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Limited Guardianship for the Mentally Retarded

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LIMITED GUARDIANSHIP FOR THE MENTALLY RETARDED

Recent developments in law and social sciences make apparent the inadequacies of existing New Mexico law in the area of guardianships for mentally retarded citizens. An increasing sophistication of mental retardation experts in understanding the gradations of mental retardation has resulted in efforts to provide a broad spectrum of programs for the mentally retarded. Although judicial decisions addressing mental retardation issues have emphasized the importance of providing appropriate services which least restrict the individual,[1] there has not been a parallel emphasis in the area of guardianship. This note will attempt to explain the special needs of mentally retarded citizens for different types of guardianship and to explore the existing New Mexico law concerning guardianship. Following an analysis of possibilities under existing New Mexico law, a review of other states' efforts in this area will be summarized in an attempt to suggest possible avenues of statutory change which may be appropriate for New Mexico.

I. BACKGROUND AND IDENTIFICATION OF THE PROBLEM

Guardianships and Conservatorships

Society's recognition that some adults cannot adequately act for themselves because of their disabilities has led to judicial appointments of someone to act on their behalf. Historically, various terms have been utilized to describe these appointees. Presently New Mexico and many other states statutorily provide for appointment of guardians and/or conservators for incapacitated persons. A guardian is "qualified to have the care, custody or control of the person of a minor or incapacitated person pursuant to testamentary or court appointment."[2] A conservator is one "appointed by a court to manage the estate of a protected person."[3]

1. Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974), *aff'd*, 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in pertinent part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); New York State Ass'n for Retarded Child., Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Halderman v. Pennhurst, C.A. No. 74-1345 (E.D. Pa. Dec. 23, 1977), 2 Mental Disability L. Rptr. 201 (1977).

2. N.M. Stat. Ann. § 32A-1-201.A.(16) (Int. Supp. 1976-77).

3. N.M. Stat. Ann. § 32A-1-201.A.(5) (Int. Supp. 1976-77).

Judicial appointment of either a guardian or a conservator[4] is actually a two-step process involving first, the removal of legal powers from the individual and, second, the transfer of these powers to the one appointed.[5] This process is used to protect both the rights of incompetent adults and the rights of other members of society. Protection of incompetent adults has been thought necessary in order to avoid the wasting of assets by incompetents or the exploitation of these people by others. Protection of other members of society is an ancillary product of appointment of a guardian in that it provides certainty and finality to activities which legally demand competence.[6]

Appointment of a guardian removes from the ward his personal legal rights and transfers them to the appointee. To remove legal powers from an individual, a court in New Mexico must first determine that an individual is incapacitated. An incapacitated person is one who is impaired by reason of physical or mental disability "to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or management of his affairs."[7] If a guardian is appointed he has "the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child."[8] The statute specifically enumerates the guardian's responsibilities to include the custody of the ward, the duty to provide care, comfort, maintenance, education and training, and the power to make medical decisions.[9]

While a guardian's responsibilities involve the social decisions of the ward, a conservator becomes a substitute decision-maker for the ward in transactions dealing with management of property and income. To appoint a conservator a New Mexico court must initially find that a "person is unable to manage his property and affairs effectively"[10] because of mental or physical disabilities. A conservator has the power to make a variety of financial decisions for the ward. These include the power to make decisions concerning investments, the borrowing of money, business operations, the sale,

4. If a guardian and a conservator are to be appointed for a ward, the same person may be appointed to serve both functions.

5. Kindred, *Guardianship and Limitations Upon Capacity,* in The Mentally Retarded Citizen and the Law 62, 63 (1976).

6. R. Allen, E. Ferster, & H. Weihofen, Mental Impairment and Legal Incompetency 71 (1968) [hereinafter cited as Allen, Ferster & Weihofen].

7. N.M. Stat. Ann. § 32A-5-101.F. (Int. Supp. 1976-77).

8. However, the "guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons for acts of the ward solely by reason of the parental relationship." N.M. Stat. Ann. § 32A-5-312 (Int. Supp. 1976-77).

9. N.M. Stat. Ann. § 32A-5-312 (Int. Supp. 1976-77).

10. N.M. Stat. Ann. § 32A-5-401.B.(1) (Int. Supp. 1976-77).

lease and improvement of assets, the employment of others and the prosecution and defense of claims.[11] Additionally, the conservator is responsible for distributing reasonable sums for the support, care and education or benefit of the ward.[12]

Statutory development in the area of appointing substitute decision-makers for incompetent adults has been limited almost exclusively to the area of conservatorships.[13] The New Mexico statutes which are based on the Uniform Probate Code are replete with provisions for the rights, duties, and liabilities of conservators.[14] On the other hand, there is a noticeable absence of clarification of the rights and duties of guardians.[15] For instance, in the area of financial decisions the statutes enumerate many powers generally granted to a conservator but also allow the court to limit any of these.[16] In fact, a court may authorize a single transaction on behalf of an incompetent person with or without the appointment of a conservator.[17] In contrast, the authority of a court to limit or specify the powers of a guardian is not clear in the statutes. Although problems still exist in the area of conservatorships for the mentally retarded, the legal literature has explored many of these problems;[18] this note, therefore, will focus on the problems of guardianships with respect to the mentally retarded.

Mental Retardation and the Need for Limited Guardianships

Mental retardation is defined by the American Association on Mental Deficiency (AAMD) as referring "to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior; and manifested during the developmental period."[19] It is important to distinguish mental retardation from mental illness. Mental illness generally refers to emotional and personality disorders.[20] The legal and social needs of individuals in

11. N.M. Stat. Ann. § 32A-5-424 (Int. Supp. 1976-77).
12. N.M. Stat. Ann. § 32A-5-425 (Int. Supp. 1976-77).
13. Allen, Ferster & Weihofen, *supra* note 6, at 95.
14. N.M. Stat. Ann. § 32A-5-401 to 432 (Int. Supp. 1976-77).
15. N.M. Stat. Ann. § 32A-5-312 (Int. Supp. 1976-77).
16. N.M. Stat. Ann. § 32A-5-426 (Int. Supp. 1976-77).
17. N.M. Stat. Ann. § 32A-5-409 (Int. Supp. 1976-77).
18. *E.g.*, Daughrity, *Estate Planning for the Handicapped, Part I: Scope of the Problem—The Handicap Gap,* 111 Trusts and Est. 178 (1972); Wormser *et al.*, *Planning for the Protection of Incompetents, Young and Old,* 6 U. Miami Inst. Est. Plan. ch. 72-15 (1972); Kay, Farnham, Karren, Knakal & Diamond, *Legal Planning for the Mentally Retarded: The California Experience,* 60 Calif. L. Rev. 438 (1972); Comment, *Planning for the Mentally Retarded: Guidelines for Lawyers,* 1962 Wis. L. Rev. 686.
19. *Manual On Terminology and Classification* in Mental Retardation 11 (H. Grossman ed. 1977).
20. N.M. Stat. Ann. § 34-2A-2.N. (Int. Supp. 1976-77).

these groups are different. New Mexico has recognized this by providing for different procedures and treatment for these two groups in its Mental Health and Developmental Disabilities Code.[21] This note will focus only on the specialized needs of the mentally retarded.

An important concept in discussing the rights of mentally retarded citizens is the recognition that the mentally retarded are not a homogeneous group. "Retarded people, like all people, vary enormously in talent, aptitude, personality, achievement and temperament."[22] The most recent AAMD manual on mental retardation divides the intellectual functioning of the mentally retarded into four groups using the Wechsler Scales of Intelligence: mild (with an IQ between 55 and 69), moderate (with an IQ between 40 and 54), severe) with an IQ between 25 and 39) and profound (with an IQ of 24 or below).[23] Among these classifications the functional or adaptive behavior of the mentally retarded varies from those who are nonambulatory or those in need of almost constant care and supervision to those who are capable of living normal personal lives and of holding jobs.[24] Even more important is the fact that 89 percent of the mentally retarded are only mildly retarded individuals[25] who "can master some formal schoolwork and become self-sufficient as adults."[26] The moderately mentally retarded adults who comprise an additional six percent of the mentally retarded[27] may be able to live and work in the community with some supervision.[28]

These facts have led many social scientists to advocate a normalization principle in providing programs for the mentally retarded. The theory of normalization is that mentally retarded citizens should be integrated into the mainstream of society as much as possible.[29] New Mexico has responded to these recent developments in the social sciences by requiring in its Mental Health and Devleopmental Disabilities Code that in involuntary commitment proceedings involving mentally retarded individuals the court must order the placement least restrictive to the client.[30] The intended effect of this

21. N.M. Stat. Ann. § 34-2A-1 to 22 (Int. Supp. 1976-77).
22. Wald, *Basic Personal and Civil Rights,* in The Mentally Retarded Citizen and the Law 2, 5 (1976).
23. *Manual on Terminology and Classification, supra* note 19, at 19.
24. Sorgen, *Labeling and Classification,* in The Mentally Retarded Citizen and the Law 214, 216 (1976).
25. U.S. President's Committee on Mental Retardation, Report 1 (1967).
26. Sorgen, *supra* note 24, at 216.
27. U.S. President's Committee on Mental Retardation, Report 1 (1967).
28. *Introduction* to the Mentally Retarded Citizen and the Law XXVIII (1976).
29. W. Wolfensberger, Normalization 27 (1972).
30. N.M. Stat. Ann. § 34-2A-12.E.,-12.F. (Int. Supp. 1976-77). N.M. Stat. Ann.

statute is that more mentally retarded citizens will be placed in community settings and encouraged to develop independence. The practical effect may be that in addition to the need for adequate social support services the legal protections of a guardian or conservator may be particularly apt for many of these mildly retarded individuals as they are reintroduced to society. For the few with property of consequence, the appointment of a conservator would alleviate the handling of complex financial affairs without taking away personal decision-making powers.[31] For the majority, however, minimal financial resources would make appointment of a conservator inappropriate,[32] and the desire for increased and increasing control over their own lives would make the appointment of a guardian with all the powers of a substitute parent too intrusive.

Acknowledgement of the diverse abilities and potentials of mentally retarded individuals leads to a recognition of a need for diverse forms of guardianship. Guardianship traditionally has been a complete transfer of all the ward's legal powers and rights to the one appointed as guardian.[33] While this type of transfer may be appropriate for minors or some extremely incapacitated individuals, the range of the abilities of the mentally retarded indicate that a total transfer of their rights and powers is not always appropriate.[34] For those individuals whose abilities are most completely limited by their mental retardation, the protection and concommitant restrictions resulting from an appointment of a total guardian may be appropriate and necessary. However, for the vast majority this amount of protection and restriction is overbroad and unnecessary. A more

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§ 34-2A-2.D. (Int. Supp. 1976-77) provides further that

> "consistent with the least drastic means principal" means that the habilitation or treatment and the conditions of habilitation or treatment for the client separately and in combination:
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> (1) are no more harsh, hazardous or intrusive than necessary to achieve acceptable treatment objectives for such client;
>
> (2) involve no restrictions on physical movement nor requirement for residential care except as reasonably necessary for the administration of treatment or for the protection of such client or others from physical injury; and
>
> (3) ,are conducted at the suitable available facility closest to the client's place of residence; . . .

This statutory concept is drawn from the constitutional concept of the least restrictive alternative in *Shelton v. Tucker*, 364 U.S. 479 (1960).

31. N.M. Stat. Ann. § § 32A-5-424, -425 (Int. Supp. 1976-77).

32. With minimal resources the fees paid to a conservator would be too large a proportion of the income to justify the use of a conservator. N.M. Stat. Ann. § 32A-5-414 (Int. Supp. 1976-77).

33. Kindred, *supra* note 5, at 71 citing International League of Societies for the Mentally Handicapped, Symposium on Guardianship of the Mentally Retarded 11 (1969).

34. *Id.*

appropriate protection would be a guardianship scheme that allows a determination of the functional disabilities of the particular individual to be matched by the grant of specific powers to a guardian, and a retention of all other rights in the ward.

Such a scheme of limited guardianship may in fact be constitutionally mandated by the least restrictive alternative doctrine. The Supreme Court declared in *Shelton v. Tucker*[35] that in judging governmental action "even though the governmental purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[36] Although this doctrine has not been applied by the United States Supreme Court to regulations concerning the mentally retarded or to guardianships, it has been applied to regulations for the mentally ill.[37] The appointment of a total guardian unnecessarily stifles the personal liberties of a ward who is only partially incapacitated. The use of limited guardians could avoid this stifling and still allow the state to reach its goal of protecting the incapacitated.

The idea of limiting guardianships is not a totally new concept in the law. Judicial decisions in other states have limited full guardianships by restricting the decision-making authority of guardians in specific situations.[38] In New Mexico, courts traditionally have been empowered to appoint guardians ad litem who, in the best interests of the ward, make all decisions regarding single court proceedings.[39] New Mexico's legislature also has recognized the need for limiting guardianships in enacting a statute which provides for the appointment of a guardian solely to make treatment decisions for an incapacitated adult.[40] A treatment guardian is a person appointed by a court if it finds that an individual is not capable of making his own treatment decisions concerning psychosurgery, convulsive therapy, experimental treatment or a behavior modification program involving

35. 364 U.S. 479 (1960).

36. *Id.* at 488.

37. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). This doctrine has been applied to regulations involving the mentally retarded by lower courts in Halderman v. Pennhurst, C.A. No. 74-1345 (E.D. Pa. Dec. 23, 1977) 2 Mental Disability L. Rptr. 201 (Sept.-Dec. 1977) and Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), aff'd, 550 F.2d 1122 (8th Cir. 1977).

38. *E.g., In re* Pescinski, 67 Wis.2d 4, 226 N.W.2d 180 (1975); Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969) (parent or guardian denied the right to authorize kidney transplant from an incompetent); A.L. v. G.R.H., 325 N.E.2d 501 (Ind. Ct. App. 1975); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974) (en banc) (parent or guardian denied the right to consent to sterilization of the ward).

39. N.M. Stat. Ann. § 21-1-1(17)(c) (Repl. 1970).

40. N.M. Stat. Ann. § 34-2A-14 (Int. Supp. 1976-77).

aversive stimuli or substantial deprivations.[41] In 1978 the New Mexico legislature extended this concept to allow a physician to request a treatment guardian for other kinds of treatment.[42] However, the recognition of the concept of limited guardianships in New Mexico has been applied only in these particularized situations. The lack of specificity in the present guardianship statute may have led practitioners and judges to assume that generally the only alternatives are a total guardian or no guardian at all. Consequently, a judge might be hesitant to appoint a guardian when he recognizes that the prospective ward is capable of making many of his own decisions even though the person may be in need of some protections that a guardian could provide. A judicially or legislatively implemented scheme of limited guardianship would better serve the needs of New Mexico's mentally retarded citizens.

II. LIMITED GUARDIANSHIPS WITH PRESENT NEW MEXICO STATUTES

Interpreting the Guardianship Statute

Provisions for the appointment of guardians are found in the New Mexico Probate Code,[43] which, like the probate codes of many other states, is based on the Uniform Probate Code.[44] These provisions allow for a judicially appointed guardian,[45] a temporary guardian,[46] and a guardian appointed by parents in a will.[47] Although the existing New Mexico Probate Code does not explicitly provide for limited guardianships, appointment of limited guardians is not precluded.

The liberal rule of construction urged by the Probate Code can be utilized to effectuate a limited guardianship.[48] When presiding over a

41. *Id.*

42. N.M. Laws, 33d Legis., 2d Sess., ch. 161, 1978, § 34-2A-14B.

43. N.M. Stat. Ann. § 32A-5-301 to 313 (Int. Supp. 1976-77). The guardian appointed may be a person or an institution, and a priority scheme is established. *Id.* § 32A-5-311. In some other states which allow public guardians to be appointed there is a priority scheme by which a public guardian can only be appointed if there is no appropriate private guardian. *See, e.g.,* Colo. Rev. Stat. § 26-3-107 (Supp. 1976); N.C. Gen. Stat. § 35-1.29 (Supp. 1977); Me. Rev. Stat. tit. 18, § 3649 (Supp. 1977-1978).

44. The other states which have adopted the Uniform Probate Code are Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota and Utah. 8 U.L.A. 84 (Supp. 1978).

45. N.M. Stat. Ann. § 32A-5-304 (Int. Supp. 1976-77).

46. N.M. Stat. Ann. § 32A-5-310 (Int. Supp. 1976-77). A temporary guardian can only be appointed when "immediate action" is necessary and for no longer than six months. Otherwise he can have the same powers as any other guardian. Consequently the concept of limited guardians may also apply to temporary guardians.

47. This appointment can be terminated by the prospective ward by simply filing a written objection in the court in which the will was probated. N.M. Stat. Ann. § 32A-5-301 (Int. Supp. 1976-77).

48. N.M. Stat. Ann. § 32A-1-102.A. (Int. Supp. 1976-77).

guardianship proceeding a court may appoint a guardian, "dismiss the proceeding or enter any other appropriate order."[49] A guardian may be appointed if the person is found to be sufficiently incapacitated and the appointment is necessary or desirable to care for the person.[50] An absence of either of these would require a dismissal. However, mentally disabled adults are rarely totally disabled.[51] Frequently, a court could find that a prospective ward is capable of making some of his own decisions but is in need of some protections that a guardian could provide. In these situations the language "or enter any other appropriate order"[52] implies that a court could appoint a guardian with limited responsibilities.

Further support for interpreting the Probate Code in this manner is found in the section describing the powers of a guardian.[53] The statute generally describes these powers as being comparable to a parent in relation to his unemancipated minor but then clarifies them through specific enumeration. The statute additionally states that the guardian has these powers "except as modified by order of the court."[54] Giving the court power to modify these parental powers implies that a court can fashion a guardianship order to fit the needs of an individual ward. Consequently, when an individual is found to be only partially incapacitated, a court could design an order in which a guardian is granted only the powers which correspond to the ward's disabilities and nothing more.[55]

Construing the guardianship provisions to allow limited guardianships would put these on a par with other provisions of the Probate Code which allow considerable flexibility in limiting the scope of conservatorships.[56] It would also allow the law in this area to develop in response to the increasing recognition of the indi-

49. N.M. Stat. Ann. § 32A-5-304 (Int. Supp. 1976-77).

50. *Id.*

51. *See* notes 22-28 and text accompanying, *supra.*

52. N.M. Stat. Ann. § 32A-5-304 (Int. Supp. 1976-77).

53. N.M. Stat. Ann. § 32A-5-312 (Int. Supp. 1976-77).

54. *Id.* This modification provision contains a qualifying phrase "without qualifying the foregoing." This phrase seems to mean that the court cannot modify the statutory command that guardians are not obligated to provide from their own funds for the ward and are not liable to third parties for acts of the ward.

55. The fact that principles of equity supplement the Probate Code, N.M. Stat. Ann. § 32A-1-103 (Int. Supp. 1976-77), may also argue for the court's ability to appoint a limited guardian since protective powers over incompetents are frequently considered to be part of the inherent power of equity. 39 Am. Jur. 2d *Guardian and Ward* § 24 (1968). Pomeroy posits that this is not part of the original power of equity courts as the authority to appoint guardians for incompetents was delegated to the chancellor alone by the King and not to the chancery court per se. 4 J. Pomeroy, A Treatise on Equity Jurisprudence § 1311-1314 (5th ed. 1941). However, courts have long included the exercise of this power within their equity jurisdiction.

56. N.M. Stat. Ann. § 32A-5-426 (Int. Supp. 1976-77).

vidualized needs and abilities of mentally retarded citizens. Most importantly, it would facilitate the policies of deinstitutionalization and normalization of mentally retarded citizens, as limited guardianship orders, rather than taking away personal decision-making power, could be designed to encourage maximum self-reliance on the ward.

Designing a Limited Guardianship Order

Although the New Mexico statute allows a court to order a limited guardianship,[57] delineating the powers and duties in such an order is more problematic. A detailed discussion of this process is beyond the scope of this note. However, the primary factors a court must consider will be generally outlined.

Three main tasks are involved in structuring a limited guardianship order. The first of these, as in any guardianship proceeding, is an evaluation of the individual's incapacity. To determine this, a court should consider the proposed ward's past behavior towards decisions involving income, property, employment, medical treatment, living arrangements, social and legal services, and family relationships.[58] Equally important is the prospective ward's current and anticipated ability to deal with these decisions. In most guardianship proceedings, after evaluating this data the court makes one finding: the person is or is not sufficiently incapacitated to require the appointment of a guardian.[59] For mentally retarded adults who are not totally disabled, this bifurcated choice is unsatisfactory. In those situations in which a limited guardianship is dictated, the court should evaluate the same data but must make a more detailed finding. It must decide which activities the ward is competent to perform by himself and those with which he needs help.[60]

The second task, assigning the guardian responsibilities to match the ward's particular incapacities, is the crux of the limited guardianship proceeding. Relying on its findings of the areas and degrees of incapacity, a court must clarify in its order which decisions the ward can handle alone, which decisions will require the concurring consent of the guardian, and which should be handled by the guardian alone. The extent of clarification required will vary from person to person. Some examples of possible determinations may be illustrative. A court may want to order that contracts over a certain amount require the concurrence of the guardian while a monthly sum of money

57. See notes 46-52 and text accompanying, *supra.*

58. H. Turnbull, The Law and the Mentally Handicapped in North Carolina 7-16, 7-17 (1978).

59. N.M. Stat. Ann. § 32A-5-304 (Int. Supp. 1976-77).

60. *See* H. Turnbull, *supra* note 57, at 7-16.

could be spent as the ward chooses. A guardian may need to help locate available housing, but the final decision of where and with whom to live would be left within the discretion of the ward. A guardian may be made responsible for investigating appropriate training or educational facilities but the concurrence of the ward would be required for the final decision of choosing a program. A ward may be allowed to decide independently whether to receive routine medical and dental treatment, but for sophisticated surgical procedures the guardian's concurring or substitute consent would be required.[61]

In addition to such specific mandates, a court may require a guardian to be generally responsible for assisting the ward in obtaining government benefits such as supplemental security income, food stamps or welfare; in dealing with complex forms such as insurance policies, tax forms, or leases; and in exercising civil rights such as voting and getting a driver's license. No matter how explicitly a limited guardianship order is defined, situations will arise which have not been anticipated. In light of this, a court may give the guardian guidance in these situations by mandating, for example, a specific duty on the guardian to encourage maximum self-reliance of the ward whenever possible.

Admittedly these determinations require a complex process, but this is not beyond the scope of a court's expertise. Procedures already exist within the Probate Code to facilitate the court's determination.[62] A physician is required to examine the prospective ward and report his finding to the court.[63] A court may also appoint a visitor to interview the prospective ward, as well as the prospective guardian, and to visit the ward's present and/or proposed residence and submit a report to the court.[64] These people and other experts can be used by the court to obtain the information necessary to construct an appropriate limited guardianship order.

The final task for the court is to consider the possible effect of the limited guardianship order on the ward's ability to exercise various civil rights. Some rights by statute or judicial decision require a level of legal competence. Most persons are presumed to be competent.[65] However, since guardians are only appointed when there is a finding of some incapacity, appointment of any guardian could be inter-

61. *Id.* at 7-22, 7-23.
62. N.M. Stat. Ann. § 32A-5-303 (Int. Supp. 1976-77).
63. *Id.*
64. *Id.*
65. *See, e.g.,* N.M. Stat. Ann. § 34-2A-4 (Int. Supp. 1976-77).

preted by another court or state official as an automatic abrogation or as evidence against the ward's ability to exercise some civil rights. The conservatorship provisions of the Probate Code explicitly state that "[a]n order . . . for appointment of a conservator . . . has no effect on the capacity of the protected person."[66] No similar provisions are found in the guardianship provisions and there is an absence of case law in the area. The lack of clear law on this issue makes it impossible to define the effect of a limited guardianship order on a ward's ability to exercise civil rights. A survey of competency requirements will illustrate, however, the wide range of rights that may be affected.

The New Mexico Constitution ensures voting rights for all citizens except "idiots," and "insane persons."[67] To make a valid will, a person must be "of sound mind."[68] A person can be denied a driver's license if he is "suffering from, any mental disability or disease which would render him unable to operate a motor vehicle with safety upon the highways."[69] Marriage is considered a civil contract, "for which the consent of the contracting parties, capable in law of contracting, is essential."[70] A person under a limited guardianship might have difficulty suing on his own behalf because "a general guardian . . . may sue or defend on behalf of [an] . . . incompetent person."[71] According to one New Mexico case, it may be required that one be "of sound mind" to consent to medical procedures.[72] Another case indicates that if one is "incompetent, he (can) neither contract personally or through an agent."[73] A third New Mexico case held that, "[a] mentally incompetent person is presumed to be incapable of changing his domicile."[74] Which of these rights might be affected by a limited guardianship order is unclear. In light of the confusion, a court should specify in the individual order, as other states have done by statute, which, if any, of these rights will be affected by the appointment of this limited guardian. Furthermore the court should clarify that some of these rights are so private, personal or fundamental that even if the individual is not competent to exercise them, they cannot be ex-

66. N.M. Stat. Ann. § 32A-5-408.E. (Int. Supp. 1976-77).
67. N.M. Const. art. VII § 1.
68. N.M. Stat. Ann. § 32A-2-501 (Int. Supp. 1976-77).
69. N.M. Stat. Ann. § 64-13-40(F) (Supp. 1975).
70. N.M. Stat. Ann. § 57-1-1 (Repl. 1962).
71. N.M. Stat. Ann. § 21-1-1(17) (Repl. 1970).
72. Woods v. Brumlop, 71 N.M. 221, 227, 377 P.2d 520, 524 (1962).
73. Chapman v. Locke, 63 N.M. 175, 177, 315 P.2d 521 (1957).
74. In re Estate of Peck, 80 N.M. 290, 292, 454 P.2d 772, 774 (1969), *cert. denied sub nom.* Chambers v. Beauchamp, 396 U.S. 942 (1969).

ercised on his behalf by the guardian.[75] These private rights may include voting, sterilization and the making of a will.

Although it seems that present New Mexico law does not bar the courts from constructing limited guardianship orders, it may be beneficial to consider statutory clarification in this area. A review of how other states have confronted the problems surrounding the appointment of guardians for the mentally retarded offers valuable insights and possible solutions to the problems in this area.

III. POSSIBLE STATUTORY RESPONSES TO THE NEED FOR LIMITED GUARDIANSHIPS

To further the goal of allowing limited guardians when appropriate for the mentally retarded, the New Mexico legislature may find it desirable to enact specific statutory authorization for their appointment. Several benefits would be attained by this authorization. Explicit statutory provisions for limited guardians would avoid the problems which may arise because of the vague guardian provisions of the existing New Mexico statutes. The courts would be aware of the alternative of limited guardianships rather than feeling limited to a choice between appointing a plenary guardian or no guardian at all. Furthermore, the guardian, the ward and the courts would have a clearer idea of which rights have been retained by the ward and which have been transferred to the guardian.

Although a detailed proposal for a statutory scheme for limited guardianships is beyond the scope of this note an overview of several recent legislative enactments in other states is offered as an attempt to put forth guidelines for the New Mexico legislature. An examination of these statutes will illustrate how New Mexico could respond to the policy statement of the American Association on Mental Deficiency, which expressed the idea that the mentally retarded "whether under guardianship or not, should be permitted to participate as fully as possible in all decisions which will affect them."[76]

Idaho, North Carolina and Minnesota recently have enacted

75. *See, e.g.,* Maine Medical Center v. Houle, Civil No. 74-145 (Super Ct. Cumberland, Me., Feb. 14, 1974), discussed in Kindred, *supra* note 5, at 78-79, which held that parents could not withhold life-saving medical treatment of a "non-heroic" nature from the child who was seriously physically impaired with a high likelihood of permanent brain damage. But *see* Superintendent of Belchertown. State School v. Saikewicz, (Mass. Sup. Jud. Ct., Nov. 28, 1977), 11 Clearinghouse Review 822 (Jan. 1978), which held that with proper procedures a guardian or close relative would be allowed to refuse life-prolonging treatment for an incompetent individual after examining relevant factors and attempting to determine what the incompetent person himself would choose.

76. "Guardianship of Mentally Retarded Persons," approved in March 1975, and published in April, 1975, issue of Mental Retardation at C-5.

different types of statutes allowing limited guardianships. An examination of these three statutory schemes points out the primary policy decisions a legislature considering limited guardianships must confront. The following overview of these statutes will focus on their purposes and their procedural aspects, as well as the effect the appointment of a limited guardian has on a ward's civil rights.

In 1976, Idaho, which like New Mexico has adopted the Uniform Probate Code, provided an additional method of appointing a guardian for a mentally retarded individual which explicitly allows the court to appoint a partial guardian.[77] The purpose incorporated in these provisions is to restrict the use of guardianship for the mentally retarded to those instances where it is necessary to promote and protect the well-being of the individual;[78] therefore, the guardianship must be "designed to encourage the development of maximum self-reliance and independence in the individual."[79] The procedure to be followed by an Idaho court is essentially that found in the Uniform Probate Code with the additional requirement that the physician's and visitor's reports "shall contain current evaluations of the individual's mental, physical and social condition and a recommendation proposing the type and scope of guardianship services needed by the individual."[80] Upon finding that the individual "lack[s] the capacity to do some, but not all of the tasks necessary to care for himself or his estate,"[81] a court may appoint a partial guardian. The statute imposes on the court the requirement of defining the powers and duties of the partial guardian.[82] This definition must permit the mentally retarded person to care for himself and his property commensurate with his ability to do so and must specify which legal disabilities are imposed on the ward.[83] Clarification of the effect of an appointment of a partial guardian on the ward's rights is found in the provision stating that a "mentally retarded person for whom a partial guardian has been appointed retains all legal and civil rights except those which have by court order been designated as legal disabilities or which have been specifically granted to the partial guardian by the court."[84]

North Carolina's article on Persons with Mental Diseases and Incompetents,[85] which became effective March 1, 1978, is the most

77. Idaho Code § 56-239(d) (Supp. 1977).
78. Idaho Code § 56-239 (Supp. 1977).
79. *Id.*
80. *Id.* subsection (a).
81. *Id.* subsection (d).
82. *Id.*
83. *Id.*
84. *Id.*
85. N.C. Gen. Stat. § 35-1.1 *et seq.* (Supp. 1977).

comprehensive attempt to tailor the availability and scope of guardianships to the specific needs of the mentally retarded. Under this statutory scheme a limited guardianship is clearly authorized.[86] Included in the explicit legislative purpose of this statute are two provisions which should be noted. First, the guardianship appointment "should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights."[87] Second, the statute provides:

> Guardianship should seek to preserve for this incompetent individual the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent individual should be permitted to participate as fully as possible in all decisions that will affect him.[88]

While Idaho basically extends the procedures of the Uniform Probate Code to the limited guardianship proceedings, North Carolina statutes allow for an elaborate fact-finding procedure at the request of the clerk,[89] the prospective ward or his counsel,[90] or the petitioner. Any of these may require a multidisciplinary evaluation of the ward which will later be offered into evidence.[91] If it is found by the greater weight of the evidence that the proposed ward is an incompetent adult, the clerk shall appoint a guardian.[92] The clerk may enter an order enumerating the nature and extent of the ward's incompetency and the powers and duties of the guardian.[93] The statutory powers of a guardian in North Carolina are generally similar to those provided to guardians in New Mexico; however, the clerk in North Carolina is specifically authorized to provide to the contrary.[94] North Carolina has also recognized the effect of the appointment of a guardian on the ward's exercise of his rights by allowing the clerk to order that the ward retain certain legal rights and

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86. *See* H. Turnbull, *supra* note 57, at 7-3.

87. N.C. Gen. Stat. § 35-1.6(4) (Supp. 1977).

88. N.C. Gen. Stat § 35-1.6(5) (Supp. 1977).

89. "The clerks of superior court have original jurisdiction of proceedings brought or filed under this Article." N.C. Gen. Stat. § 35-1.8(a) (Supp. 1977).

90. "The proposed ward is entitled to be represented by counsel of his own choice or by a court-appointed counsel if he is indigent." N.C. Gen. Stat. § 35-1.16(a) (Supp. 1977).

91. N.C. Gen. Stat. § 35-1.16(b) (Supp. 1977).

92. N.C. Gen. Stat. § 35-1.16(f) (Supp. 1977). *See In re* Estate of Roulet, 143 Cal. Rptr. 893, 899, 574 P.2d 1245, 1251 (1978) where it was held that the standard of proof in grave disability conservatorship proceedings is clear and convincing evidence.

93. N.C. Gen. Stat. § 35-1.16(g) (Supp. 1977).

94. *Id.*

privileges to which he was adjudicated incompetent.[95]

Minnesota's statutes allow for another form of guardianship called a public guardianship.[96] This type of guardianship is utilized when the appointed guardian is a state agency or employee rather than a private individual or corporation. Under the Minnesota Mental Retardation Protection Act the powers of these guardians may be limited.[97] The purpose of the Minnesota plan is to authorize

> [t]he commissioner of public welfare to supervise the mentally retarded who are unable to fully provide for their own needs and to protect such mentally retarded persons from violation of their human and civil rights by assuring that such individuals receive the full range of needed social, financial, residential and habilitative services to which they are lawfully entitled.[98]

Procedurally, a Minnesota court may appoint the commissioner of public welfare as a limited guardian if one is needed to supervise and protect a retarded person in the exercise of some but not all of his powers.[99] The appointment of a public guardian does not constitute a judicial finding of incompetence except insofar as the court order includes specific restrictions of the ward's rights.[100] The statute specifically states that a court shall not deprive one of the right to vote.[101] The statute urges the concept of normalization by imposing a duty on the public guardian to permit and to encourage maximum self-reliance of the ward.[102]

This review of other states' statutes illustrates that more appropriate protection of mentally retarded individuals would occur if New Mexico enacted specific statutory provisions for limited guardianships. Until such time as the New Mexico legislature should see fit to act, New Mexico courts should experiment under the present New Mexico Probate Code to provide limited guardianships for mentally retarded citizens who are not totally incapacitated. At present, the inappropriate appointment by the court of a total guardian can lead to "[e]xtreme protection [which] can sometimes be more onerous than moderate exploitation."[103] Alternatively, appointing no

95. *Id.*
96. Minn. Stat. Ann. §§ 252A.01 to 252A.21 (West Supp. 1978).
97. *Id.* § 252A.11(2).
98. *Id.* § 252A.01.
99. *Id.* § 252A.11(2).
100. *Id.* § 252A.12.
101. *Id.*
102. *Id.* § 252A.15.
103. *See* Kindred, *supra* note 5, at 66.

guardian at all can result in denying some mentally retarded individuals the assistance necessary to enable them to lead independent lives. The more individualized approach of limited guardianships could be used to offer the protections a guardian can provide while maximizing the self-reliance of the mentally retarded individual.

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