows the court to authorize almost any kind of financial and estate planning for the ward (short of making a will).[158] Such planning includes making gifts, creating trusts that might last beyond the disability, changing insurance beneficiaries, etc.[159] The powers under Section 5-408 relate only to the estate of the ward, and cannot necessarily be read to mean that the substituted judgment doctrine is as widely applicable to issues concerning the person of the ward.[160]

The doctrine of substituted judgment justifies guardianship by considering the decision by the guardian (or by the court or other authority empowered to make the decision) to be the legal equivalent of a

153. *See* note 151 *supra*.

154. Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969).

155. *Id.* at 145. The court claimed to be serving the best interests of the incompetent by insuring the survival of his brother with whom the ward was in "intimate communication." *Id.* at 146. *See also* Hart v. Brown, 29 Conn. Supp. 368, 375, 289 A.2d 386, 389 (1972), where the court approved a kidney transplant from a seven year old girl to her twin sister in part because "[i]t would be a very great loss to the donor if the donee were to die from her illness." For an excellent analysis of the use of the substituted judgment doctrine in regard to organ transplants *see* Feller, *Organ Donation—For Whose Sake?*, 79 ANNALS OF MED. 589 (1973); Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48 (1976). In at least two cases, the courts rejected the proposd organ donation under the substituted judgment doctrine because the proposed course of action offered no benefit to the incompetent. *In re* Richardson, 284 So. 2d 185, 187, *cert. denied*, 284 So. 2d 338 (La. 1973); Lavsier v. Pescinski, 67 Wis. 2d 4, 9, 226 N.W.2d 180, 182 (1974). *See also* Note, *Constitutional Law: Substantive Due Process and the Incompetent Organ Donor*, 33 OKLA. L. REV. 126 (1980).

156. *See* authorities cited in note 152 *supra*.

157. *See* authorities cited in note 151 *supra*.

158. UPC § 5-408(3). In this section, the substituted judgment doctrine is stated as "the Court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under a disability. . . ."

159. *Id.* § 5-408(3).

160. *But cf. id.* § 5-312 (allowing the guardian all the power that a parent has vis-a-vis an unemancipated minor child).

decision by the ward.[161] Since the decision is conceptually imputed to the ward, it is legitimate for the substitute decisionmaker to attempt to fashion his decision consistent with the personality and preferences of the ward. Ideally, the ward will have expressed a preference as to the issue at hand prior to the onset of the incompetency. Thus, in *In re Quinlan*,[162] the lower court, in deciding to allow the termination of the use of a respirator, cited evidence that Karen Quinlan had said that "she never wanted to be kept alive by extraordinary means."[163] On appeal, the Supreme Court of New Jersey held that the evidence of Karen's attitude toward continued use of the respirator lacked "sufficient probative weight . . . ,"[164] and, therefore, the court could not "discern her supposed choice. . . ."[165] Instead, the court permitted Karen's guardian and family to determine whether Karen "would exercise it [her right to terminate use of the respirator] in these circumstances."[166] The court gave no indication as to how the guardian and family were to determine what Karen might have done. The court, however, anticipatorily defended the possible choice of turning off the respirator by use of a reasonable man standard.[167] A decision to turn off the respirator would, according to the court, "be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them."[168] The court spoke of what Karen would have decided had she been restored to capacity just long enough to comment on whether to disconnect the respirator.[169]

When the ward has been incompetent since birth, and thus there could be no prior competent expression of intent, the proper test is not what the reasonable man would do, but what the reasonable incompetent man would do. In a recent Massachusetts case,[170] the court declined to approve painful chemotherapy for a 60 year old retardate

161. *See In re* Grady, 170 N.J. Super. 98, 119-26, 405 A.2d 851, 862-65 (Ch. Div. 1979) where the substituted judgment doctrine was invoked to allow the parents to consent to sterilization of their retarded 18 year old daughter. In contrast, the "Parent-Child Model" approves the acts of the guardian on the basis of whether they promote the best interests of the ward. The use of such a best interest test led one court to reject the request for a court ordered kidney donation by an incompetent for the benefit of his dying sister. *In re* Guardianship of Pescinski, 67 Wis. 2d 4, 9, 226 N.W.2d 180, 182 (1975). The "Therapeutic Model", when assessing the acts of the guardian, attempts to balance the interest of the individual and society. *In re* Spring, Mass. App. Ct. , 399 N.E.2d 493, 500 (1979), *rev'd and remanded*, 405 N.E.2d 115 (Mass. 1980).

162. 137 N.J. Super. 227, 348 A.2d 801 (Ch. Div. 1975), *modified and remanded*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

163. *Id.* at 250, 348 A.2d at 814.

164. *In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 41-42, 355 A.2d at 664.

169. *Id.* at 39, 355 A.2d at 663.

170. Superintendent v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

with an I.Q. of 10 suffering from leukemia. The court held that the refusal to consent to chemotherapy "would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision making process of the competent person."[171]

Of course, there is no assurance that the court's decision mirrors what the incompetent would have done "but for" the disability. In the absence of a prior competent expression of intent by the ward, the course of action approved by the court can only be a reasoned guess as to what the ward would have done.[172] The court must base its decision upon a reasonable person standard and an assumption as to what is "rational" behavior. But people do not necessarily act rationally, and the reasonable person is, after all, a legal paradigm that exists only in the pages of legal treatises and in the minds of first year law students. There is, therefore, no assurance that the ward, if faced with the particular decision to be made, would have acted "rationally" or in the manner of the fictional reasonable man.[173] The court must necessarily rely on the probability, rather than the certainty, of how the ward might have acted. Thence the court must, by necessity, impose its will (or that of the designated decisionmaker) upon the incompetent ward. The perception of what is "rational" behavior under the particular circumstances is, therefore, critical for the behavior that is perceived by the substituted decisionmaker as being rational will be the behavior forced upon the ward. In essence, the substitute judgment doctrine is but a legalistic rationalization of the imposition of "rational" societal values upon mental incompetents.

The "Substituted Judgment Model" might well be called the "Legalistic Model" because the doctrine seeks to frame a legalistic, formal solution to the question of what is appropriate treatment of an incompetent's person and property. The reasonable man represents a standard against which the actions of guardians and courts may be evaluated. In theory, the doctrine protects the ward from the whims of the particular guardian or court. The actions of the guardian are meant to reflect the values of the larger society, not the personal idiosyncratic views of the guardian.

The legalistic nature of the substituted judgment doctrine is seen also in the debate over consent to medical treatment when the patient is

171. *Id.* at 752-53, 370 N.E.2d at 431.

172. *In re* Jones, Mass. , , 401 N.E.2d 351, 355-56 (1980); Eichner v. Dillon, 73 A.D.2d 431, 473, 426 N.Y.S.2d 517, 548 (1980); *In re* Bohar, 380 So. 2d 550, 552-53 (Fla. Dist. Ct. App. 1980).

173. W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971).

incompetent.[174] As one court found, "The trend in the law has been to give incompetent persons the same rights as other individuals,"[175] including the right to grant or withhold consent to medical treatment.[176] Consent is necessary because medical treatment in its absence constitutes a harmful or offensive touching, and, therefore, an actionable tort.[177] When the patient is a competent adult, he is naturally the party who must consent. But if the patient is incompetent, the issue arises as to who, if anyone, can consent to the proposed treatment. Commonly, spouses, relatives, friends, or even neighbors are asked to give consent without regard to their legal authority to consent on behalf of the incompetent.[178] When the proposed treatment is "intrusive"[179] or "nonroutine,"[180] it is more likely that the medical provider will seek consent from a guardian or even a court.[181]

Proponents of the substituted judgment model, however, prefer a more formal, legalistic approach.[182] They insist that medical treatment of an incompetent not proceed without express informed consent from a duly appointed guardian, or by the court[183] in life and death decisions, *e.g.*, whether to "pull the plug." Reliance on the court is favored because only "duly established courts of proper jurisdiction" have the "ultimate decision-making responsibility,"[184] *i.e.*, courts are particularly suited to undertake "the process of detached but passionate investigation and decision" required in medical decisions of a "life and death" basis.[185] This, perhaps inflated, view of judicial wisdom would increasingly interject the judicial system, through the mechanism of

174. *E.g.*, ABA MODEL STATUTE, note 5 *supra*; *Limitations on Individual Rights in California Incompetency Proceedings*, 7 U. CAL. D.L. REV. 457, 470–71 (1974); COMMENT, *Guardianship for Adults: A Need for Due Process Protections in Vermont*, *supra* note 5; *Position Papers of the American Association on Mental Deficiency* at 15 (Approved by AAMD Council 1973-1975).

175. Superintendent v. Saikewicz, 373 Mass. 728, 747, 370 N.E.2d 417, 428 (1977).

176. For a discussion of the origins of the doctrine of informed consent, see Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent*, 56 NEB. L. REV. 51, 77-86 (1977).

177. RESTATEMENT (SECOND) OF TORTS §§ 13, 18, 892A (1965).

178. Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 470-84.

179. By "intrusive" what is meant is medical procedures that require entry into the body, *e.g.*, a barium enema.

180. By "nonroutine treatment" what is meant is, for example, the use of psychotropic drugs as opposed to the use of aspirin.

181. *In re* Jewish-Hillside Med. Center, 73 Misc. 2d 395, 397, 342 N.Y.S.2d 356, 359 (Sup. Ct. 1973). Of course, guardians and courts are not always called upon to grant consent to medical treatment when the patient is incompetent to grant consent. In some instances, the doctor will act pursuant to the "emergency" exception to the requirement of informed consent. *See* Meisel, *supra* note 178, at 434-53.

182. *See* note 52 *supra*.

183. *In re* Spring, Mass. , , 405 N.E.2d 115, 120 (1980); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 752-53, 370 N.E.2d 417 (1977).

184. Superintendent of Belchertown School v. Saikewicz, 373 Mass. 728, 758, 370 N.E.2d 417, 434 (1977).

185. *Id.* at 759, 370 N.E.2d at 435.

guardianship and by use of the doctrine of substituted judgment, into what has previously been thought to be the domain of the medical profession.[186]

Advocates of a more "Legalistic Model" of guardianship also maintain that the definition of incompetency is often overbroad or vague.[187] "Legalistic Model" advocates[188] prefer to avoid the determination of incompetency by label, *e.g.*, "person of unsound mind,"[189] or by diagnostic finding, *e.g.*, "incapable by reason of mental retardation . . . of caring for himself."[190] Under the "Legalistic Model," the behavior of the individual is determinative rather than the causal label that describes the behavior.[191] Just as criminal law looks to the act rather than the character of the actor,[192] so do legalistic advocates of guardianship seek a functional disability to justify a finding of incompetence. Thus, the ABA Model Statute would define "disabled person" (those who qualify for a plenary guardian) as: "adults whose ability to receive and evaluate information effectively and/or to communicate decisions is impaired to such an extent that they lack the capacity to manage their financial resources and/or to meet essential requirements for their physical health or safety . . . ."[193] Under this statute, a guardian is appropriate only when the incompetent clearly lacks the ability to formulate decisions, and it is therefore legally proper for the state to intervene through the appointment of a guardian to act as a substituted decisionmaker.

In addition to a reform of the definition of an incompetent, legalistic reformers would introduce a host of procedural reforms[194] that collectively would move guardianship from the current parent-child model, with its concern for a flexible response that meets the best inter-

186. Representative articles dealing with the increasing influence of the legal system on medical treatment include: Buchanan, *Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz—type Cases*, 5 AM. J. L. & MED. 97 (1979). Cantor, *Quinlan, Privacy and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243 (1977); Curren, *The Proper and Improper Concerns of Medical Law and Ethics*, 295 NEW ENGLAND J. MED. 364 (Nov. 4, 1976); Kindregan, *The Court as Forum for Life and Death Decisions: Reflections on Procedures for Substituted Consent*, 11 SUFFOLK L. REV. 919 (1977); Stewart, *The Problem of Prolonged Death: Who Should Decide*, 27 BAYLOR L. REV. 169 (1975); Vaccarino, *If Your Patient is Hopelessly Ill Must You Go to Court?*, 6 LEGAL ASPECTS MED. PRACT. 50 (July 1978); Wallace, *Pulling the Plug: Who Decides?*, 114 CAN. MED. ASS'N J. 57 (Jan. 10, 1976).

187. Mitchell, *supra* note 5, at 1419-25. *See also* note 52 *supra*.

188. See authorities cited in note 52 *supra*.

189. TEX. PROB. CODE ANN. tit. 5 § 415 (Vernon 1980).

190. IND. CODE § 29-1-18-1(c)(2) (Burns Supp. 1980).

191. *See* ABA MODEL STATUTE, *supra* note 5, Ch. 1, § 3 Definitions, Comment, which states, "This act adopts a functional definition of disability, [r]ather than emphasizing the possible conditions which may cause a partial or total disability . . . ."

192. Individuals are punished for the commission of a crime, not for the status of being a criminal.

193. ABA MODEL STATUTE, *supra* note 5, Ch. 1, § 3.

194. See text & notes 257-88 *infra*.

ests of the ward, to a model much like the adversarial proceedings now generally found in civil commitment hearings.[195] The cumulative effect of these reforms would result in a decline in the use of guardians as their appointment becomes more costly and time-consuming and as incompetency becomes more narrowly defined.

## II. IDENTIFYING THE MENTALLY INCOMPETENT

Petitions asking for a determination of incompetency are most often brought under certain limited, recurring conditions. Conservators are sought because a potential ward is about to inherit a substantial amount of money,[196] because he is not caring for himself[197] or his dependents,[198] because there is fear that he is being or will be victimized,[199] or that he is likely to dissipate his estate.[200] Guardianships of a person (and of the person and estate) tend to occur either when a doctor withholds medical treatment for fear that the recipient is incompetent to give an informed consent[201] or when an individual needs to be relocated from his present abode,[202] *e.g.*, when an elderly individual requires admittance to a nursing home or a retarded adult requires institutionalization. Whenever there is a desire to physically relocate an adult, and that adult is either uncooperative or incapable of expressing an opinion, it is probable that a guardian will be appointed.[203]

Guardians and conservators can be appointed, of course, only if the individual is legally incompetent. Generally, mental capacity is the standard by which one is judged to be competent.[204] Incapacity, in

195. Civil commitment has been extensively written about. *E.g.*, *Developments*, *supra* note 2; Elkins, *Legal Representation of the Mentally Ill*, 82 W. VA. L. REV. 157, 159-62 (1979) (containing an exhaustive bibliography).

196. *See, e.g.*, *In re* Kloman, 315 A.2d 830, 830 (D.C. Ct. App. 1974); *In re* Fabre, 371 So. 2d 1322, 1324 (La. 1979); Wood v. Wood, 137 Minn. 252, 253, 163 N.W. 297, 298 (1917).

197. *See In re* Conner, 226 A.2d 126, 128, 43 Del. Ch. 310, (1967); *In re* Adams, 209 So.2d 363, 367 (La. Ct. App. 1968).

198. *In re* Colliton, 41 Wis. 2d 487, 498, 164 N.W.2d 480, 483 (1969).

199. *See, e.g.*, Smith v. Smith, 254 Ala. 404, 409, 48 So. 2d 546, 549 (1950); *In re* Delaney, 226 S.W.2d 366, 369 (Mo. App. 1950); Guardianship of Schmidt, 221 Or. 535, 540, 352 P.2d 152, 154 (1960); *In re* Wingert, 163 Pa. Super. Ct. 616, 617-18, 63 A.2d 441, 441-42 (1949).

200. *See, e.g.*, *In re* Walters, 37 Cal. 2d 239, 246-47, 231 P.2d 473, 477 (1951); *In re* Conner, 43 Del. Ch. 310, , 226 A.2d 126, 128 (1967); *In re* Bogan, 441 P.2d 972, 974-75 (Okla. 1968).

201. A temporary guardian will often be appointed when the need exists for swift action. Typically, a temporary guardian may be appointed with a minimum of procedural formality. *E.g.*, CONN. GEN. STAT. ANN. § 45-72 (West Supp. 1980); PA. STAT. ANN. tit. 20 § 5513 (Purdon 1975).

202. Guardianship may represent an attempt to avoid an even more restrictive solution such as civil commitment. *See* SPECIAL COMMITTEE ON AGING, *supra* note 5, at 35.

203. It is, of course, difficult, if not impossible to "prove" that this is the case. If one observes guardianship hearings, however, one is struck by the number of cases in which the ultimate goal of the guardianship hearing is to admit an elderly relative to a nursing home, commit a mentally ill adult child to a mental institution, or enroll a mentally retarded adult into a group home. These cases are not reported unless there is an appeal. Even if they were reported, the underlying motive of the appointment of the guardian might not be made part of the record. Hence, the lack of proof other than personal observations of the author.

204. *See* text following note 22 *supra*.

turn, results from a physical or mental disability, *e.g.*, senility or retardation.[205] The link between incapacity and incompetency reveals a vision of a world of direct causality: incompetency results from mental incapacity caused by a physical or mental disability.[206] It is a world that assumes that the causes of incapacity, primarily mental illness and mental retardation, are identifiable medical conditions.[207] The very word "mental illness", as a substitute for the lay term "insanity" is an attempt to equate disabilities of the mind with disabilities of the body.[208] Traditional guardianship statutes, which define incapacity in terms of mental illness, assume that mental illness can be identified and diagnosed just as physical ailments are identified and diagnosed.

### A. *Identification of Mental Disability*

If it is a correct assumption that mental illness is identifiable and distinguishable from mere voluntary eccentric behavior,[209] then the problem of guardianship becomes largely a problem of diagnosis. Thus, if the diagnosis of mental disability is correct, the court should have little discretion as to whether to appoint a guardian. Presumably, under this mechanistic view, the medical expert could definitely diagnose whether an individual suffered from mental illness. There would then remain only the question of whether the mental disability caused a lack of mental capacity. The court would look either to the medical expert to explain the probable effects of the illness or it would look to the actual behavior of the person for proof that the mental illness caused aberrant behavior.

Note the importance of the belief that mental illness, mental retardation, senility, and so forth are clearly identifiable conditions. The population presumably is divisible into two groups: those who are suffering from a mental disability and those who are not. Such a belief assumes that someone, a physician, psychiatrist, or whoever, will be able to *identify* and *distinguish* the mentally disabled from the nondisabled.[210]

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205. *See id.*

206. That is, the traditional definition of incapacity assumes that an incapacity causes one to be a potential victim of designing persons or that poor judgment necessarily results from a mental incapacity. Regan, *supra* note 5, at 605.

207. Wales, *The Rise, the Fall and the Resurrection of the Medical Model*, 63 GEO. L.J. 87, 88-90 (1974).

208. Horstman, *supra* note 5, at 227; Morse, *supra* note 32, at 535; Wales, *supra* note 207, at 89. The validity of the medical model of insanity is in dispute. Perhaps its sharpest critic is Dr. Thomas Szasz. *See* T. SZASZ, PSYCHIATRIC SLAVERY (1977); T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961). A less extreme critique may be found in J. ROBITSCHER, THE POWERS OF PSYCHIATRY 145-52 (1980). *See also* Moore, *Some Myths of Mental Illness*, 32 ARCHIVES OF GEN. PSYCH. 1483 (1975).

209. *See* text following note 35 *supra*.

210. It is *not* necessary that anyone be able to explain why the disability occurred. Thus, it is

B. *Lack of Capacity Test*

Guardianship statutes which require a finding of lack of capacity as a prerequisite to the appointment of a guardian imply that an individual who has mental capacity is not a proper subject for a guardian even though he acts in a manner harmful to himself. Why should this be so? The answer would seem that only individuals who act under their own free will may behave irresponsibly. For example, an individual may engage in the sport of hang-gliding even though the risk of death is fairly high. No one is legally empowered to interfere even if the particular hang-glider was unware of the magnitude of the risk. But society will not allow a severely retarded adult to hang-glide even if the retardation did not increase the risk of injury because society will not allow one to expose himself to a risk that he cannot appreciate.[211] As for the mentally ill, the lack of capacity test seems to assume that either the person is so deranged that he cannot appreciate the consequences of his behavior or that the harmful actions of the person would not have occurred but for the mental illness.

The first assumption, the inability to appreciate the consequences of one's behavior, seems true in a commonplace way. Some of the mentally ill seem to be so deranged or withdrawn that it appears sensible to classify them as being incapable of caring for themselves or their property. The validity of the assumption that the harmful activity is caused by the mental illness, is, however, much more doubtful. We have no way of knowing which acts of a mentally ill person can be ascribed to the mental illness.[212] For example, if an insane person has an auto accident while driving in a negligent manner, did he do so because he was insane or because he was careless? Similarly, if an insane person loses $10,000 in a single night gambling at a roulette wheel, did he so because he could not help himself or because he, along with many sane persons, likes to gamble and is willing to risk heavy losses? Moreover, even if an insane person has impulses to destructive action that arise from the insanity, it does not follow that he is unable to resist those impulses.[213] Sane men are also tempted, but they are held responsible under the belief that they are free to resist. No evidence supports the assumption that the mentally ill are any less free in their choice of behavior.

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irrelevant why someone is retarded; it is enough that the court can be apprised of the existence of the retardation. Similarly, once we have identified someone as suffering from mental illness, it is not necessary that we understand the cause of the illness.

211. The application of the principal is most clearly seen in issues of consent to medical treatment where the consent must be "informed." Meisel, *supra* note 178, at 420.

212. Morse, *supra* note 32, at 589.

213. *Id.* at 581-584.

The shortcomings of the incapacity model of human behavior have led some critics to argue for its abandonment as a prerequisite for a finding of incompetency.[214] They argue that a finding of incompetency should be found whenever there is a failure to meet functional criteria of behavior.[215] The California statute, for example, looks solely to behavior, the cause of the behavior being irrelevant: "functional inabilities means . . . the person is unable properly to provide for his own personal needs. . . ."[216]

The movement away from the use of a capacity test represents the influence of the "Therapeutic Model."[217] Under the therapeutic model, *any* behavior that is self-harmful gives reason for state intervention; the "good" state being the protective state.[218] In the therapeutic state, one is not "free" to act in a manner harmful to oneself. This view derives from the theory that man is a rational creature who acts to promote his own best interests.[219] Actions not in one's own interest are evidence that something is "wrong" and are caused by a physical, mental, or perhaps even a sociological condition.[220] It is the humanitarian duty of the state to intervene, remove or cure the motivating cause of the harmful behavior and attempt to restore the person to behavior that is self-promoting rather than self-destructive.[221]

The traditional requirement of incapacity law, therefore, serves as a bar to undue expansion of findings of incompetency. If incompetency were viewed as a standard of behavior rather than a condition, judges might feel free to apply their own notions as to what is "incompetent" behavior.[222] To be sure, an incapacity requirement does not guarantee that individual judges will not expand the category of incompetency. The requirement of incapacity, however, does serve as an evidentiary barrier at which the attorney for the alleged incompetent can attempt to make a stand or at least find grounds for appeal.[223] Without

214. Regan, *supra* note 5, at 605; ABA MODEL STATUTE, *supra* note 5, at 78.
215. See authority cited in note 214 *supra*.
216. CAL. PROB. CODE § 1435.2 (West Supp. 1980).
217. *See* text beginning at note 97 *supra*.
218. *See generally* E. FERGERSON, note 44 *supra*.
219. J. BENTHAM, OF LAWS IN GENERAL 70 (H.C.A. Hart ed. 1970); D. BAUNGARDT, BENTHAM AND THE ETHICS OF TODAY 500-04 (1966) discusses the theory of rational self-interest as expressed in Bentham's *Deontology*.
220. N. KITTRIE, THE RIGHT TO BE DIFFERENT, 350-51 (1971). *Contra*, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, Report No. 79, *Toward a Public Policy on Mental Health Care of the Elderly*, 664, 673 (1970) (advocating a federally funded "Protective Service Corps" to service the elderly by the use of legal, medical and psychiatric consultants).
221. Regan, *supra* note 5, at 621-22. The values of the therapeutic state are strongly criticized in W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, DOING GOOD, THE LIMITS OF BENEVOLENCE 69-70 (1978).
222. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Service Advocates*, 12 CLEARINGHOUSE REV. 451, 458 (1978); Regan, *supra* note 5, at 603-04.
223. Appeals from findings of incompetency, however, are rare and the success rate is very poor. Mitchell, *supra* note 222, at 455.

such a barrier, the issue devolves into arguing issues much too fundamental and philosophical, to wit: should a person be allowed to live in a self-destructive manner? In short, even if traditional theories of incapacity are not true, they nevertheless serve the valuable function of limiting the expansion of the concept of legal incompetency.

## III. REFORMS

Although there is no dearth of guardianship reform proposals, there is a lack of critical examination of the efficacy of such proposals.[224] Moreover, because the reforms emanate from a variety of sources[225] who formulate their proposals under the influence of quite differing assumptions,[226] it is not surprising that the reform efforts differ in both their means and ends.[227] One exception is the almost universal call for the right of an alleged incompetent to have counsel represent him at the initial hearing of incompetency.[228]

### A. *Right to Counsel*

If we accept the premise that guardianship is desirable for an incompetent, then the value of having counsel represent the alleged incompetent would seem to be that the presence of counsel might prevent a competent individual from being found to be incompetent. In short, counsel might assist in reducing the number of findings of false positives at incompetency hearings. The cost of having counsel present at such hearings, however, is the likelihood that the number of incompe-

224. The most elaborate guardianship reform proposal, including detailed commentary, is the ABA MODEL STATUTE, note 5 *supra*. The Uniform Probate Code, while not directed specifically at guardianship reform, also presents a complete (but more modest than the ABA MODEL STATUTE) statutory scheme. *See* UPC Art. V. A reform proposal not in the form of a statute but presented rather as a prose discussion and critique is THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, GUARDIANSHIP OF THE MENTALLY IMPAIRED: A CRITICAL ANALYSIS (1977). A model public guardianship act may be found in SPECIAL COMMITTEE ON AGING, UNITED STATES SENTATE, *Protective Services for the Elderly*, at 111 (1977).

225. *See* note 27 *supra*.

226. *See* text from notes 56-160 *supra*.

227. *Compare*, for example, Horstman, note 5 *supra*, who attacks paternalistic protective service guardianship *with* Regan, note 5 *supra*, who strongly supports guardianship in the context of the delivery of protective services.

228. ABA MODEL STATUTE, *supra* note 5, at 136; THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 34; *cf.* UPC § 5-303(b) (providing that if the alleged incompetent lacks counsel of his own choice, the court shall appoint an appropriate official or attorney to act as his guardian ad litem). *Contra* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978), where the court held that the state is not constitutionally compelled to provide counsel for the alleged incompetent. The court felt that the "intrusion on liberty intersts . . . was far less severe than the intrusion from other types of proceedings in which the presence of counsel has been mandated." *Id.* at 679. The court continued, "Moreover the technical skills of an attorney are less important as the procedural and evidentiary rules of an incompetency proceeding are considerably less strict than those applicable in other types of civil and criminal proceedings." *Id.* at 678. This is a rather amazing admission as to the laxity that is permitted at guardianship hearings. The court failed to address the question of why such informality is permissible.

tent persons who need a guardian, but who are wrongly judged to be competent, will increase.[229] In short, more false negatives will occur. There is no way of determining whether the presence of counsel is more likely to reduce false positives or increase false negatives.

In fact, we are presented with five possibilities:

1). Presence of counsel increases false negatives *and* increases false positives, *i.e.*, more incompetents are falsely found to be competent, and more competent individuals are falsely found to be incompetent;
2). Presence of counsel results in fewer false positives and fewer false negatives, *i.e.*, incompetency hearings become more accurate;
3). Presence of counsel results in fewer false negatives and more false positives, *i.e.*, determinations of incompetency increase;
4). Presence of counsel has no effect upon the outcomes (in gross if not in particular cases);
5). Presence of counsel results in more false negatives and fewer false positives, *i.e.*, determinations of incompetency decrease.

Possibility number one, that presence of counsel results both in more false positive and more false negative decisions, seems highly improbable. Counsel are unlikely to be random contributors to judicial inaccuracy. Possibility number two, that presence of counsel results in greater accuracy in the determination of incompetency, would be a most desirable development. If true, it would present a compelling argument for mandating counsel's presence. Possibility number three, that presence of counsel results in more guardians, seems highly unlikely. Assuming almost any level of skill, it would seem either that counsel would have no effect or that their presence would result in a decrease in the number of determinations of incompetency.[230] If possibility number four, that counsel have no effect, is correct, then there seems little reason to have them present. Surely, the cost in time, money, and other resources might be better spent elsewhere. If the system is already fair, or if it cannot be affected by the presence of counsel, then they seem unnecessary unless the presence of counsel is thought to be important merely to legitimize the proceeding by lending an appear-

229. This assumes counsel acts in an adversarial role rather than independently determining what outcome is "best" for the client and acting accordingly. For a discussion of why lawyers in analogous civil commitment hearings should always perform an adversarial role, rather than in the "best interest" of the client, see Morris, *supra* note 5, at 234; Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1553-59 (1975). Some commentators advocate a "best interest" role for counsel rather than the more narrow adversarial one. *E.g.*, Janopaul, *Problems in Hospitalizing the Mentally Ill*, 13-14 (American Bar Foundation Research Memorandum Series No. 31, 1962); Brofman, *Civil Commitment of the Mentally Ill in the Denver Probate Court*, 46 DEN. L. REV. 469, 566 (1969).

230. The quality of counsel in civil commitment hearings is often very poor, however. *See* Elkins, note 195 *supra*.

ance of procedural fairness. Possibility number five, that presence of counsel results in fewer findings of incompetency, seems the most likely outcome. Although, in some instances, counsel might prevent the unlawful appointment of a guardian (a false positive), in other instances counsel's efforts might prevent the appointment of a guardian for an incompetent (a false negative). Would this result be desirable?

(1) *Benefits Versus Burdens*

Let us postulate that the presence of counsel would result in more petitions for guardians being denied, either because of more false negatives or because of fewer false positives. If the latter were the case, then counsel would be serving a valuable service by preventing the appointment of unneeded or, at least, unlawful guardians. This would advance the public interest in two ways: 1) it would cut costs; and 2) the reduced possibility of success in borderline or bad faith cases would diminish the number of guardianship hearings.[231] But are there other, more significant, savings? To be sure, there is the John Donne "No man is an island" gain; we are all served when anyone of us is more justly treated. But in a more concrete manner, we are all better off if we live in a society that minimizes the denial of liberty of its members. Certainly, few competent individuals would voluntarily relinquish their adult rights and liberties to a guardian. Therefore, we must be concerned that the system that appoints guardians operates in a manner designed to minimize the appointment of guardians for adults who ought not to have one. But there must also be a consideration of the cost of the failure to appoint a guardian when one is needed. How should we measure the cost if the presence of counsel increases the number of false negatives? It might be a poor trade indeed if we were to save one competent man from a guardian at the expense of denying ten incompetents the benefit of a guardian.

Here again, however, the possibility that counsel might result in the denial of needed and beneficial guardians assumes that all individuals can truly be categorized as competent or incompetent.[232] But what if this were not so? Suppose that instead of conceiving of the world as consisting of two groups, competent and incompetent, we were to think of it as a continuum stretching from the rational, careful, individual who never or only rarely makes decisions not in his interest to the incompetent individual who is incapable of understanding or making de-

231. "The adversary system apparently does not provoke a generally more vigorous search for facts, but does instigate significantly more thorough investigation by an advocate initially confronted with plainly unfavorable evidence." Lind, Thibaut, & Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1143 (1973).

232. *See* text following note 200 *supra*.

cisions in his own interest. Somewhere in the middle of that continuum people begin to lack the ability to care for themselves. In the case of the young, we distinguish the competent from the incompetent by an arbitrary age classification.[233] As for adults, we have tried to distinguish the merely foolish or weak-willed from the incompetent. This we have done through the concept of capacity.[234] So long as one has capacity, one is competent regardless of the wisdom of the decisions or of the choice of lifestyle.[235] We have essentially used a medical model to willow out the sick from the foolish or eccentric.[236] But the medical model assumes that there is a state—health—that can be distinguished from another state—illness.[237] This may well be so in the case of physical illness. For example, one either is or is not suffering from measles. But is the same true of mental illness or mental retardation, senility, drug addiction, or alcoholism? While it might be true for senility, drug addiction, or alcoholism, there exist grave doubts as to whether there is any "bright-line" that distinguishes the mentally ill[238] or mentally retarded.[239] Of course, to say that it is difficult to define precisely the line between the sane and the insane and the nonretarded and the retarded is not the same as saying that mental illness or mental retardation do not exist. Still, the lack of convincing definitions may well mean that there is no bright-line or litmus test of capacity. If capacity cannot be identified with any true degree of certainty (the degree of uncertainty itself being unclear), then there exists a group "in the middle" or "on the border-line" as to whom we can make no certain judgments. If we turn to behavior to identify the incapacitated, we face the problem that there is no unanimity of opinion as to what kind of behavior is rational or in one's best interest. We compound our problem if we venture to ask what is the measure of one's best interest. Whose values are to rule? Clearly, we are dealing with extraordinarily difficult decisions.

To raise the specter, then, that the presence of counsel might result

233. Even with juveniles, the "bright-line" age test of competency is not always used. For example, a juvenile has the right, independent of her guardian, to elect an abortion. *See* Planned Parenthood v. Danforth, 428 U.S. 639 (1976).

234. *See* text following note 209 *supra*.

235. *See* text between notes 10 & 17 *supra*.

236. *See* text & note 210 *infra*.

237. *See* text following note 209 *supra*.

238. Morse, *supra* note 32, at 554-60.

239. The most widely accepted definition is the one adopted by the American Association on Mental Deficiency: "Mental Retardation refers to subaverage general intellectual functioning which originated during the developmental period and is associated with impairment of adaptive behavior." *Quoted in* R. WOODY, *supra* note 42, at 13. Admittedly, at some point the I.Q. is so low that any observer would agree that the individual is mentally retarded. But at the borderline, the term is loose and little more than a behavior description of ill-adapted behavior. The validity of the legal classifications of mental retardation is sharply challenged in *Sorgen, The Classification Process and Its Consequence*, 215, 229-32, in THE MENTALLY RETARDED CITIZEN AND THE LAW (1976).

in the denial of needed guardians, is to flail against a strawman. At most, the presence of counsel will reduce the number of guardians appointed in the gray or shadow area where no judgment is certain or where conflicting values bar agreement as to the "correct" outcome.

(2) *Role of Counsel*

Retaining the requirement that a finding of incapacity is a prerequisite for a declaration of incompetency would blunt the thrust of the proposed reforms of the Therapeutic Model. If incompetency is not defined as solely behavioral, as the Therapeutic Model would have it,[240] then the goal of using a guardian to consent to social services cannot be achieved, because not all of those who might reject proferred state assistance would be legally incompetent under an incapacity test. The mere rejection of assistance would not support a finding of incapacity. For example, when the hermit, Harry Truman, who lived on the soon to erupt Mt. St. Helens, refused the state's offer to help him move, it did not follow that he was suffering from mental incapacity even though he remained on the mountain and died in the ensuing eruption.[241] If one thinks Harry is an unlikely example of someone being snared in the net of a therapeutic social service agency, one need only look at the following example which a proponent of a protective service proposal used as illustrative of a typical client.

> An elderly recluse who froze to death in her unheated house had bank accounts and real estate worth $250,000, according to police. Her frozen body was found in her cluttered house after neighbors had not seen her for several days and she failed to respond to telephone calls.
>
> Miss M, who retired several years ago as an elementary school principal, reportedly had not allowed anyone in her home since her parents died 25 years ago.
>
> About a week before she died, Miss M reportedly had spurned an offer of help from Police Chief W. She told him she was fine and could care for herself.[242]

Miss M was presented as a classic example of an individual who should have been declared incompetent so that her guardian could have consented to the use of state authority to save her life.[243] It is possible that Miss M lacked legal capacity, but it would not have been ascertainable without a psychiatric evaluation of her mental state. Possibly, Miss M, just as Harry Truman, believed that exposure to possible

240. *See* text following note 110 *supra*.
241. N.Y. Times, May 19, 1980, at 1, col. 2.
242. E. FERGUSON, *supra* note 44, at 23.
243. *Id.*

death was less threatening than taking the steps necessary to protect herself. At least that argument could have been made by counsel if she had been represented at an incompetency hearing.

Although the need for counsel to represent the alleged incompetent at the incompetency hearing is almost universally espoused, twenty-seven states still do not require counsel.[244] Admittedly, many of these states do require the appointment of a guardian ad litem or an attorney to act as guardian ad litem, but this is not an adequate substitute for an adversarial counsel.[245] State laws are often silent as to the role or duties of a guardian ad litem appointed to represent a person at an incompetency hearing.[246] The ABA Model Statute does, however, sharply distinguish between the role of counsel and of a guardian ad litem. As the comment to the ABA statutory definition of a guardian ad litem points out:

> The role of counsel is to serve as a zealous advocate of the legal interests of his or her client but not to determine those interests. The function of the guardian ad litem is to assist individuals to determine their interests and, if they are incapable of doing so, of acting in their stead.[247]

The role of counsel under the ABA Model Statute is to "represent zealously" the client's interests while the client "remain[s] responsible for determining his or her interests."[248] The ABA Model Statute Comment specifically notes that counsel must not act as a guardian ad litem by acting according to what counsel thinks would be best for the client.[249]

The issue of the proper role of counsel at a guardianship hearing is similar to the debate over the proper role of counsel at a civil commitment hearing. Commentators have, in general, concluded that counsel should act as an adversarial advocate rather than as a promotor of the best interests of the client.[250] Several reasons compel adoption of the adversarial role. First, if counsel has already concluded that his client needs "help" and that a guardian might be an effective source of that "help" (albeit, not the only possible source), then counsel is less likely to challenge expert testimony, either by effective cross-examination or

244. *See* ABA MODEL STATUTE, *supra* note 5, at 27–32 for a state-by-state statutory survey.
245. Baron, *The Mixed Roles of the Guardian Ad Litem, Part II—The Critical Role of Counsel*, 4 GUARDIANSHIP NEWS 1, 2 (1981).
246. COLO. REV. STAT. § 15-14-407(2) (Supp. 1980); *cf.* N.Y. MENTAL HYG. LAW § 78.03(e) (McKinney 1978) (the guardian ad litem is appointed "to represent the interests of the incompetent"). *Contra* ALA. CODE tit. 26, § 26-2-42(b) (1975) (the guardian ad litem has a "duty to defend" the incompetent).
247. ABA MODEL STATUTE, *supra* note 5, § 3(19).
248. *Id.* § 33(2).
249. *Id.* § 33, Comment.
250. *See* Elkins, *supra* note 195, at 240; Developments, *supra* note 2, at 1289; Note, *supra* note 229, at 1561.

by introducing experts with opposing points of view.[251]

Second, counsel acting for the "best interest" of his client has no standard by which to judge the quality of his efforts. In any particular case, it would be difficult for anyone (including the counsel) to judge whether the strategy employed by counsel was, in fact, in the best interest of the client. In the extreme instance, it would be almost impossible to claim an attorney was guilty of ineffective assistance of counsel. As one commentator put it: "[C]ourts will experience great difficulty separating out those lawyers who have acted in a manner they considered consistent with the best interests of the client from those who have acquiesced in commitment simply as a means of avoiding work."[252]

Third, the best interest test can too easily lead to counsel providing only procedural formality to legitimize the routine approval of guardianship petitions.[253] Presence of counsel does not necessarily mean that the petition for incompetency will be vigorously resisted. True adversarial counsel will result only if the lawyer takes seriously his obligation to "zealously" defend his client.[254]

Finally, and perhaps most fundamentally, to allow counsel to act in the "best interest" of the client would allow attorneys to make decisions concerning the mental capacity and well-being of their clients: decisions that attorneys are totally unqualified to decide. Attorneys are presumed to know the law and the legal procedures for marshalling evidence, but they are not equipped to independently determine the physical and psychological needs of their clients. It is for the court, not counsel, to decide what *lawful* course of action will serve the best interests of the client. The appointment of a guardian for a person who is not legally incompetent is not a lawful course of action, no matter how "beneficial" it might seem to counsel. A paternalistic counsel who allows the appointment of a guardian which might have been avoided by a vigorous defense has not acted in the best interests of his client.

If the client claims to be competent and wishes to avoid becoming a ward, then it seems clear that the client's counsel should attempt to defeat a showing of incompetency. Less clear, however, are those cases when the client is uncooperative and expresses no opinion or when counsel sincerely believes that the client does not know where his interests lie. The ABA Model Statute provides that when the client either can neither form nor communicate decisions or is unable to determine

251. The importance of challenging psychiatric testimony is discussed in Elkins, *supra* note 195, at 188-93.

252. Note, *supra* note 229, at 1561.

253. Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal*, 45 MISS. L.J. 43, 72 (1974).

254. CODE OF PROFESSIONAL RESPONSIBILITY, EC7-1, EC7-7, & EC7-12 (1979).

his own interest without assistance, then a guardian ad litem should be appointed to assist the client in reaching a decision (which would then be acted upon by counsel). The Model Statute goes on to provide, "If an individual is wholly incapable of determining his or her own interests, the guardian ad litem shall make that determination and advise counsel accordingly."[255] Granting that degree of power to the guardian ad litem would seem to undercut the "zealous" advocacy role of counsel, for the guardian ad litem would be duty bound to promote the best interests of the client, even if that meant acquiescing in the determination of incompetency. If the Model Statute were to be adopted, it would mean the triumph of the "best interest" role, and the right to counsel would be only a shadow protection.

There is little need or excuse for allowing counsel to forswear from promoting a vigorous defense of the competency of his client. Only four possible circumstances present themselves: (1) a competent client instructs counsel to resist the guardianship; (2) a competent client expresses no opinion or desires that a guardian be appointed; (3) an incompetent client instructs counsel to resist the guardianship; or (4) an incompetent client expresses no opinion or expresses a desire that a guardian be appointed.

The proper role of counsel in situation (1) is obvious: to defend his client from an unlawful guardian. In situation (2), the role of counsel is also clear: defend the client from an unlawful guardian. As an officer of the court, it would be unethical for counsel to cooperate in the appointment of a guardian for a competent person. Moreover, whatever benefits were sought by the client through the appointment of the guardian could be reached by other avenues —principally, a general power of attorney and the voluntary entrance into a full-care facility, *e.g.*, a nursing home, or by the employment of a personal caretaker, *e.g.*, a practical nurse.

In situation (3), when an incompetent client desires to resist guardianship, counsel is cast into a role not unlike that of a criminal defense attorney who serves society best by an active, adversarial defense of his client. The analogy is an apt one for, although being declared an incompetent is not the same as being convicted of a crime, it nevertheless results in a serious loss of personal autonomy, freedom, and self-esteem. Certainly, the cost to the unwilling ward is sufficient to warrant requiring society to prove its case in the face of a determined, opposing counsel.[256]

255. ABA MODEL STATUTE, *supra* note 5, § 34(7).

256. The societal value of a vigorous defense for the guilty criminal client is discussed in Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The*

Similarly, in situation (4) when the incompetent client expresses no opinion or desires a guardian, the role of counsel must be that of advocate. Counsel is not empowered either by training or law to decide that his client is incompetent or that society is best served by the appointment of the guardian.

### B. *Additional Procedural Reforms*

Although a requirement that counsel be present to represent the alleged incompetent would provide the most significant procedural safeguard, counsel alone cannot solve all the present procedural inadequacies. As one observer has stated, "Informality is the hallmark of guardianship proceedings."[257]

When considering due process issues or procedural safeguards, it must be admitted that there is no compelling need for the strict and formal requirements that are required in criminal proceedings[258] or even in some involuntary commitment proceedings.[259] Guardianship is, after all, not equivalent to being found guilty of a crime or being forcefully committed to a mental hospital. Nevertheless, there is no excuse for the appalling lack of procedural due process at most guardianship hearings.[260]

#### (1) *Notice*

A fundamental respect for procedural values requires that adequate notice of the guardianship hearing be given to the alleged incompetent.[261] The notice should allow sufficient time to allow the alleged incompetent to organize a meaningful defense and should be particular

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*Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Orkin, *Defense of One Known To Be Guilty*, 1 CRIM. L.Q. 170 (1958).

257. Regan, *supra* note 5, at 605. Speed may be the other hallmark of guardianship proceedings. The average length of one of 116 guardianship of the estate hearings held in Berks County Court (Pennsylvania) in 1978 was 2 minutes and 15 seconds. Letter from Joanne Longnecker, Ombudsman, Berks County Mental Health Association, to Edward R. Becker, Judge, United States District Court for the Eastern District of Pennsylvania (November 21, 1978). In all cases, the court declared the individual to be incompetent. *Id.*

258. *See generally* B. GEORGE, CRIMINAL PROCEDURE SOURCEBOOK (1976); WHARTON'S CRIMINAL PROCEDURE (12th Ed. C. Torcia ed. 1974).

259. Procedures for involuntary commitment vary from state-to-state. A representative state is Ohio, which adopted relatively formalistic proceedings in 1976. *See* OHIO REV. CODE ANN. § 5122 (Page 1976 & Supp. 1979), analyzed in Comment, *The New Ohio Mental Health Act*, 11 AKRON L. REV. 104 (1977). For an extensive bibliography of civil commitment literature see, Elkins, *supra* note 195, at 159-62.

260. The American Bar Association analysis of the guardianship laws of all states (released in 1979) indicates that twenty-seven states do not require presence of counsel at a guardianship hearing (some of those states do require a guardian ad litem); fourteen are silent as to the presence of the respondent; thirty-five states are silent as to the right of the petitioner to cross-examine witnesses or present evidence. Only ten states provide for statutory, periodic review of the determination of incompetency. ABA MODEL STATUTE, *supra* note 5, at 27-32.

261. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 606, urges notice also be sent to "close relatives." *See* UPC § 5-309(a)(1)(3).

enough to indicate what behavior is cited as the basis for the petition.[262] Also needed are adequate discovery procedures to allow counsel for the alleged incompetent to ascertain the particular events that led to the filing of the petition for guardianship. The requirement of adequate notice in civil commitments has been declared a constitutional right.[263] Whether it is constitutionally required in guardianship proceedings is, of course, unclear, but a sense of common decency would seem to require it.

(2) *Conduct of the Hearing*

The conduct of the hearing should be the next focus of procedural reform. At present, it is all too easy for a petitioner to convince the court that the hearing should be ex parte.[264] In many states, the hearing will be ex parte at the discretion of the court or upon a finding that the presence of the alleged incompetent would be detrimental to his health.[265] Although the presence of a comatose individual, *e.g.*, Karen Quinlan, would serve no function, there is still no reason to almost automatically dismiss the presence of the alleged incompetent. Certainly, there seems no compelling reason why the alleged incompetent should be denied the opportunity to be present at the hearing unless his counsel acceeds in that decision. Moreover, if counsel demands that his client be present, the hearing should be halted until that issue has been resolved.

Presence of the alleged incompetent at the hearing could be quite helpful. The alleged incompetent might be the best "counsel" for his defense. In the face of evidence of his abnormal behavior, he may be able to alert his counsel to the reasons for such behavior that would make it clear that it was not a result of mental incapacity. Second, the presence of the alleged incompetent allows the court to judge for itself

262. SPECIAL COMMITTEE ON AGING, *supra* note 5, at 38.

263. Lessard v. Schmidt, 349 F. Supp. 1078, 1090-91 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *reaffirmed*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 420 U.S. 592 (1975), *reaffirmed*, 413 F. Supp. 1318 (E.D. Wis. 1976).

264. Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, *supra* note 5, at 685.

265. *E.g.*, ARK. STAT. ANN. § 57-615(b) (Supp. 1981) ("The Court, in its discretion, may require the presence before it of the person of the alleged incompetent"); MICH. COMP. LAWS ANN. § 330.1617(4) (1980) ("However, the respondent's presence may be excused by the court only on a showing, supported by an affidavit signed by a physician or psychologist who has recently examined the respondent, that the respondent's attendance would subject him or her to serious risk of physical or emotional harm"); OKLA. STAT. ANN. tit. 58, § 851 (West Supp. 1980-81) ("such insane or incompetent person, if able to attend, must be produced before the court on the hearing"); 20 PA. CONS. STAT. ANN. § 5511(a) (Purdon) ("The alleged incompetent shall be present at the hearing unless; (i) the court is satisfied, upon the presentation of positive testimony, that because of his physical or mental condition his welfare would not be promoted by his presence"); W. VA. CODE § 27-11-1(b) (Supp. 1981) (The hearing may be held without the presence of the alleged incompetent if "such individual is physically unable to appear . . . or that such an appearance would likely impair or endanger the health of such individual").

as to the level of mental incapacity. This is particularly desirable given the conclusionary nature of psychiatric reports and their questionable reliability.[266]

Evidentiary standards are not generally addressed, but they do hold potential for reform. States do not have "special" rules of evidence for guardianship hearings; presumably, the normal civil rules of evidence apply.[267] Hearsay evidence in the form of letters or affidavits from physicians, however, is often allowed in lieu of direct testimony.[268] Cross-examination of the physician is essential given the overwhelming importance, if not dispositive nature, of medical judgment.[269] The admission of hearsay evidence may violate constitutional due process requirements.[270] Most evidentiary concerns, however, would be met if vigorous adversarial counsel were present to represent the alleged incompetent. Counsel should be able to protect his client from prejudicial or unreliable evidence.

In some states, a petition of incompetency requires a trial by jury; other states allow a trial by jury at the request of the alleged incompetent.[271] The use of a jury seems unnecessary and unwise; in fact, in actual practice, jury trials rarely occur.[272] In many instances, there is a need for rapid determination as to the issue of mental competency: use of a jury can only delay that determination.[273] Of even greater concern is whether a jury is qualified to pass on the mental capacity of the alleged incompetent. Mental capacity is a vague and slippery concept,[274] and the outcome rests more upon the experience of the court than on the application of precise legal theory.[275] It is the author's belief that a

266. *See generally* Ennis & Litwark, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

267. The ABA MODEL STATUTE, *supra* note 5, § 45, provides that the rules of evidence applicable in civil matters should govern guardianship hearings.

268. Horstman, *supra* note 5, at 252.

269. NATIONAL CENTER FOR LAW AND HANDICAPPED, *supra* note 5, at 36; the ABA MODEL STATUTE, note 5 *supra*, would require a 3 member "multidisciplinary evaluation team" appointed by the court to evaluate the alleged incompetent. The team would include a physician, social worker and psychiatrist or psychologist, *id.* § 3(23).

270. Lessard v. Schmidt, 349 F. Supp. 1078, 1102-03 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *reaffirmed*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 420 U.S. 592 (1975), *reaffirmed*, 413 F. Supp. 1318 (E.D. Wis. 1976). (The court held that the Wisconsin civil commitment procedure was unconstitutional becaue it failed to provide sufficient due process including adequate notice of all rights).

271. *See* ABA MODEL STATUTE, *supra* note 5, at 28-29, for a listing of state-by-state use or requirement of jury trials at guardianship hearings.

272. Horstman, *supra* note 5, at 251.

273. The amount of delay, if any, would depend upon local court practice.

274. *See* text following note 211 *supra*.

275. Regan goes even further and claims that "The evidence used by the courts to substantiate a finding of incompetency may not conform to the statutory criteria." Regan, *supra* note 5, at 603. Regan believes that medical judgments dominate guardianship findings at the expense of the nonmedical decision as to whether the individual lacks capacity. *Id.* at 604. He also cites the fact that the mere hospitalization of the individual will often be considered conclusive evidence of incompetency. *Id.* Interestingly, Regan's solution is to advocate the use of the Uniform Probate Code

judge is uniquely qualified, as opposed to a jury, to judge the capacity of an alleged incompetent. An experienced judge who has presided over a number of guardianship hearings will have been exposed to a great deal of unusual and odd behavior. A judge may be less likely to assume that antisocial behavior is necessarily evidence of a mental incapacity. At least, that is the hope. In any event, it seems difficult to find a compelling justification for a jury, and the interest of the state in not having a jury trial, particularly the speed, the length, and lack of cost,[276] seem sufficient justification for its abolition.[277]

(3) *Standard of Proof*

The standard of proof required for a finding of incompetency has also been subject to criticism by those who would replace the generally used standard of "clear and convincing evidence" with one of "beyond a reasonable doubt."[278] Proponents of a higher standard of proof cite the stigma of incompetency and the attendant loss of civil rights as warranting the use of a standard of proof beyond a reasonable doubt.[279] Assuming, arguendo, that the use of a different standard would in fact affect judicial outcomes, *i.e.*, judges would find fewer persons incompetent under the latter standard, the issue really seems not what is the "correct standard"[280] but what outcome do we wish to encourage. "The standard of proof influences the relative frequency of these two types of erroneous outcomes."[281] If we use a lower standard of proof, we will increase the number of individuals falsely found to be incompetent (false positives) and decrease the number of incompetent individuals falsely found to be competent (false negatives). Conversely, a higher standard of proof will mean that some individuals who should have been declared incompetent will be falsely found competent while fewer competent individuals will be falsely found to be incompetent. The choice as to the standard of proof to be used is largely a function of deciding which decisional errors should be avoided. The use of a lower

statutory criteria, which he applauds because it allows for "non-mental causes" for incompetency. *Id.* at 605. Regan does not attempt to explain why enlarging the causal catagories of incompetency would in any way diminish judicial subservience to the medical profession at guardianship hearings. *See also* Horstman, *supra* note 5, at 252.

276. Note, *Constitutional Deficiencies in Oklahoma Guardianship Law*, 13 TULSA L.J. 579, 599 (1978).

277. *Contra* Horstman, *supa* note 5, at 251 (who argues that trial by jury may be constitutionally compelled because a fundamental right is at stake).

278. *Id.* at 256; Atkinson, *Towards Due Process Perspective in Conservatorship Proceedings for the Aged*, 18 J. FAM. L. 819, 842 (1979-80).

279. *See* authorities cited in note 278 *supra*.

280. The "reasonable-doubt" standard does not appear to be constitutionally compelled. The lesser standard of "clear and convincing" has been constitutionally approved in civil commitment hearings. Addington v. Texas, 414 U.S. 418, 432-33 (1979). *Contra*, Horstman, *supra* note 5, at 254.

281. *In re* Winship, 397 U.S. 358, 371 (1969) (Harlan, J., concurring).

standard of proof leads to the possibility of overinclusion in the class of incompetents. A higher standard of proof means underinclusion. The choice between the standards depends on one's relative view of the benefit versus the stigma/burden of guardianship, and that may depend upon the breadth of power of the guardian.[282]

The standard of proof used may be less important than the presence or absence of other procedural safeguards. For instance, adequate access to appellate review may minimize the significance of the standard of proof. An individual falsely found to be incompetent stands a better chance to have a wrongful decision overruled if he has a clear right to appeal and, if necessary, is granted state assistance to pursue that appeal.[283]

A finding of incompetency should be periodically reviewed to determine if it should be continued or the powers of the guardian modified in light of changes in the abilities of the ward.[284] Naturally, the adjudicated incompetent should be able to bring suit claiming that he has gained competency. Whether by review or by suit brought by the ward, the burden of proof should be on the state rather than on the ward as has been the tradition.[285]

Placing the burden of proof on the incompetent places him in the position of having to convince a judge, who is likely to believe in the desirability of guardianship, that this "service" is no longer required. Because the ward has not been in charge of his own affairs during the period of the guardianship, he will find it difficult to bring forth behavioral evidence of his mental capacity. Hence, he will need to rely upon professional, medical testimony that he is "cured," or at least changed,

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282. The greater the power granted to the guardian over the person and property of the incompetent, the higher should be the standard of proof before that guardian can be appointed. The greater the latitude of action of the guardian, the greater should be the requirement of certainty before granting that power.

283. An appeal, however, may have an extremely low probability of success, particularly if the standard of proof is only "clear and convincing." In the absence of procedural error, an appeals court typically grants deference to the finder of fact, and thus, almost *any* evidence of incompetency will cause the finding to be affirmed. Mitchell, *supra* note 5, at 1425; Note *supra*, note 276, at 244. As one court stated:

> Furthermore, in reviewing this record we recognize that the court below had the benefit of not only hearing and observing all the witnesses but, most important, had the opportunity to hear and observe the alleged incompetent. We do not substitute our judgment for that of the court below; even though we, had we been sitting in judgment below, might have reached a contrary result, yet if the evidence is sufficient in quality and quantity to sustain the finding of incompetency such a finding should be sustained.

*In re* Myers' Estate, 395 Pa. 459, 460, 150 A.2d 525, 526 (1958).

284. *See* ABA MODEL STATUTE, *supra* note 5, § 15. Several states already provide periodic review. *E.g.*, Florida requires annual review, FLA. STAT. ANN. § 744.371 (West Supp. 1980); North Carolina provides for an initial review in six months after the appointment of the guardian and annually thereafter. 1980 N.C. Sess. Laws § 35-1.38.

285. *In re* Schrock, 211 N.W.2d 327, 329 (Iowa 1973); Suplee v. Stonebraker, 195 N.W.2d 678, 682 (Iowa 1972); Colliton v. Colliton, 41 Wis. 2d 487, 490, 164 N.W.2d 480, 481 (1969).

from the time of the declaration of incompetency.[286] Moreover, if the guardian does not agree to the proposed declaration of competency, it would seem, as a practical matter, to be impossible for the ward to succeed, since presumably the guardian is uniquely qualified to testify as to the capabilities of the ward.[287]

Again, it cannot be over emphasized that procedural reforms or safeguards will hold little meaning unless the alleged incompetent is represented by competent and agressive counsel who will use all available means to protect his client's interests.

### C. *Public Guardianship*

At least a dozen states have some form of public guardian,[288] or as it is variously called public trustee, public fiduciary, or state guardian.[289] A public guardian, as that term is popularly used, is a public employee who is typically appointed in the same manner and with the same powers as a private guardian, including the power to initiate a petition for guardianship.[290] The public guardian is available when no suitable private individual is willing to act as guardian. Typically, his duties include close coordination with social service agencies and service providers.[291]

Most guardianship reformers support the establishment of public guardians.[292] Proponents of both the "Parent-Child Model" and the "Substituted Judgment Model" of guardianship support public guardianship if for no other reason than it would assure the availability of a

286. Mitchell, *supra* note 5, at 1426. Excessive judicial caution may also account for a reluctance to approve the restoration of competency. *In re* Pearlman, 400 Pa. 350, 352, 163 A.2d 530, 531 (1960) (Musmanno, J., dissenting).

287. Mitchell, *supra* note 5, at 1426.

288. ABA MODEL STATUTE, *supra* note 5, at 22.

289. Case/Comment, *Public Guardianship-Protecting the Interests of the Ward*, 2 LAW & HUMAN BEHAV. 267, 270 (1978).

290. Report of Committee on Legal Incapacity, *Guardianship of Property of Incompetents*, 9 REAL PROP. PROB. & TR. J. 535, 538 (1974).

291. An idealized view of what a public guardian could accomplish is provided by Dr. Stone:

> A true public guardianship system would be available to anyone substantially deprived of his capacity to manage his affairs, without the stigma of mental illness criteria. It would seek out private guardians, and where necessary, itself provide such services. It would view its role as, at the least, that of aiding the individual in personal and financial matters, seeking benefits, investigating service alternatives and supervising the delivery of institutional, outpatient, or home care. It should not view the problem of the marginally competent or incompetent aged person as just a mental health problem. Rather, it should serve to coordinate available services with respect to income, housing, health care, nutrition, companionship, and so on.

A. STONE, *supra* note 2, at 169.

292. E. FERGUSON, *supra* note 44, at 86; Kindred, *Guardianship and Limitations Upon Capacity*, in THE MENTALLY RETARDED CITIZEN AND THE LAW, 87; A. STONE, *supra* note 2, at 165; Dussault, *supra* note 50, at 621; Hodgson, *supra* note 5, at 439-40; Regan, *supra* note 5, at 609; Note, *Thursday's Child: Legal Problems of Families with a Mentally Retarded Member*, 6 U. CAL. D.L. REV. 40, 51 (1973).

guardian when no private individual was willing to act as guardian.[293] As one author put it: "In a society with limited extended family ties, in which many individuals have no family member willing to assume a guardianship role, either some societal guardianship mechanism must be provided or many individuals will have no realistic access to guardianship services."[294] Public guardianship has even been declared a "right" of all mentally retarded persons for whom a family member is not available to act as guardian[295] and for incompetents whose estates are too small to bear the costs of a private guardian or conservator.[296] Advocates of the "Therapeutic Model" strongly support public guardianships, in part because of the shortage of private guardians, but also because public guardianship presents the opportunity to expand the use of guardianship[297] by insuring its availability.[298]

Under the "Therapeutic Model" of guardianship, public guardians are preferred to private, individual guardians because they can be integrated into the totality of delivery of state services.[299] The public guardian is envisioned as a public official, probably a social worker, who will work with the ward to make decisions that will advance the ward's well-being and, where possible, advance the ward's control of his life. If the guardian is a public official, then the guardian can be made aware of the various social service programs available to the ward and can assist those agencies in a pattern of sympathetic assistance to the ward.[300] Such a coordinated approach is not possible with fragmented, private guardians who cannot be centralized under common directives and who cannot be subjected to an imposed commonality of values.

The "Substituted Judgment Model" regards public guardianship as a logical extension of the use of private individuals in the capacity of guardian. For example, if it is desired that significant medical decisions concerning an incompetent not be made by the doctors but be made by a substituted decisionmaker, then there must be a public guardian available to make those decisions should there be no private individual willing to do so.[301] As substitute judgment issues become

293. Nonprofit corporate guardians might also serve where no individual was available to act as a guardian. The number of nonprofit corporate guardians, however, is very small. *See* 1 GUARDIANSHIP NEWS 7 (1980); 2 GUARDIANSHIP NEWS 7 (1981).

294. Kindred, *supra* note 292, at 85.

295. *Id.* at 285; Schoenfeld, *Human Rights for the Mentally Retarded: Their Recognition by the Providers of Service*, 4 HUMAN RIGHTS 31, 47 (1974).

296. Regan, *supra* note 5, at 611.

297. Regan, *supra* note 5, at 602–05.

298. E. FERGUSON, *supra* note 44, at 86.

299. A. STONE, *supra* note 106, at 169.

300. *See, e.g.*, E. FERGUSON, *supra* note 44, at 84-88.

301. One group of commentators has proposed an elaborate statute to govern the provision of substitute consent to health care procedures. Garvey, Leviton, Lugas, Sykes, *Informed and Substi-*

more critical and extend to matters of life and death,[302] it may become even more difficult to find private individuals willing to accept the emotional and possible financial liability associated with the role of a guardian.[303] A public guardian backed by the "deep pocket" of the state, should be more willing to make the hard decisions for which he may later be called into account.[304]

In addition to providing a substituted decisionmaker of last resort, public guardianship provides other advantages. For example, because public guardians are full-time, professional guardians, they should achieve greater sophistication and expertise in dealing with mental incompetents. This should result in a correspondingly more efficient administration of the person and property of the ward. The public guardian is also capable of providing service for an indefinite duration. Unlike private guardians who die or resign, a public guardian will be sure to survive throughout the life of the ward, even if the particular individual acting as guardian should change from time to time.[305] In addition, the appointment of a public guardian avoids potential conflicts of interest. Such conflicts may arise when a family member who petitions for a finding of incompetency is motivated not by a concern for the individual's well-being but by a desire to preserve the assets of the incompetent which the petitioner hopes to inherit.[306]

Public guardianships are not new. Minnesota, for instance, initiated a state guardian in 1917.[307] It was not, however, until the reports

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*tute Consent to Health Care Procedures: A Proposal for State Legislation*, 15 HARV. J. LEGIS. 431, 484 (1978). The authors advocate a "Substitute Review Control Board" to act when no private individual is available to act as a "qualified substitute decision maker." *Id.*

302. Superintendent v. Saikewicz, 373 Mass. 728, 733, 370 N.E.2d 417, 428 (1977).

303. The ABA Model Statute provides for possible criminal penalties, as well as civil sanctions, if the guardian harms the ward on account of "willful dereliction of duty or abuse of power." ABA MODEL STATUTE, *supra* note 5, at § 42(3). The guardian is financially liable to the ward for all funds for which he failed to account, *In re* Rudonick, 76 Wash. 2d 117, 122, 456 P.2d 96, 99-100 (1969), may be charged for interest, fees and costs if he commingles his funds with those of the ward, Shores v. Sanders, 271 Ala. 552, 556, 126 So. 2d 201, 204 (1961), and is liable if he fails his duty to collect and honestly account for all the assets of the ward. Yeaton v. Skillings, 103 N.H. 352, 354, 172 A.2d 354, 356 (1961).

304. *Guardianship of Property of Incompetents*, *supra* note 52, at 538.

305. Even though a substitute public guardian can be provided, there is nevertheless the risk of discontinuity should the particular individual acting as the public guardian die, retire, resign his position, or even be promoted. In short, the risk of the "loss" of the particular guardian may be greater with a public guardian than with a private one. *See* Axilbund, *Substituted Judgment for the Disabled*, *supra* note 107, at 138.

306. *See In re* Tyrell, No. 20467, P. Ct., Preble County, Ohio, *aff'd.*, No. 42, Ct. App. Preble County, Ohio, Oct. 31, 1962, *appeal dismissed*, 174 Ohio St. 554 (1963), discussed in Note, *The Disguished Oppression of Involuntary Guardianship: Have Elderly Freedom to Spend*, *supra* note 5, at 677. Public guardianship may exacerbate the problem because it "creates new opportunities for interested persons to veil their intentions by declining to serve themselves and referring the case of their relative, debtor, or patient to the public guardian for action." Langen, *supra* note 50, at 278.

307. Levy, *Protecting the Mentally Retarded: An Empirical Survey and Evaluation of the Establishment of State Guardianship in Minnesota*, 49 MINN. L. REV. 821, 867 (1965); A. STONE, *supra* note 106, at 168, claims that the Minnesota statute only established a "purported" public guardianship because it is so limited in scope and in protection for the ward.

of various study commissions that public guardianship began to attract significant attention.[308] As public guardianship gained prominence, it also began to attract critics, many of whom seized upon the possibility of an overlap of functions between the guardian and the service provider.[309] As one report claims, "If the group acting as the guardian is also responsible for providing the non-guardianship type of services to the ward, there is an inherent conflict of interest."[310] Critics argue that without an independent guardian, there is no one empowered to monitor the performance of the service provider and, if necessary, to sue to protect the rights of the ward. Problems of this nature have caused one commentator to claim that "No state has successfully implemented public guardianship."[311]

Although that conclusion is debatable, certainly the difficulty of the overlap or confusion of guardianship and delivery of services is readily apparent. One of the most crucial roles of the guardian may be that of forcing the service provider to adequately care for the ward. For example, a guardian of a retarded ward may be involved in litigation with an educational system to force the provision of a free education tailored to the needs of the ward,[312] or a guardian of an aged ward might become embroiled in a controversy with a local housing authority or social service agency concerning appropriate services.

If the potential of a conflict of interest were the only criticism of public guardianship, it could be easily met by the establishment of an independent state guardianship office. This has been successfully done in Delaware where a small public guardianship office oversees the needs of the wards for whom private guardians are not available.[313] In Delaware, the small size of the population allows the guardianship office to be a single, small office and still serve the needs of the community.[314] In other states, however, the size of the population would require that guardianship offices either be set up by county or be branches of a central state guardianship office.[315] In either event, the disbursement of the guardians into multiple offices would present a sig-

308. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, note 5 *supra*; ABA MODEL STATUTE, note 5 *supra*; NATIONAL COUNCIL OF SENIOR CITIZENS, note 5 *supra*

309. E. FERGUSON, *supra* note 44, at 86; Hodgson, *supra* note 5, at 440; THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 11.

310. THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 11.

311. *Id.* at 13.

312. In Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), the court held that the refusal of Pennsylvania to provide more than 180 days of schooling was incompatible with the FEDERAL EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975, 20 U.S.C. §§ 1401-1420 (1976), analyzed in Collery, *Education for All Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J. L. & EDUC. 137 (1981).

313. Axilbund, *supra* note 107, at 8-10.

314. *Id.* at 65.

315. SPECIAL COMMITTEE ON AGING, *supra* note 5, at 114-15.

nificant problem in terms of maintaining uniform standards. Even though the public guardians would be subject to uniform regulations and policies, it is possible that the actual behavior of the guardian would be strongly influenced either by local conditions or by personal prejudices and values. Local conditions, for example, might include a belief that an elderly person is best left at home, or, conversely, local practice might strongly favor institutionalization. It is difficult to believe that such differentiation in the application of the power of the guardian could be avoided short of a costly, bureaucratic oversight committee.[316] That is not to say that such individual approaches would necessarily be harmful to the wards, but rather that public guardians would not necessarily assure uniformity and expertise.

An additional criticism of some public guardianship programs is that they allow the guardianship office to initiate the petition of incompetency.[317] That causes a potential conflict of interest by allowing the public guardian to "create" its own clients. Even if the public guardianship agency were barred from initiating guardianship, other public agencies could initiate the petition, and there would be nothing the stop the public guardianship office from actively searching for potential clients and encouraging the filing of a petition by other agencies. No matter how idealistic is the motivation that creates an office of a public guardian, it seems certain that the office in time will become bureaucratized with its primary objective being its own survival and growth. We must expect public guardianship offices to work closely with social service agencies to promote the use of guardianships,[318] (and insure the social service agencies of a source of substituted consent for their activities.)

In 1965, Professor Robert J. Levy wrote a searing critique of the Minnesota system of state guardianship.[319] Although the Minnesota law has been modified, in part as a response to the criticisms of Professor Levy,[320] the points he raised remain valid concerns. One of his more disturbing findings was that social service agencies sometimes refused to deliver services to an individual unless he consented to becoming a ward of a public guardian.[321] This is a frightening prospect. It is

316. ABA MODEL STATUTE, *supra* note 5, at 86.

317. MINN. STAT. § 252 A.05(1)(b) (Supp. 1981). Not all commentators think that this is a bad idea. One article, discussing public guardianship of an incompetent's property, cites as an advantage that with a public guardian, "much of the reluctance to initiate proceedings is removed." *Guardianship of Property of Incompetents*, *supra* note 52, at 538.

318. MINN. STAT. 252 § A.03 (Supp. 1981); Axilbund, *supra* note 106, at 12-13 (describing the statutory interplay in Minnesota between the office of the public guardian and other public agencies).

319. Levy, note 307 *supra*.

320. Axilbund, *supra* note 107, at 74-75.

321. Levy, *supra* note 307, at 857.

not difficult to imagine a scenario of a social worker confronted with an obstinate individual who does not wish to accept relocation or some other proferred social service. The social service agent informs the client that unless he voluntarily accepts the services, he will be declared incompetent and a guardian will be appointed to provide consent. Hence, resistance is futile. Conversely, the social service agent might refuse to deliver desired services until the client allows a public guardian to be appointed. In the absence of a public guardian, however, the social service agent is limited in bringing a petition for guardianship because it may be difficult to find anyone willing to act as a private guardian. Without the crutch of public guardianship, the social service provider may be forced to turn away from the role of a beneficient, but compelling, agent of the state, and concentrate instead upon assisting the individual to identify his own interests. Public guardianship may be an all too easy short-cut for an overworked and frustrated service provider who has not the time, skill, or energy to obtain the consent and cooperation of the client.

Another criticism of public guardianship is that it allows guardianship to be used as a solution for problems not associated with traditional concepts of personal incapacity. For instance, Levy found that public guardianship was resorted to as a means of attacking juvenile delinquency.[322] When antisocial behavior was coupled with low intelligence or mental illness, courts tended to appoint a public guardian as a more powerful version of a probation officer.[323]

It is probable that most wards of public guardians will be poor. To some extent, public guardianship can be seen as an attempt to control lower class deviance under the guise of aiding the disabled. As one commentator noted, "For the poor who are accustomed to displacement by the state, to regulation of their behavior, and to disruption of their families by social service agencies, involuntary guardianship is only an additional oppressive component in all too familiar pattern."[324]

Of course, the poor are inevitably more entangled with government and more subject to its power, but that does not lessen the depressing fact that the rich are unlikely to find themselves under the control of a public guardian. Incompetent individuals with substantial assets have little difficulty in locating a private conservator which may well preclude the need for a plenary guardian. If nothing else, a bank will normally accept the responsibility, as well as the fee.[325] Perhaps

322. *Id.* at 859-61.
323. *Id.* at 860.
324. Mitchell, *supra* note 5, at 1449.
325. Guardians are normally entitled to statutorily governed fees. *E.g.*, ALA. CODE ANN. tit. 26 § 26-9-17 (1975), allows as payment to the guardian an amount up to five percent of the annual

the most celebrated case of total incompetence of a rich individual not leading to guardianship was Howard Hughes, whose life graphically illustrated the manner in which extreme wealth provides protection (or at least seclusion).[326]

Finally, there is the possibility that the public guardian may look for solutions that serve the best interest of the public guardian rather than the interests of the ward.[327] Even a well intentioned public guardian may be undermanned and underfinanced.[328] As a consequence, he may search for solutions that allow him to stretch his scarce resources to cover as many wards as possible. Institutionalization of wards may well increase if the public guardian were to find that institutionalization, including the use of nursing homes, allowed him to delegate the control and day-to-day maintenance of the ward to a third party and thereby allow the acceptance of a greater number of wards.[329] The Delaware experience suggests that public guardians become swamped in the minutiae of the ward's life.[330] For example, in Delaware the public guardian has been reduced to tasks such as relighting gas stoves when wards return from hospitals.[331] Obviously, no public guardian can be involved in such personalized activity and serve very many wards. As a result, the response of the public guardian is, all too often, to institutionalize the ward and thereby insure daily supervision and assistance.[332] Institutionalization represents not only a loss of personal freedom and liberty but may significantly increase the death rate of the wards.[333] Hence, at the extreme, the adoption of public guardianship may represent the signing of a death warrant for scores of incompetent individuals.

A possible alternative to public guardianship is use of an "impersonal"[334] guardian, *i.e.*, a nonprofit corporation having the power to act as guardian. New York has apparently successfully instituted such a program using the New York Association for Retarded Citizens [ARC]

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income of the ward; CONN. GEN. STAT. ANN. §§ 45-60 (West Supp. 1980), also allows the guardians up to five percent of the ward's gross income.

326. *See* Holubowich, *The Geraldine Rockefeller Dodge Estate, The Case of the Eccentric Millionaires*, 115 TR. & EST. 242 (1976), which gives a favorable assessment of a ten year corporate (bank) guardianship of Mrs. Dodge's estate estimated at approximately $85 million.

327. Mitchell, *supra* note 5, at 1449.

328. For a discussion in detail along these lines, see Langen, *supra* note 50, at 272.

329. Such appears to be the case in Minnesota, Axilbund, *supra* note 107, at 782, and in California, Mitchell, *supra* note 7, at 1442.

330. Axilbund, *supra* note 107, at 70.

331. *Id.*

332. Langen, *supra* note 50, at 272.

333. BENJAMIN ROSE INSTITUTE, *Protective Services for Older People: Findings from the Benjamin Rose Institute Study*, 157 (1974).

334. Axilbund, *supra* note 107, at 136.

as a corporate personal guardian.[335] Other states[336] allow the use of nonprofit corporate guardians, but some require prior approval of the fitness of the corporation by an appropriate state agency.[337] Naturally, a corporate guardian can only act through individual agents. In New York, "the actual guardianship duties are carried by the volunteers and staff of the local [ARC] chapter,"[338] while the state association monitors the overall program. Proponents of corporate guardianship cite as its virtue the avoidance of the possible conflicts of interest that are inherent in public guardianship.[339] The use of nonprofit corporate guardians is also thought to avoid the "impersonal and sometimes rigid"[340] nature of a public guardian which interferes with the personal interaction between the ward and the guardian. The latter being an important factor in maximizing mental growth and development of the ward.[341]

Even if nonprofit corporate guardians are, on the whole, desirable, it remains problematical whether they can be successfully implemented. In New York, the successful use of the ARC is, in part, due to the size of that organization and its corresponding ability to recruit volunteers to act as guardians and to effectively monitor their activities.[342] Whether a similarly sophisticated, energetic organization exists in other states is open to question.

## IV. THE LIMITED ROLE OF A GUARDIAN

Guardianship is neither required nor normally sought as a solution to the need for a continuous substituted decisionmaker for an incompetent. A petition for a guardianship almost always arises in response to a specific precipitating event rather than from the need for day-to-day supervision.[343] Most commonly, a petition for guardianship is initiated when something has occurred or is expected to occur

335. N.Y. SURR. CT. PROC. ACT § 1754 (McKinney Supp. 1980-81). For a discussion of the New York nonprofit corporate guardian program, see Hodgson, *supra* note 5, at 433-34.

336. *E.g.*, ILL. REV. STAT. ch. 3, § 112 (Smith-Hurd Supp. 1980); OHIO REV. CODE ANN. § 2111.10 (Page Supp. 1979); WIS. STAT. ANN. § 880.35 (West Supp. 1979).

337. *E.g.*, Ohio allows a nonprofit corporation to serve as guardian for the mentally retarded and the developmentally disabled if it has a contract with the department of mental health and mental retardation to provide protective services. OHIO REV. CODE ANN. § 2111.10 (Page Supp. 1980); Wisconsin permits a private nonprofit corporation to serve as guardian if it is actively conducting a program for individuals in need of protective services and if the department of health and social services finds it to be "suitable". WIS. STAT. ANN. § 880.35 (West Supp. 1980).

338. Hodgson, *supra* note 5, at 434.

339. *Id.* at 440. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 11.

340. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 10. Other commentators counter that it is not the private or public nature of the guardian that is critical, but rather it is the size of the agency acting as guardian, as well as the number of wards per guardian, that is determinative of the quality of the guardianship. Axilbund, *supra* note 107, at 137.

341. NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 11.

342. Hodgson, *supra* note 5, at 434-35.

343. *See* cases cited in notes 37, 56, 67, 68 & 74.

for which the consent of the incompetent is required. Yet, the individual either cannot or will not consent to the proposed course of activity. For example, an adult retardate requires an operation and the hospital refuses to accept his consent as being "informed," or an aged senile parent refuses to voluntarily move into a nursing home and guardianship is sought to enable a child to consent to the forced relocation.

In other situations, guardianship will be sought as an anticipatory response. For example, parents of an adult retardate are often motivated to seek a guardianship as a precaution against the day that they die and are not available to give informal, but functionally adequate, consent and direction for their child. But even in this last instance, the guardianship is sought not to provide day-to-day supervision of the incompetent but only to insure that someone will be available in the future if a substituted decisionmaker is required.[344]

Society seems quite capable of providing day-to-day supervision of an incompetent without the need to resort to formal guardianship. Adult incompetents who are housed in state institutions often have their lives subjected to almost complete dominance and control without their having been formally adjudicated incompetent.[345] Adult incompetents who reside with their parents have even less need for a legal guardian as the parents tend to act as if the incompetent were still a minor and thus subject to their control. As long as a parent survives, individuals and institutions who deal with an incompetent will often accept parental consent as sufficient, even though the parents are not the guardian of their adult incompetent child and, therefore, lack legal capacity to grant consent.[346]

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344. Hodgson, *supra* note 5, at 432. Hodgson promotes the use of a "standby guardian", that is, the anticipatory appointment of a guardian who takes his office immediately upon the death or incompetency of the last surviving parent as provided for in N.Y. SURR. CT. PROC. ACT § 1752 (McKinney Supp. 1972). Tennessee uses the term "standby guardian" to mean one who has been previously named as a successor guardian in the event that the guardian is unable to continue to serve. TENN. CODE ANN. § 34-12-110(5)(b) (Supp. 1980).

345. Axilbund, *supra* note 107, at 140, cites the Ohio case of *In re* Donald D., No. 318605 (Franklin Co. Prob. Ct., Sept. 27, 1978), where the court refused to appoint a guardian for a profoundly retarded, institutionalized 34 year-old man on the grounds that he had no need for a guardian given that the institution was responsible for his maintenance. A contrasting development is occurring in Pennsylvania where guardianship hearings are routinely brought against the institutionalized retarded in response to litigation that successfuly challenged the right of the state to control the personal assets, including Supplemental Security Income checks, of the institutionalized wards. Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir. 1977), *cert. denied*, 434 U.S. 493 (1978).

346. Mesibov, Conover & Saur, *supra* note 5, at 221. As a result of their field investigations of the North Carolina limited guardianship laws, the authors concluded:

> One problem that might be anticipated after identifying adults appropriate for limited guardianship, is the conflict this could create with the de facto guardians, usually the parents. In most cases where limited guardianship should apply, a parent is probably exercising legal authority over the developmentally disabled person who would earn this authority from a limited guardianship proceeding. Earning legal rights for a developmentally disabled adult through limited guardianship will therefore often mean taking some authority away from the parents.

Even when an incompetent lives in a less coercive environment, such as a group home, he is likely to have his day-to-day actions heavily influenced, if not actually governed, by the supervisor of the group home.[347] If the incompetent lives on his own, or in a rooming house, almost by definition he does not require a guardian to oversee or direct his daily activities. Of course, a guardian might assist the incompetent to live a "better" life, but that assumes that an orderly, but controlled, life is "better" than a chaotic, but autonomous, life. Unless the behavior of the incompetent actually endangers his life (in which case he might well be a proper candidate for an involuntary mental commitment if insane, or if only retarded then he should be placed in some appropriate institutional setting), there seems little to recommend the appointment of a plenary personal guardian.

To be sure, many mentally disabled adults require assistance in the handling of their financial affairs. For some, a representative payee[348] will suffice; for others a conservator may be needed to manage their assets. Many adult incompetents can manage their day-to-day lives if they are freed of the responsibility of managing their finances. Conversely, if the disability of the incompetent is so great as to require institutionalization, there may be almost no need for a guardian. The need for a personal guardian thus reduces itself, in almost all cases, to a need for substituted consent for particular situations. In such instances, a temporary guardian should suffice.

Nevertheless, plenary guardians are appointed even though common sense tells us that a guardian is not in a position to effectively govern the day-to-day activities of his ward. The notable exception occurs if the guardian and ward share an abode, *e.g.*, parent and an adult child. If the guardian and the ward do not live together, the guardian will, by necessity, essentially delegate daily supervision. A ward, for

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*Id.* at 221.

347. "Group home" is a term used to embrace a host of different community living arrangements which have arisen in response to deinstitutionalization and the hope for normalization of living arrangements. One commentator has urged "the phasing-down of mental retardation institutions and the creation of specific networks of alternative living and support services. These services include group homes, specialized foster care, halfway houses, homemaker and home health services and other designated community-based diagnostic, treatment or habilitative services." S. Herr, *The President's Committee on Mental Retardation, From Rights to Realities: Advocacy By and For Retarded People in the 1980's*, U.S. DEPT. OF H.E.W., OFFICE OF HUMAN DEVELOPMENT SERVICES 14 (1979).

348. Representative payee is a term used by the Social Security Administration by which it empowers a third party to act as an agent and to collect the check of a disabled beneficiary who receives either Social Security or Supplemental Security Income payments. 42 U.S.C. § 1383(a)(2) (1976); 20 C.F.R. § 404-1601 (1980). By the terms of the agreement with the Social Security Administration, the representative payee is required to apply the payment for the benefit of the disabled recipient. *Id.* A representative payee may be appointed without a showing that the recipient is incompetent. *Id.* It is only required that the recipient be disabled (either physically or mentally), and there is need of assistance in the handling of the monthly payment. *Id.*

example, might be placed by his guardian in a home for the retarded. From that time on, the guardian is that in name only with the effective "guarding" of the ward being in the hands of the employees of the institution.[349]

If guardians generally delegate their duties, it becomes clear that the main role of the guardian is either to select supervised living arrangements for the ward or to provide legal consent for a preselected living arrangement. Once the question of the living arrangement of the ward has been settled, the guardian is likely to be called upon only infrequently and then principally for consent to medical procedures or because circumstances dictate a change in the ward's residence.

After the decision that precipitated the appointment of the guardian has been made, the guardian is not likely to be called upon again for some time. A conservator may be needed to manage the ward's finances, but the person of the ward will likely be under the effective day-to-day control of the place of residence of the ward. It is paradoxical, but true, that the need for a guardian's supervision is almost inverse to the condition of the ward: the greater the incapacity the less the services of the guardian will be required. Conversely, as the incapacity of the ward increases, the harm to him from having a plenary guardian decreases, for it is the border-line incompetent who best benefits from the retention of self-control and autonomy.[350]

## V. THE DESIRABILITY OF LIMITED GUARDIANSHIP

The infrequent and intermitent nature of the decisions required of a guardian (again, assuming financial decisions either are or could be made by a conservator) do not require that the guardian be continu-

349. Mesibov, Conover & Saur, *supra* note 5, at 225. The relative unimportance of guardianship is described by the authors.

> It appears that guardianship, of any kind, is not a relevant variable for community residences because the notion of guardianship is unclear and, therefore, the need for limited guardianship is poorly understood. An example of this is that in many cases, housemanagers in the group homes were not immediately aware of the guardianship status of many residents. They were not sure who had a guardian and who didn't and most had to check their files to ascertain the guardianship status of their residents. Not knowing the status means they are not utilizing guardianship when it has been imposed, and, therefore, would not see the relevance or need for limited guardianship if necessary. Residents were equally confused about their own guardianship status. Of the residents who were able to respond to the question "Who is your guardian?" (about 75%), many felt that they did have a guardian (56%), whereas only 19% did in reality. Overall, about 50% of the residents who responded could correctly identify their guardianship status. Those who did have a guardian were not any more accurate about their guardianship status than those who didn't. This suggests that whether or not guardianship is in effect, most residents and their housemanagers are unaware of the residents' status.

350. Of course, one might argue that the symptoms are intermittent, but that the mental illness or disability remains. But the result is the same: varying ability to deal with reality in a competent manner. Moreover, even if one is mentally ill, it does not follow that the mental illness necessarily caused or was responsible for one's irrational behavior.

ously available. A guardian who is only called upon sporadically has little need for plenary power over the ward's life. Decisions could either be made on an ad hoc basis, or the guardian could be a stand-by one, granted only those powers germane to the decisions that he will be called upon to make. In short, what is needed is a "limited" guardian with sharply circumscribed powers. The power of the limited guardian should be tailored to the particular needs of the ward. Once the need for the guardian was past and an appropriate decision made or a desirable course of action instituted, the guardianship could cease and the ward would have control of his life returned to him. If necessary, the guardianship could be reinstated upon an appropriate showing of need.

Proscribed powers and a durational limit on the term of the guardianship would allow the ward the maximum control of his life commensurate with his capabilities. No justifiable societal purpose is served by greater interference in the life of an individual than is demanded by the circumstances. In some instances, the loss of autonomy and responsibility arising from becoming a ward of a plenary guardian are counter-therapeutic. The retarded, for example, are best served by being forced to care for themselves to the limit of their abilities, a course of action incompatible with plenary guardianship.[351] Similarly, some of the mentally ill need to be forced to take responsibility for their own behavior as a means of preventing them from retreating into the shelter of the role of an irresponsible, mentally ill incompetent.[352] Even incompetency brought upon by senility is not necessarily complete or unrelenting. For many of the elderly, the effects of senility are intermittent and do not justify the total loss of freedom associated with plenary guardianship.[353] With the growing understanding that mental incapacity is situational and not necessarily a yes-no, or binary, status, the justification for plenary guardianship has ceased to exist. Hence, it is time to discard it in favor of a more rational, flexible system of limited guardianship.

### A. *The Need to Abolish Plenary Guardianship*

It might be argued that no matter how effective or desirable limited guardianship might be, it should be an alternative rather than a replacement for plenary guardianship. Although there is no logical reason not to use limited and plenary guardianship to provide a full

351. A. STONE, *supra* note 2, at 136; Note, *Limited Guardianship for the Mentally Retarded*, 8 N. M. L. REV. 231, 235 (1978).

352. *See generally* T. SZAZ, MYTH OF MENTAL ILLNESS (1961).

353. COGNITIVE AND EMOTIONAL DISTURBANCE IN THE ELDERLY (Eislorter & Friedel eds. 1977); Goldman, *The Social Impact of the Organic Dementias of the Aged* in SENILE DEMENTIA: A BIOMEDICAL APPROACH (1968).

spectrum of alternatives, the experience in states that have added limited guardianship to existing plenary guardianship is that limited guardianship is rarely used as long as plenary guardianship remains available.[354] In part, plenary guardianship is favored because it is familiar. Practitioners and courts feel comfortable with what they know. Lacking an appreciation of the advantages to the ward of limited guardianship, they tend to automatically request the appointment of a plenary guardian.[355] An educational campaign among the bench and bar may thus be necessary if limited guardians are to be commonly used.[356]

But the problem goes even deeper. Plenary guardianship holds the fatal attraction (for limited guardianship) of offering the flexibility of unlimited power. A judge, when faced with the choice of granting a limited or plenary guardian, is likely to select plenary power in the belief that such power will provide the guardian with sufficient authority to handle any circumstance that might arise. The appointment of a limited guardian, on the other hand, might result in a rehearing if the power granted to the guardian should prove inadequate to the changing needs of the ward. Moreover, the appointment of a plenary guardian eliminates the effort of tailoring the power of the guardian to fit the particular needs of the ward.[357] In short, plenary guardianship is familiar, uncomplicated, and saves time and effort. With these "advantages," it is easy to understand why limited guardians stand little likelihood of being appointed so long as the court has the discretion to appoint a plenary guardian.

Although limited guardianship has been strongly advocated, its backers have failed to grasp the concurrent need for the abolition of plenary guardianship.[358] The exclusive use of guardians who are limited in their powers would promote the values of autonomy, self-determination and individual dignity, and discourage the overreach of societal interference and manipulation. Abolition of plenary guradianship would serve to promote the use of the least restrictive alternative, a concept in which may well be found a constitutional basis for the possi-

354. Axilbund, *supra* note 107, at 109 (describing the situation in Washington), 115 (describing the situation in Wisconsin).

355. *Id.* at 111; Additionally there may be outright hostility to the concept of limited guardianship. In response to a survey, the typical response by North Carolina clerks of courts to that state's limited guardianship law was negative, *e.g.*, "unworkable," "not needed," or "too complicated." Mesibov, Conover & Sauer, *supra* note 5, at 225.

356. Axilbund, *supra* note 107, at 116; Mesibov, Conover & Sauer, *supra* note 5, at 226.

357. *See* the assessment procedure for a proposed limited guardianship statute in New Mexico, Note, *supra* note 351, at 240.

358. *See, e.g.*, Hodgson, *supra* note 5, at 438; Kindred, *supra* note 294, at 72; Regan, *supra* note 5, at 608; THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, *supra* note 5, at 9.

ble abolition of plenary guardianship.[359]

Finally, the abolition of plenary guardianship should mean the end of the more egregious aspects of guardianship: the power of the guardian to voluntarily commit his ward to a mental institution; the power of the guardian without court approval to sterilize the ward; the power of the guardian to interfere in the ward's right to marry or procreate; and the power of the guardian to consent to medical experimentation on the ward.[360] Criticism of these aspects of guardianships is not made to suggest that wards should never be committed or sterilized, but only to suggest that such acts should take place only after a court hearing on the merits of the proposed course of action.

### B. *Limited Guardianship and the "Parent-Child Model"*

Limited guardianship is not only desirable in its own right, but, indeed, it could act as a rallying point for the various reformers, for it, along with substantial procedural reforms, would answer their central concerns. Those who see guardianship as similar to the parent-child relationship[361] or who believe in a "developmental model"[362] already advocate the adoption of limited guardianship because it promotes the aim that the guardian should assist the ward much as the parent assists a child. The goal of such models is not merely to preserve the person and property of the ward but to encourage the ward's personal growth and maturation.[363]

Abolition of plenary guardianship should not trouble advocates of the "Parent-Child Model" for even under existing law truly significant decisions are not generally made by the guardian without prior court consultation and approval.[364] Hence, all guardianships are to some extent "limited." To formally require that any power granted to a guardian be specified in the order of his appointment should abet the end of

359. The constitutional doctrine of the least restrictive alternative was first articulated in Shelton v. Tucker, 364 U.S. 479 (1960) where the Supreme Court declared unconstitutional an Arkansas statute that required teachers in state-supported schools to file affidavits listing all organizations to which they belonged or contributed. *Id.* at 490. The court held that a legitimate state purpose cannot be sought by the use of means that "stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488. For a discussion of the constitutional and statutory basis of the doctrine of the least restrictive alternative as applied to the institutionalization of the mentally retarded, *see* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 129 (E.D. Pa. 1972), *aff'd and modified*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 49 U.S.L.W. 4363 (1981).

360. For a thoughtful discussion of "excessive" plenary guardianship powers, see Kindred, *supra* note 292, at 76. Kindred's solution in the context of sterilization is three-fold: require active participation of the ward in the decision; require multiple layers of review; and require the use of counsel to represent the ward. It would seem much less cumbersome to deny the guardian the power to approve sterilization and require a court hearing on the matter. *Id.* at 81-82. *See also* Morris, *supra* note 50, at 97.

361. *See* text following note 42 *supra*.

362. *See* text following note 86 *supra*.

363. *See* text following note 90 *supra*.

364. *See* text & notes 68-72 *supra*.

serving the best interests of the ward. That is, limited guardianship ensures court examination and approval prior to *any* undertaking of the guardian since the guardian must justify the power that he requests.[365]

### C. *Limited Guardianship and the "Substituted Judgment Model"*

Proponents of the "Substituted Judgment Model" of guardianship are likely to be somewhat less comfortable with limited guardianships. As stated earlier, the essence of the doctrine of substituted judgment is the legal fiction that decisions of the guardian are, in effect, those of the ward.[366] The legal fiction that imputes the acts of a guardian to the ward distinguishes guardianship from the fiduciary trust relationship, where the trustee acts for the benefit of the beneficiary, but the acts of the trustee are not considered the legal actions of the beneficiary.[367] Limited guardianship would not convert guardianship into a trust relationship, for the acts of the limited guardian would continue to be considered as the legal acts of the ward. Yet, advocates of the "Substituted Judgment Model" may complain that the exclusive use of limited guardianship would leave two possible spheres of ambiguity.

Uncertainty might arise if third parties dealing with the guardian are unclear as to the scope of the guardian's authority. Even if the guardian were armed with a court order describing the powers granted to him, there may well be zones of authority as to which the court order is unclear. In such instances, there would be no recourse except to reapply to the court for clarification of the original order or for the third party to transact business with the guardian knowing that he risks the voiding of the transaction if the acts were beyond the scope of the guardian's authority. Neither prospect is particularly welcome. Two possible answers suggest themselves.

The most obvious solution would be to draft the order granting a limited guardianship with great particularity so that the scope of the authority of the guardian is clear both to him and to any third party with whom he might deal. The problem of an ambiguous grant of power might be more common initially until standard methods of describing authority evolve. Over time, one could expect litigation to define and clarify what might be meant by the use of particular lan-

365. Tennessee requires that: "The court order establishing limited guardianship shall contain findings of fact, define the powers and duties of the limited guardian, and specify all legal disabilities to which a person is subject." TENN. CODE ANN. § 34-12-110(5)(b) (Supp. 1980). See also MINN. STAT. ANN. § 525.56 (West Supp. 1980).

366. *See* text & notes 161-73 *supra*.

367. A. SCOTT, THE LAW OF TRUSTS § 2.5 (3d Ed. 1967); In § 7, Scott states, "The functions of guardians are narrower than that of trustees," in reference to guardianship of an estate.

guage. It should be emphasized, however, that the probability of ambiguous authority, although real, is likely to be limited. For the most part, the powers of a guardian will not be limited to specific acts but to particular aspects of the ward's life. For example, a limited guardian might be authorized to commit his ward to a nursing home and be authorized to consent to nonlife threatening medical procedures. The grant of such authority is fairly clear as to its scope. Obviously, the guardian can not contract for the ward as to matters not immediately concerned with the nursing home, but, conversely, the guardian would seem to have almost unlimited power to grant consent to various nursing home procedures.

Another answer to the problem of ambiguous grants of authority would be to define within the grant of guardianship those powers that are not available to the limited guardian. Here again, the list of prohibited activities by the guardian could be routinized. It should not be terribly difficult to devise a list of activities that would be barred to the guardian, and then allow the court to strike the prohibitions when it desires to specifically grant those powers to the guardian.

A troublesome aspect of limited guardianship, at least as to the doctrine of substituted judgment, is whether the ward of a limited guardian can act in a legally binding manner in all areas except those specifically granted to the guardian. Here we must admit to a possible clash between the view of the developmental model of guardianship and the substituted judgment model. Under the developmental model, it is critical that the ward be allowed to act in all areas not specifically transferred to the guardian. The theory of that model is that the ward's capabilities will be fully realized only if he is allowed to act on his own behalf.[368] Conversely, the underlying assumption of the doctrine of substituted judgment is that the ward lacks, with certain exceptions, the capacity to make legally binding decisions.[369] The doctrine of substituted judgment must be modified to accept the view that the incapacity of the ward is contextual and varies from situation to situation. The ward, therefore, can be competent as to certain decisions but be incompetent to decide more serious issues. If limited guardianship is to be truely effective, the proponent of the substituted judgment doctrine will have to abandon the view that one is either competent or incompetent

368. *See* text & notes 88-96 *supra*.

369. Even an incompetent person can be held to a contract if the contract was fair and the other party lacked knowledge of the incompetency. RESTATEMENT (SECOND) OF CONTRACTS § 18C (Tent. Draft No. 1, 1973). In such instances the contract is valid to the extent performed or if voidance would be inequitable under the circumstances. *Id.* Moreover, the standard or measurement of incompetency is not always the same. Traditionally, testamentary capacity has its own tests which are usually not the same as the general test of incompetency. Note, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation*, 18 STAN. L. REV. 1119, 1124 (1966).

and instead accept a more complex view of mental capacity. Failure to concede that incompetency is not all-or-nothing would result in a ward who lacked any power to act on his own behalf. Limited guardianship, thus, would serve primarily to protect the ward from overreaching activity by the guardian. This would be an unnecessary stifling of the value of the limited guardianship. Although allowing an adjudicated incompetent ward to nevertheless undertake legally binding action seems confusing, the practice finds support under present law. Tennessee, for example, specifically provides that a disabled person, for whom a limited guardian has been appointed, retains all legal and civil rights except those specifically deprived by the court or specially granted to the limited guardian.[370] The doctrine that a ward may be legally competent in some areas and not in others, while perhaps troubling to some, should not prevent the adoption of limited guardianship and the concurrent abolition of plenary guardianship.

### D. *Limited Guardianship and the "Therapeutic Model"*

Advocates of the "Therapeutic Model" of guardianship should present little opposition to the adoption of limited guardianship. The "Therapeutic Model," with its emphasis on assistance to the less capable members of the society, is entirely compatible with a limited guardianship concept.[371] Services can as easily be delivered to a ward under the protection of a limited guardian as to a ward whose life has been usurped by a plenary guardian. The chief point of concern to the therapeutic advocate would be to insure that the limited guardian's powers are defined broadly enough to allow him to consent to the provision of services to the ward.[372] In theory, this should present no problem. The limited guardian might well have been appointed in response to the refusal of the ward to accept desirable state assistance, and it would therefore follow that the guardian would be granted authority to accept such assistance.

The crux of the "Therapeutic Model" of guardianship is not the power of the guardian, but rather the definition of the circumstances giving rise to the lawful appointment of a guardian. In essence, the "Therapeutic Model" would enlarge the definition of whom is incompetent and would sweep within its net individuals who might be called eccentric or self-destructive, but competent, under present law.[373] The use of limited guardianship will not necessarily act as a bar to this

370. TENN. CODE ANN. § 34-12-110(5)(b) (Supp. 1980).
371. *See* text accompanying note 97 *supra*.
372. *See* text following note 103 *supra*.
373. *See* id.

broader definition of incompetency, since the thrust of limited guardianship is the power of the guardian. The definition of who is incompetent is a separate question.

The use of limited guardianship, however, should serve to deter the adoption of a public guardianship system. Limited guardianship seems by its very nature to be incompatible with public guardianship, which envisions a state agency with broad powers over the life over the ward.[374] Naturally, the two are not absolutely incompatible: one can imagine a public guardian whose powers are specifically tailored and limited based upon the abilities of the ward. Nevertheless, it seems reasonable to assume that a public guardianship, if it were to be efficiently operated, would depend upon a standard, general grant of authority to the public guardian, not a grant that is individually designed for each ward. The public guardian, therefore, could have limited powers of guardianship, but these powers would not necessarily be limited to the needs of the particular individual ward. To only limit the powers of the guardian, however, is not truly compatible with the spirit of limited guardianship. That model is designed to mold the powers given to the guardian around the particular incapacities of the ward, not merely to prohibit an unlimited grant of authority to the guardian.[375] Hence, to the extent that limited guardianship interferes with the efficient operation of a public guardianship, it can be expected that "Therapeutic Model" advocates will oppose its adoption.

If, however, public guardianship is rejected in favor of private, nonprofit corporate guardians, then limited guardianship may be more compatible with the "Therapeutic Model." If private, nonprofit corporate guardians become available,[376] it would be hoped that such guardians would be more flexible and more adaptive to the particular needs of the ward. The malleable nature of limited guardianship would seem to go hand-in-hand with the authorization of private nonprofit corporate guardianships. If advocates of the "Therapeutic Model" can be convinced that private nonprofit corporate guardians are at least as desirable as public guardianship, then, perhaps, the exclusive reliance upon the limited guardian concept will find support even among these reformers.

374. *See* Langen, *supra* note 50, at 272-73.

375. *See* text following note 350 *supra*.

376. Corporate entities, primarily banks, are available to act as conservators, but many state laws would require revision if corporations, nonprofit or otherwise, are to be allowed to act as guardians. *Contra*, ABA MODEL STATUTE, *supra* note 5, § 13, which does not allow the appointment of a corporation as a guardian from an expressed belief that the "personal element . . . is critical where decisions over health, safety, residence and services are involved." *Id.* Comment to § 13.

## VI. CONCLUSION

Guardianship reform is long overdue. The varied and sometimes contradictory views of those promoting reform should not obscure the compelling need for procedural reforms. Of particular importance is the need to recognize the adversary nature of a guardianship hearing and, therefore, to mandate that counsel represent the alleged incompetent.

Strict and fair procedures alone are not sufficient. The time has come to abolish plenary guardianship as a relic of the past. Legitimate needs for substituted decision-making cannot justify excessive intrusion into the lives of those who suffer a mental disability. Both the individual and society can be served better by flexible, limited guardianships that are tailored to the needs and capabilities of the individual.